

STATES OF JERSEY



Jersey

DRAFT EMERGENCY POWERS AND PLANNING (AMENDMENT NO. 3) (JERSEY) LAW 201-

**Lodged au Greffe on 5th August 2019
by the Chief Minister**

STATES GREFFE



Jersey

DRAFT EMERGENCY POWERS AND PLANNING (AMENDMENT No. 3) (JERSEY) LAW 201-

European Convention on Human Rights

In accordance with the provisions of Article 16 of the Human Rights (Jersey) Law 2000, the Chief Minister has made the following statement –

In the view of the Chief Minister, the provisions of the Draft Emergency Powers and Planning (Amendment No. 3) (Jersey) Law 201- are compatible with the Convention Rights.

Signed: **Senator J.A.N. Le Fondré**

Chief Minister

Dated: 30th July 2019

REPORT

This report sets out the proposed amendments to the [Emergency Powers and Planning \(Jersey\) Law 1990](#). These amendments are in 2 parts –

- (1) Amendments to make changes to the process and membership of the Emergencies Council (“EC”). The EC will have a quorum and a decision-making procedure to make its Orders and Acts more robust and less open to challenge. It will be able to meet via teleconference or videoconference. All designated ‘competent authorities’ will become members of the EC.
- (2) The creation of a ‘competent authority’ for medicines and medical supplies, to mirror the existing competent authorities for other essential services and supplies. The competent authority would be able to exercise powers to ensure the supply of medicines and medical supplies to the Island, and the provisions are largely analogous to those for the competent authority for food. Additional provision will also be made to the competent authorities for both food and medicines to temporarily override existing legislation, for example where labelling restrictions might cause a problem with emergency supply routes.

Background

Civil contingencies legislation

The Emergency Powers and Planning Law 1990 has been considered ready for revision for some time. The prospect of a Day 1 No Deal (“D1ND”) Brexit in autumn 2019 means Ministers decided to amend the Law to ensure that the current provisions were fit for purpose in the event of an emergency situation occurring.

Emergencies Council process

When preparing for the potential impact of a Brexit D1ND at the end of March, the roles of both the competent authorities and the Emergencies Council were tested by the Government of Jersey’s (“GoJ”) contingency preparations. While it was felt that the government had a good level of readiness for emergency situations, concerns were raised by officers about the lack of process surrounding the Emergencies Council. Given the power of the EC to make Orders with an impact on business, public services and individual islanders, it was felt that any decisions should be demonstrably robust. The absence of any quorum or clear process for making decisions could create challenge to any such decisions. The straightforward amendments proposed create a structure around the Council to ensure decisions are made by a quorum of at least half the Council’s members and by majority agreement.

Emergencies Council membership

The existing membership of the EC is –

- (a) the Chief Minister (Chair);
- (b) the Minister for Home Affairs [fuel and electricity; gas; postal services];
- (c) the Minister for Economic Development, Tourism, Sport and Culture [food, ports];
- (d) the Minister for Infrastructure [water] ;
- (e) the Minister for Health and Social Services; and
- (g) a Connétable, who is nominated by the Comité des Connétables to be a Council member (currently the Connétable of St. Lawrence) .

The majority of the members are also competent authorities as indicated above. The appointment generally follows Ministerial responsibilities, with the Minister for Home Affairs also having overall Ministerial responsibility for the Emergency Planning Office (“EPO”). The Minister for External Relations has been designated the competent authority for telecommunications in line with his own Ministerial responsibility for financial services data transfer. Given the decision-making powers of EC members, in the interests of equity and accountability all competent authorities should have the same status in the Council and therefore the proposed amendment makes all designated competent authorities Council members.

Competent authority for medicines and medical supplies

When preparing for a D1ND Brexit, the importance of ensuring the supply of medicines and medical supplies to the Island was one of the key areas of GoJ preparation. The absence of a competent authority for these supplies is an anomaly that the proposed amendment seeks to address. The powers of a competent authority are exercised by Order, with the Law setting out only enabling powers and areas of responsibility. The amendment draws on the existing provisions for the competent authority for food as the most comparable area.

