SHORTER ARTICLE

LEGISLATING FOR A PANDEMIC IN GUERNSEY

Jon McLellan

At the time of writing, the number of active cases of COVID-19 in Guernsey has dropped to zero, and it has been well over a hundred days since a new active case. That may well have changed by the time this is published; nevertheless, it seems an apposite time to take a look back at the Bailiwick's experience of the pandemic from the point of view of a legislative drafter, and to make a few general observations.

An emergency under the 2012 Law

1 The legislative response to the pandemic was and remains predicated on it being an emergency within the meaning of the Civil Contingencies (Bailiwick of Guernsey) Law 2012 ("the 2012 Law"), thereby permitting the making of emergency regulations to prevent, control or mitigate the emergency.[1]

2 The parts of the 2012 Law concerned with the making of emergency regulations are couched in similar terms to equivalent provisions of the United Kingdom's Civil Contingencies Act 2004 ("the 2004 Act"). In particular, in both enactments a power is conferred to make emergency regulations if criteria relating to the occurrence of an emergency, *viz.* urgency and necessity, are satisfied. However, the 2012 Law contains an additional condition: that Her Majesty's Procureur must have advised the Civil Contingencies Authority ("the CCA"—a committee of the States established by Part 1 of the Law) about the proportionality of making the proposed regulations. In the 2004 Act, the equivalent condition requires the person making the regulations[2] to be satisfied that the effect of the provision is in due proportion to that aspect or effect of the emergency, but it makes no reference to a requirement for advice from any person in relation to proportionality.

3 Under provisions in both the Law and the Act, regulations can make (subject to certain restrictions, especially in respect of the power to

[1] See s 13(3) of the 2012 Law.
[2] Including, presumably, Her Majesty in Council—see below.

create criminal offences[3]) any provision that can be made by an Act of Parliament or the Royal Prerogative, or *Projet de Loi* (as the case may be); and under both, regulations need to be laid before Parliament or the States "as soon as reasonably practicable" after being made, and have a maximum duration of 30 days.

4 A noteworthy and politically pertinent difference between the two enactments is the identity of the person who may make emergency regulations. Under the 2012 Law it is the CCA; under the 2004 Act it is Her Majesty by Order in Council, or if an Order in Council cannot be made without "serious delay", a senior minister of the Crown (a defined term that includes any of Her Majesty's Principal Secretaries of State). The CCA comprises the Presidents of four Committees of the States and where (as is the case with the pandemic) Alderney and Sark are affected, representatives from those Islands in the capacity of temporary members.

5 Anyone who has been following the responses of government to the pandemic will know that the Bailiwick's approach differs from that of the United Kingdom, where, instead of regulations being made under the 2004 Act, the Coronavirus Act 2020 was enacted on 25 March 2020 and several sets of regulations have also been made under the Public Health (Control of Disease) Act 1984. It is not for the author to speculate why HM Government acted as it did in this regard, though several commentators have drawn attention to the requirements in the 2004 Act to make new regulations every 30 days and to lay them before Parliament as soon as possible, and compared with the less exacting scrutiny requirements in the Coronavirus Act.[4]

6 In Jersey, where there is no directly equivalent to the 2004 Act in place, the Covid-19 (Enabling Provisions) (Jersey) Law 2020[5] created a regulation-making power that appears broadly similar in scope to that under the 2012 Law, though limited to provision that appears to the States "necessary or expedient as a direct or indirect result (a) of the outbreak of Covid-19 in Jersey or (b) the aftermath of that outbreak". No regulations may be made under the Law on or after 1 January 2021.

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[3] In addition, emergency regulations cannot amend the Human Rights Law or Part 3 of the 2012 Law—see s 15.

[4] See for example Blick and Walker, *Law Society Gazette*, 2 April 2020; "[the Coronavirus Act's] model of legislation contradicts the wishes of parliament's better self as represented by the CCA . . ."

[5] The 2020 Law was approved by the States on 27 March; sanctioned by Her Majesty in Council on 3 April; and was in force on 8 April. A remarkably fast turn-around!

How the regulations have developed

7 The pandemic is the first event or situation[6] that has caused the powers to make emergency regulations under the 2012 Law to be used. The first set of regulations, dealing with powers of the Medical Officer of Health ("the MOH") to impose restrictions, including requirements to self-isolate and be detained, and associated police powers and criminal offences, were made on 18 March 2020. After those regulations, another 11 sets of regulations were made within the 30-day duration period of the initial set, dealing with issues ranging from driving licences to the closure of schools and the holding of remote meetings of the Islands' legislatures, as well as conferring wide-ranging powers for the Committee for Health & Social Care to issue directions controlling gatherings. On the expiry of the first set, the decision was taken to revoke all the regulations and to re-enact them in one composite set (the Emergency Powers (Coronavirus) (General Provision) (Bailiwick of Guernsey) Regulations, 2020, made on 16 April). The reason for this was to increase public accessibility, and to increase coherence and consistency between the different sets of regulations. That set was subsequently made subject to minor amendments, and then re-enacted (with further tweaks) on expiry as the (No 2) Regulations. This process has been repeated since, with further provision being made by amendment to the composite regulations and not by a free-standing set of regulations. At the time of writing (mid-August) the (No 5) Regulations are in force.

