

STATES OF JERSEY



DRAFT DISCRIMINATION (AMENDMENT OF LAW) (JERSEY) REGULATIONS 202- (P.58/2021): COMMENTS

**Presented to the States on 16th July 2021
by the Health and Social Security Scrutiny Panel
Earliest date for debate: 20th July 2021**

STATES GREFFE

COMMENTS

Introduction

P.58.2021 - the “Draft Discrimination (Amendment of Law) (Jersey) Regulations 202-” (the ‘Draft Regulations’) was lodged by the Minister for Social Security on 8th June 2021.

As noted in the report attached to the Draft Regulations, if approved, the regulations would:

‘prohibit those offering residential premises from refusing to let or sell on the basis that a prospective occupier has responsibility for a child or children under the age of 18, except for certain defined circumstances. The amendments also prohibit those who market residential properties (for example, estate agents or property management companies) from refusing to provide details of such properties, or refusing to show such properties, to prospective occupiers with children.’

Background

The Jersey Landlords Association (the ‘JLA’) wrote to the Minister on 5th July 2021 (attached at Appendix 1) to highlight a number of their queries which remained outstanding following the consultation period on the Draft Regulations. This was also shared with the Health and Social Security Panel (the ‘Panel’) who requested a briefing with the Minister and officials in order to address the points raised.

The ‘Panel’ received a briefing on the Draft Regulations on 13th July 2021 from the Minister for Social Security, the Head of Policy, Strategic Policy, Planning and Performance and the Policy Principal, Customer and Local Services. The briefing focussed on the queries raised by the JLA and the Panel have produced this comments paper in advance of the States Assembly debate, for the information of all Members.

The JLA’s questions have been summarised below but are attached in full at Appendix 1:

1. How would the Law affect any pre-existing rules in place on a property (for example a leasehold flat which has rules in place from the freeholder limiting the age of those permitted to live on the premises)? (Question 1)
2. How would lodging houses be affected by the Law? (Question 2)
3. Would landlords be justified in refusing letting their property to people with a child if they felt it was unsuitable, i.e. if they had concerns over health and safety, overcrowding, or perceived hazards specific to children? (Question 3)

Comments

The Panel received a copy of the guidance on the application of the Discrimination (Amendment of Law) (Jersey) Regulations 2021 and a copy is attached to this paper as Appendix 2.

Question 1

The Panel was informed that if the Draft Regulations were adopted by the States Assembly, the regulations would take precedence over any pre-existing rules or contracts that historically prevented families with children occupying certain leasehold, share transfer or flying freehold properties.

The Law would make it impossible to prevent children from being included under a tenancy through the existing 'association / house rules' and that it would be impossible to draft a legal contract exempt from P.58/2021.

The Panel was advised that if P.58/2021 is adopted by the States Assembly, it would not apply in relation to retrospective claims for discrimination and would only apply to future claims after the adoption of P.58/2021.

Question 2

The Panel noted that lodging houses were governed by the Lodging Houses (General Provisions) (Jersey) Order 1962 and the Lodging Houses (Registration) (Jersey) Law 1962. The Panel was advised that the lodging house laws remained unchanged and would take precedence over the operation of P.58/2021.

Question 3

It was explained that landlords and landowners would only be provided with a reasonable excuse to refuse to sell or let a property to a family with children if the premises were deemed unsafe for a child under the Public Health and Safety (Rented Dwellings) (Jersey) Law 2018 (Rented Dwellings Law). It was further advised that P.58/2021 did not take precedence over the Rented Dwellings Law, where the property was deemed unsafe for occupancy by a child.

The Panel noted that specific features of a property might make it unsuitable for children, and cited situations where staircase railings might be too wide, potentially allowing a small child to fall through them. P.58/2021 did not impose a requirement on landlords or landowners to make modifications to their property in order to comply with P.58/2021, and that all issues relating to property standards were dealt with under the Rented Dwellings Law.

