

Consultation Paper:

# Amendments to the Powers of Attorney (Jersey) Law 1995

MAY 2022

# Consultation: Proposed amendments to the Powers of Attorney (Jersey) Law 1995

## Summary

The Government of Jersey is consulting on proposals to amend the Powers of Attorney (Jersey) Law 1995 (the “**PoA Law**”).

This consultation follows engagement with Jersey Finance Limited (“**JFL**”) and representatives from the legal sector. Their views and suggestions have helped shape the drafting of the amendments to the PoA Law which take the form of the Powers of Attorney (Amendment) (Jersey) Law 202- (the “**Draft Law**”). This consultation now seeks views from a wider selection of relevant stakeholders on the Draft Law and should be read in conjunction with the proposed amendments.

This consultation does *not* deal with electronic or remote witnessing of Powers of Attorney or other documents which considerations will be or have been consulted upon separately in the context of amendments to the Electronic Communications (Jersey) Law 2000.

The amendments will *not* have any effect on Lasting Powers of Attorney made under the Capacity and Self-Determination (Jersey) Law 2016.

**Date published:**

6 May 2022

**Closing date:**

12 August 2022

**Supporting documents:**

- Draft Powers of Attorney (Amendment) (Jersey) Law 202-
- The PoA Law: <https://www.jerseylaw.je/laws/revised/Pages/04.680.aspx>

## **How we will use your information**

The information you provide will be processed in accordance with the Data Protection (Jersey) Law 2018 for the purposes of this consultation. For more information, please read our privacy notice, which is Appendix A of this document.

The Government of Jersey may quote or publish responses to this consultation, but will not publish the name and addresses of individuals without consent. Types of publishing may include, for example, sending to other interested parties on request, sending to the Scrutiny Office, quoting in a published report, reporting in the media, publishing on [www.gov.je](http://www.gov.je), and listing on a consultation summary. Confidential responses will still be included in any summary of statistical information received and views expressed.

Under the Freedom of Information (Jersey) Law 2011, information submitted to this consultation may be released if a Freedom of Information request requires it, but no personal data may be released.

## **Do you give permission for your comments to be quoted?**

- 1. No
- 2. Yes, anonymously
- 3. Yes, attributed

Name to attribute comments to:

Organisation to attribute comments to, if applicable:

## Ways to respond

Please respond to Government:

- by email to [economy@gov.je](mailto:economy@gov.je) using the subject line "Powers of Attorney", and including in the email whether you give permission for your comments to be quoted and, if so, whether they should be attributed or anonymous.
- by post to:  
Louise Richardson, Associate Director of Financial Services  
Department for the Economy  
Government of Jersey  
19-21 Broad Street  
St Helier  
Jersey  
JE2 3RR

Alternatively, responses can be forwarded to Jersey Finance Limited. Comments should be submitted to JFL by 12 August 2022 and should be marked clearly if there is a requirement for anonymity.

Please contact Joanna McAviney at Jersey Finance Limited:

- by email to:  
[Joanna.McAviney@jerseyfinance.je](mailto:Joanna.McAviney@jerseyfinance.je)
- by post to:  
Joanna McAviney, Legal and Technical Manager  
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4th Floor, Sir Walter Raleigh House  
48-50 Esplanade  
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## Introduction

