STATES OF JERSEY

DRAFT COVID-19 (CAPACITY AND SELF-DETERMINATION) (JERSEY) REGULATIONS 202- (P.47/2020): COMMENTS

Presented to the States on 20th April 2020
by the Health and Social Security Scrutiny Panel

STATES GREFFE

COMMENTS

1. P.47/2020 – Draft Covid-19 (Capacity and Self-Determination) (Jersey) Regulations 202- (the "draft Regulations") was lodged by the Minister for Health and Social Services on 17th April 2020, in light of the ongoing Covid-19 pandemic.

2. The Panel would like to thank the Health and Community Services Department for sharing the draft Regulations with it prior to formal lodging. It would also like to thank the Assistant Minister for Health and Social Services, departmental officers and Law Officers for briefing the Panel on the draft Regulations on 14th April 2020.

3. As outlined in the report accompanying P.47/2020, if adopted, the draft Regulations would make temporary amendments to the Capacity and Self-Determination (Jersey) Law 2016 during an extraordinary period declared by the Minister for Health and Social Services. The Panel notes that the purpose of the draft Regulations is to allow services to continue to function during the Covid-19 period. It further notes that, whilst the proposed changes to the Mental Health (Jersey) Law 2016 are wide-ranging, the amendments proposed to the Capacity and Self-Determination (Jersey) Law 2016 relate to specific parts of the legislation. For instance, we were advised that the draft Regulations would change the authorisation process associated with imposing 'significant restrictions of liberty' on a person who lacks capacity. However, in doing so, the draft Regulations would also provide the safeguards necessary to protect the rights of those individuals. The Panel notes that examples of a significant restriction on liberty could include: a person not being permitted to leave their care home unaccompanied, or their freedom of movement in the care home being limited to certain rooms, or use of physical force and/or restraint if necessary.

4. The Panel is informed that the new provisions proposed within the draft Regulations could only be enacted once the Minister for Health and Social Services had declared, by Order, an extraordinary period under Regulation 1 of the Draft Covid-19 (Mental Health) (Jersey) Regulations 202- (P.46/2020). An extraordinary period could only be declared for a period of up to 28 days, but could be reduced or extended, if considered necessary by the Minister. The Panel is assured that the provisions within the Draft Regulations would only be used when absolutely necessary.

5. It is noted that the draft Regulations set out that the Minister may, on receipt of a written application, authorise the manager of a care facility to impose, on an interim basis only, significant restrictions on liberty on an individual person. This is known as an 'interim authorisation', as distinct from a 'standard authorisation' as provided under the 2016 Law. We note that the current Law allows the Minister to grant a standard authorisation on the completion of two assessments (one carried out by a Capacity and Liberty Assessor and one by a registered Medical Practitioner). The purpose of the two assessments is to provide the Minister with assurances that: (a) the person lacks capacity; (b) it is necessary to impose measures to keep the person safe; and (c) the measures proposed are in the person's best interest. The Panel were advised that whilst the proposed interim authorisation process does not require the two assessments

to be undertaken, the draft Regulations nevertheless provide for those assurances to be given.

6. It was stressed during the briefing that, under new Article 60C inserted by Regulation 1 of the draft Regulations, a care facility manager can only apply for an interim authorisation if the individual has already been assessed as lacking capacity, and that the manager must provide evidence of a diagnosis of a mental disorder or impairment. It was further stressed that an application by a manager must also include a statement explaining why a significant restriction on liberty is believed to be necessary, plus confirmation that a standard authorisation would not be practical in the circumstances and would put the welfare of the patient at risk.

7. New Article 60D provides that upon receipt of an application from a manager, the Minister must consult with the individual's health and welfare attorney or guardian (in instances where powers have been granted under a Lasting Power of Attorney) and any person the manager has included in their application as being appropriate to consult with. The Panel understands that this could include members of the individual's family.

8. At the briefing, the Panel was keen to establish the current status of assessments that were being undertaken under the Capacity and Self-Determination (Jersey) Law 2016, to allow for the granting of standard authorisations. The Panel was advised that whilst urgent authorisations, which last 28 days, were still being carried out, standard authorisations were unable to take place due to the current pandemic crisis. It was advised that assessors are currently unable to enter care facilities to undertake assessments, and some assessors had been redeployed elsewhere within health and community services. The Panel raised questions regarding the historic backlog of assessments and how these were being dealt with. It was advised that there were currently 107 people awaiting assessments (the oldest application dating back to 12th February 2019), and that the backlog was increasing as a result of Covid-19 and the inability to carry out 'business as usual'.

9. The Panel wished to seek clarity as to whether or not the backlog of assessments would be managed under these draft Regulations, if they were to be adopted by the States Assembly. It was advised that the Assistant Minister and his officers would revert to the Panel, following the briefing, with an explanatory paper which addressed these queries. The additional briefing note was provided to the Panel on 16th April and can be found appended to our Comments. The note advises that at the point at which post-Covid-19 'business as usual' resumed, the operational team would be able to continue the work started in March 2020 on reducing the existing backlog, as care home visits would recommence. However, the Panel notes that, post-Covid-19, the backlog might increase in the short term as any 'interim authorisation' provided under the draft Regulations would fall away and would generate a requirement for full assessment under the standard authorisation procedures. The note also provides confirmation that the interim authorisation process, provided for in the draft Regulations, was only intended to deal with applications received during the Covid-19 period and not to address outstanding applications. However, the Panel has been advised of two instances where the interim authorisation process may be used to deal with outstanding applications –

(a) if there is an outstanding application relating to a particular person, and that person experiences a change of circumstances due to Covid-19 measures, the need for new restrictions would need to be considered under an interim application (this is to ensure that the care home manager can safeguard that person on an interim basis);

(b) in the event that an individual was objecting to any restrictions that were already imposed, the interim authorisation would be used to provide for a review of those restrictions.