Conclusion

The Panel welcomes the Draft Regulations and are supportive of their adoption. The Panel feel that the issues raised in by the JLA have been sufficiently addressed by the Minister.

Statement under Standing Order 37A [Presentation of a Comment relating to a proposition]

These comments were submitted to the States Greffe after the noon deadline as set out in Standing Order 37A due to the States Meeting at which they were due to be presented being moved forward to Monday 19th July which in turn affected the final lodging deadline for Comments.



5th July 2021

Ref: P58/2021 Draft Discrimination (Amendment of Law) (Jersey) Regulations 202-

Dear Deputy Martin,

We write concerning the proposal P58/2021 Draft Discrimination (Amendment of Law) (Jersey) Regulations 202- on which the Jersey Landlords Association commented during the consultation period.

It would seem that our (along with others) comments and concerns have not been taken on board and the draft regulations are now scheduled for debate on the 20th July 2021, unamended from the consultation.

The Jersey Landlord Association held its AGM on Tuesday 22nd July 2021, and there was great concern amongst landlords about the amendments to the Discrimination Regulations.

We should make it clear from the outset that we have little issue with the spirit of the draft regulations, however, we are concerned that not enough thought has gone into these issues and that landlords may be caught between two or more sets of obligations.

We have 3 further questions, which we think need answering by you, and looking at by Scrutiny, prior to these regulations being taken to the States for debate.

You mention in your Report to the draft regulations, that you "*consider that the provision of a defence to a refusal as set out in the draft Regulations is sufficient to meet most, if not all, of the concerns expressed. The explanatory note highlights the health and safety aspect of such a defence.*"

Would the following 3 questions therefore be covered? We think not.

Question 1.

Since the JLA AGM, we received an email from a landlord in the following terms and we would like you to respond to us, so we can forward your response onto this landlord. Specifically, would paragraph 41 (3)(c) be able to be used in these circumstances?

"I attended the AGM on Tuesday and asked a question about the anti-discrimination

proposals and how they might address situations where pre-existing rules are in place, but where a landlord has no ability to change these rules. ...

My situation is that I own a leasehold, 2/3 bedroom flat, with c. 65 years left on the lease. The freeholder has an established set of house rules which prevents me from having children under the age of 16 live in the flat (extract from the rules states “ The Lessee shall not permit any children to live on the premises under sixteen years of age”). I am allowed to sublet the flat, but any tenants have to abide by the same set of rules."

We understand that similar issues may arise in the context of share transfer and flying freehold properties. Has any research been done in relation to such issues (perhaps by raising the issue with local lawyers and the LOD)? What is the solution? In such circumstances would your department advise a landlord/owner that they would be safe to ignore any such legal obligations set out in a lease, articles of association of a share transfer company or a flying freehold association declaration of co-ownership. If so, will your department (or another relevant government department) publish guidance along with your proposition stating that this is the case? In short would government back landlords/owners on this issue if it were to come before the courts and, if so, why not draft this as an amendment to your proposition?

Question 2.

How are lodging houses going to be dealt with? Each unit in a lodging house has a maximum occupancy determined under the relevant lodging houses laws/regulations/codes of practice and specified in the conditions on the lodging house's certificate. The categories are, for example, 1 adult; 2 adults; 2 adults & a child to 5 years old; 2 adults and a child to 18 years old. How are the Discrimination regulations going to “fit in” with landlords not being allowed to take children in some units? Which law is going to take precedence? So far this appears to us to be very unclear and not dealt with in your proposition. Our members (who will primarily be affected by your proposition) are finding it very difficult to understand the implications for them. Will guidance relating to this matter be published alongside your proposition?

Question 3.

You state in your Report that “*the JLA and other respondents raised the specific issue of the size of a property being appropriate (or not) for the number of people wanting to live in it. The Minister considers that the provisions in the Public Health and Safety (Rented Dwellings) (Jersey) Law 2018 are sufficient to meet this point.*”

This matter gave great concern to our members at the recent JLA AGM, that far from being a defence to refusing to take a child, for example in, a 1 bed flat, that the Health & Safety law, might actually be permissive for a child to be housed in such a flat, notwithstanding, that the

landlord thinks that it is fundamentally wrong and not in the interests of the child/not putting the children first.

