

Consultation on proposed amendments to the Electronic Communications (Jersey) Law 2000

NOVEMBER 2020

Summary

The Government of Jersey recognises it is important to maintain Jersey's status as a reliable yet flexible jurisdiction in which to do business digitally. It is important that the Island can respond quickly to, and capitalise on, new technological developments while ensuring that Jersey remains a safe place to live and do business in the digital age. The Government of Jersey's high-level objectives are set out in the Digital Policy Framework¹.

To help deliver these objectives it is essential that the legislative framework under which business is conducted digitally on the island is updated when necessary to:

- respond to technological advances and changes in behaviour;
- provide legal certainty to industry about increasingly common digital business practices;
- put in place any necessary safeguards; and
- ensure that Jersey remains aligned with international best practice.

In consultation with industry, the Government has conducted a review of the Electronic Communications (Jersey) Law 2000 (the "**EComms Law**") and identified some specific and targeted areas which require amendment. These proposed amendments are necessary to either help clarify aspects of the EComms Law or ensure that the law remains up to date with current and future business practice. In reviewing the EComms Law Government has looked at lessons learned as a result of COVID-19 and the resulting accelerated move to remote working. The amendments therefore aim to capture opportunities and risks identified by business during the pandemic and the Islands' response to it. At a high level the amendments that this consultation covers are:

- i. Remote witnessing of signatures;
- ii. Authority to attach a signature electronically on behalf of another; and
- iii. Clarifying that a signature, seal, attestation or notarisation is not to be denied legal effect, validity or enforceability only because it is in electronic form, whether such a requirement is as a result of statute or otherwise, and that the EComms Law applies both to documents sent to another, and documents which are simply stored after execution

The consultation also considers whether there should be exceptions to these proposals.

¹ <https://www.gov.je/Government/DigitalPolicyFramework/Pages/home.aspx>

Consultation purpose

This consultation is seeking stakeholder views on:

- The recommended amendments to the EComms Law generally, and more specifically:
 - whether there any points or concerns to consider in relation to the identified key areas of modernisation; and
 - if it is possible to identify areas that should be exempt from the changes proposed
- If there are there other areas of the EComms Law that require modernisation to enable businesses to take advantage of new technologies and continue to conduct business online.

Date published:

Thursday 10 December 2020

Closing date:

Friday 8 January 2021

How we will use your information

The information you provide will be processed for the purpose of consultation. The Chief Executive's Office will use your information in accordance with the Data Protection (Jersey) Law 2018 and the Freedom of Information (Jersey) Law 2011. We may quote or publish responses to this consultation, but we will not publish the names and addresses of individuals. If you do not want any of your response to be published, you should clearly mark it as confidential. Confidential responses will be included in any summary of statistical information received and views expressed.

Who should respond and ways to respond

The Government of Jersey is interested in receiving responses from individuals, businesses or organisations that have an interest in the conducting business digitally.

Responses should be submitted by email to:

Jonathan Van Neste

Digital Policy Advisor | Digital Policy Unit | Chief Executive's Office

Email: j.vanneste2@gov.je

Alternatively, Jersey Finance will be collating an industry response and these responses should be sent to:

Lisa Springate

Head of Legal and Technical | Jersey Finance Limited

Email: Lisa.Springate@jerseyfinance.je

Responses sent to Jersey Finance will be shared with the Government of Jersey unless the respondent indicates that they wish to remain anonymous. Please indicate clearly on your response if this is the case.

This consultation paper has been sent to the Public Consultation Register.

Feedback on this consultation

We value your feedback on how well we consult or seek evidence. If you have any comments on the process of this consultation (as opposed to the issues raised) please email communications.unit@gov.je.

Introduction

1. The objectives of Government, in proposing amendments to the EComms Law and the undertaking of this consultation, are:
 - a. to ensure local businesses can conduct business digitally without unnecessary legislative barriers. This includes the formation and execution of contracts and other legally binding documents;
 - b. to ensure local businesses can use new technologies which assist in conducting business digitally, including utilising software and online resources;
 - c. to ensure that, where business is conducted digitally, there is legal certainty as to the validity of such actions;
 - d. to ensure business can be conducted remotely as efficiently as possible;
 - e. to address issues that came to light during the experience of the COVID-19 lockdown;
 - f. to ensure any necessary safeguards are in place; and
 - g. to keep Government abreast of technological and workplace developments to ensure Jersey's laws are future proofed.

