

STATES OF JERSEY



DRAFT COVID-19 (EMERGENCY PROVISIONS – COURTS) (JERSEY) REGULATIONS 202- (P.41/2020): COMMENTS

**Presented to the States on 20th April 2020
by the Corporate Services Scrutiny Panel**

STATES GREFFE

COMMENTS

1. [P.41/2020 – Draft Covid-19 \(Emergency Provisions – Courts\) \(Jersey\) Regulations 202-](#) (the “draft Regulations”) has been lodged by the Chief Minister in response to the ongoing Covid-19 outbreak.
2. On 27th March 2020 the States Assembly adopted [P.29/2020 – Draft Covid-19 \(Enabling Provisions\) \(Jersey\) Law 202-](#) (now published as enacted Law – see [L.2/2020](#)) in light of the Covid-19 outbreak. This enabled the States Assembly to introduce any emergency legislation that may be required to manage the effects and impact of the Covid-19 outbreak in Jersey, and allowed the States to make Regulations that would have the effect of primary Laws, and thereby ensure the enactment of emergency legislation as quickly as possible.
3. The purpose of P.41/2020 is to maintain the continued operation of the Court system where possible, whilst maintaining social distancing requirements. It intends to do this in the following ways –
 - i. Allow the Royal Court to be constituted if the members of the Court are present by way of a live television link, telephone link, or other appropriate electronic means, and can both follow and participate in the proceedings of the Court. The draft Regulations require that a defendant in a criminal trial must be able to see and hear the proceedings, and make it possible for proceedings to be recorded by audio and video so that a proper record may be maintained;
 - ii. Reduce the quorum required to constitute the Superior Number¹ of the Royal Court by reducing the number of Jurats required under Article 16 of the [Royal Court \(Jersey\) Law 1948](#) (the “1948 Law”) to a minimum of two, the same number as needed to constitute the Inferior Number²;
 - iii. Expand the ability for the Bailiff (meaning here the Bailiff, the Deputy Bailiff or a Commissioner) to sit alone as provided by Article 17 of the 1948 Law so that a single judge can determine certain criminal proceedings. This would be without the generally required agreement of the parties, or a certificate from the Judicial Greffier to do so in either civil or criminal matters. This would not impact criminal trials, the imposition of sentences, hearing an appeal against a sentence imposed by the Inferior Number, or any appeal against conviction or sentence from the Magistrate’s Court;
 - iv. Limit the right to jury trial and instead undertake trials 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 [Criminal Procedure \(Jersey\) Law 2018](#) to be jury trialled. This is for when the judge believes it to be that a jury can be assembled to hear the matter, and it is ruled not appropriate to adjourn the matter so that it may be

¹ The Superior Number refers to the Bailiff, Deputy Bailiff, or a Royal Court Commissioner sitting with five Jurats.

² The Inferior Number refers to the Bailiff, Deputy Bailiff, or a Royal Court Commissioner sitting with two Jurats.

heard at a later date, provided all submissions from the defence and prosecution have been heard; and

- v. Make provision so that the Licensing Assembly is constituted by the Bailiff, Deputy Bailiff, or Lieutenant Bailiff, and two Jurats, as opposed to five. Applications may also be dealt with without a public hearing or attendance by the person or be held remotely.
4. The Panel has discussed the draft Regulations, and notes that, as with most legislation related specifically to Covid-19, the draft Regulations are time-limited to 30th September 2020.
5. The Panel understands that, in England and Wales, jury trials were suspended on 23rd March 2020 [at the request of the Lord Chief Justice](#), The Lord Bunnett of Maldon, as a result of the inability to convene physical hearings due to the spread of Covid-19. Similar suspensions are in place in Scotland and Northern Ireland. Under Schedules 23 to 27 of the [Coronavirus Act 2020](#), non-public hearings may now be held by telephone, video-link, or online. Under select circumstances, the UK's [Criminal Justice Act 2003](#) allows for judges to hear a prosecution without a jury.
6. The Panel received a letter from the Law Society of Jersey (attached to this Comments Paper as an **Appendix**) that outlined its opinion on the draft Regulations. Although supportive of the Bailiff sitting alone, the presence of members in the Royal Court, remote hearings and changes to licensing assemblies, the Law Society has requested that the draft Regulations specify who is entitled to make a recording of proceedings and permitted use of such recordings.
7. The Law Society disagrees with the draft Regulations' proposal to reduce the number of necessary jurats, arguing that the use of retired jurats would be suitable if they appear by video link, and if it is needed to be reduced it should be to a minimum of 3 or 4 to make it distinguishable from the Inferior Number.
8. The Law Society also disagrees with the proposal to limit the right to jury trial, arguing that it is fundamental and should not be compromised, even in the current circumstances. Whilst it notes that this position may need to change should current issues extend beyond six months, it believes it premature to affect these changes now, with all jury trials to be adjourned to a new date. The Law Society also states that it is unclear what right of appeal a defendant would have if their right to a trial by jury was overturned by the emergency provisions, or whether the defendant would have liberty to apply to reinstate their right to trial by jury.
9. The Panel shares the concerns expressed by the Law Society, particularly in regard to the proposed limits to jury trials, and agrees with the recommendation made by the Law Society that, where possible, all jury trials should be adjourned to a new date.
10. The Panel further recommends that, where a defendant has previously elected for a jury trial under Article 48(2) of the Criminal Procedure (Jersey) Law 2018, the decision as to whether or not the trial is maintained as a trial by jury or a

trial by the Inferior Number should rest with the defendant rather than the Bailiff.

