

THE STATES OF DELIBERATION
of the
ISLAND OF GUERNSEY

**POLICY & RESOURCES COMMITTEE, COMMITTEE *FOR* HEALTH & SOCIAL CARE, AND
COMMITTEE *FOR* HOME AFFAIRS**

LIVING RESPONSIBLY WITH COVID-19

The States are asked to decide: -

Whether, after consideration of the Policy Letter entitled 'Living responsibly with COVID-19' (dated 20th December, 2021) they are of the opinion: -

1. To direct the Committee *for* Health & Social Care to bring proposals as soon as is practicable to amend the Public Health Ordinance, 1936, to confer powers on the Medical Officer of Health to order the self-isolation of, and impose other restrictions or requirements on, persons already within the Bailiwick who are infected, or suspected of being infected (e.g. contacts of cases), with Coronavirus; and to confer on the Committee *for* Health & Social Care the power to make regulations to extend the powers to other notifiable diseases, further to its consideration of the clinical judgement of the Medical Officer of Health and the advice of Her Majesty's Procureur.

The above Proposition has been submitted to Her Majesty's Procureur for advice on any legal or constitutional implications in accordance with Rule 4(1)(c) of the Rules of Procedure of the States of Deliberation and their Committees.

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LIVING RESPONSIBLY WITH COVID-19

The Presiding Officer
States of Guernsey
Royal Court House
St Peter Port

20th December, 2021

Dear Sir

1 Executive Summary

- 1.1 The Bailiwick is now facing an emerging threat from a new variant of concern - Omicron. The Policy & Resources Committee, Committee *for* Health & Social Care, and the Committee *for* Home Affairs, (together, the “Committees”) having considered deferring this Policy Letter to provide time to understand the impact of the new variant, believe it remains important for the States of Deliberation to decide their future approach for the long-term public health response in such situations. Furthermore, they consider that the swift, co-ordinated response led by the Civil Contingencies Authority and communicated clearly to the community, remains appropriate and therefore, on balance, decided to proceed with their proposals.
- 1.2 This emerging threat is being monitored and reported to the Civil Contingencies Authority. The Civil Contingencies Authority is the body with the widest powers to respond. It has now made emergency regulations in response to Omicron to bring in further restrictions to be operated at the borders and to mandate the wearing of face coverings in shops, public transport, and public parts of States buildings.
- 1.3 The current restrictions on arrivals into the Bailiwick and associated powers at the border are in place to limit community seeding while more is learnt about the transmissibility of the virus, the efficacy of vaccinations, and severity of disease resulting from infection by Omicron.

- 1.4 The Committee *for* Health & Social Care has also responded with a significant expansion to its vaccination booster programme, and the Committee *for* Education, Sport & Culture likewise with regards wearing masks in communal areas in schools.
- 1.5 With this new, reportedly highly contagious, variant of concern emerging, and vaccine scientists speaking of a need to prepare for the next pandemic of unknown origin or type, the States of Deliberation must consider whether they should amend current legislation that protects public health, so their response is not purely based on emergency powers.
- 1.6 The Bailiwick of Guernsey, through the Civil Contingencies Authority, has for nearly two years been identifying and monitoring risk and responding with mitigating actions to manage the security, safety, and welfare of the community during the Coronavirus pandemic. In doing so it has acted under the provisions of the Civil Contingencies (Bailiwick of Guernsey) Law, 2012 (the “2012 Law”).
- 1.7 The pandemic has shown itself to be an emergency situation within the definition of emergency under section 2 of the 2012 Law, particularly insofar as it threatens ‘serious damage to human welfare’. Action to prevent, control and mitigate the impact of Coronavirus in the community has necessitated, subject to statutory safeguards, the sustained use of emergency regulation-making powers by the Civil Contingencies Authority under the 2012 Law.
- 1.8 The substantive matters in the General Provisions Emergency Regulations relating to COVID-19 made by the Civil Contingencies Authority have been enacted subject to four conditions under the 2012 Law. These include where there are no other legislative tools available and where it has not been possible for the usual process to be followed in making or amending legislation through the Assembly. Those matters that to date have been determined (by the Civil Contingencies Authority) to meet those four conditions and which are likely to persist, and were therefore the focus of initial consultation undertaken recently by the Policy & Resources Committee, are broadly of two types:
 - (i) to order the self-isolation of, and impose other restrictions on, persons already within the Bailiwick who are infected, or suspected of being infected (e.g. contacts of cases), with COVID-19; and
 - (ii) restrictions on arrivals into the Bailiwick and associated powers at the border, subject to variation by the Medical Officer of Health.

