

STATES OF JERSEY



Jersey

DRAFT COVID-19 (EMERGENCY PROVISIONS – COURTS) (JERSEY) REGULATIONS 202-

**Lodged au Greffe on 7th April 2020
by the Chief Minister**

STATES GREFFE

REPORT

Introduction

The Draft Covid-19 (Emergency Provisions – Courts) (Jersey) Regulations 202- (“the draft Regulations”) would be made under Article 2 of the Covid-19 (Enabling Provisions) (Jersey) Law 2020 (the “2020 Law”). The draft Regulations aim to ensure business continuity in the operation of the courts throughout the Covid-19 pandemic. Some of the provisions of the draft Regulations would also apply to tribunals and the Licensing Assembly, so general references to the courts in this report include references to them.

These Regulations are freestanding provisions that, for the temporary period they are in force, override existing provisions of the law. These existing provisions are referenced where relevant in the report. The draft Regulations would come into force on the day after they are made and would expire on 30th September 2020.

Purpose

The draft Regulations are needed to ensure that Jersey’s courts can remain operational throughout the Covid-19 pandemic. The courts perform vital functions in enabling action to be taken for a range of purposes, including safeguarding people from harm and ensuring that criminal offences are swiftly and appropriately dealt with. It is imperative that they continue to be able to function throughout this public health crisis.

Accordingly, these draft Regulations seek pragmatic and practical solutions for that core purpose. The proposals are designed to minimise the physical proximity of people within the Court system wherever possible and to help maintain social distancing requirements. The objective in this respect is to protect, to the greatest extent possible, the health of the Judiciary, court staff and everyone who comes into contact with the court system.

In particular, the draft Regulations account for the reality that the Judiciary in Jersey is constituted of a finite number of individuals, and that these individuals are subject to the same pressures as all other citizens at present. Consequentially, some members of the Judiciary may, for numerous reasons, not be able in the coming weeks and months to fulfil their duties to the same extent as they would in ordinary times. Due regard must be, and has been, given to this likelihood.

It should be noted that the provisions in these draft Regulations have been developed in close liaison with the Bailiff’s Chambers, the Magistrate and the Law Officers’ Department.

Key provisions

Television and other remote links

The draft Regulations allow for the Royal Court to be constituted if the members of the Court are present by way of a live television link, telephone link or another appropriate electronic means, and are able to both follow and participate in the proceedings of the Court. The draft Regulations also provide that court proceedings in general can take place remotely, so long as the participants (including the parties, their legal representatives and witnesses) are able to communicate with the court. However, the draft Regulations require that a defendant in a criminal trial must be able to see and hear the proceedings.

This ensures that, for matters where the court doesn't consider it to be appropriate to adjourn the proceedings to a later date (when current social restrictions and requirements are reduced to at least some extent), they can take place without the relevant persons needing to be physically present inside the court, so long as they have a live communication link with the court. This directly supports efforts to minimise personal interaction where possible. It is important to note that the relevant parties would be able to make representations in this respect before the court makes any such direction to hold a hearing by live television or telephone link (or other means), thus ensuring that suitable and workable arrangements can be put in place.

It would also be possible for any proceedings to be recorded by audio or video, to ensure both that the Courts can remain open and transparent for the period of the pandemic, and also that a proper record can be maintained.

Reduced quorum of Superior Number

In addition to taking these steps to enable proceedings to be dealt with remotely, it is considered appropriate to make provision to temporarily reduce the quorum required to constitute the Superior Number of the Royal Court. This will ensure that certain types of decisions can continue to be made if there is illness among the Jurats, or if the Jurats are providing support or care for others, during the pandemic.

At present, in order for the Superior Number to be constituted, Article 16 of the [Royal Court \(Jersey\) Law 1948](#) (the "1948 Law") requires, in addition to the presiding judge, not less than 5 Jurats. It is proposed that this be temporarily reduced to a minimum of 2 Jurats. This effectively means that, for the duration of the Covid-19 pandemic, the number currently required to form the Inferior Number will also be sufficient to constitute the Superior Number.

