

STATES OF JERSEY



DRAFT MENTAL HEALTH (YOUNG OFFENDERS) LAW (JERSEY) AMENDMENT REGULATIONS 202- (P.40/2024) – COMMENTS

**Presented to the States on 20th June 2024
by the Children, Education and Home Affairs Scrutiny Panel**

STATES GREFFE

COMMENTS

The Children, Education and Home Affairs Scrutiny Panel (the “Panel”) was briefed on the Draft Mental Health (Young Offenders) Law (Jersey) Amendment Regulations 202- (the “draft Regulations”) on 5th June 2024, ahead of the lodging of [P.40/2024](#) on 12th June 2024.

The Panel was advised that the Minister for Justice and Home Affairs would seek a reduced lodging period for the draft Regulations (with a debate anticipated to be requested at the sitting commencing on 25th June 2024) due to the urgent requirement to address an identified lacuna in the [Mental Health \(Jersey\) Law 2016](#) (the “MH Law”).

The Panel confirms that it is supportive of the draft Regulations, however, these Comments are intended to provide further context ahead of the debate so that States Members can make an informed decision. It is also important to highlight (see below) the submission that the Panel received from the Children’s Commissioner for Jersey (the “Children’s Commissioner”), which contains notable information that is not specifically outlined in the report accompanying P.40/2024.

What is the substance of the change?

As a very high-level summary, Article 69 of the MH Law currently permits the movement of a prisoner to an “approved establishment”, which is defined as a premises for the purpose of the care and treatment of patients, as approved by the Minister for Health and Social Services.

The Panel understands that the current wording of Article 69 does apply to young people who are serving a sentence of youth detention in a Young Offenders Institution, however, it does not apply to a young person where they are held in secure accommodation (for example, Greenfields Secure Care Unit). This is because secure accommodation is not included in the definition of a “prison” in the [Criminal Justice \(Young Offenders\) \(Jersey\) Law](#).

The Panel has been advised that the only substantial change to the MH Law proposed by the draft Regulations is effectively the inclusion of “secure accommodation” through the amendments proposed to Article 60 (interpretation and application of Part 9) amended, and Article 69 (transfer orders) substituted as per the draft Regulations.

There are a number of other restructuring aspects included in the articles, but these do not include any change to the substance of the MH Law. The Panel was advised that that the policy intent has not changed and that this was important for the principal of making a consequential amendment through Regulations.

Panel queries

In response to queries about why the draft Regulations were needed to effect a change to the MH Law, the Panel was advised that the lacuna had been exposed during the process of acquiring a transfer order in late 2023.

The Panel asked why the issue had not been identified previously. It was explained that the overlap of the introduction of secure accommodation and the development of the MH Law was the likely reason. Secure accommodation was introduced by the Criminal

Justice (Young Offenders) (Jersey) Law 2014, but this was not brought into force by a commencement act until November 2016. The MH Law was initially adopted by the States Assembly in September 2016, but it did not come into force until 1st October 2018. It was suggested to the Panel that the work to develop the MH Law would have been going on before the concept of secure accommodation was on the statute book, and so this was the likely reason that secure accommodation was not specifically referenced in the MH Law.

As highlighted by paragraph 23 of the report accompanying P.40/2024, it is suggested that the original intention of Part 9 of the MH Law was to include all persons who are sentenced to youth detention.

Advice from the Children's Commissioner

The Panel wrote to the Children's Commissioner on [13th June 2024](#) to independently gather evidence for its scrutiny of the draft Regulations and was grateful to receive a response in the short timeframe requested. The Panel has highlighted some key points below but has attached the letter (dated 19th June 2024) at [Appendix 1](#), so that Members can read the whole response directly and in context.

The Children's Commissioner confirmed that constructive discussions took place with Government to discuss the draft Regulations and that a course of action was agreed. This was that:

- *The draft Regulations would be an **interim measure**, to meet the needs of children who are currently securely accommodated, until more robust provisions are brought forward in the second tranche of changes to the Mental Health (Jersey) Law 2016 addressing the concerns of the Office. These amendments are due to come back to the Assembly in early 2025.*
- *Alongside this, the **Code of Practice accompanying the Mental Health (Jersey) Law 2016 and any practice guidance will be updated to incorporate human rights safeguards for children and young people** and also seek to address the broader concerns we have raised.¹*

These aspects are not highlighted to the Assembly as part of the report accompanying P.40/2024 and the Panel wishes to highlight this information to States Members to help ensure as informed a debate as possible.

The concern highlighted by the Children's Commissioner in respect of the draft Regulations and the accompanying [Child Rights Impact Assessment](#), was that the original policy intent was that Article 69 of the MH Law would apply in the same way to adults and children and that this would not be appropriate. The Panel has summarised the below points which were highlighted in the letter:

- The duration of periods of detention is not defined separately for children and young people (in comparison to adults) and the omission of this aspect is a concern.