- 1.9 The Policy & Resources Committee found there to be general support for future-proofing the Public Health response by amendment to the Public Health Ordinance, 1936 (the “Public Health Ordinance”), noting that any new powers for Coronavirus should go no further than those already established in the management of Coronavirus by the Civil Contingencies Authority.
- 1.10 This will move the Bailiwick’s response to the disease, in public health terms, back within the normal mechanisms of government.
- 1.11 There was also recognition in the value of increasing flexibility and futureproofing through conferring a power on the Committee *for* Health & Social Care to make regulations to extend the powers to other notifiable diseases, further to its consideration of the clinical judgement of the Medical Officer of Health and the advice of Her Majesty's Procureur.
- 1.12 As regards the second matter, some consultees are understandably concerned by any act of government to restrict civil freedoms.
- 1.13 Having reflected on the policy and operational feedback from, in particular, the Committee *for* Home Affairs on the matter of regulations and their enforcement at the borders, there is considerable counter-concern that any change should neither add unnecessary complexity nor risk a tried-and-tested mechanism.
- 1.14 The facts are that statutory powers with significant legal safeguards are vested in the Civil Contingencies Authority by the States of Deliberation. Regulations made by the Civil Contingencies Authority must be laid as soon as is reasonably practicable before the States of Deliberation with a Proposition to approve them, in the usual way. If the Proposition is not carried the Regulations will lapse immediately. If the Proposition is carried, the Regulations continue in force, expiring after 30 days from the date on which they are made.
- 1.15 The Regulations, in any event, will lapse at the end of the seven days beginning with the date of laying if, during that period, the States of Deliberation have not considered them at all.
- 1.16 It appears to the Policy & Resources Committee that the constitution, powers, and safeguards within the 2012 Law, alongside the operationalisation of the emergency response by the public service, can neither be modified nor replaced to improve outcomes without compromise in efficiency and effectiveness. Furthermore, it is unlikely that any action which restricts civil liberties would be taken outside a setting where the meaning of emergency in the 2012 Law would not be engaged.

- 1.17 Having also considered views expressed with regards the benefits in co-ordination and the criticality of decision-making during this period, the Policy & Resources Committee is of the view that the wider response led and co-ordinated by the Civil Contingencies Authority currently remains appropriate, in light of Public Health advice and pressures on health services which are monitored by the Medical Director. This includes the restrictions required from time to time at the borders.
- 1.18 This must, however, be kept under review. It is not acceptable to restrict the freedom of individuals for any longer than absolutely necessary to protect the community, especially in the face of low numbers of COVID-19 cases requiring hospitalisation.

2 Introduction

- 2.1 The 'new normal' often spoken of is a world with a declared pandemic and unknown timeframe for de-escalation which generates significant uncertainty about the future, an on-going requirement for near-immediate action, and potential long-term ramifications for how we live. This has required the Bailiwick to respond flexibly and often very swiftly to the potential for this highly contagious and potentially deadly disease spreading uncontrolled in the community in order to protect medical services and preserve life.
- 2.2 Measures necessary to manage the spread of the disease include the enactment of legislation. This is currently achieved through the enactment of regulations by the Civil Contingencies Authority under the 2012 Law. The Civil Contingencies Authority is empowered to make regulations because this pandemic and its impact on human welfare is judged to meet the legal tests as described in section 3 of this Policy Letter. The use of this legislation is under scrutiny by the States as is right and proper in a democracy when the mitigating actions continue to place restrictions on people's lives.
- 2.3 The Assembly needs a solid understanding of how the operation of the Civil Contingencies Authority has, is still, and will continue to keep the Bailiwick safe, in often time-critical circumstances, in order to understand how, or indeed if, to move away from this approach to manage the risk in the normal mechanism of government.
- 2.4 The specific matters under consideration would fall within the policy and operational mandate of the Committee *for* Health & Social Care with regards the Public Health Ordinance and the delivery of hospital services, and of the Committee *for* Home Affairs with regards operational delivery of enforcement restrictions on arrivals into the Bailiwick and associated powers at the border.

- 2.5 The Civil Contingencies Authority has a number of statutory functions under the 2012 Law, which include identifying and assessing the risks of an emergency occurring, ensuring that appropriate risk assessments are undertaken, and that plans are in place to prevent, reduce, control or mitigate the effects of an emergency.
- 2.6 The Civil Contingencies Authority will continue to discharge these important functions under the Law. For the avoidance of doubt this would include issuing guidance or making regulations for mandatory non-pharmaceutical inventions.

3 Understanding the role and responsibilities of the Civil Contingencies Authority

Constitution of the Civil Contingencies Authority

- 3.1 The Civil Contingencies Authority provides a unified mechanism for urgent decision-making across policy mandates. Its constitution is set out in Schedule 1 to the 2012 Law. When, in the view of a majority of the permanent members of the Civil Contingencies Authority, either an emergency has occurred, is occurring, or is about to occur, or the significant risks set out in section 6(1)(a) and (b) of the 2012 Law are engaged and one or both of Alderney and Sark have, are or will be affected, then the Civil Contingencies Authority invites Committees on those Islands to nominate persons to be temporary members of the Civil Contingencies Authority. They have the same rights and responsibilities (including voting rights) as other members, thereby properly and fully engaging each of the islands' Assemblies¹.
- 3.2 Each member, permanent or temporary, must take an oath or affirmation as set out in section 23 of the 2012 Law.
- 3.3 The 2012 Law also sets out, in section 22, that unauthorised disclosure of any information, document or other article is an offence with significant penalty on conviction on indictment if it causes damage to the work of the Civil Contingencies Authority.
- 3.4 Under the 2012 Law, the Civil Contingencies Authority has a number of functions which might be categorised into two key areas as follows.

¹ Schedule 1 section 2 to the 2012 Law

Identifying and Monitoring

- 3.5 The first and ongoing function is preventative. This involves identifying and assessing the risks of an emergency occurring, including ensuring that appropriate risk assessments are undertaken, and plans are in place to prevent, reduce, control or mitigate the effects if an emergency occurs. This ensures that normality can continue or can be restored as soon as possible after an emergency event.
- 3.6 In the 2012 Law, section 2 provides as follows:

'Meaning of "emergency".'