8 The first set of regulations made on 18 March comprised 14 regulations. The first composite set of regulations made on 16 April was made up of 46 regulations in 11 Parts, and 5 Schedules, and ran to some 123 pages with the Explanatory Note—a hefty piece of legislation by Guernsey standards. Since that first composite set, the process of legislating in the emergency has, in part, been one of keeping the regulations in force under regular review and revoking in a timely manner provisions that no longer satisfy the statutory criteria. The (No 5) Regulations comprise 22 regulations and 2 Schedules, and are primarily concerned with a key aspect of the very first set of regulations—powers at the border. In a way, the regulations in force over time, from March to August, describe a bell-curve in terms of length and subjects covered; and, as noted above, Guernsey has now, to a significant degree, reverted back to the substance of the very first set of regulations.

An ongoing emergency

[6] See para 9 below.

9 The 2012 Law defines an emergency in terms of its being "an event or situation" which threatens serious damage to human welfare or the environment in the Bailiwick or any part thereof (or war, or terrorism, which threatens serious damage to the security of the Bailiwick, or any part thereof). Interestingly, in the context of the Bailiwick's ongoing COVID-free status (at the time of writing), s 2(4) provides that such an event or situation may occur or be within or outside the Islands.

10 Most might instinctively think of an emergency, in the context of emergency powers legislation, as an event, such as a plane crash. The pandemic has been a reminder that an emergency can also be, as expressly provided for in the legislation, an (ongoing) situation—indeed, a pandemic has for some time been high on many jurisdictions' risk registers, and it will be clear that if a pandemic is serious enough, not only will it be an emergency within the terms of the 2012 Law, but it will also likely persist for a long period. There is, it is submitted, clearly nothing wrong in legislative terms in repeatedly re-enacting regulations[7] for the purpose of addressing an ongoing emergency, if the statutory conditions for making such regulations continue to be met, given that those regulations will in any event be of short duration (as provided for under the 2012 Law). In terms of democratic scrutiny, the requirement that the regulations must be laid before the States "as soon as practicable" also ensures that there is an opportunity for debate, notwithstanding that they will already have come into force.

"When was the emergency declared?"

11 A minor ongoing confusion has been in relation to the idea that an emergency needs to be declared under the 2012 Law for the power to make emergency regulations to be lawfully exercised by the Authority. Under the predecessor to the 2012 Law, the Emergency Powers (Bailiwick of Guernsey) Law 1965, the Emergency Powers Authority had power by order to "declare that a state of emergency exists", and such a declaration was a necessary pre-condition of the making of emergency regulations. There is no such equivalent public trigger in the 2012 Law; the CCA is empowered to make emergency regulations once the statutory conditions for doing so have been satisfied. Nevertheless, it remains a stubborn misconception that a declaration of some sort is necessary; it is as though such a public step meets a psychological need.

[7] "[T]he making of new regulations" is expressly provided for under the 2012 Law at s 16(6)(a).

Directions, variations, and the need for flexibility

12 The circumstances relating to the pandemic are, by their very nature, subject to constant change, and government's response needs to be equally adaptable. It also became clear early on that the detailed public health requirements to control the spread of infection in the first stages of lockdown were not easily susceptible to being set out in regulations, and that consequently some form of enforceable instrument to be made under the regulations would be needed.

13 As early as 20 March, in the Control of Premises regulations, the CCA created a power exercisable by the Committee for Home Affairs, after consultation with the MOH, to issue a direction imposing prohibitions, requirements or restrictions in relation to premises (excluding solely residential premises); and it was this power that was used to make a direction that had the effect of closing pubs and nightclubs that same Friday night. A few days later, the Control of Events, Gatherings and Meetings regulations were made, which conferred a direction-making power on the Committee for Health & Social Care. The power was to "issue a direction imposing conditions, prohibitions, requirements or restrictions in relation to the holding of an event, gathering or meeting (whether planned or unplanned and of whatever duration) between or attended by persons from different households"; and the regulations provided that a direction could "amongst other things, specify a minimum distance that must be maintained between persons of different households". Both sets of regulations provided that directions made under them could only be in force for a maximum of 14 days, and could only be made after consultation with the MOH. Importantly, the regulations also provided that a failure without a reasonable excuse to comply with a direction would be an offence: a failure to maintain social distancing was made subject to the sanction of the criminal law.