¹ [Letter](#) – Children's Commissioner to the CHEA Scrutiny Panel – 19th June 2024 (emphasis added)

- There is no requirement under Article 69 for a regular review of the transfer and detention order by a suitably qualified medical practitioner, which would be a safeguard to ensure that the detention ends when it is no longer necessary.
- There is limited scope of the people who are allowed to apply for discharge (it is either the person themselves or the Attorney General) and where the child does not have capacity, the current provisions do not allow for a parent or professional around the child to apply on their behalf.
- The concern that a child could be placed in an approved establishment that is an adult facility, rather than a dedicated facility for young people.
- There is no clarity in the MH Law about how child or young person detained under Article 69 could challenge or appeal their detention.

However, the Children’s Commissioner has summarised that her office is supportive of the draft Regulations in the context and circumstances on the understanding that it is an interim measure:

*“Notwithstanding these concerns, the Office acknowledges that, in these circumstances, the priority must be to ensure that children who are currently securely accommodated and may require acute in-patient mental health treatment are able to do so without further delay in a rights compliant manner. As such **we are supportive of the draft Regulations as an interim measure until the rights issues we have raised can be addressed through the next planned phase of reform to the Mental Health (Jersey) Law 2016 and brought before the Assembly in early 2025.**”²*

Conclusion

The Panel is supportive of the intent of the draft Regulations which, if adopted, will ensure that any young person in secure accommodation could be transferred to an approved establishment under the MH Law. However, the Panel notes the advice provided by the Children’s Commissioner that this should be an interim measure until such a time as the updates to the MH Law are brought to the States Assembly for consideration in early 2025.

The Panel requests that both the Minister for Justice and Home Affairs (when presenting the draft Regulations) and the Minister for Health and Social Services (as Minister with responsibility for the MH Law) publicly address the concerns raised by the Children’s Commissioner in relation to the draft Regulations during the debate on P.40/2024 in the States Assembly.

² [Letter](#) – Children’s Commissioner to the CHEA Scrutiny Panel – 19th June 2024 (emphasis added)

Appendix 1: Letter from the Children’s Commissioner for Jersey to the Chair of the Children, Education and Home Affairs Scrutiny Panel, 19th June 2024



Children's Commissioner for Jersey

Promoting and Protecting Children's Rights

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Deputy Catherine Curtis
Chair, Children, Education and Home Affairs Scrutiny Panel

By Email

19 June 2024

Dear Chair

Draft Mental Health (Young Offenders) Law (Jersey) Amendment Regulations 202-

The Office of the Children's Commissioner (the Office) welcomes the opportunity to inform of the Children, Education and Home Affairs Panel's (the Panel) review of Draft Mental Health (Young Offenders) Law (Jersey) Amendment Regulations 202- (the draft Regulations).

The Office was briefed on the Regulations, in accordance with Article 25 of the Commissioner for Children and Young People (Jersey) Law 2019, in early April 2024 by the Cabinet Office. The briefing identified the gap in existing legislation in relation to the transfer and detention of children accommodated in secure care and also highlighted the need for swift resolution of this issue due to the ongoing welfare of children currently residing within secure accommodation.

The following sets out the view of the Office on the draft Regulations, focusing on areas of concern. These were discussed with the Cabinet Office as part of the above briefing and provided in writing following the briefing.

The UN Convention on the Rights of the Child (UNCRC), under Article 24, recognises the right of all children to the highest attainable standard of health, and access to the health services necessary to achieve this. These rights apply to all children everywhere and must do so without discrimination of any kind. This includes children deprived of their liberty in any setting. The 2019 [UN Global Study on Children Deprived of their Liberty](#) (the UN Global Study), is clear that, *"Deprivation of liberty does not mean deprivation of liberties. In other words: When deprived of their right to personal liberty, human beings shall, in principle, keep all other human rights and shall be enabled by State authorities, as far as possible, to exercise these rights in detention. This doctrine of minimal limitations applies in even stronger terms to children who are still in their formative stage. When State authorities decide, as a measure of last resort, to detain children, they have the positive obligation to ensure that these children can in fact enjoy all other rights enshrined in the CRC."*

The UN Global Study also notes that, *"...there is already considerable evidence that deprivation of liberty can be harmful to the health of children, and often compounds trauma."*

It goes on to highlight that “*Children in justice-related detention have a markedly higher prevalence of mental disorder than their community peers*” and “*Justice-related detention also likely erodes mental health and may compound existing socioeconomic and psychosocial health risks in vulnerable populations.*”

As such our view is that children deprived of their liberty in secure accommodation should be receiving adequate mental health care and support within the secure accommodation setting in order to minimise the possibility of requiring in-patient treatment.

We do, of course, recognise that there may be circumstances where in-patient treatment is necessary, and the law must therefore provide for this, hence the purpose of the draft amendment to Article 69 of the Mental Health Law. However, the Office is concerned that the original policy intention was, and remains, that the provisions in this article will apply in the same way to children and adults. It is our view that this is not appropriate, and our concerns are set out below.