2. (1) *In this Law "emergency" means –*

- (a) *an event or situation which threatens serious damage to human welfare or the environment in the Bailiwick, or any part thereof, or*
 - (b) *war, or terrorism, which threatens serious damage to the security of the Bailiwick, or any part thereof.*
- (2) *For the purposes of subsection (1)(a) an event or situation threatens damage to human welfare only if it involves, causes or may cause –*
- (a) *loss of human life,*
 - (b) *human illness or injury,*
 - (c) *homelessness,*
 - (d) *damage to property,*
 - (e) *disruption of the supply and distribution of food, water, energy or fuel, or money,*
 - (f) *disruption of a system of communication,*
 - (g) *disruption of facilities for transport, or*
 - (h) *disruption of services relating to health'.*

- 3.7 Subsection 2(3) sets out an event or situation which threatens serious damage to the environment in the Bailiwick (which circumstances do not currently arise).
- 3.8 It is also important to note that any of the above may occur or be within or outside the islands.

Response

- 3.9 The second function of the Civil Contingencies Authority is to respond when an emergency has occurred, is occurring or is about to occur. For more than 18 months, its leadership of an on-going response to the risks created by the pandemic has predominated, as it has sought to prevent, control and mitigate the impact of COVID-19 in the community. The Civil Contingencies Authority made the first emergency regulations relating to COVID-19 on 18th March, 2020; since then, some form of emergency legislation has been in force to enable the Bailiwick to manage its response to the pandemic.

Legal safeguards

- 3.10 The 2012 Law provides the Civil Contingencies Authority with wide regulation-making powers, including powers temporarily to amend primary legislation. Were it not for those regulation-making powers, many of the legislative measures needed to manage the spread of COVID-19 would have to be implemented by new Ordinances or Projets de Loi enacted by the States and approved by the States of Alderney and the Chief Pleas of Sark.
- 3.11 The regulation-making powers under the 2012 Law have significant safeguards set out in section 13 which provide a four-fold lock which must be considered each and every time the Civil Contingencies Authority makes regulations.
- 3.12 The four conditions are that the Civil Contingencies Authority is satisfied that:
- (i) an emergency has occurred, is occurring or is about to occur;
 - (ii) it is necessary to make provision for the purpose of preventing, controlling or mitigating the emergency or aspects or effects of the emergency;
 - (iii) the need for provision is urgent; and
 - (iv) Her Majesty's Procureur has advised the Civil Contingencies Authority about the proportionality of making the regulations.

- 3.13 Only if the Civil Contingencies Authority is satisfied that each of these conditions is met, can it lawfully make regulations. The duration of the regulations is set out in section 17 of the 2012 Law. Subject to the provisions in that section, in particular, that they have been approved by the States within seven days of having been laid, they remain extant for a maximum of 30 days.

Operational mechanism

- 3.14 It is important that it is clearly understood that the Civil Contingencies Authority can and does consult and seek advice when deliberating on matters under both its responsibility to monitor risks and to respond to an emergency that has occurred, is occurring or is about to occur. During the pandemic it has met with other Committees of the States and taken advice from the Medical Officer of Health, the Medical Director, and senior civil servants supporting the development of the policy and operational responses. During critical periods it has also directly briefed States Members and Members of the other two island Assemblies.
- 3.15 It is not the role of the Civil Contingencies Authority to manage the operational response to regulations. These are decisions for the Committees and the Service Areas for which they have political accountability. The Civil Contingencies Authority does not assume responsibility for all of government in managing the response when an emergency has occurred, is occurring or is about to occur. Officers advising the Civil Contingencies Authority, and the policy and guidance it issues for the community, will be relied on to support the response by Service Areas and the islands of the Bailiwick.
- 3.16 This is a key factor underpinning the recommendations that are brought to the Assembly, which is asked to regularise public health measures.
- 3.17 The Civil Contingencies Authority will continue to identify and monitor risks and therefore the Committee *for* Health & Social Care will advise the Civil Contingencies Authority directly of pressures which may indicate that an emergency within section 2 of the 2012 Law is occurring or is about to occur. The Civil Contingencies Authority will also take advice from the Medical Officer of Health, the Medical Director and senior civil servants.

4 Replacing the Emergency Regulations

4.1 While the Civil Contingencies Authority will on occasion make emergency regulations with regards non-pharmaceutical interventions, the substantive and enduring matters in the General Provisions Emergency Regulations relating to COVID-19 are broadly of two types:

- (i) powers of the Medical Officer of Health to order the self-isolation of, and impose other restrictions on, persons already within the Bailiwick who are infected, or suspected of being infected (e.g. contacts of cases), with COVID-19; and
- (ii) restrictions on arrivals into the Bailiwick and associated powers at the border, subject to variation by the Medical Officer of Health and the Civil Contingencies Authority (and related offences).

