Health and Community Services

Government of JERSEY

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Deborah McMillan
Children's Commissioner for Jersey
Ground Floor, Brunel House
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10 May 2019

Dear Commissioner

Covid-19 (Mental Health) (Jersey) Regulations 2020 (the "Mental Health Regulations"); the draft Covid-19 (Capacity and Self-Determination) (Jersey) Regulations 202- (the "draft Capacity Regulations")

Thank you for your comments. As Assistant Minister for Health, I am the rapporteur for the draft Capacity Regulations hence my writing in response.

Before responding to the issues you have raised, please note that the draft Covid-19 (Capacity and Self-Determination) (Jersey) Regulations 202- (P.58/2020) were lodged for debate on 6 May 2020.

You will recall that, during the debate on the Draft Covid-19 (Capacity and Self-Determination) (Jersey) Regulations 202- (P.47/2020) on 22nd April, the Assembly voted, in effect, to bring the debate on P.47/2020 back to the Assembly on 12 May. That proposition has since been replaced with P.58/2020 which contains the provisions previously proposed in P.47/2020 with two additional provisions which are usefully summarised at page 3 of P.58/2020. The additional provisions are functional drafting points or address matters raised by the Attorney General during the debate.

Participation and Scrutiny

Government recognizes the challenges involved in scrutinising legislation being developed at pace in response to the Covid-19 pandemic. We appreciate the efforts of all stakeholders involved in that exercise.

There is a statutory requirement to consult the Commissioner[1] on proposals relating to enactments that *directly* concern children or young people. As acknowledged[2] in the case of the Mental Health Regulations and the draft Capacity Regulations, the urgency with which the

[1] Article 25(1)(a) of the Commissioner for Children and Young People (Jersey) Law 2019.
[2] See comments paper circulated to all States Members on 22 April 2020.

legislation was developed, the generality of its application and the relatively narrow scope of the amendments, meant that prior consultation with the Commissioner was not immediately pursued. On reflection, in view of your concerns, that is regrettable, and we welcome the opportunity we now have to consider the points you have raised.

Government does want to address the concerns raised by the other stakeholders you mention, as far as it is possible to do so. However, in view of Covid-19 pressures on time and resource, engagement must be focussed on those issues directly pertinent to the propositions before the Assembly.

Broader policy and legal issues, as raised by other stakeholders and as reflected in your letter, may reasonably be topics for future discussions. The inclusion of these matters at this point does not serve to facilitate meaningful and constructive dialogue on the present propositions.

We are very happy to pick up these broader issues with you, with Scrutiny colleagues and other stakeholders, but for the time being, our response to your letter is directed at the points relevant to the current proposition.

Government recognizes the right of children to respect their views, guaranteed by Article 12 of the United Nations Convention on the Rights of the Child ("UNCRC"). A prerequisite for the enjoyment of this right is access to information and, for this reason, Government has made available a number of child-specific resources to enable children to understand the broader implications of the Covid-19 pandemic[3]. We also welcome any opportunity to engage with children and young people, and to work with the Commissioner and stakeholders, in ensuring the views of children and young people are considered.

The United Nations Committee on the Rights of the Child has urged the involvement of children in "*decision-making processes on the pandemic*" and, in this broad sense, Government will facilitate engagement with children and young people in these matters in accordance with Article 12 UNCRC as far as it possibly can in present circumstances[4]. The Mental Health Regulations and the draft Capacity Regulations, though, concern technical amendments to the manner in which detentions and restrictions of liberty are authorized on account of Covid-19 pressures, under frameworks which already exist in primary legislation - and it is the case that the participation of children and young people in their care and treatment is facilitated by the legislation. For example, there is a requirement to consult individuals or their carers - including where they are children or young people - when making determinations of capacity[5] or considering whether to impose an interim authorization[6], or in continuing access to independent mental and capacity advocates[7].

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[3]https://www.gov.je/Health/Coronavirus/EducationChildcare/Pages/CoronavirusAdviceForParentsAndCarers.aspx#anchor-3. Materials available via this GoJ website page includes materials specifically for children.

[4] It is acknowledged that Article 12 UNCRC is one of the civil and political rights guaranteed for children which cannot be dependent on resources (per Article 4 UNCRC).

[5] Articles 4 – 6 of the Capacity and Self-Determination (Jersey) Law 2016 would require, among other things, steps to be taken for P's participation as fully as possible in any act done or any decision affecting that person, and requires the assessor of capacity matters to ascertain, among other things, P's past and present wishes and feelings.

[6] Article 60E, set out in the draft Capacity Regulations, enables the Minister to consult with children if the Minister considers it appropriate to do so in determining whether to impose an interim authorization.

[7] Access to independent mental health advocates is facilitated through the Mental Health (Independent Mental Health Advocates) (Jersey) Regulations 2018, and access to Independent Capacity Advocates in the engaging on the imposition of interim authorizations is now facilitated through Article 60G in the draft Capacity Regulations, which extends the application of Article 51 of the Capacity and Self-Determination (Jersey) Law 2016 in the case of interim authorizations.