Medicines and medical supplies (“MMS”) covers medical products, equipment and devices. Precise uses of the competent authority powers remain to be determined but will enable the following uses –

- (a) regulating the length or number of prescriptions that may be given by medical practitioners (e.g. GPs and other with prescribing rights);
- (b) regulating the importation of MMS;
- (c) regulating the licensing of MMS;
- (d) requisitioning potentially ‘at risk’ MMS from pharmacies to a central distribution point to manage use;
- (e) requiring reporting of stock levels of MMS by pharmacies to the Chief Pharmacist;
- (f) restricting the dispensing of MMS by pharmacists (i.e. only allowing them to dispense one month of MMS not three at one time);
- (g) allowing pharmacists to provide alternative MMS to those on a prescription in accordance with a list approved by the Chief Pharmacist;
- (h) ability to restrict pharmacy opening hours or close stores, which may be necessary if safety became an issue in a situation of severe shortage of MMS;
- (i) allowing MMS authorised in other jurisdictions around the world to be temporarily treated as if they were authorised in Jersey (e.g. in cases where usual supply routes were blocked);
- (j) the temporary overriding of existing legislation in order to ensure that emergency measures can be put in place. (A similar provision will also be included in the powers of the competent authority for food.)

Financial and manpower implications

There are no financial or manpower implications for the States arising from the adoption of this draft Law.

Human Rights

The notes on the human rights aspects of the draft Law in the **Appendix** have been prepared by the Law Officers’ Department and are included for the information of States Members. They are not, and should not be taken as, legal advice.

APPENDIX TO REPORT**Human Rights Notes on the Draft Emergency Powers and Planning
(Amendment No. 3) (Jersey) Law 201-**

These Notes have been prepared by the Law Officers' Department in respect of the Draft Emergency Powers and Planning (Amendment No. 3) (Jersey) Law 201- (the "**draft Law**"). They summarise the principal human rights issues arising from the contents of the draft Law and explain why, in the Law Officers' opinion, the draft Law is compatible with the European Convention on Human Rights ("**ECHR**").

These notes are included for the information of States Members. They are not, and should not be taken as, legal advice.

The draft Law will make amendments to the Emergency Powers and Planning (Jersey) Law 1990 ("**EPP Law**") to provide more detail on the procedures of the Emergencies Council, to add powers for a competent authority for medical supplies, to enable Orders made by a competent authority for food to override contractual or statutory obligations, and to extend Article 18 of the EPP Law such that it applies also in respect of offences committed by limited liability partnerships, separate limited partnerships and incorporated limited partnerships.

Most notable for ECHR-purposes are the new powers for competent authorities to secure and regulate medical supplies, and to enable the provisions of Orders in relation to food to override other obligations. Any potential interference with ECHR rights would arise as a result of the contents of any Orders made in exercise of these powers. At this stage it is unnecessary to consider possible permutations of the exercise of the new Order-making powers; indeed, to do so would be purely speculative. These notes consider whether it is in principle possible to exercise the powers compatibly with the ECHR.

The powers in relation to food and medical supplies in the EPP Law as amended by the draft Law are wide, such that any exercise of these powers has the potential to engage ECHR rights. In particular, Orders may interfere with the right to protection of property under Article 1 of Protocol 1 ("**A1P1**"), with respect to any person whose economic interests may be affected by an Order.

Designated competent authorities will need to ensure in each case that any Orders are compatible with ECHR requirements. It should be noted that it is unlawful for a public authority to act in a way which is incompatible with an ECHR right pursuant to Article 7(1) of the Human Rights (Jersey) Law 2000 ("**HR Law**"). Any competent authority exercising powers under the EPP Law constitutes a public authority for the purposes of the HR Law, and so any exercise of these powers will necessitate careful consideration by that competent authority of the human rights implications that may arise.

It is also worth highlighting that the EPP Law provides an additional safeguard on the use of Order-making powers by designated competent authorities, as it requires any Order to have been approved by the Emergencies Council (Article 12(7) EPP Law).

A1P1 provides that every person is entitled to the peaceful enjoyment of his or her possessions. "*No one shall be deprived of his or her possessions except in the public interest and subject to the conditions provided for by law and by the general*

principles of international law.” AIP1 is a qualified right and it does not impede the right of a state to enforce laws it deems “necessary to control the use of property in accordance with the general interest...”

It is conceivable that an exercise of the powers in the draft Law could constitute a prima facie interference with individual rights under AIP1. The purpose of AIP1 is to protect individuals from arbitrary interference by the state with their possessions, and an Order made pursuant to the powers described in new Article 8A, for example, may well require the control or appropriation of property. Nevertheless the ECHR preserves the right of states to control the use of, and even to expropriate where appropriate, individuals’ property where such would be (a) in accordance with the law; (b) in the public interest; and (c) proportionate to the aim pursued (e.g. satisfying the ‘fair balance’¹ test).²

The case law of the European Court of Human Rights (“**ECtHR**”) demonstrates that the ECHR grants each signatory state a wide margin of appreciation in determining the public interest,³ and the powers in the draft Law can satisfy the public interest requirement. With respect to Article 4, it is in the general interest that there is a statutory mechanism to ensure people in Jersey can access medical supplies whatever the prevailing circumstances may be. With respect to Article 3, that provisions of Orders made by the competent authority for food may override or suspend contractual or statutory obligations, this provision in principle also satisfies the public interest test – its purpose is to afford to a competent authority sufficient flexibility to enable him or her to make appropriate provision to manage whatever situation may present itself in respect of food supplies.