4.2 The Policy & Resources Committee is mandated to advise the States on the allocation of policy responsibilities to committees; it is responsible for promoting and facilitating cross-committee policy development; and to develop and implement policies and programmes relating to non-operational matters in an emergency to preserve life, wellbeing and law and order. It has explored a new legal framework so the States may exercise, under the normal mechanisms of government, the longer-term mitigating actions necessary to protect services. Applying the general principle of subsidiarity, it has sought views on:

- (i) firstly, updating the current Public Health Ordinance to include powers to allow the Medical Officer of Health to impose screening requirements and appropriate precautionary measures where there are reasonable grounds to believe a person is or may be infected with coronavirus, whilst also introducing modern safeguards; and
- (ii) secondly, introducing new primary legislation (a Projet) to confer powers on a States' Committee to require travellers to self-isolate on public health grounds on the basis of a specified reason such as pandemic status of their place of origin; and also views on where those powers should be conferred.

4.3 The Policy & Resources Committee has consulted with:

- the Civil Contingencies Authority and the Committees whose Presidents form its membership;
- the other Principal Committees of the States;
- the States of Alderney and the Chief Pleas of Sark; and
- the Medical Officer of Health and the Medical Director.

Summary of Consultation Responses

Committee for Health & Social Care

- 4.4 The Committee *for* Health & Social Care supports the amendment of the Public Health Ordinance and understands that any wider review, as put forward by the Medical Officer of Health, would need to be considered alongside the other policy and legislative demands in the Government Work Plan.
- 4.5 However, the Committee *for* Health & Social Care expressed some uncertainty about whether the proposals for new primary legislation would really address concerns in terms of vesting in any Committee, existing or new, the powers to restrict the freedom of individuals as we move towards living responsibly with COVID-19. While the Committee *for* Health & Social Care acknowledged that a debate in the Assembly about future possible arrangements in this context is appropriate, it also emphasised the importance of maintaining a co-ordinated approach. On balance, the Committee *for* Health & Social Care concluded, by a majority, that neither new legislation nor a new Committee is necessary.

Committee for Home Affairs

- 4.6 The Committee *for* Home Affairs acknowledged the potential benefits of updating existing Public Health legislation to create new powers in respect of COVID-19 (those powers currently in the emergency regulations) and to facilitate their extension to other notifiable diseases. The Committee *for* Home Affairs also felt strongly that any such restrictions to be imposed widely (as opposed to the clinical judgement applied in individual cases) should ultimately be a political decision and not rest with a statutory official, notwithstanding that this is a decision that is founded on evidence and informed by the experience of the relevant professionals.
- 4.7 It was also unanimous in the view that the creation of any new entity would not in any way alleviate the perception that the decision-making process is not open to appropriate scrutiny, which it deduces is in part the issue at the centre of this review. Therefore, conferring the powers on an extant Committee would not redress the concerns either. It is the Committee *for* Home Affairs' view that this is likely to be the case whichever body has responsibility for placing fundamental restrictions on the community.

- 4.8 It is suggested that a new Project would do little to address any concerns centred on the decision-making process other than confer responsibility from one political body to another. Indeed, the Committee *for* Home Affairs felt that such an arrangement within Guernsey's committee government system might be cumbersome and detrimental to efficient government working. The Committee *for* Home Affairs would, however, endorse consideration being given to how additional levels of scrutiny can be achieved within the existing process under the Civil Contingencies Authority.

Civil Contingencies Authority

- 4.9 The consultation paper was considered at a meeting of the Civil Contingencies Authority, and it chose not to provide formal comment.

Principal Committees of the States of Deliberation

- 4.10 The Committee *for* Education, Sport & Culture identified that the implications for its mandate arise from the restrictions; where the powers are conferred is not the issue and the Committee *for* Education, Sport & Culture is a disinterested party regarding the mechanism of government deployed. As a Committee, it notes that the rigour applied to the structures ensuring the right flow of information to- and from decision-making bodies has varied with the intensity and nature of the current emergency.
- 4.11 The Committee *for* Employment & Social Security has no specific comment to make, explaining that it is not a key stakeholder in the ongoing management of COVID-19 but noting that personal views of individual Members will be expressed in debate.
- 4.12 The Committee *for* Economic Development has not formally responded. The consultation paper was considered, and the feedback would be characterised as a clear majority content with the current management secured under the 2012 Law and raising no objection to amendment of the Public Health Ordinance.
- 4.13 The Committee *for the* Environment & Infrastructure, the President of which is a permanent member of the Civil Contingencies Authority under the 2012 Law, also noted that personal views of individual Members will be expressed in debate having concluded that it could offer limited comment as a Committee given its mandate. It noted that Members would benefit from clarification on the powers vested in the Medical Officer of Health and the associated governance arrangements. The Committee *for the* Environment & Infrastructure wanted clear boundaries and assurance that there would be limited scope for subjective interpretation.

Bailiwick views

- 4.14 The representatives of the other islands' Assemblies broadly consider that the management of the pandemic by the Civil Contingencies Authority has been, and continues to be, robust, efficient and proportionate for the residents of the Bailiwick. Subject to their continued representation and decision-making powers being protected, further statutory change would be supported. They would accept change to the Public Health Ordinance and recommend their respective Assemblies to approve any necessary legislative changes in their jurisdictions.

Clinical advisers - Medical Officer of Health and Medical Director

- 4.15 The views were expressed that the ability to react quickly and nimbly to sudden changes in the face of winter pressures should not be lost.
- 4.16 Both advisers are supportive of proposals to extend, on a permanent basis, the powers of the Medical Officer of Health to impose COVID-19 restrictions on those already in the Bailiwick. The Medical Officer of Health expressed the view that it would be beneficial to review public health legislation in its entirety and ensure it is aligned with national and international regulations, including the International Health Regulations, 2005.

