



Children's Commissioner for Jersey Promoting and Protecting Children's Rights

Covid-19 (Mental Health) (Jersey) Regulations 202- and the draft Covid-19 (Capacity and Self-Determination) (Jersey) Regulations 202-.

I have raised a number of concerns with the above amendments which I have grouped into 3 key areas namely:

- Participation and scrutiny
- Necessity and proportionality
- Safeguards and wider international law

Human rights are just as necessary, if not more so, in times of crisis and it is imperative that the rights of every islander are protected, respected and fulfilled. I have significant concerns that the amendments are not compatible with international human rights law, and am advocating for their withdrawal.

Participation and Scrutiny

The amendments proposed could have a significant impact on a number of rights and as such it is vital that there is adequate scrutiny of the mental health and capacity amendments. The current situation presents a number of challenges and requires timely decision making, however as a scrutiny body it has been exceptionally difficult to engage with such fast moving changes, and we have not been consulted on proposals as per the Commissioner for Children and Young People (Jersey) Law 2019. Similarly, the lack of time for scrutiny has proven to be a significant barrier for third sector organisations to participate, and I note that Jersey Cares, Enable Jersey, and Brighter Futures have highlighted their concerns on this. Timeframes of a matter of hours to respond on issues have become routine, as again exemplified by a government report being circulated hours in advance of a scrutiny meeting, ultimately disrupting it. I am concerned that the approach appears to be defending decisions which have been made rather than engaging in meaningful and constructive dialogue to promote a collective understanding of the rights issues engaged.

Importantly, children and young people are not being meaningfully involved in decisions which affect them, as is their right under Article 12 of the United Nations Convention on the Rights of the Child (UNCRC). The United Nations Committee on the Rights of the Child have again emphasised that one of the key actions States must take includes to “provide opportunities for children’s views to be heard and taken into account in decision-making processes on the pandemic”¹.

In order to do so, there must be access to clear information, sufficient time to participate and genuine opportunities for dialogue. My office has worked with those in government to produce a questionnaire for children and young people to share their views and experiences, which can play an important role in decisions on how to respond to Covid-19. However, it is

¹ <https://www.childcomjersey.org.je/publications/international/un-committee-on-the-rights-of-the-child-covid-19-statement/>

important that there is a plan for children and young people to be involved at the start of and throughout the decision-making processes.

Child Rights Impact Assessments (CRIAs) would also be a helpful tool to allow for consideration of the impact of decisions on children and young people. The indirect incorporation consultation set out the government's intention for elected members and government officials to conduct CRIAs as a way of discharging the proposed duty to have due regard to children's rights under the United Nations Convention on the Rights of the Child (UNCRC). Research and evidence on CRIAs has been gathered within government, and my office has made recommendations on this including highlighting research from Unicef² on what has been shown to be most effective. CRIAs do not have to be a legal duty for them to be used, and implementing CRIAs now will support better decisions and allow for children and young people's rights to be better protected throughout the Covid-19 situation and indeed afterwards.

Proportionality and Necessity

Any interference with rights must be necessary, proportionate and in accordance with law. The rationale for the necessity of these amendments however remains unclear. The European Court of Human Rights has been clear that the state has the burden of justifying interferences with rights in the Convention.³ This includes that the grounds must be "relevant and sufficient"⁴, and the necessity for a restriction must be "convincingly established".⁵

In past communications received from government, we were told that without the amendment, "individuals who lack capacity in Jersey may experience arbitrary detention with no scrutiny, no legal process, no means to review, or recourse around detention." This situation would of course not be compatible with human rights, however I am not persuaded that this amendment was the only alternative available. Consideration must be given to ensure that any interference with rights is necessary and proportionate, and I am concerned that this amendment appears to have been considered as a binary choice.

Similarly, the government's position stated that "[a]n interim authorization is required because Capacity and Liberty Assessors cannot access care homes to undertake the capacity assessment that forms part of a standard authorization process due to Covid-19." There has not been justification for this and it is unclear as to why Covid-19 will stop all Capacity and Liberty Assessors from being able to access care homes. Decisions around assessing an individual's capacity must be conducted by those with sufficient training and expertise, which protects both staff and individuals impacted by this legislation.

As noted, the States Assembly must not make subordinate legislation which is incompatible with the European Convention on Human Rights (ECHR). As such, further information taking into account the rights engaged and the options considered must have been made available

² Child Rights Impact Assessment (CRIA): A review of comparative practice across the UK, Lisa Payne, Unicef, 2017. Available at https://downloads.unicef.org.uk/wp-content/uploads/2017/09/Unicef-UK-CRIA-comparative-review_FOR-PUBLICATION.pdf?_ga=2.269075633.170741958.1580729294-1247536189.1575887630

³ See Appl. No. 22414/93, *Chahal v. the United Kingdom*, 27 June 1995, paragraph 135 – 138, and the partly dissenting opinion of Judge Martens in *Observer and Guardian v. the United Kingdom* judgment of 26 November 1991, A216, paragraph 11.2

⁴ *Observer and Guardian* judgment, paragraph 72

⁵ *Autronic AG v. Switzerland* judgment of 22 May 1990, A 178, paragraph 61; *Weber* judgment of 2 May 1990, A 177, paragraph 47

to States Assembly members, and I am requesting that this information be published in the interests of transparency, and in order for my office and others to participate in effective scrutiny.

