

STATES OF JERSEY



DRAFT COVID-19 (WORKPLACE RESTRICTIONS) (JERSEY) REGULATIONS 202- (P.59/2020): COMMENTS

**Presented to the States on 18th May 2020
by the Economic and International Affairs Scrutiny Panel**

STATES GREFFE

COMMENTS

Introduction

The Draft Covid-19 (Workplace Restrictions) (Jersey) Regulations 202- ([P.59/2020](#)) (the “draft Regulations”) were lodged by the Minister for Health and Social Services on 14th May 2020 in response to the Covid-19 crisis. The draft Regulations would be made under the [Covid-19 \(Enabling Provisions\) \(Jersey\) Law 2020](#).

The draft Regulations relate to Jersey businesses which would normally be the remit of the Minister for Economic Development, Tourism, Sport and Culture. In this instance, however, the draft Regulations are a public health control measure, and have therefore been lodged by the Minister for Health and Social Services. Given the crossover of ministerial remits, the Economic and International Affairs (“E&IA”) Scrutiny Panel has taken responsibility for scrutinising the legislation, in agreement with the Health and Social Security (“H&SS”) Scrutiny Panel.

The E&IA Scrutiny Panel, along with members of the H&SS Scrutiny Panel, received 2 briefings on the draft Regulations. The first briefing was held on 14th May with the Head of Policy of Strategic Policy, Planning and Performance, and the second briefing was held on 15th May and was attended by both the Minister for Health and Social Services and the Head of Policy.

Purpose of the draft Regulations

If adopted by the States Assembly, the draft Regulations would make it an offence, punishable by a fine, to open a workplace in contravention of a restriction Order. The draft Regulations are intended to provide the legislative measures that support a managed relaxation of the public health controls imposed to protect against the spread of Covid-19. The aim is to support a safe transition to “back to business”.

If adopted, the draft Regulations would replace the existing [Covid-19 \(Restricted Trading\) \(Jersey\) Regulations 2020](#) (the “Restricted Trading Regulations”), but not the existing [Covid-19 \(Construction Work\) \(Jersey\) Regulations 2020](#) (the “Construction Work Regulations”). When the Panel was briefed on the draft Regulations, the Head of Policy explained that replacing the Restricted Trading Regulations would ensure that there is one single legislative regime that applies to all workplaces. This avoids any complications that could occur in some dual or multiple businesses. For example, if a firm was providing both business-to-business services (not trade) and services directly to members of the Public (trade) on a single site.

The Construction Regulations are not replaced by these Regulations because they focus on single-function construction sites that are inspected by building control professionals. The Construction Regulations also provide for a permit scheme which is not included in the draft Regulations. The Panel was advised that it would not be feasible or proportionate to introduce a permit scheme for all Jersey businesses.

A workplace is defined in the draft Regulations as any place in which a person works, whether outdoors or indoors, in any part of a building, vehicle or vessel (except for a construction site for the reasons outlined above). The workplace also does not include a person’s home – unless a service is provided to another person in that home, for example, clients attending appointments in a professional’s own home.

A restriction Order is made by the Minister for Health and Social Services to prohibit some or all workplaces from being open. The restriction Order can specify certain workplaces if relevant guidance or specified conditions are complied with. For example, it may be determined that workplaces cannot open to employees if those employees have to use a lift to access their work areas.

An Order may only be made if the Minister is advised by the Medical Officer of Health that the risk to public health from Covid-19 is such that it is necessary and proportionate to do so. In making a restriction Order, the Minister must consult with the Minister for Economic Development, Tourism, Sport and Culture, given the crossover of ministerial remits.

If approved, the draft Regulations will expire on 30th September 2020 unless extended by the States Assembly.

Panel concerns

Health and Safety at Work (Jersey) Law 1989

The Panel’s primary concern relates to whether the draft Regulations are necessary, given that a [Health and Safety at Work \(Jersey\) Law 1989](#) (the “1989 Law”) already exists. It is noted that the draft Regulations state that they do not deviate from the provisions set out in the 1989 Law and, therefore, employers must still ensure the health, safety and welfare of their employees.

The Panel notes that there are a number of similarities between the enforcement powers contained in both pieces of legislation, as set out below (relevant parts highlighted):

Health and Safety at Work (Jersey) Law 1989	Draft Covid-19 (Workplace Restrictions) (Jersey) Regulations 202-
<p>Article 12 sets out the powers of inspectors who have been appointed by the Minister.</p> <p>(1) Any person generally or specially authorized in writing by the Minister, in that behalf (in this Law referred to as an “inspector”) may, for the purpose of the execution of any of the relevant statutory provisions and subject to the production by the person, if so required, of evidence of the person’s authority, and subject to paragraph (3), exercise the powers set out in paragraph (2).</p> <p>(2) The powers referred to in paragraph (1) are –</p> <p>(a) at any reasonable time to enter any premises which the inspector has reason to believe it is necessary to enter for the purpose mentioned in paragraph (1);</p>	<p>Regulation 4 (The Minister may authorise any person to enforce this Regulation.)</p> <p>(2) An enforcement officer may, for the purpose of ensuring compliance with a restriction Order and subject to the production by the person, if so required, of evidence of the person’s authority, exercise the powers set out in paragraph (3).</p> <p>(3) The powers are –</p> <p>(a) at any reasonable time to enter any workplace which the enforcement officer has reason to believe is open in contravention of a restriction Order or otherwise failing to comply with such an Order; and</p>

