

MISCELLANY

The threat of Covid-19

1 The arrival of the life—and economy—threatening Covid-19 virus in the Channel Islands has unsurprisingly required the States of Jersey and the States of Guernsey to move very fast on a broad range of fronts to seek to contain the pandemic and to protect our people. This has included the enactment of emergency legislation to control the situation and to adjust the legal framework so as to enable the Islands to operate as smoothly as possible in the circumstances. That process might have been made more difficult by the fact that neither of the States Assemblies is a sovereign legislature, and primary legislation requires the sanction of Her Majesty in Council.¹ However, it must be said that all concerned have reacted to the crisis with remarkable speed. In Jersey, an enabling Law, the Covid-19 (Enabling Provisions) (Jersey) Law 2020 (“the Covid-19 Jersey Law”), was drafted within days, considered and adopted by the States on 27 March 2020, sanctioned by Her Majesty in Council on 3 April, and registered by the Royal Court on 7 April. It came into force on 8 April.

2 The States of Jersey’s approach to Covid-19 legislation has been three-fold. First, they determined to enact an overarching Law giving the legislature extremely broad-ranging emergency powers to pass Regulations dealing with Covid-19.² In relation to the virus, the requirement for primary legislation to have the approval of Her Majesty in Council has effectively been removed. Such Regulations may amend any Law or subordinate legislation and may confer a power on a Minister to make Orders thereunder.

3 Secondly, pending the coming into force of that overarching Law, they have, albeit in only a few instances, made use of their power to

¹ Noting the power though of all four Channel Island assemblies to make regulations and ordinances, both under inherent powers and delegated powers via “Laws”, these two are, on one analysis, forms of primary legislation. The concern here is legislation requiring Royal Sanction.

² Article 2(1)—

“The States may by Regulations make such provision as appears to them to be necessary or expedient as a direct or indirect result—

(a) of the outbreak of Covid-19 in Jersey; or
(b) of the aftermath of that outbreak.”

pass triennial regulations as a stop-gap.³ Thirdly, where possible, and where so empowered by the principal law, subordinate legislation has been employed.

4 An important first step in the context of a virus that spreads at speed *via* human contact is the ability to control the movement of the population and to require individuals to undertake medical examination and isolation where they risk spreading the infection. Amongst the first pieces of legislation enacted to address the pandemic was the Covid-19 (Screening, Assessment and Isolation) (Jersey) Regulations 2020 (“the Screening and Assessment Regulations”) which came into force on 28 March 2020. These were triennial regulations made by the States of Jersey under the Order in Council dated 28 March 1771. The Regulations addressed three specific areas. First, individuals arriving in Jersey who had shortly before been in an area infected with Covid-19 were required to self-isolate for a period of time. Secondly, the Minister for Health and Social Services was empowered to declare a period of restricted movement if he was “satisfied that the risk to public health caused by Covid-19 has reached a level at which it is proportionate and necessary to make the Order”. Thirdly, power was given to an authorised officer to direct or remove persons to a place suitable for screening or assessment and to require them to be tested and to assist the authorities in ascertaining where and from whom they had contracted the virus and to whom they might have passed it on. In each case, a failure to abide by the rules was made a criminal offence. An amendment to the Regulations swiftly followed on 2 April 2020 to clarify what reasonable excuses might be offered for entering a public place during a period of restricted movement.

5 The use of the power to make triennial regulations in this way, is subject to the restrictions imposed by the Order in Council of 1884, namely that such Regulations “do not infringe upon the Royal prerogative and are not repugnant to the permanent political or fundamental laws of the said Island”.⁴ It is arguable that the Covid-19 (Schools and Day-Care of Children) (Jersey) Regulations 2020 (“the Schools Regulations”) (which empower the Minister of Education to require the closure of school premises) conflict with (are repugnant to) the obligations of the Minister under the Education (Jersey) Law 1999 (“the 1999 Law”) (*inter alia*) “to ensure that there is available to every

³ See, *e.g.*, the Covid-19 (Schools and Day-Care of Children) (Jersey) Regulations 2020 made on 28 March 2020.

⁴ Order in Council of 14 April 1884 relative to the powers of the States to pass provisional triennial Regulations.

child of compulsory school age full-time education . . .”⁵ The contrary argument, however, is that the 1999 Law expressly enables the Minister to make arrangements for the education of children of compulsory school age otherwise than at school.⁶ Furthermore, art 2 of the European Convention on Human Rights, incorporated into law by the Human Rights (Jersey) Law 2000, imposes positive obligations on the state to take appropriate steps to safeguard the lives of those within its jurisdiction. In enabling the closure of school premises on account of the threat to health posed by the virus, it is also arguable that the Schools Regulations contribute to fulfilling Jersey’s obligations under the Convention.

