Health and Social Security Panel

Further Evidence for the Panel's Review of Regulations P.46/2020 (Draft Covid-19 (Mental Health) (Jersey) Regulations 202-) and P.47/2020 (Draft Covid-19 (Capacity and Self-Determination) (Jersey) Regulations 202-)

Following the publication of the Panel's Comments Papers on P.46/2020 and P.47/2020, members of various third-party stakeholders, including the Children's Commissioner, contacted the Panel with concerns about the Draft Regulations, which were due to be debated on 22nd April 2020. The public submissions can be found here.

Due to the nature of these concerns and the significance of what is being proposed under the draft Regulations, the Panel felt it would be appropriate to raise these concerns with the Assistant Minister for Health and Social Services and request further clarity about the issues expressed. The Panel received a response from the Department for Health and Community Services addressing the concerns raised by the Children's Commissioner on the draft Regulations. The response is appended to this paper.

The Panel was also contacted by My Voice Jersey – the independent advocacy charity which currently holds the two-year Government contract to help give vulnerable islanders with mental health issues a voice. The Panel also asked the Department to respond to the concerns raised by My Voice Jersey in respect of the draft Regulations. The Department's responses can be found in red below:

- *In concerns about proposition 47 which refers to the application of the Capacity Law. Many subjects to SROL do not have family or attorney and yet no mention is made of independent advocates who have a statutory role?*

  Where an independent advocate was previously appointed to a person who was subject to a significant restriction of liberty (SRoL) – because they had no nearest relative - this will remain the same.

  The introduction of an interim authorisation process does not change this.

- *There is insufficient detail as to the provision for any checks and balances, nor is a clear process outlined for "managers" to make Best Interests decisions. I am especially dismayed that there is no attempt to seek the input of an Independent Capacity Advocate.*

  We think concerns shown here may arise from the fact that Art 51 (1) (b) makes reference to an advocate being appointed where a standard authorization has been granted and, that Art 51 (1) (b) has not been amended to reference a standard authorization and an interim authorisation. T

  This is simply because, for the purposes of the intention of proposed changes, an interim authorisation is treated as if it were a standard authorisation – and therefore the same safeguards apply.

Appendix

Response to Children's Commissioner comments

Overview

1. The mental health law applies to all people (including under 16 years), and Capacity law applies to people aged 16 and over who are assessed as lacking mental capacity, however, the instances in which they are applied to children and young people are very low, hence the oversight in not consulting the Children's Commissioner.

2. The provisions of the mental health law are only used in the most significant of cases where people represent a risk to themselves or others, and where it is necessary to impose treatment because they do not want treatment. In 2019 and 2020, the provision of the mental health law were applied to 1 person under 18 years.

3. Since 2018, under the Capacity Law, there have only been four applications for significant restriction of liberty relating to people aged 25 or under. Young people are most usually at their parents' home with care packages, which do not fall under the significant restriction of liberty provisions. By contrast, in the same time period there have been over 200 applications for people aged 25 plus.

4. The proposed changes will affect children (those under 18) and young people (over 18 but under 25), within the meaning of the Commissioner for Children and Young People (Jersey) Law 2019, significantly less any other group.

Response to Commissioner's comments on Capacity and self-determination regs

5. CC comments*: The provisions contained within the draft Regulations propose significant reductions in the protections established in Jersey Law.*

    - LoD's considered view is the proposals are human rights compliant

    - Managers in both care homes and hospital can already impose significant restrictions on liberty (SRoL) via an existing standard application or an urgent authorisation. The provisions do not change this, they only provide for a new interim authorisation

    - An 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.

    - The interim authorization is means to **ensure** human rights are upheld, not the reverse. Without an interim authorisation process to augment the standard authorisation process which cannot operate due to the associated covid-risk, individuals who lack capacity in Jersey may experience arbitrary detention with no scrutiny, no legal process, no means to review, or recourse around detention.

- The interim application process echoes new UK provision which was due to take effect later in 2020 (i.e. the changes, which for Jersey a dialling back of current provision due to covid-19, will probably mirror the new provision to be introduced in the UK)

- There needs to be a balancing exercise. The interim provision does amend the current assessment processes that underpin a standard SRoL authorization, however, these changes are needed to ensure that essential services can continue during the Covid-19 period.