1. The PoA Law was introduced in Jersey in 1995. A power of attorney is a legal document by which a person (the “**donor**”) gives another person/s (the “**donee(s)**”) the authority to do on behalf of the donor anything the donor can lawfully do by attorney. Under Jersey law, a power of attorney can be granted to a donee for a wide variety of reasons. A power of attorney is often granted by a donor to a professional adviser or a family member to enable that person to execute a commercial transaction on the donor’s behalf, where that is the most convenient way to proceed.
2. In most cases a power of attorney takes effect upon it being duly executed by the donor in the presence of one witness who is not party to the power of attorney. The witness to a power of attorney such as this is not required to have any particular qualification. However, if it is intended that the power of attorney be used to execute a transaction associated with immovable property (i.e. land transactions) then the witness to the signature must be a Jurat, member of the States, an Advocate or Solicitor of the Royal Court or a Notary Public; and it will not be exercisable until it has been registered by the Judicial Greffe in the Public Registry (“**Registrable PoAs**”).
3. Certain provisions in the PoA Law have been identified which it is considered would benefit from further clarification. The proposals are principally aimed at bringing greater certainty to the PoA Law as it is applied within the cross-border finance sector, as well as providing a clear mechanism for non-corporate bodies with separate legal personality, such as Limited Liability Partnerships and Limited Liability Companies, to grant powers of attorney under Jersey law.
4. These proposals will not have any effect on the making of lasting powers of attorney under the Capacity and Self-Determination (Jersey) Law 2016 (which deals with the support of a person who has lost capacity). Nor is it intended to have an effect on the making of Registrable PoAs save that it is intended that the changes enabling entities with legal personality to make a PoA, will extend to permitting them to make a Registrable PoA, if they satisfy all other existing requirements for a Registrable PoA under the PoA Law.

5. In summary, the proposed amendments to the PoA Law are intended to:
- A. provide that particular entities with separate legal personality that are not body corporates are able to execute powers of attorney;
  - B. clarify the applicability of the PoA Law to foreign-law governed powers of attorney granted by Jersey persons;
  - C. confirm that an attorney may, in certain circumstances, sign a power of attorney on behalf of a donor;
  - D. confirm that an irrevocable power of attorney can be granted for longer than a year where it secures the performance of an obligation owed to the donee (at present this is expressly permitted in relation to defined Jersey security interests or interests secured under foreign law);
  - E. confirm that the PoA Law does not affect arrangements created under the customary law of agency (in particular agency *in rem suam*); and
  - F. clarify that nothing in the PoA Law shall be interpreted so as to preclude the grant of a power of attorney under the PoA Law by an entity incorporated or established outside of Jersey.

These proposals are set out in more detail below and should be considered in conjunction with the Draft Law. The Government welcomes responses to the questions posed by this consultation, and comments on the Draft Law more generally.

The responses to this consultation paper will be reviewed with industry and interested parties. Subject to those responses and discussions, the Draft Law will be lodged for debate by the States Assembly.

## Section A: Separate legal persons

6. Since the introduction of the PoA Law, Jersey has introduced legislation for the creation of limited liability partnerships, separate limited partnerships and limited liability companies. Each of these entities has separate legal personality (i.e. they are able to contract in their own right, can sue and be sued and can hold assets) but they are not body corporates.
7. The PoA Law provides a mechanism by which individuals and body corporates may execute powers of attorney, but there is currently no express provision for vehicles with separate legal personality to do so.
8. Powers of attorney are important for financing transactions and executing foreign law documents in which limited liability partnerships and separate legal partnerships are often used. It is anticipated that limited liability companies will also be used for the same purpose. The potential legislative gap in respect of entities with separate legal personality is considered to create challenges for practitioners albeit that solutions have been found.
9. It is therefore proposed that the PoA Law be amended to expressly provide that separate limited partnerships and limited liability partnerships may execute a power of attorney, with associated amendments to the provisions dealing with revocation, registerable powers etc. These include equivalent foreign law entities.
10. Separately, consequential amendments have been made through the regulation-making power in Article 60 of the Limited Liability Companies (Jersey) Law 2018 (the "LLC Law") to allow a limited liability company to execute a power of attorney.
11. Any new types of entity created in the future can be added to the list as a consequential amendment at the time of creation.
12. The ability of a partner or other officer of a separate legal person to execute a PoA is unaffected by the introduction of the new provision.

### **Section A: Questions**

- i. Do you consider the proposed amendment achieves the desired aim? If not, why not?
- ii. Are there any other entities which are not body corporates and which it would be beneficial to add to the list of entities that are able to make a PoA?
- iii. Are there any other associated amendments required?