Electronic Communications (Jersey) Law 2000

2. The EComms law has been in place for 20 years. In 1999, the then Policy and Resources Committee identified the need to, *“develop[] a legislative framework that will adapt swiftly to the needs of a rapidly changing commercial world.”* This resulted in the enactment of the EComms Law, which provided an environment in which electronic business could flourish and businesses could take advantage of the opportunities presented by technology within a stable yet flexible legal framework.
3. The EComms law was designed to provide for the recognition of electronic records and electronic signatures; for certainty in the creation of electronic contracts; and protection of electronic intermediaries. Secondary legislation already existed at the time which provided for data protection, copyright, proceeds of crime, trademarks and computer misuse. Many such laws have been developed further, notably the Data Protection (Jersey) Law 2018 which offers equivalent protection to the European Union's General Data Protection Regulation (GDPR).
4. The EComms Law has not required substantive amendment since its adoption². The EComms Law is now, however, 20 years old and there have been significant developments in technology and common business practice which mean it is now appropriate to consider amending the legislation. This is reinforced by COVID-19 and the business response to it which has seen a rapid acceleration of the use of technology as well as a significant shift to remote working.

² The EComms Law was amended by the Electronic Communications (Amendment of Law) (Jersey) Regulations 2019 last year to provide quick fixes to issues raised by industry.

5. The EComms Law is currently arranged as follows:

- a. Part 1 - Interpretation. This Part contains the general interpretative provisions. It was accepted when the EComms Law was drafted that as technology progresses the interpretive provisions may become out of date. Provision was therefore made for both defined expressions to be reinterpreted and for other expressions to be given a definition to allow the Law take into account advances in technology.
- b. Part 2 - General provisions. This Part establishes various default rules in respect of electronic transactions that can be varied by agreement between the parties. It also provides for the admission in evidence of information in electronic form.
- c. Part 3 - Requirements under enactments. An “enactment” is defined by the Interpretation (Jersey) Law 1954 to mean, unless a contrary intention appears, *“any provision of any Law passed by the States and confirmed by Her Majesty in Council and any provision of any regulations, order, rules, bye-laws, scheme or other instrument passed or made in the Island under the authority of any Order in Council or under any such Law as aforesaid.”*

This Part provides that where an enactment requires or permits information to be provided or retained in writing, electronic means may be used to provide or store the information. It also makes provision for the recognition of electronic means of identifying a person in relation to an electronic communication where an enactment would otherwise require his/her signature.

In most cases the requirement contained in an enactment to provide or retain information is in respect of a States entity or agent of such an entity, but the Part equally has effect where, for example, a company is required by an enactment to supply information to a shareholder. Where the recipient is a States entity or an agent of such an entity, then the consent of the States entity is required, and the technology requirements of that entity must be met, for the signature to be valid³.

- d. Part 4 - Service providers. This Part provides Internet Service Providers with an additional defence in certain criminal and civil proceedings in respect of information their services handle.

It is generally acknowledged that an Internet Service Provider (ISP) is not reasonably able to monitor the voluminous amount of information the ISP handles. In practice, therefore, the ISP may be unlawfully disseminating material, which could leave the ISP open to either a criminal charge or civil action, or both.

The protection this Part will give will only apply if the ISP can show

- i. that they could not reasonably have known that their system was handling the unlawful material; or

³ Article 11(1)(b); 12(1)(c); and 13(1)(c)

- ii. that immediately on becoming aware that the ISP is or could be doing so, they took measures to stop it doing so and, in the case of a possible criminal offence, informed the police.
- e. Part 5 - Rules and Orders. Certain of the provisions of the Law will allow into evidence material that was previously not readily admissible (information in electronic form) under the best evidence rule. For this reason, it may be necessary for Rules of Court to be made in respect of the manner of admission of this material. The Rules may, for example, provide for the use of computers to display the material.

The general provisions of the Law, which will allow certain information to be submitted in electronic form, do not generally apply to the practice and proceedings of the courts. However, there is no reason why in some instances they should not do so, but EComms Law provides that this is a matter for the courts to decide, which they will be able to do by Rules of Court.

Certain things (for example which documents referred to in enactments must remain in paper form) may be prescribed under the Law. This will be done by Orders made by the Minister (currently the Minister for Economic Development, Tourism, Sport and Culture).

Where an Order relates to an enactment the Minister cannot make the Order without the approval of the Minister responsible for that enactment. Conversely a Minister with responsibility of an enactment can require the Minister responsible for the EComms Law to make an Order in respect of their enactment (for example that it be exempted from the provisions of this Law until the Minister is able to implement the provisions in respect of the enactment).

- 6. A consolidated version of the EComms Law is annexed⁴ to this consultation paper.

Government Proposals

- 7. During the course of 2020, Government has consulted closely with working groups organised by Jersey Finance (JFL). These groups included representatives of the finance and legal industry, regulators, Digital Jersey and Government. These working groups have been productive in identifying specific areas where amendments to the legislation would modernise the EComms Law to help ensure it reflects developments in technology and allows businesses to adapt to new ways of working. In considering these amendments Government was keen to identify lessons learned from COVID-19 - for example where businesses had to move to remote working. The following priority areas for modernisation were identified:
 - a. remote witnessing of signatures;
 - b. the authority to attach a signature electronically on behalf of another; and
 - c. amendments to bring greater clarity as to the application and scope of the EComms Law.