<p>(b) on entering any premises by virtue of sub-paragraph (a) to take with the inspector –</p> <p>(i) any person duly authorized by the Minister, and</p> <p>(ii) any equipment or materials required for any purpose for which the power of entry is being exercised;</p> <p>(c) to make such examination and investigation as may in any circumstances be necessary for the purpose mentioned in paragraph (1);</p> <p>(d) as regards any premises which the inspector has power to enter, to direct that those premises or any part of them or anything therein, shall be left undisturbed (whether generally or in particular respects) for so long as is reasonably necessary for the purpose of any examination or investigation under sub-paragraph (c);</p> <p>(e) to take such measurements and photographs and make such recordings as the inspector considers necessary for the purpose of any examination or investigation under sub-paragraph (c);</p> <p>(f) to take samples of any articles or substances found in any premises which the inspector has power to enter, and of the atmosphere in or in the vicinity of any such premises;</p> <p>(g) to require any person whom the inspector has reasonable cause to believe to be able to give any information relevant to any examination or investigation under sub-paragraph (c) to answer (in the absence of persons other than a person nominated by him or her to be present and any persons whom the inspector may allow to be present) such questions as the inspector thinks fit to ask and to sign a declaration of the truth of the person's answers;</p> <p>(h) to require the production of, inspect, and take copies of or of any entry in –</p> <p>(i) any books or documents which by virtue of any of the relevant statutory provisions are required to be kept, and</p>	<p>(b) to make such examination and investigation as may in any circumstances be necessary for the purpose mentioned in paragraph (2).</p> <p>(4) Nothing in this Regulation allows an enforcement officer to make an examination or investigation or to disclose or make use of any information received in the course of such examination or investigation other than for the purposes of these Regulations or a restriction Order.</p>
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<p>(ii) any other books or documents which it is necessary for the inspector to see for the purposes of any examination or investigation under subparagraph (c);</p> <p>(i) to require any person to afford the inspector such facilities and assistance with respect to any matters or things within that person's control in relation to which that person has responsibilities as are necessary to enable the inspector to exercise any of the powers conferred on the inspector by this Article;</p> <p>(j) any other power which is necessary for the purpose mentioned in paragraph (1).</p> <p>(3) An inspector shall not exercise any powers under this Article for the purpose of investigating a matter which is the subject of a police inquiry save in conjunction with the police officer conducting the inquiry.</p>	
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The Panel raised the number of similarities during the briefing with the Minister for Health and Social Services and Head of Policy. The Head of Policy advised that an options analysis, which the Panel has not seen, was carried out by Strategic Policy, Planning and Performance, which considered a number of options including whether the 1989 Law could facilitate all of the provisions intended within the draft Regulations. The result of the analysis was that the 1989 Law could *not* introduce all of the necessary provisions, for example, there are no adequate controls under the 1989 Law to provide for staggered opening times or for businesses to remain shut. It was noted that ability to stagger opening times, or keep businesses in certain locations shut, may be needed to help manage footfall and therefore help limit Covid-19 transmission. The Minister advised that the decision was taken to draft a new set of Regulations which are time-limited and are drafted specifically to deal with the Covid-19 emergency.

[Covid-19 \(Restricted Trading\) \(Jersey\) Regulations 2020](#)

The Panel considered the Restricted Trading Regulations and noted that they already provided controls on business premises for the purpose of trading. In that regard, the Panel questioned why a new set of Regulations was required, and whether it would be possible to rely on the Restricted Trading Regulations and issue a Code of Practice under the 1989 Law. The Head of Policy advised that it was not clear whether it would be possible to make a distinction between places of work under the Restricted Trading Regulations (i.e. trading businesses) and other places of work (i.e. trade and non-trade businesses). Therefore, the most appropriate course of action was to draft a new set of Regulations which would ensure that services delivered from a single place of work did not fall under 2 different sets of Regulations.

Regulations of concern

The open nature of the draft Regulations means that the Minister for Health and Social Services is given particularly strong powers that are exercisable by Order. Regulation 3(2)(e)¹ is of particular concern in this regard, as it gives the Minister the power to exclude anybody from the workplace for any reason. Whilst this power is tempered by the requirement to act on the advice of the Medical Officer of Health, the Panel is of the view that such a provision is not ordinarily acceptable, and may only pass in this case because the draft Regulations are time-limited, if approved.

Time afforded to Scrutiny

The Panel acknowledges the urgent nature of the current Covid-19 pandemic and the requirement for emergency legislation. However, in this case, the Panel is concerned about the length of time afforded to Scrutiny to review a piece of draft legislation which is not so urgent because of existing provisions in law.

During the briefing with the Minister for Health and Social Services, the Panel requested sight of the restriction Order before it was signed. It is the Panel's view that, given the short timescales, sharing these types of subordinate enactments before they are in force would add another layer of due diligence and scrutiny to the process.

The Minister accepted the Panel's view and agreed to amend the legislation to ensure that, where reasonably practicable, Scrutiny would be consulted before a restriction Order was made.

Consultation

The Panel has been in contact with the Chamber of Commerce and the Institute of Directors, and have been assured that they have been consulted by the Department and amendments have been lodged as a result of those conversations. The lack of time has precluded the opportunity to speak to employee representative organisations.

Conclusion

The Panel would like to thank the Minister for Health and Social Services for sharing the draft Regulations with it prior to formal lodging. It would also like to thank the Head of Policy for the briefings held on 14th and 15th May 2020.

The Panel acknowledges the purpose of the draft Regulations, but is concerned that the urgency placed upon them means that they are not as well-formed or properly consulted upon as they should be.

¹ "the characteristics of any person who may enter the workplace;"