Summary of consultation findings

Amendment of the Public Health Ordinance

- 4.17 There is general support for amending the Public Health Ordinance, with appropriate safeguards and governance. The Committee *for* Health & Social Care should proceed to develop proposals for the Medical Officer of Health to have authority to act and to issue directions under the secondary legislation but not have regulation-making powers which rest with government.

New primary legislation

- 4.18 The majority response indicates that the Bailiwick needs to have tried-and-tested mechanisms in place to respond to any changes in the co-ordinated fashion which has so far characterised the islands' strong pandemic response. There was little support for 'complicating decision making and operational responses with new primary legislation which will or might generate confusion' and absorb resource unnecessarily. The Civil Contingencies Authority has the powers to achieve this with effective safeguards in place and has been central to the Bailiwick's response.

- 4.19 In summary, there is no substantive support evident in the consultee responses for new legislation as it is generally argued that it would not deliver improvement nor enhance the current arrangements.

New issues identified through consultation

Transparency in decision making

- 4.20 A repeated observation was a desire to ensure that appropriate political examination is applied in a timely manner to political decisions that restrict the freedoms of individuals, which is a power that in any democracy should be strictly limited. This is expressed by political consultees as a desire for improved transparency in decision-making as the intensity and immediacy of the current public health emergency dissipates following the success of the Committee *for* Health & Social Care's vaccination programme.
- 4.21 The Civil Contingencies Authority is subject to strict confidentiality provisions, within section 22 of the 2012 Law, regarding the unauthorised disclosure of information, because of the nature of its role and responsibilities. A person who is, or has been, a member of the Civil Contingencies Authority is guilty of an offence if without lawful authority they make a disclosure of any information, document or other article which is or has been in their possession by virtue of their position as a member of the Civil Contingencies Authority. Section 22(2) extends the same restrictions on a person who is or has been a States of Guernsey employee or contractor.
- 4.22 The matter of increasing the range, depth and availability of information for either States' Members or the public rests as an operational matter for the Civil Contingencies Authority. The Civil Contingencies Authority would likely point to its agreement to lawful disclosure of the wide range of relevant material which it ensured was shared by its professional advisers in political briefings; at its regular online briefings for the community; and on gov.gg, as a demonstration of sharing relevant material used to inform its decision-making. Indeed, this was clearly demonstrated in the community briefing on 29th November, 2021, responding to the emerging Omicron threat.
- 4.23 To amend the 2012 Law would in practice have a very similar lead-time as enacting a new Projet, and on balance is not considered a proportionate remedy to the concerns raised through the consultation.

Winter pressures

- 4.24 A second issue raised centres on the understanding and acceptance of the different risks monitored by the Civil Contingencies Authority and to which the Civil Contingencies Authority is now also responding. The impact of winter pressures on the hospital is a significant concern, and the mitigating actions to limit cases of COVID-19 not only address the spread of the disease in the community but reduce the potential number of cases needing hospital admission, and also protects the health of critical workers.
- 4.25 However, and notwithstanding the current threat from Omicron and future variants of concern, the Committees agree that all possible steps must be taken to manage the risk to the hospital without impacting civil liberties. It is believed to be for this very reason that the community has been prepared to participate in the vaccine programme.
- 4.26 It is for the Committee *for* Health & Social Care to take action to manage pressures on the health service, working as necessary with Committees of the States to implement mitigation policies and operational changes.
- 4.27 Any restrictions on arrivals into the Bailiwick and associated powers at the border that impact on an individual's civil liberties rest with the Civil Contingencies Authority only if it determines, on the advice of the Committee *for* Health & Social Care, Medical Officer of Health and the Medical Director, such action is necessary, for example, to prevent disruption to health services and the concomitant threat to human welfare including loss of life, and because it considers, on the evidence available, that the spread of Coronavirus and the impact of COVID-19 threatens serious damage to human welfare.

5 Jurisdictional review

- 5.1 The Bailiwick of Guernsey, akin with the Isle of Man and Gibraltar, has worked within its emergency legislative framework since the outbreak in March 2020. The powers are conferred on the Civil Contingencies Authority in the Bailiwick; in the Isle of Man, these rest with the Council of Ministers; and, in Gibraltar, with the Minister for Civil Contingencies acting with the consent of the Chief Minister. In each jurisdiction, emergency regulations are limited to a 30-day or one-month duration.
- 5.2 The legislative approach taken in Gibraltar is most akin to that of the Bailiwick; throughout the pandemic it has made sets of emergency regulations under its Civil Contingencies Act 2007.