⁴ Annex 1

8. Each of these points is considered in detail below. The questions for consultation follow each point.

a. Remote witnessing of signatures

9. Remote witnessing will allow for a requirement that a signature be witnessed to be met where the witness is not in the same location as the person providing the signature. This requirement could be met by various means such as a webcam, or by ‘sharing⁵’ your screen.

During engagement with members of industry, it has been suggested that this amendment would be of benefit in a number of contexts relevant to both cross-border and local finance transactions. For example, ordinary powers of attorney granted under Jersey law by an individual require a witness, as do relevant documents relating to the purchase of property. There is currently no general domestic rule in legislation or case law that determines whether a requirement to witness a signature is legally valid where the witnessing occurs remotely. The present assumption is that any witnessing requirement can only be met where the witness witnesses the provision of a signature in person.

10. As a result of COVID-19, there have been specific legal developments to provide for accepting remote witnessing as a valid method of witnessing, such as the ‘*Probate and the execution of wills under the Covid-19 (Signing of Instruments) (Jersey) Regulations 2020*’ (P.50/2020) and the ‘*revised COVID-19 - Court Directions: Powers of Attorney & Affidavits*’⁶ which provide a method for the remote witnessing of documents relating to probate and wills, and powers of attorney.
11. Government proposes that the EComms Law be amended to provide for a general power to allow for the remote witnessing of signatures (both with regards to statutory and non-statutory witnessing requirements). The current recommendation is that the ability to witness signatures remotely should not extend to the ‘practice and procedures of a court or tribunal’, except to the extent provided in Rules of Court, as is already the case with statutory requirements for electronic signatures, information and documents under Article 10(2) of the EComms Law (see Article 10 for more detail). Article 10’s application is however restricted to statutory execution formality requirements. Government’s intention is for the new rule on remote witnessing to be of general application, and not restricted to statutory requirements for witnessing.

Consultation question 1

Do you think that there are merits to the proposal to amend the legislation to allow for the remote witnessing of signatures? Please provide an explanation of your views.

⁵ Screen sharing involves sharing access to a given computer screen with another computer. Screen sharing software uses many different methods to allow sharing a screen remotely with a second user for collaboration purposes or other objectives

⁶ Annex 2

Consultation question 2

Do you have any further comments relevant to remote witnessing which would be helpful when considering this issue, including the existing exemption of practices and procedures of the court and whether this should apply to the new rule; and for the development of Government policy in this area generally?

12. In amending the EComms Law to capture technological developments, Government must ensure that any potential risk is mitigated. Given this, there may be witnessing requirements, not captured by Article 10(2) (practices and procedure of the court), which might be appropriate to exempt from a general ability to undertake such witnessing remotely.
13. One such example relates to ensuring that vulnerable people are protected. For example, the existing witnessing requirement for wills requires that, for a will to be valid, the signing of a will must be witnessed by a lawyer in person. There is an argument that the physical presence of a lawyer can reduce the risk of a vulnerable person being placed under undue pressure. Given this, it is possible that allowing remote witnessing and removing the current requirement for a lawyer to be physically present in the same room as the signatory, might increase the risk to certain individuals.

Consultation question 3

Do you think there are specific scenarios where there are risks to permitting remote witnessing? If so, please provide details of the scenarios and risks and any potential mitigation.

b. Authority to attach a signature electronically on behalf of another

14. Conducting remote signings of documents with signatories located in different jurisdictions creates a number of practical and legal difficulties. In those circumstances it can sometimes be difficult for the parties and their advisors to ascertain conclusively whether a set of instructions as to the method for completing the signing has been followed.
15. To help provide greater legal certainty in such cases, consultation with industry members suggests there is a need to provide, conclusively, and in the absence of any existing statutory or case law precedent, that an electronic signature may be validly affixed on behalf of another.
16. Government understands that it is possible that this practice may already be occurring despite the lack of clarity. Amending the law in this manner will provide the clarity sought. Whether the person affixing the signature has in fact been duly authorised to

so will remain a question of fact – but the method of execution itself would be expressly permissible