As well as being in the public interest, for an interference with property to be permissible there must be a reasonable relationships of proportionality between the means employed and the public interest objective.⁴ The interference with AIP1 rights must not create an “excessive burden”⁵ for an individual, and a ‘fair balance must be achieved between the public interest demands and the requirements of the protection of individuals’ rights. A competent authority exercising their EPP Law powers should ensure that the means employed to achieve their objective are “appropriate”⁶; note however that satisfying the fair balance test does not require adoption of the least restrictive alternative.⁷

Whether the proportionality requirement is satisfied by a particular Order made using the new powers will need to be evaluated on a case-by-case basis. The powers provide a statutory mechanism to enable action to be taken in unforeseen circumstances to ensure people in Jersey are able to access medical supplies and food. These goods are of such critical importance to life that where an interference with individual property

¹ *“The Court must determine whether a fair balance was struck between the demands of the general interests of the community and the requirements of the protection of the individual’s fundamental rights...” Spjorring and Lonroth v Sweden A52 (1982).*

² *Beyeler v Italy App. No. 33202/96.*

³ *In Handyside v. the United Kingdom, A24 (1976), para. 48 the Court observed that “...the machinery of protection established by the Convention is subsidiary to the national systems safeguarding human rights. The Convention leaves to each contracting state, in the first place, the task of securing the rights and freedom it enshrines. The institutions created by it make their own contribution to this task but they become involved only through contentious proceedings and once all domestic proceedings have been exhausted.”*

⁴ *James v the United Kingdom, A98 (1986), para. 50.*

⁵ *Lithgow v. UK (1968) 8 E.H.R.R. 329.*

⁶ *James v UK (1986) 8 E.H.R.R. 123.*

⁷ *R.(Clays Land Housing Co-op) v The Housing Group [2008] WLR 2229 at 2241-2242: “the appropriate test of proportionality requires a balancing exercise and a decision which is justified on the basis of a compelling case in the public interest and as being reasonably necessary but not obligatorily the least intrusive of Convention rights.”*

rights is necessary to achieve that objective, the AIP1 fair balance test may well be satisfied.

Despite the in principle compatibility of the new powers with ECHR rights, where a designated competent authority intends to exercise the powers provided by the draft Law and such could amount to a deprivation of an individual's property rights, it is advised that advice is sought from the Law Officers' Department to ensure the proposed action would satisfy the proportionality test.

EXPLANATORY NOTE

The Draft Emergency Powers and Planning (Amendment No. 3) (Jersey) Law 201- , if passed, will amend the Emergency Powers and Planning (Jersey) Law 1990 (“principal Law”) to provide for additional persons to be members of the Emergencies Council (“Council”) established under the principal Law, amend the requirements in relation to meetings of the Council and provide for a competent authority (designated under Article 4 of the principal Law) in relation to medical supplies.

Article 1 defines “principal Law”, an expression used in this draft Law, as the Emergency Powers and Planning (Jersey) Law 1990.

Article 2 substitutes Article 1 of the principal Law to set out who are members of the Council, who may call and attend meetings of the Council, the quorum for meetings and the way decisions are made.

Article 3 amends Article 8 of the principal Law to provide that an Order by the competent authority for food may suspend, modify, extend or exclude any contractual obligation, or any obligation or restriction imposed by a licence or authorisation or imposed under any enactment, that directly or indirectly affects the supply, distribution or acquisition of food.

Article 4 inserts new Article 8A into the principal Law. Article 8A introduces powers to enable a competent authority to make an Order to secure, regulate or prohibit the import, acquisition, distribution or supply of medical supplies, regulate the price at which medical supplies may be supplied and provide for the requisition of medical supplies from a medical supplier. The new Article also provides that an Order may permit a competent authority to give directions and may suspend, modify, extend or exclude any contractual obligation, or any obligation or restriction imposed by a licence or authorisation or imposed under any enactment, that directly or indirectly affects the provision or use of medical supplies or directly or indirectly affects medical suppliers.

Article 5 amends Article 10 of the principal Law so as to enable a competent authority to give directions requiring a person carrying on any undertaking to keep records and furnish information described in Article 10 for the purpose of enforcing any of the provisions of any Order made under new Article 8A.