*A summary of all questions can be found on p14*

### **Section B: Foreign law governed powers of attorney**

13. Article 9 states that a non-security PoA can be expressed to be irrevocable by the donor for a maximum period of one year, save where it is an Article 5 security PoA (which can be irrevocable for the life of the security). However, in some other jurisdictions it is possible for a donee to grant a PoA that is irrevocable for a longer period or for an indefinite period. The amendment to Article 9 seeks to make clear that if a PoA, made by a Jersey resident or entity, is governed by foreign law, which law permits a longer or indefinite period of irrevocability (and is otherwise valid under the foreign law), that PoA will be valid notwithstanding Article 9. This reflects usual conflicts of law principles but it is helpful for it to be set out on the face of the statute.
14. Registrable PoAs and lasting powers of attorney cannot be the subject of an irrevocable foreign law PoA.
15. In addition, it has been suggested that the provision at Article 9(4) to the effect that a power of attorney can only be expressed to be irrevocable by the donor for a maximum period of one year should either be amended to remove this prohibition or that the opportunity be taken to clarify that the effect of breaching the rule is that the power of attorney remains valid, but is then able to be revoked after one year (as opposed to being invalid immediately).
16. The Government's starting point is that PoAs should usually be revocable, so that they can only be exercised to the extent the donor continues to consent to their term, but that this rule can be subject to specific and limited exceptions. As reflected below, it is intended that

Article 5 of the PoA Law be expanded to permit a wider range of PoAs securing obligations to be irrevocable and in view of this it may not be necessary to amend or remove the provision in Article 9(4). However, the Government welcomes views on this point.

#### **Section B: Questions**

- iv. Do you consider the proposed amendment achieves the desired aim? If not, why not?
- v. Please provide comments on
  - (a) the removal of the Article 9(4) one year limit and any adverse consequences of doing so;
  - or
  - (b) any proposed clarification as to the effect of breaching the one year rule as mentioned in para 15.

*A summary of all questions can be found on p14*

#### **Section C: Signing a power of attorney on behalf of the donor**

17. Amendments are proposed to Articles 2 and 8 of the PoA Law (see Article 4 of the Draft Law) to clarify that a power of attorney can be validly executed by an attorney on behalf of a donor, provided that the original power of attorney appointing an attorney makes it clear that the authority given to the attorney extends to executing a subsequent power of attorney on the donor's behalf – a "sub-PoA".
18. The proposed amendment intends to address the situation where an agreement which contains a power of attorney, such as a security agreement, is signed by an attorney. It is intended to resolve any uncertainty which there might be as to the signing of the embedded power of attorney, due to the current requirement that a power of attorney be signed by the donor (current Article 2(3) PoA Law).
19. Article 8 of the PoA Law already permits an attorney, if authorised to do so in a power of attorney, to appoint a substitute attorney to exercise some or all of the powers of the appointing attorney. However, where an attorney signs an agreement that contains a power of attorney, this would not be the appointment of a substitute attorney under the original power, but the grant of a new power. Article 8 does not presently permit an attorney to be appointed in such manner.

20. The current drafting envisages either an express provision in the original grant authorising the attorney to grant a further power of attorney or that the authority could be implied where authority is granted to sign an agreement with an embedded power of attorney.
21. There has been consideration of whether a sub-attorney should (where authorised, expressly or impliedly) be able to grant a 'sub-sub-PoA'. Any such sub-power of attorney must not confer a power to do anything or take any action that is not expressly - or impliedly - contemplated by the original power of attorney.
22. However, there are questions as to whether notice should be given to the donor of such a sub-grant and in respect of revocation of the PoA and any sub-PoAs. For example, Article 9(2) provides that: *"The revocation or abandonment of a power of attorney revokes any appointment of a substitute attorney made thereunder."* It might well be necessary to impose a requirement that an attorney must give notice of a sub-grant to the donor (and indeed potentially to anyone higher in the chain). Further, the PoA Law is used in many circumstances such as relating to share transfer property and probate of movable assets. It would be necessary to ensure that there was no disadvantage or heightened risk in relation to these circumstances.