- 5.3 The Isle of Man made regulations under its emergency powers legislation earlier in the pandemic, but the main regulations currently in force there are made under its Public Health Act.
- 5.4 The States of Jersey Assembly is the exception across the Crown Dependencies in enacting a Coronavirus-specific enabling Law at the start of the pandemic, under which the States have made wide-ranging, time-limited regulations.
- 5.5 In the UK, the Coronavirus Act 2020 was enacted in March 2020. For the most part the Act modifies existing regulation-making powers; where new regulation-making powers are conferred, these are generally conferred on the Secretary of State. The current legislative position is complex, but the key provisions now in place are in large part regulations made under the Public Health Act 1984.
- 5.6 A fuller summary of the position in the other Crown Dependencies, Gibraltar and the UK is set out at Appendix 1.
- 5.7 The complicating factor for the States of Guernsey and wider Bailiwick is our normal mechanism of government operating alongside the statutory powers of the Civil Contingencies Authority for an extended period, giving rise to concerns of the potential for a democracy deficit.
- 5.8 The 2012 Law sets out to mitigate these concerns by:
- (i) defining the ‘meaning of emergency’;
 - (ii) the Civil Contingencies Authority inviting and conferring voting privileges to temporary members thereby properly and fully engaging with each of the islands’ Assemblies;
 - (iii) only if the Civil Contingencies Authority is satisfied that each of four conditions is met, can it lawfully make Regulations;
 - (iv) requiring that regulations are approved by the States within seven days of having been laid;
 - (v) Regulations remain extant for a maximum of 30 days; and
 - (vi) making provision for the Assembly to annul regulations if the case is not made.

- 5.9 On the presumption the Proposition to develop proposals to amend the Public Health Ordinance is supported, there remain two risks which the approach adopted by the Bailiwick does not address and which the Committees believe will need to be monitored by the Civil Contingencies Authority together with the Policy & Resources Committee:
1. there is no power to enact regulations (specifically with regard to restrictions at the borders) other than in the circumstances set out in the 2012 Law; and
 2. the reputational risk of a jurisdiction continuing to rely on emergency powers and in circumstances where the legislature would have had ample time to make more targeted non-emergency legislative provision.
- 5.10 The alternative approach of new legislation, conferring powers on a Committee in accordance with our machinery of government, was not favoured by consultees who responded on this matter.
- 5.11 It could be reconsidered and, like other jurisdictions, include a ‘sunset clause’ (giving an expiry date once passed into Law), but the views received suggest that, on balance, the status quo should be maintained with regards to powers to enact restrictions at the borders, having given due consideration to the legal safeguards in place and the benefits achieved from the co-ordinated approach led by the Civil Contingencies Authority.
- 5.12 The Civil Contingencies Authority continues to have the power to make emergency regulations which impose restrictions on arrivals into the Bailiwick at the border and that impact on an individual’s civil liberties, where it determines that its legislative powers engage under the 2012 Law.
- 5.13 Furthermore, the Committees note that the Civil Contingencies Authority has a number of statutory functions which include identifying and assessing the risks of an emergency occurring, ensuring that appropriate risk assessments are undertaken, and that plans are in place to prevent, reduce, control or mitigate the effects of an emergency; and that the Civil Contingencies Authority will continue to discharge these important functions under the 2012 Law.

6 Recommendations

- 6.1 The Medical Officer of Health powers provided for through emergency regulations do not need to be susceptible to change on a regular basis; they have changed remarkably little since the very first iterations of the regulations and are likely to be needed in essentially the same form for several years to come at least. They are also clearly public health powers.

- 6.2 Inserting them on a permanent basis by amendment of the Public Health Ordinance removes the need for ongoing provision to be made in respect of them by the Civil Contingencies Authority and was generally accepted as a pragmatic change by consultees.
- 6.3 To increase flexibility and futureproofing, it is proposed that a power is also conferred on the Committee *for* Health & Social Care to make regulations to extend the powers to other notifiable diseases, further to its consideration of the clinical judgement of the Medical Officer of Health and the advice of Her Majesty's Procureur.
- 6.4 The States are asked to decide: -

Whether, after consideration of the Policy Letter entitled 'Living responsibly with COVID-19' (dated 20th December, 2021) they are of the opinion: -

1. To direct the Committee *for* Health & Social Care to bring proposals as soon as is practicable to amend the Public Health Ordinance, 1936, to confer powers on the Medical Officer of Health to order the self-isolation of, and impose other restrictions or requirements on, persons already within the Bailiwick who are infected, or suspected of being infected (e.g. contacts of cases), with Coronavirus; and to confer on the Committee *for* Health & Social Care the power to make regulations to extend the powers to other notifiable diseases, further to its consideration of the clinical judgement of the Medical Officer of Health and the advice of Her Majesty's Procureur.

7 Compliance with Rule 4

- 7.1 Rule 4 of the Rules of Procedure of the States of Deliberation and their Committees sets out the information which must be included in, or appended to, motions laid before the States.
- 7.2 In accordance with Rule 4(1)(a), the Proposition is brought to the States of Deliberation in accordance with the phasing they established in their Government Work Plan Priority 1 – to consider, prepare and implement legislation necessary to continue to manage COVID-19 as part of business as usual.
- 7.3 In accordance with Rule 4(1)(b), the sponsoring Committees can advise that in addition to considering this matter together, the Policy & Resources Committee led a closed consultation, as set out in section 4 of this Policy Letter, which actively supported the preparation of the Proposition.