6 The second triennial regulation made before the enactment of the Covid-19 Jersey Law was the Screening and Assessment Regulations, as mentioned in para 4 above. They empower the Minister for Health and Social Services to utilise powers to restrict the movement of people. The Covid-19 (Restricted Movement) (Jersey) Order 2020 was made on 29 March by the Minister under powers conferred by the Regulations. This declared a period of restricted movement from 8 a.m. on Monday 30 March 2020 to 8 a.m. on 13 April 2020 (subsequently extended to 27 April, and thereafter to 11 May). Persons were prohibited from entering or remaining in a public place. It allows for exceptions from the requirement not to go or remain in a public place for the police and for persons there for the purposes of work (where it was not reasonably possible for that person to work from his home). These restrictions are difficult to reconcile with ECHR Convention rights of liberty (art 5) and freedom of assembly (art 11).⁷

7 The restrictions imposed by the Screening and Assessment Regulations undoubtedly engage Convention rights, particularly the right to liberty (art 5) and the right to freedom of assembly (art 11). However, in both instances these rights are qualified by the Convention. Article 5(1)(e) permits the lawful detention of persons for the prevention of the spreading of infectious diseases and art 11(2) permits lawful interferences with the right of assembly if “necessary in a democratic society . . . for the protection of health”. The Screening and Assessment Regulations would not therefore infringe the

⁵ Article 11 of Education (Jersey) Law 1999.

⁶ Article 13 of the 1999 Law

⁷ On the other hand, before 1771 the States Assembly had begun to exercise the jurisdiction to regulate concurrently with the Royal Court, and there are examples in the 15th and 16th centuries of the Royal Court making regulations.

Convention and would accordingly not be repugnant to the permanent political laws of the Island.⁸

8 There are, as one might expect in a functioning democracy, restrictions on these wide-ranging powers. Regulations under the Covid-19 Jersey Law may not: impose or increase taxation; impose a penalty of imprisonment for more than 4 years for a criminal offence; take effect from a date earlier than that of the making of the Regulations containing the provision; or amend the Covid-19 Jersey Law or the Human Rights (Jersey) Law 2000. The provisions that may be made by Order under Regulations have similar restrictions. Finally, the Covid-19 Jersey Law has an end point: no subordinate legislation made be made under it after 1 January 2021.

9 Regulations under the Covid-19 Jersey Law have been passed in a host of other areas including the operation of the courts and tribunals (including the Licensing Assembly), residential tenancies, cremation, social security contributions, nursing care, official recording of deaths, registration of medical practitioners, schools and day care for children, control of housing and working.⁹ These are designed to deal with a range of issues. For example, the Covid-19 (Residential Tenancy) (Temporary Amendment of Law) (Jersey) Regulations 2020 amend residential tenancy agreements to protect tenants from the effect of the expiration of a lease, and prohibit rental increases and financial penalties for breach of terms of the lease. The Minister is empowered to issue guidance in relation to the termination of tenancies, rental payments and eviction for arrears caused by the Covid-19 outbreak. A quirky example is the Statutory Nuisances (Amendment) (Jersey) Regulations 2020 which extend the definition of a statutory nuisance to include a gathering of persons which by its size or duration is considered to be prejudicial to health in the Covid-19 context.

10 The Law Society of Jersey has been proactive in assisting the Jersey authorities in the drafting of legislation and guidance notes. For example, under the Covid-19 (Residential Tenancy) (Temporary Amendment of Law) (Jersey) Regulations 2020, the Minister is empowered to issue guidance in relation to the termination of tenancies, rental payments and eviction for arrears caused by the Covid-19 outbreak. The Law Society prepared the draft of a guidance

⁸ It is interesting to note that before 1771 the States Assembly had begun to exercise the jurisdiction to regulate concurrently with the Royal Court, and there are examples in the 15th and 16th centuries of regulations being made to combat plague.

⁹ Most of these Regulations and Orders are expressed to expire on 30 September 2020.

note which sets out the conduct expected from landlords and tenants: it is not compulsory, but it will be taken into account by the court in the event that a dispute between a landlord and tenant is litigated.