### **Section C: Questions**

- vi. So far as there is currently uncertainty, do you agree that attorneys should be able to grant further powers of attorney on behalf of donors? Are there risks in doing so? How could they be managed? Should it only be for certain situations – such as for security agreements? Please provide any comments.
- vii. Should such a power have to be expressly stated in the first power of attorney or can it be implied – at least for some situations? Should it be stated within the Law that every power of attorney is deemed to include this authority? Should such implied authorisation be limited to security powers of attorney only?
- viii. If an attorney is permitted to grant a further power of attorney, should that sub-attorney be able to do the same? Or should the ‘chain’ stop?
- ix. Should notice be given to the donor whenever a sub-grant is made? What should be the effect of any revocation?
- x. Are there any particular issues with such an amendment when considering this amendment in a non-commercial context? Should the proposed power only be possible in certain situations and what would those be?
- xi. Do you consider that the drafting of the Draft Law achieves the stated aim? Please provide any comments.

*A summary of all questions can be found on p14*

### **Section D: Securing an obligation**

23. Article 5 of the PoA Law makes provision in respect of irrevocable powers of attorney created in relation to security, which are an essential element in the implementation of transactions that create security interests governed by Jersey law (defined to include interests created under the Security Interests (Jersey) Law 1983 and the Security Interests (Jersey) Law 2012) or security interests created under foreign laws. These will typically be powers of attorney executed for the purpose of granting a power to a lender to act to realise its security should the debtor default on its obligations to the lender.

24. Article 5 does not cover PoAs to secure the performance of an obligation owed to the donee that does not amount to a defined security interest or foreign law security.
25. The English Powers of Attorney Act 1971 provides that PoAs can be granted that are expressed to be irrevocable where they secure (a) a proprietary interest of the donee of the power, and for (b) the performance of an obligation owed to the donee (not covered in Article 5).
26. There does not appear to be a particular reason for this distinction and it is considered useful to extend Article 5 to allow irrevocable powers to be granted in the wider range of circumstances permitted by the 1971 Act.
27. Accordingly, Article 6 of the Draft Law (amending Article 5 of the PoA Law) is intended to provide that an irrevocable power of attorney can be used to secure a proprietary interest or the performance of an obligation owed to the donee (as opposed to securing only a security interest).
28. An example of where this might be used is to secure the performance of the obligation of a shareholder to transfer shares pursuant to *drag and tag* provisions in the articles of association of a company. If the shareholder fails to transfer shares in accordance with the articles, a power of attorney is given to the directors to sign a transfer form on behalf of the shareholders. Such a power of attorney is not given to secure a proprietary interest of the donee of the power as no proprietary/security interest is granted. Rather, the power of attorney secures the performance of an obligation.
29. Further examples include a general partner being authorised under a power of attorney to sign a transfer of a limited partner's partnership interest, or a senior creditor being authorised under a power of attorney to claim on the insolvency of a debtor on behalf of a subordinated creditor.
30. As noted, this reflects similar provisions in England and Wales, and indeed is understood to reflect the pre-existing customary law position in Jersey with agency *in rem suam* being referred to in Pothier.
31. It may also be necessary to clarify that whether a foreign law irrevocable power of attorney is granted "*pursuant to, in connection with, for the purpose of, or as ancillary to, security*

*governed by foreign law*” for the purposes of Article 5(2)(b) should be determined by reference to the foreign law concerned – which would thus in a UK context include security in the wider sense contemplated by section 4 of the English Powers of Attorney Act 1971.