- 7.4 In accordance with Rule 4(1)(c), the Proposition has been submitted to Her Majesty's Procureur for advice on any legal or constitutional implications.
- 7.5 In accordance with Rule 4(2)(a), the Proposition relates to the duties of the Policy & Resources Committee, which is mandated to advise the States on the allocation of policy responsibilities to committees; it is responsible for promoting and facilitating cross-committee policy development; and to develop and implement policies and programmes relating to non-operational matters in an emergency to preserve life, wellbeing and law and order. Further, the Proposition relates to the responsibilities of the Committee *for* Health & Social Care, with respect to the development and implementation of policies relating to Public Health; and, to the responsibilities of the Committee *for* Home Affairs with respect to the operational delivery of law enforcement.
- 7.6 In accordance with Rule 4(2)(b) of the Rules of Procedure of the States of Deliberation and their Committees, it is confirmed that the Proposition above has the unanimous support of the Policy & Resources Committee. The Proposition has the majority support of Committee *for* Health & Social Care. Please note that Deputy Bury and Deputy Matthews do not support the Proposition. The Proposition also has the majority support of the Committee *for* Home Affairs. Please note that Deputy Taylor does not support the Proposition.

Yours faithfully

P T R Ferbrache
President, Policy & Resources Committee

H J R Soulsby MBE
Vice-President, Policy & Resources Committee

J P Le Tocq
M A J Helyar
D J Mahoney
Policy & Resources Committee Members

A H Brouard
President, Committee *for* Health & Social Care

T L Bury
Vice-President, Committee *for* Health & Social Care

M P Leadbeater
A D S Matthews
A Snowdon
Committee *for* Health & Social Care Members

Ms E J Litten
Dr G A Oswald
Non-States Members, Committee *for* Health & Social Care

R G Prow
President, Committee *for* Home Affairs

S P J Vermeulen
Vice-President, Committee *for* Home Affairs

S E Aldwell
L McKenna
A W Taylor
Committee *for* Home Affairs Members

P A Harwood
Non-States Member, Committee *for* Home Affairs

Jurisdictional review of legislation and regulation-making powers

United Kingdom (UK)

Legislation

- A1.1 Two key items of primary legislation have been relied upon during this period, being the [Coronavirus Act 2020](#) (the “2020 Act”) and the [Public Health \(Control of Disease\) Act 1984](#) (the “1984 Act”).
- A1.2 The UK made the 2020 Act on 25th March, 2020, which has been modified since and certain sections repealed. The 2020 Act is large, confers regulating powers and performs a multitude of functions, such as but not limited to –
- Temporarily modifying existing legislation (which is specifically set out in the Act).
 - Providing for temporary derogation from requirements under existing legislation.
 - Providing indemnity against liability for personal injury or death due to breach of duty of care in connection with the treatment of coronavirus.
 - Making provision for temporary appointments where there is a sudden shortage of persons to perform statutory functions.
 - Providing regulation-making powers to modify/suspend existing legislation.
 - Making provision for vaccines, live links in legal proceedings, and to postpone elections, among other things.
- A1.3 While the 2020 Act directly modifies certain legislation, the UK has, to date, also made 1,043 pieces of secondary legislation applicable in England, Northern Ireland, Scotland and Wales. It appears that the majority of the secondary legislation is made under either the 2020 Act or the 1984 Act, although there are some exceptions (i.e. the Employment and Support Allowance and Universal Credit (Coronavirus Disease) (Amendment) Regulations 2021, which were made under the Social Security Act 1988 and the Welfare Reform Act 2007).
- A1.4 Currently applicable regulations managing restrictions on the grounds of health protection and which address matters such as self-isolation and international travel and operator liability are all made under the 1984 Act.

Regulation-making powers

- A1.5 For the most part the 2020 Act modifies existing regulation-making powers and whoever already has that power continues to do so with the normal mechanism of cabinet government. Where new regulation-making powers are conferred, these are for the most part conferred on the Secretary of State, but not always – for example, sections 39(1) and 40(1) both provide for regulation-making powers in the Social Security Contributions and Benefits Act 1992, but in section 39(1) the power is conferred on the Commissioners for Her Majesty’s Revenue and Customs, and section 40(1) empowers the Secretary of State. In addition, some confer on the Secretary of State or the Minister for Cabinet Office (sections 61, 62, 63), a Minister of the Crown, Welsh Ministers, Department for Communities in Northern Ireland and Department of Finance in Northern Ireland.
- A1.6 Regulations under the 1984 Act may be made by the Secretary of State or Welsh Ministers with respect to Wales.

Jersey²

Legislation

- A1.7 Unlike the other Crown Dependencies, Jersey did not declare a state of emergency at the outbreak of the pandemic, an act which would have allowed the Emergencies Council extensive powers to legislate without requiring the assent of the States of Jersey Assembly. Therefore, COVID-19 legislation had to be tabled and debated by the States of Jersey Assembly in the usual manner.
- A1.8 From the outbreak of Coronavirus in early 2020 until the end of April 2021, the States of Jersey Assembly adopted over 30 pieces of COVID-19 related legislation in order to respond to and contain the transmission of the virus in Jersey. The Government of Jersey is operating under Triennial Regulations and a standalone enabling COVID Law.
- A1.9 The initial legislative response to the outbreak of Coronavirus initially made use of established Triennial arrangements. Triennial Regulations are used where there is an urgent need to make regulations without sufficient time to enact or amend a law to give power to make such regulations. They may be made by the States of Jersey Assembly under an Order in Council dated 14th April, 1771, and managed matters such as lockdown measures and school closures.