6. *Have managers been given sufficient training and support around human rights to be able to conduct assessments in line with international law and best practice?*

   There has been discussion with the Care Commissioner who recognise the need for the proposed changes. The Care Commission will, on behalf of HCS, ensure all care home mangers are supported to operate with these new provisions. Support will be provided to those managers via designated link workers from the Adult Social Care Team, plus via Capacity and Liberty Officers. Furthermore, written guidance is in the process of being developed.

   Care Home Managers care for people who lack capacity on a day to day basis. They are the cohort of professionals who perhaps best place to make these difficult judgements during the Covid-19 period.

7. Children's Commissioners Comments*:*

   a) *What evidence is required to justify that detaining a child, or indeed an adult, for up to 90 days without their consent is both necessary and in their best interests? Similarly, the thresholds set out in Article 60C (1)(f) that having a Capacity and Liberty Assessor conduct an assessment would not be 'practicable' or 'result in undesirable delay' seem to prioritise systemic issues rather than human rights.*

   b) *CC comments: I note that the 2016 law recognises that a person who is deemed to lack capacity may "at some time have capacity" yet this is not reflected in the current provisions.*

   c) *CC comments: Relying on a previous assessment of capacity therefore would significantly dilute rights protections here.*

- The provisions set out in the Regulations should not to be read in isolation. If passed, they are inserted as new temporary provisions under Part 5 of the 2016 Law (Articles 60A-F). All the general principles associated with the Law, which are set out in Part 1, and protections afforded to the person under the law still apply. For example, P would still be entitled to:

a. representation by the nearest relative/advocacy service (under Part 6 and Article 51)

b. referral to the Mental Health Review Tribunal (Part 5, Article 55) to challenge the authorization.

These protections would address the issue of that person who is deemed to lack capacity may "at some time have capacity" (see comment b) above

- There is some misunderstanding to reliance on a previous assessment of capacity (see comment c above). Under the law, as it stands at the moment, an assessment is undertaken by a Capacity and Liberty Assessor, who assesses the person's capacity. Where there is no previous diagnosis of an impairment or disturbance in the functioning of the person's mind or brain, the medical practitioner is also in attendance at that assessment but not if there is a pre-existing diagnosis of impairment or disturbance in the functioning of the person's mind or brain. The involvement of a medical practitioner is a feature of Jersey law, it is not a feature of the UK law.

  Under the provisions set out in the regulation, the manager cannot apply for an interim authorization unless there is evidence of previous diagnosis of an impairment or disturbance in the functioning of P's mind or brain (which addresses the issues of medical practitioner not be involved).

  In making an interim application, it will be the manager – as opposed to the Capacity and Liberty Assessor who cannot access the person in the care home – who will be forming a view on person's capacity (Article 60C (1)(b)). The manager <u>will not</u> be relying on a previous determination of lack of capacity, albeit the manager may provide evidence relating to a previous determination of a lack of capacity if there had been one.

- The evidential requirements for establishing whether SRoL can be authorised will rest with the Minister. If the Minister is not satisfied, there will be no authorisation as per the current law. The Minister will make enquiries regarding Lasting Power of Attorney, Mental Health Articles and **additional** consultation with family. People who require Independent Capacity Advocates will still be referred and those 'objecting' to measures will have access to Tribunal. Objectors can be identified as individuals trying to leave, asking to leave or other indicators.

<u>Response to Children Commissioner's comment on Draft Mental Health Law (Covid-19) Regulations</u>

- LoD have confirmed that they are satisfied that the proposed changes are human rights compliant.

- The proposed changes will only come into force if necessary because to do otherwise would risk the person's welfare as care or treatment could not be provided.

- As with the Capacity Law Regulations, the Mental Health Regulations should not to be read in isolation (i.e. during the emergency period P will still be entitled to independent review mechanisms such as reference to the Mental Health Review Tribunal under Part 7 of the MHL 2016 and appointment an independent mental health advocate).

- The period in which an individual must be transferred to an approved facility is extended from 7 days to a maximum of 28 days as an 'in extremis measure only' (ie. in the event that due to staffing constraints a place in not available for that person, particularly given the constraints on UK transfer). It is highly unlikely that this provision will be used in relation to children during the covid period. In the event that transfer is extended beyond the existing 7 days the arrangements for care and treatment, which must be made in any eventually for the existing 7 days, will be extended through the whole period.