Duration of periods of detention

The duration of the periods of detention within this article (both the initial period of detention and then subsequent periods of renewal for detention) are lengthy and appear to apply as the required period of time of detention i.e. ‘for 6 months’ rather than a maximum period of detention i.e. ‘for up to 6 months’. The Office recognises that the law must provide for the maximum time periods that can be applied and that in practice it may not be the case that these maximum periods of detention are applied in relation to children and young people. However, the ability for these time periods to be applied to children, without the inclusion of an ‘up to’ qualification, has the potential to indicate that the detention of children for those periods of time is appropriate and therefore should be sought. International human rights standards, for example Article 37 of the UNCRC, are clear that deprivation of liberty of children should be a measure of last resort and for the shortest time possible.

Regular review of detention

Regular review of the need for detention to continue and the requirement that detention ends as soon as it stops being necessary and proportionate are important human rights safeguards when infringing on a person’s right to liberty. We are concerned by the lack of a requirement under Article 69 to regularly review the transfer and detention order by a suitably qualified medical practitioner, during both the initial period of detention and any subsequent period of detention, and by the lack of requirement to ensure that the detention ends when it is no longer necessary.

Application for discharge

This is linked to further concerns about the limited scope of those permitted to make an application to the court to enable a person to be discharged from the approved establishment. In the case of a child or young person, particularly where the child may not have capacity, the current provisions do not allow for anyone to act on behalf of the child such as a parent or a professional around the child, such as an independent advocate, suitably qualified medical professional or legal professional.

Approved establishments

The Office is concerned that children and young people detained under Article 69 Mental Health Law are likely to be placed in approved establishments which are adult facilities. The UN Committee on the Rights of the Child has repeatedly called for children to be detained separately from adults when deprivation of liberty is required, including in mental health settings. In its Concluding Observations to the UK State Party, which includes Jersey, in

[2016](#) (see paragraph 60 & 61) the Committee recommended that the UK State Party, *“expedite the prohibition of placing children with mental health needs in adult psychiatric wards, while ensuring the provision of age-appropriate mental health services and facilities.”*

In its [2023](#) (see paragraph 43(a)) Concluding Observations, the Committee recommended that the UK State Party, *“Urgently reform the Mental Health Act, in line with its previous commitments and the policy position set out in the 2021 white paper, and ensure that it: (i) explicitly prohibits the detention or placement in adult psychiatric units or police stations of children with mental health issues, learning disabilities and autism; (ii) guarantees children’s right to be heard in decisions regarding their mental health care, to access therapeutic mental health services and to receive support from independent mental health advocates; and (iii) establishes standards for determining the duration of inpatient mental health care and for appropriate follow-up, with a view to preventing unnecessary and prolonged stays in inpatient mental health care.”*

Mechanisms for challenging/appealing detention

It is unclear how a child or young person detained under Article 69 could challenge their detention.

Given these concerns it was and remains our view that that there should be separate provisions in the Law relating to the transfer and detention of children and young people in secure accommodation, which provide robust safeguards and ensure that deprivation of liberty is a measure of last resort and for the shortest time possible, in line with international human rights standards.

However, after constructive discussions with Government regarding the time sensitive nature of the issue and the constraints of the legal mechanisms available, a course of action was agreed, in essence, as follows:

- The draft Regulations would be an interim measure, to meet the needs of children who are currently securely accommodated, until more robust provisions are brought forward in the second tranche of changes to the Mental Health (Jersey) Law 2016 addressing the concerns of the Office. These amendments are due to come back to the Assembly in early 2025.
- Alongside this, the Code of Practice accompanying the Mental Health (Jersey) Law 2016 and any practice guidance will be updated to incorporate human rights safeguards for children and young people and also seek to address the broader concerns we have raised.

Current position

We are disappointed to see that neither the above issues nor the fact that this is an interim measure are reflected in either the proposition or the accompanying CRIA. As such, it is our view that the CRIA has not provided a rounded assessment of the potential impact of the draft regulations on children’s rights. Whilst we recognise the urgency with which these regulations have been brought forward and the constraints of the enabling legal mechanism, this does not negate the need for the impact on children’s rights to be properly assessed and reflected. In future the Office would welcome earlier sight of the CRIA to allow us adequate time to provide advice and time for that advice to be considered. Further, the absence of a clear statement that these measures are of an interim nature does not, in our view, provide the full and accurate context for consideration by the Assembly.

Notwithstanding these concerns, the Office acknowledges that, in these circumstances, the priority must be to ensure that children who are currently securely accommodated and may

require acute in-patient mental health treatment are able to do so without further delay in a rights compliant manner. As such we are supportive of the draft Regulations as an interim measure until the rights issues we have raised can be addressed through the next planned phase of reform to the Mental Health (Jersey) Law 2016 and brought before the Assembly in early 2025.

If you have any further questions please do not hesitate to contact me.

Yours sincerely

A handwritten signature in blue ink that reads "Carmel Corrigan". The signature is written in a cursive style with a long horizontal flourish at the end.

Dr Carmel Corrigan
Commissioner for Children and Young People