

Significant Restriction on Liberty (SRoL) During An Extraordinary Period Declared In Response To Coronavirus (COVID-19) Pandemic: Guidance for Hospitals and Care Homes

Who we are

The Children's Commissioner for Jersey was established to promote and protect children and young people's rights. The Children's Commissioner works for every child and young person in Jersey who is:

- Under the age of 18
- Under the age of 25 if they have a disability, have been care experienced or have been sentenced under the Young Offenders Law
- Placed off-island for their care or treatment

The Commissioner for Children and Young People (Jersey) Law 2019 established the role of the Commissioner, and set out the powers and actions the Commissioner can take. These include:

- Providing children and young people with information about their rights.
- Supporting children and young people to complain.
- Working with people and organisations who provide services to help them to solve any problems or complaints at the earliest opportunity.
- Asking for information from people providing services to children and young people.
- Visiting places where children and young people are cared for, accommodated or receive services and speak to them.
- Investigating cases where the rights of children and young people have not been respected and suggest how things could be improved.
- Going to court for children and young people in certain circumstances.

Further information on the role of the Commissioner and the wider office is available on our website at www.childcomjersey.org.je

Children's Rights

The United Nations Convention on the Rights of the Child (UNCRC), which was extended to Jersey in 2014, contains significant rights protections for children and young people. It is the most widely and rapidly ratified treaty and established a set of international minimum standards, recognizing that children require special measures of care and protection. This includes a broad range of protections, all of which are equally important, however 4 General Principles have emerged which help to interpret the Convention. These are: non-discrimination and equality (Article 2); the best interests of the child (Article 3); the right to life, survival and development (Article 6), and; the right to be heard (Article 12).

The UNCRC is explicit that the rights apply to all children and young people aged up to the age of 18¹, and as these Regulations impact young people aged 16 years old and above, it is important to ensure that the guidance protects children's rights.

I have expressed my concerns with the possible impact of the measures on children's rights during the passage of the amendment through the States Assembly² and whether they are necessary and proportionate. I also note the Care Commissioner's response to the Regulations³ and would echo the concerns raised in their response.

It is vital that the guidance is clear around children's rights protections as any restrictions of liberty would interfere with children's rights. For example, every effort should be made to ascertain the young person's views, with clear and accessible information provided, and the best interest of the child should be an overarching principle. Whilst I recognise that the guidance seeks to reflect the best interest's principle and of obtaining views, I would seek for explicit reference to children's rights protections to be made within the guidance.

I remain concerned that with regards to interim authorisations, as stated in paragraph 41:

"Standard SRoL authorisation requires a review of medical diagnosis of mental disorder or impairment in the functioning of the mind or brain. In the circumstances where this is not possible in an 'extraordinary period' for any reason, iSRoL will allow Managers to provide evidence of a medical diagnosis from records."

I share the concerns of the Care Commissioner who highlighted that a past diagnosis: "could be presented as de facto evidence that a person lacks capacity to consent to significant restriction/s being imposed on their liberty" and that "Such a presumption may be construed as being prejudicial and discriminatory particularly given that it may then legitimately be relied upon as the basis for significantly restricting a person's liberty for up to 90 days."⁴

The UNCRC embeds equality and non-discrimination as one of the general principles and therefore children have the right to not be discriminated against based on past diagnosis. Lack of capacity at one time does not mean that the individual will lack capacity for weeks or months.

I remain concerned around the training and support for those being asked to make difficult decisions balancing a number of rights. Managers make a number of difficult decisions, however this is distinct from the specific skillset of Capacity and Liberty Assessors. As highlighted by the Care Commission:

"The Commission is also concerned in respect of the reasonableness in requiring a care home manager to state from an informed perspective that they believe a significant restriction on liberty to be proportionate in respect of likelihood and seriousness of harm and

¹ Article 1, UNCRC

² See <https://www.childcomjersey.org.je/publications/responses-and-advice-to-government/comment-on-draft-covid-19-capacity-and-self-determination-jersey-regulations-202/> and <https://www.childcomjersey.org.je/publications/responses-and-advice-to-government/further-comments-and-government-response-on-amendments-re-mental-health-and-capacity/>

³ <https://carecommission.je/wp-content/uploads/2020/06/JCC-Response-to-Covid-19-Self-Determination-and-Capacity-Law-Regulations.pdf>

⁴ See page 5 <https://carecommission.je/wp-content/uploads/2020/06/JCC-Response-to-Covid-19-Self-Determination-and-Capacity-Law-Regulations.pdf>

that such a significant restriction (for up to a period of 90 days), is in that person's best interests".

They go on to say that "the Commission does not accept that it is appropriate for managers to form a judgement regarding an individual's capacity in the context of an Interim Significant Restriction on Liberty which may be authorised for up to 90 days."

It is crucial that those who are making decisions on SRoL are trained in rights protections and able to interpret the best interest of the child within the context of the full complement of their rights. Further, it remains unclear how a manager is to decide who else they might consider to be appropriate for the Minister to consult with when making a decision.

It is vital that children's rights are respected, protected and fulfilled not just at the time of making decisions around treatment or of imposing significant restrictions of liberty but also throughout their treatment. For example, children have the right to rest and leisure under Article 31 of the UNCRC, meaning that there should be opportunities for children to engage in recreational activities. Children also have the right to maintain relationships with family members, including when being deprived of their liberty as set out in Article 37(c) of the UNCRC. Efforts must therefore be made to ensure that young people are able to stay in contact with their families, including through use of teleconferencing facilities. As noted in the guidance, not everyone has the same access to ICT and equipment, nor familiarity with technology and so efforts should be made to remove these barriers so that contact can be maintained.