11 Guernsey has followed a similar course, although, as is often the case, the journey is not quite the same. Guernsey already had enabling legislation in place, namely the Civil Contingencies (Bailiwick of Guernsey) Law 2012 (“the 2012 Law”), which came into force on 4 February 2013. The legislation comprises 27 sections and three schedules and is as much about contingency planning and emergency prevention as permitting emergency powers to be taken. The Law establishes the Civil Contingencies Authority (“the Authority”),¹⁰ presided over by the President of the Policy & Resources Committee (Guernsey’s Chief Minister) and including the Presidents of the relevant key committees (Home Affairs, Environment & Infrastructure, Health & Social Care) as well as a temporary member from each of Alderney and Sark when an emergency affects those Islands. The Bailiff, as Presiding Officer of the States of Deliberation¹¹ (or in his absence the Deputy Bailiff), also has a right to attend and advise, both at meetings “and otherwise”. HM Procureur “. . . shall be present at all meetings” of the Authority. Express provision is made for meetings to be held virtually. The Authority is free to decide its own procedures.

12 The key emergency power provisions are to be found at Part 3 of the 2012 Law comprising ss 12–16. In summary, the Authority may make emergency regulations if an emergency has occurred, provision is necessary to control or mitigate the emergency, the need for provision is urgent and HM Procureur has advised the Authority “about the proportionality of making the proposed regulations”.¹² What is an emergency is defined at s.2(1) and includes: “. . . an event or situation which threatens serious damage to human welfare or the environment in the Bailiwick, or any part thereof . . .” Human welfare extends to loss of human life, human illness or injury. There can be no doubt that Covid-19 fulfils these criteria.

13 Section 14 gives broad scope to the emergency regulations which can be made which includes protecting human life, health or safety, treating human illness or injury. They extend to protecting food, water and fuel supplies, systems of communication, transport, protecting the provision of health services and, at the end of a long list, maintaining public order. A key provision is at s.14(3): “Emergency regulations may make provision of any kind that could be made by *Projet de Loi*

¹⁰Section 1.

¹¹ The formal name of Guernsey’s Legislative Assembly.

¹² Section 13.

...” Section 15 sets limits on emergency regulations. The Authority must be satisfied that any given provision is appropriate for the purpose of preventing, controlling or mitigating the emergency and that the effect of the provision “is proportionate to the emergency or that aspect or effect of the emergency”. Regulations may extend to any part of the Bailiwick or the entire Bailiwick. Emergency regulations cannot create an offence other than failure to comply, failing to comply with a direction or obstruction and the maximum penalty must not exceed three months’ imprisonment or a fine of more than £10,000. Emergency regulations cannot amend either the regulation making powers in the 2012 Law or the Human Rights (Bailiwick of Guernsey) Law 2000.

14 Guernsey’s emergency regulations are of short duration. Once made they must be laid before the States of Deliberation as soon as reasonably practicable. In general, they lapse seven days after being made, or after 30 days if approved by resolution of the States. There is some slight ambiguity as to the duration provisions, but in any event new regulations can always be made (assuming the emergency conditions for making regulations still prevail). The States of Alderney and the Chief Pleas of Sark have power to annul emergency regulations.

15 In relation to Covid-19, successive emergency regulations have indeed been made under the 2012 Law, commencing as early as 18 March 2020 with the Emergency Powers (Coronavirus) (Bailiwick of Guernsey) Regulations, 2020. The Regulations commence with what has become a familiar mantra reciting the fact of the infection, consultation with the Medical Officer of Health, fulfilment of the conditions under the Law for making regulations, and their proportionality and compatibility with Guernsey’s human rights legislation, before going on to recite the regulations themselves. They give power to the Medical Officer of Health to impose restrictions on those arriving in the Bailiwick comprising detention, screening requirements, admission to hospital, isolation, the wearing of protective clothing, provision of information, not working, isolation and so on. Regulations concerning schools followed on 20 March, conferring the power to close schools. By 24 April, no fewer than 17 Regulations had been made, controlling a raft of human activity. The Regulations in force as this issue went to print, the Emergency Powers (Coronavirus) (General Provision) (Bailiwick of Guernsey) Regulations 2020, consolidated and replaced the previous Regulations. They cover the following areas: screening, assessment and powers to detain (there is an important safeguard in that the Medical Officer of Health cannot impose a restriction or requirement unless she has sought the advice of HM Procureur in relation to appropriateness and proportionality and has taken account of that advice); control of

premises, gatherings and movement of persons; temporary registration and authorisation of medical and health professionals; registration of death and still-births (to waive obligations to carry out certain acts in person); modification to legislation relation to cremations; modifications to the requirements for parochial meetings; disapplication of various health and safety provisions relating to installations; permitting the Court of Appeal to sit virtually; permitting the Bailiff to register legislation sitting alone; permitting the Medical Officer of Health to close schools; modifying the legislation governing the assemblies of Guernsey, Alderney and Sark to allow, for example, Sark's Chief Pleas not to sit in public and the States of Deliberation to hold virtual meetings; relaxation of provisions relating to employment permits, intriguingly, permitting the issues of notices authorising the cutting, collecting, landing, lifting or carrying of seaweed, notwithstanding any enactment or customary law to the contrary; and allowing a person with an automatic transmission driving licence to drive an ambulance with manual transmission.