17. The EComms Law contemplates providing a signature on behalf of another, as shown in the definition of “signature” or “signed” under Article 1, which include, “any symbol executed or adopted, or any security procedure employed or adopted, using electronic means or otherwise by or on behalf of a person with intent to authenticate an electronic communication or electronic record”. [Emphasis added]. Further, there would not appear to be an impediment existing elsewhere under Jersey law which would provide a barrier to such an act.
18. There is however no express rule positively permitting such at the moment. Industry has indicated that a positive statement would offer certainty to businesses and bring the Island’s legislation in line with other leading jurisdictions.
19. Government is therefore proposing to put in place a general power to allow for the affixing of a signature on behalf of another with authority to do so (both with regards to statutory and non-statutory signature requirements). The ability to attach someone’s signature will not extend to the ‘practice and procedures of a court or tribunal’, except to the extent provided in Rules of Court, as is already the case with statutory requirements for signatures, information and documents under Article 10(2) of the EComms Law. Further, the general rule should be stipulated to:
 - a. not violate any rule of agency; and
 - b. not amount to an act of delegation so that it does not engage prohibitions on delegation when dealing with people acting in a capacity such as director or trustee and does not offend the rule of *delegata potestas non potest delegari*.
20. Again, Article 10’s application is restricted to requirements under statute. The suggestion is for the new rule on attaching signatures to be of general application, and not restricted to statutory requirements for signatures.

Consultation question 4

Do you think that there are merits to the proposal to amend the legislation to provide an express rule for providing a signature on behalf of another? Please provide an explanation of your views

Consultation question 5

Do you have any further comments relevant to providing a signature on behalf of another which would be helpful when considering this issue, including the existing exemption of practices and procedures of the court and whether this should apply to the new rule; and for the development of Government policy in this area generally?

21. There may also be signature requirements, not captured by Article 10(2), which need to be exempt from a general ability to attach signatures on someone’s behalf because

the weight of a particular signature is particularly important; or because the signatory is particularly vulnerable. As discussed, Government's policy objective is not only to enable digital business, but also to keep people safe, and reduce the potential for any risk or abuse of the new rules.

Consultation question 6

What existing signature requirements, whether as a result of statutory requirements for the same, or otherwise, should not be subject to a general rule that an affixed signature on behalf of another is a valid method of meeting a signature requirement?

Consultation question 7

Other than those proposals already identified by the working group for modernisation, are there other areas of the EComms Law that should be amended to help businesses take advantage of new technologies, and continue to conduct business online? If so, please set out in detail what areas of the EComms Law requires amendment and why.

c. Amendments to bring greater clarity as to the application and scope of the EComms Law.

22. The suggested minor amendments:

- a. ensure the EComms Law clearly applies to electronic documents which are communicated to another, as well as those electronic documents which are not communicated, such as those documents which are immediately stored for future reference;
- b. as well as clarifying that the EComms Law applies generally, whether as a result of statutory requirements, or non-statutory requirements.

23. There may be other minor amendments the EComms Law could benefit from.

Consultation question 8

Are there other areas of the EComms Law you consider to be ambiguous, or which could otherwise benefit from minor amendment or modernisation?

Summary of consultation questions

<p>Page 8</p>	<p>Remote witnessing – general rule Consultation question 1</p> <p>Do you think that there are merits to the proposal to amend the legislation to allow for the remote witnessing of signatures? Please provide an explanation of your views.</p>
<p>Page 9</p>	<p>Remote witnessing – general questions Consultation question 2</p> <p>Do you have any further comments relevant to remote witnessing which would be helpful when considering this issue, including the existing exemption of practices and procedures of the court and whether this should apply to the new rule; and for the development of Government policy in this area generally?</p>
<p>Page 9</p>	<p>Remote witnessing – specific exemptions Consultation question 3</p> <p>Do you think there are specific scenarios where there are risks to permitting remote witnessing? If so, please provide details of the scenarios and risks and any potential mitigation.</p>
<p>Page 10</p>	<p>Providing a signature on behalf of another – general rule Consultation question 4</p> <p>Do you think that there are merits to the proposal to amend the legislation to provide an express rule for providing a signature on behalf of another? Please provide an explanation of your views.</p>
<p>Page 10</p>	<p>Providing a signature on behalf of another – general questions Consultation question 5</p> <p>Do you have any further comments relevant to providing a signature on behalf of another which would be helpful when considering this issue, including the existing exemption of practices and procedures of the court and whether this should apply to the new rule; and for the development of Government policy in this area generally?</p>
<p>Page 11</p>	<p>Providing a signature on behalf of another – specific exemptions Consultation question 6</p>

	<p>What existing signature requirements, whether as a result of statutory requirements for the same, or otherwise, should not be subject to a general rule that a signature electronically affixed on behalf of another is a valid method of meeting a signature requirement?</p>
Page 11	<p>General question on new technologies, and the ability to continue conducting business online Consultation question 7</p> <p>Other than those proposals already identified by the working group for modernisation, are there other areas of the EComms Law that should be amended to help businesses take advantage of new technologies, and continue to conduct business online? If so, please set out in detail what areas of the EComms Law requires amendment and why.</p>
Page 11	<p>Minor amendments Consultation question 8</p> <p>Are there other areas of the EComms Law you consider to be ambiguous, or which could otherwise benefit from minor amendment or modernisation?</p>