14 Several complex and detailed directions were issued under these regulations before the direction-making powers were combined in the first composite set of regulations. This composite set conferred on the Committee for Health & Social Care the power to issue a direction imposing conditions, prohibitions, requirements or restrictions in relation to "the movement of people outside the place where they are living as well as premises, and gatherings etc." The power was only exercisable after consultation with Her Majesty's Procureur as well as the MOH; nevertheless, the provision must surely constitute one of the most, if not the most, wide-ranging set of powers to restrict freedom of movement ever conferred on a Committee of the States in peace-time.

15 As conditions changed, different directions (and "general authorisations" issued thereunder by the Committee for Health & Social Care, dealing with such matters as "bubble arrangements" and

the use of outdoor leisure facilities) were made; the last direction was Direction No 10, made under the (No 2) Regulations with effect from 5 June until 13 June.

16 A similar requirement for flexibility has been required as the Bailiwick starts the difficult process of opening its borders. As that process began, it became apparent that the requirement to self-isolate for 14 days would need to be capable of modification. Accordingly, a power to vary the application of the requirement—by the MOH in relation to particular cases (to meet individual medical and compassionate needs) and by the CCA itself in relation to all cases or specified categories of cases (to meet broader policy purposes)—was introduced; and variations have followed directions as a species of quasi-legislation made under the emergency regulations.

Alderney and Sark

17 There have, at the time of writing, been no cases of Covid-19 in Alderney or Sark. Nevertheless, as the pandemic is "an event or situation which threatens serious damage to human welfare" as much to the sister Islands of the Bailiwick as to Guernsey, there is consequently, in the terms of the Law, an emergency throughout the Bailiwick. The 2012 Law is a Bailiwick-wide Law and the CCA is an authority for the whole Bailiwick. Schedule 1 to the Law provides that where a majority of the permanent members of the Authority are of the view that an emergency has occurred, is occurring or is about to occur, and Alderney and/or Sark are affected, the Authority shall invite the relevant Committees in those Islands "to nominate a representative to be a temporary member of the Authority; and on that nomination being accepted by the representative, he shall be a temporary member of the Authority".

18 Such temporary members have the same rights and responsibilities in relation to the Authority as permanent members,[8] and representatives from Alderney and Sark have sat on the Authority in the capacity of temporary members and contributed to its deliberations from its first meetings in respect of the pandemic. Separate provision has on occasion been made for one or both Islands at their request; most recently, the seven-day self-isolation option variation from the requirement to self-isolate for 14 days on arrival in the Bailiwick from a "Category B country" did not extend there on introduction.

Remote meetings—of the CCA (and other committees), and the Island legislatures

[8] Paragraph 2(2) of Schedule 1 to the 2012 Law.

19 The participation of the temporary members of the CCA from Alderney and Sark has been made much easier by the express provision in the 2012 Law for the CCA to meet remotely.[9] Remote meetings of other States committees have been facilitated by a change to the Rules of Procedure,[10] and remote meetings of the States of Deliberation were enabled by the Emergency Powers (Coronavirus) (States Procedures) (Guernsey) Regulations 2020, made on 9 April, which temporarily modified the Reform (Guernsey) Law 1948—inserted art 3A(1) and provided that "The States of Deliberation may meet remotely". Consequently, Rules of Procedure were made under art 3A governing such remote meetings, and of course the States did of course go on to meet remotely,[11] in another first arising from the pandemic. Provision in respect of remote meetings of committees in Alderney and Sark, and of the States of Alderney and the Chief Pleas, was made by separate sets of regulations.[12]

An immense effort

20 At the time of writing, 22 sets of emergency regulations have been made—just under 30% of the total number of statutory instruments made at the time of writing this year. In addition, as noted, significant numbers of instruments made under the regulations—many of them as lengthy and complex as any other piece of legislation—have been prepared. This has all been done at great pace: in the period between 18 March and 16 April, 13 sets of regulations as well as multiple directions, and general authorisations thereunder, were drafted and made. This legislative effort is of course just one part of a huge effort by the governments of the Bailiwick to manage and mitigate the effects of this extraordinary public health emergency.

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[9] Paragraph 9 of Schedule 1 to the Law.

[10] The change does not allow remote meetings of committees in all circumstances; the relevant paragraphs inserted into Rule 40 only have effect when the Presiding Officer has made a determination upon representations from the CCA.

[11] With fewer problems than some perhaps had first feared.

[12] See the Emergency Powers (Coronavirus) (States Procedures) (Alderney) Regulations 2020, the Emergency Powers (Coronavirus) (Chief Pleas Procedures) (Sark) Regulations 2020, and provision in the consequent composite sets of regulations.