I would therefore request further clarity as to why the amendments were considered necessary and proportionate, and assurances that any future proposals will be published with sufficient time to allow for effective scrutiny. I note that Senator Kristina Moore, President of the Scrutiny Liaison Committee, has announced their intention to bring forward proposals to ensure that there is a minimum time frame of 72 hours before legislation can be debated to allow for better scrutiny, which I am supportive of.

Safeguards and Wider International Law

The proposed changes need to be considered alongside the full complement of rights under international law as well as domestic. This includes the absolute right to be free from torture, inhuman or degrading treatment which cannot be derogated from even during an emergency.⁶ The Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment have published guidance as to the treatment of those deprived of their liberty, including that states should “[p]revent the use of medical isolation taking the form of disciplinary solitary confinement; medical isolation must be on the basis of an independent medical evaluation, proportionate, limited in time and subject to procedural safeguards”.⁷ The advice also calls on states to “respect the minimum requirements for daily outdoor exercise, whilst also taking account of the measures necessary to tackle the current pandemic”. It is imperative that individuals in Jersey do not become subject to inhuman or degrading treatment, and that the dignity of each individual is respected.

Further, the UNCRC sets out a number of rights protections and is clear that every child has the right to establish and maintain family relationships⁸. Consideration as to how this will be managed throughout the public health emergency is essential, irrespective of the status of the proposed law. There is a protective element here as those who are able to apply for a review on behalf of the individual include a guardian or nearest relative, and they, or indeed anyone who is able to apply for a review under the Capacity and Self-Determination (Jersey) Law 2016⁹, must be able to have regular contact with the individual for this to be protected. Proactive offers should be made to family members to ensure that they have access to teleconferencing facilities, internet and support to utilise these.

I recognise that the number of children and young people up to the age of 25 directly impacted by the amendments is a small total, however their rights protections are just as important. The low numbers of individuals affected does not equate to a low risk for the individuals affected. Vigilance is required to ensure all young people’s rights are respected, protected and fulfilled.

⁶ See United Nations Convention Against Torture (UNCAT), Article 2(2) and International Covenant on Civil and Political Rights (ICCPR), Articles 4 and 7

⁷ Advice of the Subcommittee on Prevention of Torture to States Parties and National Preventive Mechanisms relating to the Coronavirus Pandemic (adopted on 25th March 2020) paragraph 9.14

⁸ Article 16, UNCRC

⁹ Article 55

I further note that the proposed law states that managers must ‘include supporting evidence of diagnosis of impairment or disturbance in the functioning of P’s mind or brain’. This does not evidence that an individual lacks capacity, yet the report which accompanied the Proposition¹⁰ stated that “a manager can only apply for an interim authorisation in relation to an individual if that individual has already been assessed as lacking capacity”.

There is important learning from the international community that can be tapped into, not least from the United Nations Convention on the Rights of Persons with Disabilities (UNCRPD). Article 1 of the UNCRPD sets out that “Persons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others.” This is similar to the Discrimination (Jersey) Law, which protects people from being discriminated against on the grounds that “the person has one or more long-term physical, mental, intellectual or sensory impairments which can adversely affect a person’s ability to engage or participate in any activity in respect of which an act of discrimination is prohibited under this Law.”¹¹ Disabled people are likely to be disproportionately affected by the amendments and it is therefore crucial that proper considerations are given to their rights under both domestic and international law. Further, I note that the States’ margin of appreciation in establishing different legal treatment for disabled people is considerably narrower.¹²

The QualityRights Tool Kit, developed by the World Health Organisation, is a useful resource which draws attention to individual’s rights under the UNCRPD. This includes the right to liberty and security of person (Article 14) and the right to exercise legal capacity (Article 12). It warns against the dangers of the availability of services and professional decisions being the deciding factors, and reinforces that individual’s rights must govern responses.

To conclude, I have significant concerns that the amendments are not compatible with international human rights law, and would therefore advocate for their withdrawal.

¹⁰ <https://statesassembly.gov.je/assemblypropositions/2020/p.47-2020.pdf>,

¹¹ Schedule 1, Discriminations (Jersey) Law 2016

¹² *Glor v. Switzerland*, no. 13444/04, ECHR 2009, § 84