16 These are, of course, unprecedented interferences with individual freedom. As matters stand in Guernsey, the average subject is only permitted out of his or her home for two hours a day to exercise and for additional, other limited purposes such as essential shopping and medical treatment. There are strict limits on the ability to associate. In Jersey the situation is much the same.

17 It is interesting to compare and contrast the Jersey and Guernsey enabling provisions. The 2012 Guernsey Law is broader in scope and suited to every emergency without limit of time. The Covid-19 Jersey Law is directed only at the present emergency. Both Laws give considerable powers to make regulations having the effect of primary legislation and without reference to the Privy Council. Indeed it is a feature of the emergency that the Bailiwicks are currently entirely in control of their own destinies. The sunset clauses are different. The 2012 Guernsey Law states quite explicitly that Emergency Regulations made under s 12 will lapse after a maximum period of 30 days, although they can of course be renewed.¹³ The Covid-19 Jersey Law provides that no Regulations, or Order, made thereunder may be made on or after 1 January 2021.¹⁴ That leaves open the possibility that Regulations made prior to 1 January 2021 could last indefinitely; in other words that the States of Jersey could amend primary legislation by regulation with permanent effect. In fact, each regulation made so

¹³ Section 16.

¹⁴ Article 3.

far has had its own sunset provision built into the regulation.¹⁵ But subordinate legislation purporting to extend beyond 1 January 2021 would be amenable to judicial review if it failed to meet the requirements of art 2—*viz.* that it was “necessary or expedient as a direct or indirect result (a) of the outbreak of Covid-19 in Jersey; or (b) of the aftermath of that outbreak.”¹⁶

18 The Government of Jersey has not sought to use the provisions of the Emergency Powers and Planning (Jersey) Law 1990 (“the 1990 Law”), which follows a similar pattern to the 2012 Guernsey Law. It constitutes an Emergencies Council under the chairmanship of the Chief Minister and declares a function of the Council to “coordinate the planning, organization and implementation of measures . . . designed to . . . mitigate or overcome the effects or possible effects of any happening, event or circumstance that . . . may endanger the health or safety of the community”. The Lieutenant Governor may declare a state of emergency which may empower a Minister to make Orders in relation to fuel, telecommunications, postal services, gas, food, medical supplies, water or port operations. It is clear, however, that the crisis caused by the Covid-19 pandemic was not in the mind of the draftsman of the 1990 Law. It seems that a deliberate decision has been taken not to use the 1990 Law for the purpose of regulating for the pandemic. Instead the Covid-19 Jersey Law has been enacted. Changes to standing orders have also been enacted enabling, *inter alia*, propositions to be lodged in reduced timeframes, and States Members to participate in proceedings by electronic means. Indeed Jersey was the first Commonwealth country to facilitate (on 2 April) a full virtual sitting of its legislature in response to the pandemic.

19 In tackling the pandemic, different countries in the Council of Europe have taken different approaches to the necessity for a derogation under art 15 from the European Convention on Human Rights. Countries which have sought a derogation include Latvia, Romania, Serbia and Estonia. The Channel Islands are within a group including France, Germany and the United Kingdom which have not done so. The Royal Courts retain, therefore, the right to consider the proportionality of measures reportedly under consideration to restrict the freedom of movement of those over the age of 70 for an extended period. In any event they retain the right to consider the *vires* of all

¹⁵ *E.g.* Covid-19 (Restricted Movement) (Jersey) Order 2020 (which lapsed on 27 April) and Covid-19 (Emergency Provisions—Courts) (Jersey) Regulations 2020 (which will lapse on 30 September 2020).

¹⁶ See *Jersey Fishermen’s Assn Ltd v States of Guernsey* 2007–08 GLR 36 (PC).

such measures. So far, the governments of both Bailiwicks have, it seems to this *Review*, acted appropriately and proportionately to the extraordinary circumstances faced by the Islands.