10. The Panel expressed its concern regarding the backlog of assessments and the current situation in which 'normal' assessments could not be undertaken. As such, the Panel questioned whether the conditions were such that the Minister should declare an extraordinary period (see paragraph 4 above).

11. The Panel has reviewed the draft Regulations, albeit briefly given the current circumstances, and understands the rationale and the importance for their introduction at this stage. Furthermore, the Panel recognises the urgent need to ensure that assessments can be undertaken during the Covid-19 period and the requirement for the Minister for Health and Social Services to declare an emergency period to enable this to happen. The Panel is satisfied that, whilst the draft Regulations amend the authorisation process associated with imposing 'significant restrictions of liberty' on a person who lacks capacity, they also provide appropriate safeguards necessary to protect the rights of individuals. The Panel will be keeping abreast of the issue of the backlog of assessments to ensure that enough resources are in place post-Covid-19 to reduce the historic backlog, and to deal any increases that may have resulted due to the current circumstances.

APPENDIX

Draft Covid-19 (Capacity and Self-Determination) (Jersey) Regulations 202- Additional briefing note

Introduction

1. The Health and Social Security Scrutiny Panel were briefed on Tuesday 14th April on the Draft Covid-19 (Capacity and Self-Determination) (Jersey) Regulations 202- (the "draft Regulations"). During the course of that briefing, operational officers informed the Panel that there were 107 outstanding applications related to significant restrictions on liberty ("SRoL"). The purpose of this briefing paper is to explain –

   (a) how the outstanding applications will be processed; and

   (b) the relationship between the provisions of the draft Regulations and those outstanding applications.

Significant restriction on liberty ("SRoL")

2. The Capacity and Self-Determination (Jersey) Law 2016 (the "2016 Law") provides safeguards for individuals who lack capacity to make decisions about their care and treatment, including where there might be a requirement for ongoing restraint and/or restriction on liberty. This is defined in the 2016 Law as a 'significant restriction on liberty' ("SRoL").

3. The 2016 Law sets out that a manager of a care facility may impose a significant restriction on liberty, if the Minister has authorised them to do so. The manager may apply to the Minister for –

   (a) a standard authorisation which can last up to 12 months; or

   (b) an urgent authorisation which can last up to 28 days.

4. Under the 2016 Law the Minister may only issue an SRoL authorisation on completion of two assessments, which are carried out by a trained medical assessors and a Capacity and Liberty Assessor.

Outstanding applications

5. There are currently 107 outstanding SRoL applications from care managers[1]. This operational backlog arose from a lack of both trained medical assessors and Capacity and Liberty Assessors. In 2019 additional funding was provided to rectify this problem, leading to the establishment of an operation team in February 2020. This team included a locum Capacity and Liberty Assessor brought over from the UK who would remain in post until all outstanding applications were processed.

[1] This includes applications received before 16th March 2020, plus a small number received post-16th March 2020, 16th March being the point at which Covid-19 started to have an impact on the ability to carry out SRoL assessments, as many care settings began to restrict visitors.

6. In addition, arrangements were put in place to deliver training to local G.P.s and Capacity and Liberty Assessors (this training was due to commence on 30th March 2020). This training would have provided for the operational team plus around 12 'satellite' assessors from other teams who could assist at busier times.

7. The increased focused on the SRoL application process had immediately started to deliver results. In February 2020, only 8 standard authorisations were processed, but this rose to 25 in March 2020.

8. At the point at which post-Covid-19 'business as usual' resumes, the operational team will be able to continue the work that started in March 2020 on reducing the existing backlog, as they will be able to recommence care home visits. It should be noted, however, that post-Covid-19, this backlog may increase in the short term as any 'interim' authorisation provided under the draft Regulations will fall away and will generate a requirement for full assessment under the standard authorisation procedures.

Interim authorisations issued under draft Regulations

9. It is not known how many requests for interim authorisations will be received during the Covid-19 period. In Q1 2020, there was an average of 19 applications per month, however it is not known if this will increase. Factors which may contribute to an increase include –

   (a) Care home managers may need to utilise additional or different restrictions in order to assist in them managing social distancing or preventing care recipients who unwell from affecting others.

   (b) Care recipients' wellbeing may deteriorate due the period of social isolation, creating a need to impose restrictions for the first time or to change existing restrictions.

Interim authorisations and outstanding applications

10. The interim authorisation process provided for in the draft Regulations is only intended to deal with applications received during the Covid-19 period. This interim authorisation process is not being brought forward to deal with outstanding applications. However –

   (a) if there is an outstanding application relating to a particular person, and that person experiences a change of circumstances due to Covid-19 measures, the need for new restrictions would need to be considered under an interim application (this is to ensure that the care home manager can safeguard that person on an interim basis);

   (b) in the event that an individual was objecting to any restrictions that were already imposed, the interim authorisation would be used to provide for a review of those restrictions.

11. It should also be noted that, where an urgent authorisation has been granted, that authorisation will fall way after 28 days, in which case an interim authorisation may be needed.