11. The Corporate Services and Education and Home Affairs Scrutiny Panels held a private video conference briefing with Officers from the Law Officers' Department on the draft Regulations and received a letter from them responding to the concerns expressed by the Law Society³. From the briefing and letter, the Panels understand that defendants will retain access to the Court of Appeal in the usual way.
12. Whilst the Panel acknowledges that the proposal to instead conduct jury trials by the Inferior Number of the Royal Court is compatible with the European Convention on Human Rights and that the request for appeal is preserved, the Panel nonetheless believes that this change would unduly deny access to an appropriate choice of trial available to defendants.
13. Further, whilst the Panel acknowledges that the lack of jury trial is not uncommon in other jurisdictions, as noted in the report accompanying the draft Regulations, this should not justify the precedent it will establish, given the stark differences in legislative history, custom, and procedure.
14. The Panel has also made note of comments made by the former Bailiff, then-Senator Philip Bailhache, during the [debate on the Draft Sexual Offences \(Jersey\) Law 201- on 21st March 2018](#). During the debate, then-Senator Bailhache defended the right to trial by jury as –

“... an important constitutional right. It should not be swept away on a whim without very serious consideration and the opportunity to look at the proposal in the round.”
15. Despite these exceptional circumstances, the Panel is sympathetic to this statement, and believes that it is important that the option for defendants to select a jury trial is one that should be preserved wherever possible.
16. Based on the draft Regulations, as lodged, The Panel is seeking the following amendments –
 - i. To increase the reduced number to form the Superior Number of Jurats from 2 to 3. This will ensure that a clear distinction is made for the composition of the Superior and Inferior Numbers and that there cannot be a split decision of the Superior Number.
 - ii. To make it the choice of the defendant to waive the right to a trial by jury in favour of a trial by the Inferior Number where a defendant has previously elected for a jury trial under Article 48(2) of the Criminal Procedure (Jersey) Law 2018.
 - iii. To make it a requirement that all recordings made in court should only be made and used by Officers of the Court.

³ Note: this has not been attached as an appendix due to confidential information being shared within the letter.

17. The Panel would like to acknowledge the collaboration on this piece of work with the Education and Home Affairs Scrutiny Panel. The two Panels worked together closely on all aspects of the amendment, and were able to reach consensus on the most appropriate way in which to strike a balance between protecting the health of Royal Court participants and the rights of defendants.
18. The Panel would also like to thank Government Officers, the Law Officers' Department and the Legislative Drafting Office for their co-operation and expediency in gathering the required background material for, and production of, the Panel's amendment.



The Law Society of Jersey

Corporate Services Scrutiny Panel
Scrutiny Office
Morier House
St Helier
Jersey
JE1 1DD

7 April 2020

Dear Sir

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

I refer to the Panel's request, received this afternoon, requesting the Law Society's comments on the Draft COVID-19 (Emergency Provisions – Courts) (Jersey) Regulations.

Given the limited timescale for providing comments, please excuse the brevity of this feedback, which is summarised as follows:

Bailiff may determine certain matters sitting alone

Agreed.

Quorum of the Superior Number

Not agreed.

While we fully understand the need to protect jurors, with the use of retired jurors, we consider that there should be more than enough particularly if they appear by video link rather than in person.

The question arises as to how often the Superior Number is due to sit over the next five months (until the end of August).

If it is determined that numbers need to reduce, it is considered that the Superior Number should only reduce to a minimum of 3 or 4 so that it is distinguishable from the Inferior Number.

Presence of members of the Royal Court

Agreed.

Limit on right to jury trial

Disagree.

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The right of a defendant to trial by jury is fundamental and should not be compromised, even in the current circumstances. In the event that the current issues extend beyond six months from now, the position could be reviewed. However, we consider it premature to effect these changes now, particularly given that all scheduled trials have been vacated and re-listed for later dates.

Our view is that any trials in respect of which the defendant elects to be tried by jury should be adjourned to a new date, even if this results in the defendant being remanded in custody for a longer period of time.

It is unclear what right of appeal a defendant would have in the event that their right to a trial by jury was overturned by the emergency provisions. Furthermore, if restrictions were lifted and a jurat trial had been imposed, would the defendant have liberty to apply to reinstate their right to a jury trial?

Hearings by television link or other remote link

Agreed.

Licensing Assemblies

Agreed.

Proceedings may be recorded

While agreed, the regulations need to specify who is entitled to make a recording of proceedings and the permitted use of such recordings, on the basis that, as written, any party may make, and presumably use, a recording of proceedings.

If any further clarification is required, please do not hesitate to contact me.

Yours sincerely



Neville Benbow
Chief Executive Officer
The Law Society of Jersey

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