The rights of children and young people, not least Article 12 UNCRC, is engaged more acutely in the day-to-day application of mental health and capacity legislation, rather than in consideration of technical modifications to statutory authorization processes which do not impact on, or reduce their ability to participate in decision making.

Government has committed itself to further incorporating the UNCRC and the first steps towards this will introduce legal obligations on Ministers and others to provide Child Rights Impact Assessments ("CRIA")[8]. We have been working with your office for some time on this legislative initiative, in the course of which your helpful advice and research as to the implementation of CRIAs in other jurisdictions has been beneficial to policy development.

Government is mindful of its political commitments and obligations in international law to act in accordance with the UNCRC but now, in the midst of responding to a public health crisis, is not the time for introducing hastily formalised CRIA requirements. You will recognize that Lisa Payne, in the study you have referred to, highlights the risks of ineffective practice in implementing CRIAs[9]: there is inconsistent take-up by policy makers; CRIAs are superficial in scope and depth; CRIAs reveal, but do not rectify, impacts on children; and there is a lack of specificity in the narratives around UNCRC articles engaged.

An efficient and, most importantly, an effective CRIA system requires, across the entirety of government, a broad knowledge base on the UNCRC, the CRIA framework and how CRIAs are to be developed through the policy, legislative and scrutiny process. The benefits of implementing any form of CRIA now do not outweigh the risk of ineffective practice, rushed implementation and diversion of essential policy resource at this time.

Proportionality and Necessity

Focussing on the draft Capacity Regulations, which is the legislation in focus, it is the case that Covid-19 is having a very real impact on how authorizations of significant restrictions on liberty ("SRoL") under the Capacity and Self-Determination (Jersey) Law 2016 (the "2016 Law") are handled. Capacity and Liberty Assessors cannot access vulnerable people in care homes because those individuals are vulnerable and must be shielded from potential infection. To date, in Jersey, there have been 11 Covid-related deaths in our care homes. We need to take all appropriate steps to try to ensure that figure does not rise.

The draft Capacity Regulations make modifications to the process for the authorization of SRoLs, in the main by introducing an interim authorization process, and extending existing provision in Part 5 of the 2016 Law to those types of authorization. They do not change the general SRoL mechanism under the 2016 Law, nor the framework for its operation which continues to enable the state to authorize restrictions of a person's liberty if considered to be in that person's best interests, with in-built safeguards of access to independent advocacy, information, and review by the Mental Health Review Tribunal. That SRoL framework, as set out in the 2016 Law, was deemed to be compatible with the European Convention on Human Rights ("ECHR")[10].

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[8] Government recently concluded a consultation exercise on indirect incorporation of the UNCRC, including the implementation of CRIAs: https://www.gov.je/SiteCollectionDocuments/Government%20and%20administration/Indirect%20Incorporation%20of%20the%20UNCRC%20-%20Public%20Consultation%20Guide.pdf

[9] Section 3.2.1.

[10] See human rights notes which accompanied the draft Capacity and Self-Determination (Jersey) Law 201- (P.79/2016).

In considering the numbers of people who could be impacted by the amendments, as previously stated, since 2018 there have only been four SRoL applications for people aged 25 or under. It is therefore very likely that no people aged 25 or under will be impacted by the changes. Over 200 applications were received in the same time period for people aged 26 or over.

The modifications to the SRoL framework proposed in the draft Capacity Regulations will come about (i) because the Minister has by Order deemed it proportionate and necessary to declare the start of an extraordinary period[11] (which is a political decision taking into account the interests of vulnerable persons, public health matters and impacted healthcare resources in equal part) and, (ii) once that period has been declared, and the modifications take effect, at a point at which a Manager reasonably believes, among other things, that it is not practicable or would result in undesirable delay for a standard authorization to be granted[12]. If and when the interim authorization modifications take effect in law does not mean that every SRoL will then come about as a result of the interim authorization. Where it remains practicable to do so - because public health, resource and impacts on vulnerable persons permit it - the standard authorization process can be followed, in which case capacity and liberty assessors will access care homes or facilitate assessments by other means. That will be a case-by-case determination. The draft Capacity Regulations simply seek to maintain flexibility in the present crisis in the way in which SRoLs are authorized, which both preserves inherent human rights safeguards but also facilitates an alternative process which can be actioned at the point at which Covid-19 pressures demand it.