Bailiff may determine certain matters sitting alone

In both civil and criminal proceedings, the Royal Court will often sit as the Inferior Number, composed (as mentioned above) of a presiding judge (i.e. the Bailiff, Deputy Bailiff or a Commissioner) sitting with 2 Jurats. Pursuant to Article 15 of the 1948 Law, determinations of law and fact require both the Bailiff (under paragraph (1)) and the Jurats (under paragraph (2)) to be sitting.

However, an exception is made in Article 17 of the 1948 Law allowing the Bailiff to sit alone in civil matters involving questions of law and fact, with the agreement of the parties and if the Judicial Greffier grants a certificate.

In order to be able to deal with circumstances as they arise for the duration of the pandemic, and particularly to be able to consider bail applications or to make other interlocutory decisions in criminal proceedings, it is proposed that this exception be expanded to permit a single judge not only to determine matters in civil proceedings (as at present), but also in some criminal proceedings. For the duration of the pandemic, the judge would not require the agreement of the parties or a certificate from the Judicial Greffier to do so in either civil or criminal matters.

A judge could only utilise this option to sit alone if it was his opinion, having considered the relevant overriding objective (whether civil or criminal), that it is not appropriate to adjourn the matter to be heard at a later date. In addition, a judge would not be permitted to sit alone in the case of a criminal trial, the imposition of a sentence, when hearing an appeal against a sentence imposed by the Inferior Number or any appeal against conviction or sentence from the Magistrate's Court. These safeguards are accordingly built into the draft Regulations.

Limit on right to trial by jury

In addition to the above, it is necessary to address the difficulties in conducting a jury trial during the present outbreak. Trial by jury may unfortunately not be possible in view of the need to both minimise personal interaction and comply with social distancing requirements, and given the limited facilities available in the Royal Court.

Where, as a result of the nature and gravity of an offence it is appropriate for the offence to be tried in the Royal Court, there are 2 potential modes of trial: jury trial (where the Court is composed of the Bailiff sitting with a jury) or Inferior Number trial (without a jury).

The method of determining the mode of trial is set out in Article 48 of the [Criminal Procedure \(Jersey\) Law 2018](#) (the “2018 Law”). Currently, under that Article, to reflect custom and practice, a defendant has the right to elect for a jury trial where the indictment only lists customary law offences (or offences that are treated as such, e.g. serious sexual offence). Where such a defendant makes no election or the case involves a mixture of customary and statutory offences, then the mode of trial is determined by the court. An indictment listing only statutory offences will currently be tried by the Inferior Number.

While it might be possible to adjourn some trials pursuant to Article 10(2) of the 2018 Law that would take place in front of a jury once it is possible to do so without risk to the jury members, there is no guarantee as to when this will be possible, and in some cases an extended delay to a trial might cause further distress to the witnesses or victim, or prejudice the availability of evidence.

It is therefore proposed in the draft Regulations to require trial by the Inferior Number even where the defendant has elected for jury trial, or where the mode of trial is determined under Article 48(4) of the 2018 Law to be jury trial, provided the judge considers that:

- at the point in time at which the matter would be ready for trial, it is unlikely to be practicable to assemble a jury to hear the matter; and
- having heard any submissions from the defence and the prosecution, and having regard to the overriding objective, it is not appropriate to adjourn the matter so that it may be heard at a later date when it may be possible to assemble a jury.

Further consideration is given to this temporary limit on the right to trial by jury in the Human Rights section at the end of this report.

Licensing Assemblies

Finally, it is also proposed that provision is made so that the Licensing Assembly is constituted by the Bailiff, Deputy Bailiff or Lieutenant Bailiff and 2 Jurats. The Assembly is ordinarily constituted by the Bailiff, Deputy Bailiff or Lieutenant Bailiff sitting with 5 Jurats.

Furthermore, under the draft Regulations applications could be dealt with ‘on the papers’ without the need for a public hearing or the attendance by any person. The provisions previously outlined in this report also make it possible for the Assembly to conduct hearings remotely, so long as the participants can communicate with the Assembly (including via live television or telephone link), and for them to be recorded by video or audio.

Human Rights

Human Rights considerations relating to these draft Regulations would focus primarily on the temporary suspension of the provision for jury trials.