#### **Section D: Questions**

- xii. Should it be possible to secure performance of an obligation in this way – as opposed to this only being possible in relation to a security interest or foreign law security?
- xiii. Does the proposed amendment to Article 5 of the PoA Law (Article 6 of the Draft Law) achieve the stated intention? If no, please provide further comments.
- xiv. Is it necessary to state, for the avoidance of any doubt, that a PoA created under these new provisions (in relation to the performance of an obligation) shall not be construed as creating a security interest under the Security Interests (Jersey) Law (1983/2012). If this is a concern, should this be addressed in an alternative manner?
- xv. Are there any circumstances that should be excluded?
- xvi. Should the clarification envisaged in paragraph 31 be made?

*A summary of all questions can be found on p14*

#### **Section E: Customary law of agency**

- 32. Article 8 of the Draft Law is intended to clarify that nothing in the PoA Law affects the rules of agency. This addresses concerns that the PoA Law may have been said to have replaced the corresponding Jersey customary law of agency, in particular agency *in rem suam* – where an agent acts with an irrevocable authorisation.

#### **Section E: Question**

- xvii. Does the proposed amendment to Article 10 of the PoA Law (Article 8 of the Draft Law) suitably clarify the interaction between the PoA Law and the customary law of agency? If no, please provide further comments.

*A summary of all questions can be found on p14*

## Section F: Other

33. A provision has been inserted at Article 2 of the Draft Law which it is intended will clarify that nothing in the PoA Law shall be interpreted so as to preclude the grant of a power of attorney under the PoA Law by an entity incorporated or established outside of Jersey.

### Section F: Questions

- xviii. Do you consider the provision at Article 2 achieves the stated intention? Do you consider that this is a helpful addition for the purposes of clarity? Please provide any additional comments.

*A summary of all questions can be found on p14*

### Final Question

- xix. Please provide any further comments in respect of the Draft Law and the PoA Law more generally.

*A summary of all questions can be found on p14*

## Summary of questions

### Section A: Separate legal persons

- i. Do you consider the proposed amendment achieves the desired aim? If not, why not?
- ii. Are there any other entities which are not body corporates and which it would be beneficial to add to the list of entities that are able to make a PoA?
- iii. Are there any other associated amendments required?

### Section B: Foreign law governed powers of attorney

- iv. Do you consider the proposed amendment achieves the desired aim? If not, why not?
- v. Please provide comments on (a) the removal of the Article 9(4) one year limit and any adverse consequences of doing so; or (b) any proposed clarification as to the effect of breaching the one year rule as mentioned in para 15.

### Section C: Signing a power of attorney on behalf of the donor

- vi. So far as there is currently uncertainty, do you agree that attorneys should be able to grant further powers of attorney on behalf of donors? Are there risks in doing so? How could they be managed? Should it only be for certain situations – such as for security agreements? Please provide any comments.
- vii. Should such a power have to be expressly stated in the first power of attorney or can it be implied – at least for some situations? Should it be stated within the Law that every power of attorney is deemed to include this authority? Should such implied authorisation be limited to security powers of attorney only?
- viii. If an attorney is permitted to grant a further power of attorney, should that sub-attorney be able to do the same? Or should the 'chain' stop?
- ix. Should notice be given to the donor whenever a sub-grant is made? What should be the effect of any revocation?
- x. Are there any particular issues with such an amendment when considering this amendment in a non-commercial context? Should the proposed power only be possible in certain situations and what would those be?
- xi. Do you consider that the drafting of the Draft Law achieves the stated aim? Please provide any comments.

#### Section D: Securing an obligation

- xii. Should it be possible to secure performance of an obligation in this way – as opposed to this only being possible in relation to a security interest or foreign law security?
- xiii. Does the proposed amendment to Article 5 of the PoA Law (Article 6 of the Draft Law) achieve the stated intention? If no, please provide further comments.
- xiv. Is it necessary to state, for the avoidance of any doubt, that a PoA created under these new provisions (in relation to the performance of an obligation) shall not be construed as creating a security interest under the Security Interests (Jersey) Law (1983/2012). If this is a concern, should this be addressed in an alternative manner?
- xv. Are there any circumstances that should be excluded?
- xvi. Should the clarification envisaged in paragraph 31 be made?