Pursuant to a FOI response published on 19 February 2019 on the topic of overcrowding, the response stated:

"The [Environment] Department uses the UK guidance on room and space standards as guidance, which takes into account a child's gender from certain ages. However, an assessment is made on individual circumstances."

In the Operating Guidance for the UK, Housing Health & Safety Rating System, which Jersey follows, the following is said about numbers of occupants to a flat:

"11.16 There should be sufficient provision for sleeping having regard to the numbers likely to be accommodated in the dwelling. As a guide, and depending on the sex of household members and their relationship, and the size of rooms, a dwelling containing one bedroom is suitable for up to two persons, irrespective of age. A dwelling containing two bedrooms is suitable for up to four persons. One containing three bedrooms is suitable for up to six persons, and one containing four bedrooms is suitable for up to seven persons."

It would therefore appear that a single parent could be in a 1 bed flat with a child e.g. a mother and her 16 year old son.

Looking at the UK definition of overcrowding, the room standard and the size standard, a flat isn't overcrowded until things get worse (not only can the living room be used for sleeping but so can the kitchen, if you can get a bed in it).

The room standard

Section 325 of the Housing Act 1985 provides that there is overcrowding wherever there are so many people in a house that any two or more of those persons, being ten or more years old, and of opposite sexes, not being persons living together as husband and wife, have to sleep in the same room. For these purposes, children under ten may be disregarded and a room means any room normally used as either a bedroom or a living room. A kitchen can be treated as a living room provided it is big enough to accommodate a bed. When applying this definition, a local authority looks at how sleeping arrangements within the dwelling could be organised, rather than how they are organised. Therefore, a couple, with two children of opposite sexes and aged ten years or more, with two living rooms (e.g. bedrooms), may not be statutorily overcrowded because the couple could occupy separate rooms, with one each of the children (of the appropriate sex). There is no limit on the number of people of the same sex who can live in the same room under section 325 although there may be a contravention of the space standard (see below).

The space standard

This standard works by calculating the permitted number of people for a dwelling in one of two ways. The lower number thus calculated is the permitted number for the dwelling. One test is based on the number of living rooms in the dwelling (disregarding rooms of less than 50 square feet):

- one room = two persons
- two rooms = three persons
- three rooms = five persons
- four rooms = seven and a half persons
- five rooms or more = ten persons plus two for each room in excess of five rooms.

A child below the age of one is disregarded and a child between the age of one and ten counts as a half person. The other test is based on floor areas of each room size:

- less than 50 square feet = no one
- 50 to less than 70 square feet = half a person
- 70 to less than 90 square feet = one person
- 90 to less than 110 square feet = one and a half persons
- 110 square feet or larger = two persons."

Could the Minister therefore confirm the position as to whether landlords should take or not take a child (or children) over the age of 1 in a 1 bed flat? The reality is that there are many children living in 1 bed flats in Jersey and if this stops, those children will be without a place to live as a 2 bed flat is simply unaffordable to many and there are fewer available. On the other hand, many landlords think it is fundamentally wrong to let their 1 bed flat to a couple with 1 or 2 children, as their view is that this would be seen as overcrowding, notwithstanding what the above-mentioned guidance says. Are they going to be forced to so let?

Many of our members contact us on a regular basis to raise concerns with overcrowding, where couples have one then more children in accommodation, which is not suitable for them, but then do not want to leave.

One of our members has contacted us to say that they have come across at least one circumstance of a family of four (a married couple with a boy and girl of primary school age), where each child has their own bedroom, but the parents sleep on a sofa bed in the lounge. Is this over crowding - at the very least is not desirable - what happens when the children are

teenagers or older, eventually with their own grown up relationships? Will the landlord be liable for allowing or being complacent to the overcrowding of such a dwelling.