In that regard, it should be noted that the right to a jury trial in Jersey originates from the customary law and applies to customary law offences only. However, the right to elect for trial by jury in respect of a customary offence is not a fundamental right, but rather one that reflects the origin of the offence in question. Indeed, it is not an unqualified right at present, since the right to elect for jury trial only arises where the offence is sufficiently serious that it would exceed the Magistrate’s sentencing jurisdiction and the defendant is committed for trial to the Royal Court. Less serious customary offences, for example common assault and breach of the peace, are tried in the Magistrate’s Court without a jury.

Where a statutory offence is sufficiently serious to warrant a trial in the Royal Court, the trial takes place before the Inferior Number of the Royal Court (i.e. before the Bailiff and 2 Jurats). The European Court of Human Rights has confirmed that trial by the Inferior Number is compatible with the European Convention on Human Rights (the “ECHR”)^[1] and in particular the right to a fair trial.

Having modes of trial which do not involve a jury is by no means uncommon – indeed outside common law jurisdictions juries are a rarity. And even amongst those countries that retain juries, there are a number of differences in the selection of jurors and the number of jurors required for delivery of a verdict. A number of jurisdictions rely solely on one or more professional judges in order to determine guilt in criminal cases, depending on the nature or severity of the case: including Guernsey, the Netherlands, Singapore and France. Other jurisdictions rely on experienced lay assessors, which are comparable to Jurats, and the number of lay persons hearing a matter may depend on the severity of the case, such as Austria, Germany and Denmark.

It follows that the temporary limit being placed on the right to jury trials due to the Covid-19 pandemic does not infringe the rights of defendants under the ECHR. In any event, in all cases, the Royal Court will need to consider any representations by the parties and the overriding objective (as required by the 2018 Law) when deciding whether to proceed with an Inferior Number trial during this period.

Financial and manpower implications

There would be no resource implications for the States arising from the adoption of these draft Regulations.

^[1] *Snooks and Dowse v United Kingdom* [2002] JLR 475

EXPLANATORY NOTE

These Regulations make temporary changes to the hearing of certain court and tribunal proceedings as a result of the Covid-19 outbreak in Jersey.

Regulation 1 provides that a reference to the Bailiff in the Regulations includes a reference to the Deputy Bailiff or a Commissioner (except in relation to *Regulation 7*), for a reference to court in *Regulation 6* or *Regulation 8* to include any court, tribunal or the Licensing Assembly, and for other words and phrases used in the Criminal Procedure (Jersey) Law 2018 to have the same respective meanings in the Regulations. The Regulations are said not to limit the inherent jurisdiction of the Royal Court.

Regulation 2 enables the Bailiff to sit alone to determine matters of fact and law in any type of case if the Bailiff considers that an adjournment is not appropriate. The Bailiff may not do so in the case of a trial, the imposition of a sentence, the hearing of an appeal against sentence to the Superior Number or any appeal against conviction or sentence from the Magistrate's Court.

Regulation 3 changes the constitution of the Superior Number to consist of the Bailiff and not less than 2 Jurats.

Regulation 4 states that the Royal Court is duly constituted if the members of the Court are present by way of a live television link, telephone or otherwise, and can follow and participate in the proceedings of the Court.

Regulation 5 limits the right to jury trial by enabling the trial to take place with the Bailiff and 2 Jurats if the Bailiff considers it not likely to be practicable to assemble a jury and, having heard submissions, the Bailiff considers that an adjournment is not appropriate.

Regulation 6 enables the hearing of any court, tribunal or Licensing Assembly proceedings, where, after hearing the parties, an adjournment is not considered appropriate, to take place with remote participation as long as participants are able to communicate with the court, tribunal or Assembly. In the case of a defendant (in a criminal case) he or she must be able to see and hear the court.

Regulation 7 provides that the Licensing Assembly is to consist of the Bailiff (or Deputy Bailiff or Lieutenant Bailiff) and 2 Jurats and that applications may be dealt with on the papers without a hearing.

Regulation 8 enables any proceedings to be recorded by audio or video.

Regulation 9 contains the citation provision of the Regulations and provides for them to come into force the day after they are made. The Regulations will expire on 30th September 2020.