Article 6 makes a consequential amendment to Article 11 of the principal Law, so as to clarify that the Council may make an Order in relation to gas, electricity and medical supplies.

Article 7 amends Article 12 of the principal Law to provide that an Act is made under Article 4 of the principal Law (being an Act to designate a Minister as a competent authority) and an Order is made under Article 11(4) (being an Order made by the Council when a state of emergency has been declared to exist) if the Act or Order, as the case may be, is signed on behalf of the Council by any member of the Council.

Article 8 substitutes Article 18 of the principal Law. The substituted Article 18 describes the additional persons who will be liable for an offence in the case where an offence under the principal Law is committed by a limited liability partnership, a separate limited partnership, an incorporated limited partnership or another body corporate, or by an unincorporated association.

Article 9 gives the title of this Law and provides for it to come into force on the day after it is registered.



Jersey

DRAFT EMERGENCY POWERS AND PLANNING (AMENDMENT No. 3) (JERSEY) LAW 201-

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Jersey

DRAFT EMERGENCY POWERS AND PLANNING (AMENDMENT No. 3) (JERSEY) LAW 201-

A LAW to amend the Emergency Powers and Planning (Jersey) Law 1990 to change the constitution of the Emergencies Council, enable the making of emergency arrangements in relation to medical supplies and for connected purposes.

Adopted by the States [date to be inserted]

Sanctioned by Order of Her Majesty in Council [date to be inserted]

Registered by the Royal Court [date to be inserted]

Coming into force [date to be inserted]

THE STATES, subject to the sanction of Her Most Excellent Majesty in Council, have adopted the following Law –

1 Interpretation

In this Law “principal Law” means the Emergency Powers and Planning (Jersey) Law 1990¹.

2 Article 1 (Emergencies Council) amended

For Article 1 of the principal Law there is substituted –

“1 Emergencies Council

- (1) There continues to be constituted an Emergencies Council (in this Law referred to as the “Council”) and is composed of the following members –
 - (a) the Chief Minister;
 - (b) the Minister for Home Affairs;
 - (c) the Minister for Economic Development, Tourism, Sport and Culture;
 - (d) the Minister for Infrastructure;
 - (e) the Minister for Health and Social Services;

- (f) every Minister who is designated as a competent authority under Article 4;
 - (g) a Connétable nominated by the Comité des Connétables to be a Council member (who may, but need not, be a Connétable who is member of the Council by virtue of being a competent authority under Article 4).
- (2) The Bailiff, the Lieutenant-Governor and the Attorney General are entitled to attend and be heard at any meeting of the Council but are not members of the Council.
 - (3) The Chief Minister may call a meeting of the Council at any time.
 - (4) The Chief Minister must chair every meeting of the Council.
 - (5) The quorum for any meeting of the Council is the greater of –
 - (a) 4 members; or
 - (b) a simple majority the membership of the Council.
 - (6) A member is deemed to be present at the meeting, even if not physically present at it, if, by any means, he or she is able to hear all the members of the Council at the meeting and be heard by all those members.
 - (7) Any matter arising or to be decided in a meeting of the Council is to be done or decided by a simple majority of the members of the Council present at the meeting.”.

3 Article 8 (powers of competent authority in relation to food) amended

After Article 8(4) of the principal Law there is inserted –

- “(4A) An Order made under this Article may suspend, modify, extend or exclude any contractual obligation, or any obligation or restriction imposed by a licence or authorisation or imposed by or under any enactment, that directly or indirectly affects the supply, distribution or acquisition of food.”.

4 Article 8A (powers of competent authority in relation to medical supplies) inserted

After Article 8 of the principal Law there is inserted –

“8A Powers of competent authority in relation to medical supplies

- (1) A competent authority may by Order –
 - (a) make provision to secure, regulate or prohibit the import, acquisition, distribution or supply of medical supplies;
 - (b) regulate the price at which medical supplies may be supplied; and
 - (c) provide for the requisition of medical supplies from any medical supplier.
- (2) An Order under paragraph (1) may, in particular –