#### Section E: Customary law of agency

- xvii. Does the proposed amendment to Article 10 of the PoA Law (Article 8 of the Draft Law) suitably clarify the interaction between the PoA Law and the customary law of agency? If no, please provide further comments.

#### Section F: Other

- xviii. Do you consider the provision at Article 2 achieves the stated intention? Do you consider that this is a helpful addition for the purposes of clarity? Please provide any additional comments.

#### General

- xix. Please provide any further comments in respect of the Draft Law and the PoA Law more generally.

## **Appendix A - Data Protection (Jersey) Law 2018 Privacy Notice**

### **How will we use the information about you?**

We will use the information you provide in a manner that conforms to the Data Protection (Jersey) Law 2018.

We will endeavour to keep your information accurate and up to date and not keep it for longer than is necessary. In some instances, the law sets the length of time information has to be kept. Please ask to see our retention schedules for more detail about how long we retain your information.

We may not be able to provide you with a service unless we have enough information or your permission to use that information.

We may not pass any personal data on to anyone outside of the State of Jersey, other than those who either process information on our behalf, or because of a legal requirement, and we will only do so, where possible, after we have ensured that sufficient steps have been taken by the recipient to protect your personal data.

We will not disclose any information that you provide “in confidence” to anyone else without your permission, except in the few situations where disclosure is required by law, or where we have good reason to believe that failing to share the information would put someone else at risk. You will be told about this unless there are exceptional reasons not to do so.

We do not process your information overseas using web services that are hosted outside the European Economic Area.

### **Data Sharing**

We may need to pass your information to other States of Jersey (SOJ) departments or organisations to fulfil your request for a service. These departments and organisations are obliged to keep your details securely and only use your information for the purposes of processing your service request.

We may disclose information to other departments where it is necessary, either to comply with a legal obligation, or where permitted under other legislation. Examples of this include, but are not limited to: where the disclosure is necessary for the purposes of the prevention and/or detection of crime; for the purposes of meeting statutory obligations; or to prevent risk or harm to an individual, etc.

At no time will your information be passed to organisations for marketing or sales purposes or for any commercial use without your prior express consent.

### **Your rights**

#### **You can ask us to stop processing your information**

You have the right to request that we stop processing your personal data in relation to any of our services. However, this may cause delays or prevent us delivering a service to you. Where possible we will seek to comply with your request, but we may be required to hold or process information to comply with a legal requirement.

#### **You can withdraw your consent to the processing of your information.**

In the few instances when you have given your consent to process your information, you have the right to withdraw your consent to the further processing of your personal data. However, this may

cause delays or prevent us delivering a service to you. We will always seek to comply with your request, but we may be required to hold or process your information in order to comply with a legal requirement.

**You can ask us to correct or amend your information**

You have the right to challenge the accuracy of the information we hold about you and request that it is corrected where necessary. We will seek to ensure that corrections are made not only to the data that we hold but also any data held by other organisations/parties that process data on our behalf.

**You request that the processing of personal data is restricted**

You have the right to request that we restrict the processing of your personal information. You can exercise this right in instances where you believe the information being processed is inaccurate, out of date, or there are no legitimate grounds for the processing. We will always seek to comply with your request, but we may be required to continue to process your information in order to comply with a legal requirement.

**You can ask us for a copy of the information we hold about you**

You are legally entitled to request a list of, or a copy of any information that we hold about you. However, where our records are not held in any way that easily identifies you, for example a land registry, we may not be able to provide you with a copy of your information, although we will do everything we can to comply with your request.

You can ask us:

- to stop processing your information
- to correct or amend your information
- for a copy of the information we hold about you.

You can also:

- request that the processing of your personal data is restricted
- withdraw your consent to the processing of your information.

You can complain to us about the way your information is being used by contacting us at [dataprotection2018@gov.je](mailto:dataprotection2018@gov.je). Alternatively you can complain to the Information Commissioner by emailing [enquiries@dataci.org](mailto:enquiries@dataci.org).