Jersey

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Jersey

DRAFT COVID-19 (EMERGENCY PROVISIONS – COURTS) (JERSEY) REGULATIONS 202-

Made [date to be inserted]
Coming into force [date to be inserted]

THE STATES make these Regulations under Article 2 of the Covid-19 (Enabling Provisions) (Jersey) Law 2020¹ –

1 Interpretation

- (1) In these Regulations –
 - (a) except in Regulation 7, a reference to the Bailiff includes a reference to the Deputy Bailiff or a Commissioner appointed under Article 10 of the Royal Court (Jersey) Law 1948²;
 - (b) in Regulations 6 and 8, a reference to a court includes any court, any tribunal or the Licensing Assembly (within the meaning of the Licensing (Jersey) Law 1974³);
 - (c) any other words and phrases that are defined in the Criminal Procedure (Jersey) Law 2018⁴ have the same respective meanings as in that Law.
- (2) Nothing in these Regulations limits the inherent jurisdiction of the Royal Court.

2 Bailiff may determine certain matters sitting alone

- (1) This Regulation applies to all causes and matters before the Royal Court, civil, criminal and mixed, other than –
 - (a) a trial;
 - (b) the imposition of a sentence;
 - (c) an appeal against sentence from the Inferior Number to the Superior Number; or
 - (d) an appeal from the Magistrate's Court under Article 17 of the Magistrate's Court (Miscellaneous Provisions) (Jersey) Law 1949⁵.
- (2) Despite any other enactment, where this Regulation applies the Bailiff may sit alone to determine matters of both fact and law if the Bailiff considers that it is not appropriate to adjourn the cause or matter to be heard at a later date.

3 Quorum of the Superior Number

Despite any other enactment the Superior Number of the Royal Court is constituted by the Bailiff and not less than 2 Jurats.

4 Presence of members of the Royal Court

The Royal Court is duly constituted if the Bailiff and the required number of Jurats (if any) are present by way of a live television link, telephone or otherwise, and can follow and participate in the proceedings of the Court.

5 Limit on right to jury trial

- (1) This Regulation applies if –
 - (a) a defendant has elected under Article 48(2) of the Criminal Procedure (Jersey) Law 2018⁶ to be tried by the Royal Court sitting with a jury; or
 - (b) the Royal Court has decided under paragraph (4) of that Article that the defendant should be so tried.
- (2) Despite any other enactment, where this Regulation applies the defendant must be tried by the Inferior Number of the Royal Court sitting without a jury if the Bailiff considers –
 - (a) at the time when the defendant's case is expected to be ready for trial it is likely not to be practicable to assemble a jury; and
 - (b) having heard any submissions from the defence and the prosecution it is not appropriate to adjourn the case to be heard with a jury at a later date.

6 Hearings by television link or other remote link

- (1) This Regulation applies where any court that is due to hear proceedings considers that it is not appropriate to adjourn the proceedings to be heard at a later date.
- (2) Despite any other enactment, the court may, after hearing representations from the parties, direct that any or all participants in the proceedings (including parties and their legal representatives and witnesses) be treated as being present at the proceedings if the participant is able to communicate with the court by way of a live television link, telephone or otherwise.
- (3) However, the defendant (in a criminal trial) must also be able to see and hear the court.

7 Licensing Assembly

Despite the Licensing (Jersey) Law 1974⁷, the Licensing Assembly referred to in that Law –

- (a) is to consist of the Bailiff (or the Deputy Bailiff or Lieutenant Bailiff) and 2 Jurats; and

- (b) may deal with all applications under that Law on the papers without the need for a public hearing or any appearance or attendance by any person.

8 Proceedings may be recorded

It is permissible to make an audio or video recording of any proceedings of any court.

9 Citation, commencement and expiry

- (1) These Regulations may be cited as the Covid-19 (Emergency Provisions – Courts) (Jersey) Regulations 202-.
- (2) These Regulations come into force on the day after they are made and expire on 30th September 2020.

ENDNOTES

Table of Endnote References

<i>1</i>	<i>L.2/2020</i>
<i>2</i>	<i>chapter 07.770</i>
<i>3</i>	<i>chapter 11.450</i>
<i>4</i>	<i>L.25/2018</i>
<i>5</i>	<i>chapter 07.595</i>
<i>6</i>	<i>L.25/2018</i>
<i>7</i>	<i>chapter 11.450</i>