- (a) enable a competent authority to give a direction to any medical supplier in respect of the persons to whom a medical supplier is to supply such medical supplies as may be specified in the direction in accordance with such requirements as may be so specified and, to such extent as may be specified in the direction, restrict or prohibit the supply of medical supplies to persons so specified; and
 - (b) enable a competent authority to give a direction in respect of the business opening hours of a retail pharmacy business or of any other medical supplier.
- (3) Where a medical supply is supplied to a person under a direction under paragraph (2), subject to any provision in an Order made under paragraph (1)(b) as to the price to be paid for the medical supply, the person supplied must pay such price in respect of the medical supply as may be reasonable.
- (4) An Order made under this Article may suspend, modify, extend or exclude any contractual obligation, or any obligation or restriction imposed by a licence or authorisation or imposed by or under any enactment, that directly or indirectly affects the provision or use of medical supplies or directly or indirectly affects medical suppliers.
- (5) In this Article –
- “health care professional” means a person registered under the Health Care (Registration) (Jersey) Law 1995²;
- “medical supplies” means medicinal products and any substance, article, equipment or device that is or may be used for a medical or health-related purpose for human beings or animals, whether or not it may be supplied only by being prescribed, and whether or not it is or could also be used for a purpose other than for a medical or health-related purpose;
- “medical supplier” means any person providing health care or medical supplies and includes a retail pharmacy business, wholesale distributor of medical supplies, hospital, hospice, care home or other establishment, and a practitioner, pharmacist, pharmacy technician or healthcare professional;
- “medicinal product” has the same meaning as in the Medicines (Jersey) Law 1995³ (including herbal remedies);
- “pharmacy technician” means a person registered as such under the Pharmacists and Pharmacy Technicians (Registration) (Jersey) Law 2010⁴;
- “practitioner” has the meaning given in the Medicines (Jersey) Law 1995;
- “retail pharmacy business” has the meaning given in the Medicines (Jersey) Law 1995;
- “substance” means any natural or artificial substance, whether in solid or liquid form or in the form of a gas or vapour.”.

5 Article 10 (documents and information) amended

In Article 10 of the principal Law for “7, 8” of the principal Law there is substituted “7, 8, 8A”.

6 Article 11 (state of emergency) amended

In Article 11(4) for the words “food, water, fuel, light, telecommunication services, postal services and other necessities,” there is substituted “food, water, medical supplies, fuel, gas, electricity, light, telecommunication services, postal services and other necessities,”.

7 Article 12 (provisions as to Orders, directions and Acts) amended

After Article 12(7) of the principal Law there is inserted –

“(7A) An Act is effected under Article 4, and an Order is made under Article 11(4) if the Act or Order, as the case may be, is signed on behalf of the Council by any member of the Council.”.

8 Article 18 (offences by corporations) substituted

For Article 18 of the principal Law there is substituted –

“9 Offences: responsibility of directors, partners and officers etc.

(1) In this Article –

“relevant offence” means an offence under this Law committed by a limited liability partnership, a separate limited partnership, an incorporated limited partnership or another body corporate;

“relevant person” means –

- (a) if the relevant offence is committed by a limited liability partnership, a partner of the partnership;
- (b) if the relevant offence is committed by a separate limited partnership or an incorporated limited partnership –
 - (i) a general partner, or
 - (ii) a limited partner who is participating in the management of the partnership;
- (c) if the relevant offence is committed by a body corporate other than an incorporated limited partnership –
 - (i) a director, manager, secretary or other similar officer of the body corporate, and
 - (ii) if the affairs of the body corporate are managed by its members, a member who is acting in connection with the member’s functions of management; and
- (d) a person purporting to act in any capacity described in subparagraphs (a) to (c) in relation to the partnership or body that commits the relevant offence.

- (2) If a relevant offence is proved to have been committed with the consent or connivance of a relevant person, that relevant person is also guilty of the offence and liable in the same manner as the partnership or body corporate to the penalty provided for that offence.
- (3) If a relevant offence –
 - (a) is an offence that may be committed by neglect; and
 - (b) is proved to be attributable to any neglect on the part of a relevant person,that relevant person is also guilty of the offence and liable in the same manner as the partnership or body corporate to the penalty provided for that offence.
- (4) A fine imposed on an unincorporated association on its conviction of an offence under this Law must be paid out of the funds of the association.
- (5) Paragraphs (6) and (7) apply if it is alleged that an offence under this Law has been committed by an unincorporated association (that is, not by a member of the association).
- (6) Proceedings for such an offence must be brought in the name of the association.
- (7) For the purposes of such proceedings, any rules of court relating to the service of documents have effect as if the association were a body corporate (to the extent that those rules do not make specific provision for service on unincorporated associations).”.

9 Citation and commencement

This Law may be cited as the Emergency Powers and Planning (Amendment No. 3) (Jersey) Law 201- and comes into force on the day after it is registered.

ENDNOTES

Table of Endnote References

<i>1</i>	<i>chapter 23.100</i>
<i>2</i>	<i>chapter 20.300</i>
<i>3</i>	<i>chapter 20.625</i>
<i>4</i>	<i>chapter 20.770</i>