² [States of Jersey Assembly briefing paper](#)

- A1.10 Jersey also has a COVID-19-specific enabling Law, namely, the [COVID-19 \(Enabling Provisions\) \(Jersey\) Law 2020](#) (the “Enabling Law”), which came into force on 8th April, 2020. The States (rather than some other defined body or individual) make the Regulations under the Enabling Law. Section 3 of the Enabling Law provides a ‘sunset clause’ that no Regulations under the Enabling Law may be made on or after 1st April, 2022 (this date has been amended on a number of occasions) other than to repeal Regulations made before that date.
- A1.11 In September 2020, the States of Jersey Assembly approved the COVID-19 (Amendments – Extension, Suspension And Repeal) (Jersey) Regulations 2020, which variously suspended, repealed and extended 24 pieces of domestic legislation that had been brought forward and adopted in response to the outbreak of COVID-19 since March 2020.
- A1.12 These Regulations granted Jersey’s Government continuing powers to respond quickly and to legislate appropriately in the case of further outbreaks, but also limited its access to powers that interfered with the lives of citizens or bypassed normal safeguards unless it could be clearly established that these powers were absolutely necessary.
- A1.13 Winter 2020 saw a significant increase in the number of cases of COVID-19 as well as the emergence of new variants of the virus. The States of Jersey Assembly adopted further new regulations under the Enabling Law, which gave the Jersey Government additional powers to limit the spread of COVID-19 in the Island in the event of a deteriorating situation. This included legislation which provided for:
- a means of enforcing mask use in certain spaces;
 - further restrictions for workplaces and businesses serving customers;
 - new rules around gatherings; and
 - a means of allowing care homes to continue to operate lawfully in the event of staff shortages resulting from the need for staff to self-isolate following contact with someone who had tested positive for COVID-19.
- A1.14 This new package of COVID-19 emergency legislation consisted of enabling provisions only, and therefore any regulations created had no effect in themselves, rather providing for Orders (or equivalent tertiary legislation) to be made which would have the direct effects that were sought after.

Regulation-making powers

A1.15 Regulations may amend any Law or subordinate legislation (although there are restrictions) and may confer a power on a Minister to make Orders thereunder under Jersey's executive government structure.

Isle of Man

Legislation

A1.16 Legislation relating to COVID-19 has been made under a number of Acts including the Emergency Powers Act, 1936, the Emergency Powers (Amendment) Act 2020 and the Public Health Act, 1990.

A1.17 Section 101 of the UK Coronavirus Act 2020 provides that the Act may be extended to the Isle of Man by Order in Council. As of 12th December, 2021, no Orders in Council have been made under section 101.

A1.18 The main set of Regulations under which the Isle of Man was operating during the height of the pandemic were the Emergency Powers (Potentially Infectious Persons) Regulations, 2020. These were made under section 4 of the Emergency Powers Act, 1936.

A1.19 The Regulations may remain in force for one month. This is because the Governor in Council may make Regulations for as long as a proclamation of emergency has been made. No proclamation of emergency shall be in force for more than one month without prejudice to the issue of another proclamation at or before the end of that period. Regulations still in force at the end of one period shall be considered to be remade of the beginning of the next period if the proclamation is in respect of the same emergency.

A1.20 The Isle of Man's current main COVID Regulations, namely the [Public Health Protection \(Coronavirus\) Regulations 2020](#), are made under the [Public Health Act 1990](#), as amended. The Regulations apply where the Council of Ministers publishes a declaration notice declaring that the incidence or transmission of Coronavirus constitutes a serious and imminent threat to public health and the measures outlined in the Regulations may prevent significant transmission.

A1.21 Regulations must specify the period for which any restriction or requirement is to remain in force. The current Regulations cease to have effect on 20th January, 2022.

A1.22 Regulations may come into operation without first being approved by Tynwald (the parliament of the Isle of Man) if they contain a declaration that the person making them is of the opinion that it is necessary for them to come into force before being approved, however, such Regulations cease to have effect after 14 days unless Tynwald has approved them with or without amendment (section 51Q). There is a provision covering those times when it is not possible for Tynwald to sit within 14 days.

Regulation-making powers

A1.23 The Isle of Man's current main COVID Regulations are made under the [Public Health Act 1990](#), as amended. The Regulations are made by the Council of Ministers. The Council of Ministers comprises eight Ministers and the Chief Minister and a small number of advisors. Before making Regulations, if it is practicable to do so in all the circumstances, the Council of Ministers must consult the Department of Health and Social Care and such other persons as appear to it to be appropriate.

A1.24 Emergency Regulations under Emergency Powers Act, 1936 are made by the Governor in Council.

Gibraltar

Legislation

A1.25 Gibraltar is operating under emergency regulations made under the [Civil Contingencies Act 2007](#).

A1.26 A Civil Contingencies Committee is established under the Law and comprises such members as the Chief Minister may by notice in the Gazette specify. The role and functions of the Civil Contingencies Committee are to advise the Gibraltar Government on matters relating to civil contingencies and emergencies, co-ordinate the roles and activities of government departments, etc. It does not include a Regulation-making power since that falls (under section 11) to the Minister for Civil Contingencies acting with the consent of the Chief Minister.

A1.27 As in Guernsey, Coronavirus was declared an infectious disease for the purposes of Part IV of Gibraltar's Public Health Act. Gibraltar does not appear to have yet enacted any Coronavirus legislation under the Act.

Regulation-making powers

A1.28 Emergency regulations are made by the Minister for Civil Contingencies acting with the consent of the Chief Minister. The regulations are limited to a 30-day duration.