20 Jersey and Guernsey celebrated the 75th anniversary of Liberation Day on 9 May. There is yet greater poignancy to the notion of liberation at this time, but as Her Majesty so rightly said in her 5 April 2020 broadcast to the United Kingdom and the Commonwealth: “. . . better days will return; we will be with our friends again; we will be with our families again; we will meet again”, echoing the lyrics of Vera Lynn’s famous 1939 recording. As the song says, “we’ll meet again some sunny day”. Hopefully that day will come soon.

Spare the rod and spoil the child

1 Jersey has become the first jurisdiction in the British Isles, but only just,¹ to proscribe smacking or other physical chastisement or correction of a child.² It is, however, by no means the first in Europe—indeed Switzerland, the Czech Republic and England are the only countries where corporal punishment of children is still permitted. In Jersey, the change has been achieved by the abolition of the customary law defence to a charge of assault—*viz.* that the child was being lawfully and reasonably corporally punished. Article 79(2) of the Children (Jersey) Law 2002 now provides that

“corporal punishment of a child cannot be justified in any civil or criminal proceedings on the grounds that it constituted, for the purpose of any rule of customary law—

- (a) reasonable punishment; or
- (b) acceptable conduct.”

The Education (Jersey) Law 1999 has also been amended in relation to the power of members of staff to use reasonable force (not including corporal punishment) to reflect the change in the law.

2 It is interesting how quickly the global mood has changed. Arguably, there is no Biblical justification for the corporal punishment

¹ The Scottish Parliament adopted the Children (Equal Protection from Assault) (Scotland) Act in October 2019, but the Act does not come into force until 7 November 2020. Wales appears poised to change its law.

² See art 3 of the Children and Education (Amendment) (Jersey) Law 2020 which was adopted by the States on 10 December 2019 and came into force on 24 April 2020. The move was initiated by a backbencher in the States Assembly—Deputy Mary Le Hegarat.

of children. The Book of Proverbs states “He that spareth his rod hateth his son; but he that loveth him chasteneth him betimes.”³ But this has been interpreted as meaning that if one does not discipline a child, he or she will never learn obedience and good manners. The New Testament is gentler. St Matthew’s Gospel records Jesus as saying “Let the children come to me and do not hinder them, for to such belongs the Kingdom of Heaven. And He laid His hands on them and went away.”⁴ There is no suggestion of corporal punishment there. In Victorian times, however, and much later, the notion that appropriate and reasonable physical chastisement or punishment of children was not acceptable would have been laughed out of court. The European Court of Human Rights initiated the change of mood by ruling that the birching of juveniles was “degrading treatment or punishment” and breached art 3 of the Convention.⁵ In 1979, Sweden became the first country to ban corporal punishment of children, and since then a stream of countries following suit has become a flood.

3 The United Nations Committee on the Rights of the Child reported in June 2006 and defined corporal punishment as—

“... any punishment in which physical force is used and intended to cause some degree of pain or discomfort, however light. Most involves hitting (‘smacking’, ‘slapping’, ‘spanking’) children, with the hand or with an implement—a whip, stick, belt, shoe, wooden spoon, etc. But it can also involve, for example, kicking, shaking or throwing children, scratching, pinching, biting, pulling hair or boxing ears, forcing children to stay in uncomfortable positions, burning, scalding, or forced ingestion (for example washing children’s mouths out with soap or forcing them to swallow hot spices). In the view of the Committee, corporal punishment is invariably degrading.”⁶

4 Many of those instances given by the UN Committee would probably not fall within the customary law defence of reasonable

³ Proverbs 13:24.

⁴ St Matthew 19:13

⁵ *Tyrer v United Kingdom*, judgment of 25 April 1978. [https://hudoc.echr.coe.int/fre#{%22itemid%22:\[%22001-57587%22\]}](https://hudoc.echr.coe.int/fre#{%22itemid%22:[%22001-57587%22]}) (accessed 29 April 2020). Tyrer was a Manx boy of 15 who had pleaded guilty to assault occasioning actual bodily harm to an older boy at his school. He was sentenced by the Juvenile Court in the Isle of Man to three strokes of the birch. The British judge, Sir Gerald Fitzmaurice, gave the only dissenting opinion.

⁶ <https://www.refworld.org/docid/460bc7772.html> (accessed on 29 April 2020).

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chastisement. Guernsey's position on corporal punishment of children is unclear. England continues to resist change, perhaps because so many decision-makers experienced corporal punishment at school and feel none the worse for it. They are, however, clearly swimming against the tide.