

STATES OF JERSEY



COURT PROCEEDINGS: PROVISION OF LIVE-STREAMING FOR SITTINGS NORMALLY HELD IN PUBLIC (P.43/2020): COMMENTS

**Presented to the States on 20th April 2020
by H.M. Attorney General**

STATES GREFFE

COMMENTS

By [P.43/2020](#), members of the States Assembly are asked to decide whether they are of the opinion – (a) that Court proceedings which are normally held in public should be live-streamed on a publicly-accessible website during the period in which courts are closed because of Covid-19; and (b) to request the Judicial Greffier to ensure that live-streaming is in place by 31st May 2020.

The Attorney General makes the following comments.

Legislative principle

It is an essential feature of the constitution in Jersey and elsewhere that the courts do not intervene in parliamentary matters and that, if the States wishes to legislate about the courts they would only do so after close and detailed consultation with the Judiciary and generally have secured the Judiciary's agreement. The introduction of web-streaming would be a very substantial change indeed and would raise many practical issues that are summarised below and, absent full consultation at least, would be contrary to the well-established constitutional principle.

Legal principles

It appears the main justification for the Proposition is that, pursuant to Article 6 of the European Convention on Human Rights ("ECHR"), an accused person is entitled to a fair and public hearing by an independent and impartial tribunal, and the temporary closure of the public gallery to protect the public and other court users infringes this right.

The relevant part of Article 6 ECHR is as follows –

“In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interest of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.”

The rights guaranteed by Article 6 are qualified rights and, accordingly, if it is in the interests of justice to do so or for other specified reasons such as public order, the courts can restrict public access to a hearing without infringing Article 6 ECHR. Taking a broad view of the interests of justice includes the interests of conducting cases without undue delay, and in a manner in which neither the public nor those who are required to be in court by reason of their duties, are put at enhanced risk to their health. The risk of infection by Covid-19 may very well bring the public order qualification into play as well.

Secondly, the rights enshrined under Article 6 are rights to protect the individual defendant. They are not general access rights afforded to members of the public. If an accused person did not wish his or her case to continue in a manner where the public

did not have access then they (but no one else) may have *locus standi* to make a complaint under the Human Rights Law. In my view, it seems likely that such a complaint would fail on the grounds mentioned above but, nonetheless, the claim would be theirs to bring and would be considered by the Court after full argument.

The right to observe any particular case is not a right available to the general public under Article 6. To establish that Article 6 had been breached a defendant would need to show that his or her rights had been directly violated. Nothing less will do.

No defendant has suggested that their Article 6 rights have been violated since the public gallery was temporarily closed. Indeed it is difficult to see how such an argument could be sustained. Hearings are still in public in that other cases will be listed at the same time, the courts remain open to the media, and judgments in Royal Court criminal (and other) cases are reported extensively on the same principles as normally apply.

The second principle that is in play is quite distinct from Article 6. It is the principle of open and transparent justice. It is of course the case that this important principle has been espoused and upheld by the Jersey courts. It is right that for most cases the public should be able to come in and see the courts in operation, and that would be the case whether or not the parties wished the public to be able to do so. That is not a human rights matter, however, but derives as I have said from the important principle of open and transparent justice. Of course, the vast majority of members of the public learn about cases through the media or published judgments, and arrangements in this regard are unchanged.

The important principle of open and transparent justice has always been subject to restriction and control by the courts in exceptional cases.

In considering whether measures restricting public access to the courts are consistent with the principle of open justice, a key consideration is the extent to which the measures are necessary in the particular circumstances prevailing at the present time. That involves a careful consideration of how a balance can best be struck during a pandemic between maintaining a reasonable degree of public access to the courts which does not adversely impact upon the good administration of justice, whilst at the same time safeguarding so far as possible against the risk of contagion via the court system. Live-streaming to a publicly-accessible website is a radical departure in this and other equivalent jurisdictions, which brings with it its own risks to the good administration of justice, which are outlined below.

The fact that the courts permit the media to attend (and will allow the media to attend remotely where hearings are conducted in that way) any case that they are otherwise entitled to do, and will publish judgments in the usual way, is an adequate protection and ensures the transparency of the courts and sufficient openness in the rare and temporary circumstances that obtain at the moment.

Problems with the Proposition

There are material risks in the practice of broadcasting court cases. There is the risk that a court case, particularly if it contains details that might be salacious or deeply personal, might be viewed as entertainment. That would of course be a far cry from any legitimate scrutiny of the activities of the courts.

There is, in my view, a real risk that broadcasting of evidence may have a distorting effect on its quality and may prevent vulnerable witnesses from making complaints to the police or from giving evidence.

Should jury trials resume, there is also the potential risk that some members of the jury would be intimidated were they to think that their identities might become public, or members of their family and others would attempt to follow the proceedings and thus influence the verdict, which would cease to be the opinion of those who have seen and heard the evidence first-hand.

There is also a concern about policing justified anonymity in certain cases. For example, rape and other criminal trials with child victims take place in public and members of the public who attend generally see and hear all of the evidence. Such proceedings would fall within the terms of the Proposition and would be televised. However, there is a statutory provision that provides that the identity of a victim in a sexual case may not be named or identified, and there are similar provisions protecting children. It is far from clear how such a provision could apply or be policed if any member of the public could watch and hear all the evidence from anywhere in the world. The adverse consequences for the administration of justice could be very substantial.

These matters require the most anxious consideration and consultation.

If, notwithstanding the principles that I have set out above, the Assembly were to agree that the proposition should be adopted, then the courts would have to consider how the problems identified could be dealt with, and whether justice could be done in any particular case. This may result in adjournments. The courts would not, of course, adjourn a case lightly, but would be mindful of the need to preserve the anonymity and confidentiality in cases of that nature. Such adjournments could lead to Article 6 ECHR claims that cases were not being determined within a reasonable time.

The restrictions currently in place are mitigated by the potential presence of the media, the publication of judgments and, of course, the Court of Appeal. The restrictions in place are temporary in nature, and the courts will remove them when the safety of members of the public and those using the courts can be maintained.