The report accompanying an application for an interim authorization will need to set out the Manager's assessment as to the matters in Article 60(1)(b) to (e)[13]. These matters, which include an assessment of capacity, are all matters which Managers are trained and qualified to make – the assessment of capacity is one that a wide range of persons are empowered to undertake under the 2016 Law. To be absolutely clear, the assessment of capacity involves a medical and a broader social circumstances assessment. Managers will *not* be undertaking medical assessments of individuals; their report must include supporting evidence of a medical diagnosis, i.e. the diagnosis of a registered medical practitioner. If there is no medical diagnosis, there can be no lawful assessment of capacity, and in which case there cannot be an SRoL authorization. In view of the need for medical expertise at the point at which restrictions are imposed[14], the viability of existing medical diagnoses will be a matter for the determination of Managers. Where a medical diagnosis does not remain relevant, e.g. because the condition is one from which the individual might recover from within the period of the diagnosis, the Manager should seek to arrange a fresh medical assessment of the individual.

The prohibition on the States Assembly from making subordinate legislation which is incompatible with the ECHR does not require, nor imply, that States Members must in all cases be provided with human rights advice. The Minister proposing subordinate legislation may, in bringing a proposition, seek legal advice and, at the Scrutiny stage and during the debate, States Members are able at any stage to ask for advice as to ECHR matters from the Attorney General. The purpose of that advice, where the Attorney General is able to do so, is to assure the Assembly

[11] Article 60A(1).
[12] Article 60D(1)(f).
[13] Article 60(3)(a).
[14] *Ilnseher v. Germany* (Applications nos. 10211/12 and 27505/14).

that the draft legislation before it is compatible with the ECHR. It is then for the Assembly to debate and adopt the merits of the proposition accordingly.

Safeguards and Wider International Law

Government is acutely mindful of its international law obligations. However, it is not clear which aspects of the draft Capacity Regulations would amount to *torture, inhuman or degrading treatment*, nor which aspects of practice conducted proportionately in accordance with the 2016 Law, if amended, could amount to this.

The United Nations Convention against Torture and Other Cruel, inhuman or Degrading Treatment or Punishment ("UNCAT") does not provide, and does appear to have facilitated in its jurisprudence, a universally accepted definition of inhuman and degrading treatment or punishment. Jurisprudence around Article 3 ECHR is, though, generally accepted as providing a source for the interpretation of these standards. In this context, *inhuman* treatment denotes conduct which meets a particularly severe threshold: it is premeditated, lasts a number of hours and either causes physical injuries or physical or mental suffering[15]. *Degrading* treatment is treatment which grossly humiliates a person or drives him to act against his will or conscience[16]. As such, the standard which must be met in order for there to be an arguable case of inhuman and degrading treatment is high. Moreover, in most instances, treatment which is not contrary to the right to private life guaranteed by Article 8 ECHR, interference of which may be justified on the basis of public safety and health, is unlikely to be contrary to Article 3 ECHR. In view of this, it is the Government's position that the draft Capacity Regulations are compatible with Articles 3 and 8 ECHR, and by that token, Article 2 UNCAT.

Article 16(1) UNCRC requires that "*no child is subjected to arbitrary or unlawful interference with his or her privacy, family, home or correspondence…*" The authorization of an SRoL in the case of a child, assessed to be required in that person's best interests, and imposed in accordance with the 2016 Law, will not amount to an arbitrary or unlawful interference with the Article 16 UNCRC right. There is nothing in the draft Capacity Regulations which would suggest that a child subject to an SRoL would be prevented from wider contact with their family, properly facilitated in accordance with public health guidelines (unless the relevant restriction is one that limits contact with certain individuals). Health and Community Services will continue to manage access to detained individuals, physically or virtually, in accordance with its obligations under the 2016 Law, applicable human rights law, and the broader Covid-19 guidance.

Reference is made to the United Nations Convention on the Rights of Persons with Disabilities ("UNCRPD") which is not binding on Jersey under international law[17] with the Discrimination (Jersey) Law being presented as a comparator. While it is absolutely the case that our law works to protect people against discrimination, it is not clear how the specific amendments would amount to unlawful discrimination in the case of 'disabled' persons. Discrimination denotes two people in an analogous position being treated differently on account on one person's status. The changes to the authorisation process – if brought into force by an Extraordinary Period order - will apply equally to all people engaged by Part 5 of the 2016 Law. Note, too, that Part 5 of the 2016

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[15] *Tryer v United Kingdom* (1978) 2 EHRR 1, and other judgments.

[16] *The First Greek Case* 12 YB.1 Comm.Rep. CM Res DH (70).

[17] The binding nature of international treaties and conventions being established primarily by the Vienna Convention on the Law of Treaties (1969). The UNCRPD has not been ratified or extended by the UK in respect of Jersey.

Law, which sets out the general framework for authorizing an SRoL, but which is not in issue here, was deemed to be compatible with the ECHR, including Article 14 ECHR.

I apologise for the length of my response but felt it may be helpful to comment in detail on the points you raised that are relevant to the current proposition. As previously mentioned, we are very happy to pick up the broader human rights issues you reference with yourself and other stakeholders and hope to arrange a meeting in the very near future.

In the meantime, please do not hesitate to contact me.

Yours sincerely

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