A subjective analysis conducted by the Environmental Health Department will be impractical and will give no certainty to landlords. Any lack of clarity on such matters could later call into doubt the effectiveness of your proposition and we feel that guidance must be issued in this respect so that landlords will have a clear view of their legal obligations.

Landlord perceived hazards

Finally, in the JLA's response to the consultation, we raised issues such as having a main road immediately outside the front door of a property, having a reservoir just outside the curtilage of a property, swimming pools or ponds in gardens.

Many landlords would take a common sense approach to such issues and some may choose, not to let to people with children rent such a property, because they do not want to "take the risk" of an accident occurring.

It would appear from your response, that you feel these situations are covered by the Public Health (Rented Dwellings) Health & Safety laws/regulations. We would suggest that it is impossible for all such situations to be covered by laws/regulations, and letting landlords take a common sense view is preferable.

Landlords, attending the AGM expressed concern, that the "authorities" would require works to be done to make safe for children. Eg, fence curtilage of property etc. Such works, may or may not be possible, as other governmental departments, would usually be involved, eg planning, which may refuse/disagree with the proposed works. At the every least, it will increase the costs for the landlord, which will likely need to be passes on, in rent increases, and at worse, could result in the rented dwelling being removed from the rental, resulting in another lost rental unit.

In instances such as these, pragmatic "common sense" decisions, are being removed from landlords to "solve" an issue which the Minister herself "accepts ... may be few and far between" in relation landlords to refusing children.

We look forward to hearing your urgent response to the above matters.

Kind regards

Jersey Landlords Association.

**Guidance on the application of the
Discrimination (Amendment of Law) (Jersey) Regulations 2021**

The New Regulations

1. The Discrimination Law has been extended to prohibit discrimination against potential occupiers of residential property who will or may have children under the age of 18 living with them.
2. If a person who is letting or selling the property, or a person or company who is instructed to do so, refuses to let or sell, or to show or advertise the property, purely on the fact that a child or children under the age of 18 could be living in the property then this is an act of discrimination which is prohibited. There are some exceptions which are set out below.
3. The Regulations do not override other Jersey Laws that relate to the provision of accommodation. One example is the law relating to lodging houses. Some lodging houses are specifically excluded because the layout of the premises is not appropriate, safe or suitable to accommodate children. The introduction of these Regulations will not affect such exclusions.
4. Certain types of accommodation are also exempt from the new Regulations. These include tourist premises, care homes or accommodation reserved for particular categories of people – for example, those who are over a certain age, or where disabled facilities for adults are a requirement in the accommodation.
5. The Regulations also provide for a defence to a claim of discrimination, where health and safety issues pose a potential hazard to a child. This means that an owner or landlord can refuse the transaction on the grounds of health and safety. The hazard must be one that is covered by the Public Health and Safety (Rented Dwellings) Jersey Law 2018.

What the Regulations don't do

6. The Regulations do not apply retrospectively. It is not possible to make a complaint of discrimination if a potential occupier thinks they have been denied access to a property in the past. The Regulations came into force on XXXX. Transactions completed before this date are not covered.
7. The Regulations do not require the Minister to “police” compliance by owners of residential property with the requirement not to discriminate against potential occupiers with children. Discrimination on the grounds of the other protected characteristics contained in the Discrimination Law is not “policed” in this way either.

The Jersey Employment and Discrimination Tribunal

8. If a potential occupier believes that they have been unfairly discriminated against because they have children, they can lodge a claim with the Jersey Employment and Discrimination Tribunal, which is an independent judicial body.
9. The Tribunal has jurisdiction to consider claims of acts of discrimination more generally; the new Regulations add discrimination against potential occupiers with children to the list.
10. The Tribunal will hear evidence from the owner and the prospective occupier and will make a decision as to whether discrimination has taken place.
11. The Tribunal Service will help applicants make an application. There is no need to use a lawyer.