

# STATES OF JERSEY



Jersey

## **DRAFT COVID-19 (CAPACITY AND SELF-DETERMINATION) (JERSEY) REGULATIONS 202-**

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**Lodged au Greffe on 6th May 2020  
by the Minister for Health and Social Services**

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**STATES GREFFE**



## REPORT

### Introduction

Covid-19 is placing significant pressures on the Island's healthcare system, its hospitals and care homes, including –

- existing mental health staff – doctors, nurses and other professionals – being redeployed to other priority healthcare services;
- restrictions on access to places of care, including the Island's hospital facilities and care homes.

The Draft Covid-19 (Capacity and Self-Determination) (Jersey) Regulations 202- (the “draft Regulations”) amend some of the existing statutory requirements set out in the [Capacity and Self-Determination \(Jersey\) Law 2016](#) (“the 2016 Law”) in order that services can continue to function during the Covid-19 period.

Specifically, the draft Regulations change the authorisation process associated with imposing ‘significant restrictions of liberty’ on a person who lacks capacity but, in doing so, the draft Regulations also provide the safeguards necessary to protect the rights of those individuals.

A significant restriction on liberty could include, for example, 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, or restrictions on their social contact.

#### **P.47/2020 – Draft Covid-19 (Capacity and Self Determination) (Jersey) Regulations 202-**

Draft Capacity Regulations were previously lodged as [P.47/2020](#) on 16th April 2020 and debated on 22nd April. The principles of the draft Regulations were adopted. However, during debate on the draft Regulations in 2nd Reading, the Assembly then voted to move to the next item of public business, following a successful proposition from Deputy G.P. Southern of St. Helier. The draft Regulations attached to this report contain the provisions as previously drafted; however, additional provisions have been included, as summarised below –

- Inclusion of a separate ‘extraordinary period’ Order-making power:
  - Previously, the draft Regulations required the Minister to declare an ‘extraordinary period’ under the [Covid-19 \(Mental Health\) \(Jersey\) Regulations 2020](#) [[P.46/2020](#) adopted 22nd April], in order for the powers within the draft Capacity Regulations to come into effect.
- Clarification of access to elements within the 2016 Law, for those subject to an ‘interim authorisation’ – access to the Mental Health Review Tribunal and the appointment of an Independent Capacity Advocate, will be available in the same way as for those subject to a ‘standard authorisation’.

### Draft Regulations

As with all Covid-19 legislation, the draft Regulations are time-limited and will expire on 30th September 2020. This is a safeguard to ensure that any divergence from existing policy and practice is permitted for the shortest possible timeframe.

Regulation 1, however, also provides an additional safeguard. It sets out that –

- (a) the Minister must, by Order, declare the start of an ‘extraordinary period’ in order for the proposed amendments to the 2016 Law to take effect; and that
- (b) the Minister may only declare an extraordinary period if satisfied that the disruption caused by the Covid-19 outbreak in Jersey is limiting the ability to carry out assessments for the purpose of standard authorizations for imposing significant restrictions on liberty under Part 5 of the 2016 Law.

This extraordinary period can be for a maximum of 28 days, albeit this period can be reduced or extended for a further period of up to 28 days by Order, as deemed necessary by the Minister.

In order to overcome the significant practical and logistical challenges posed by the Covid-19 pandemic (including restricted access to care homes), the draft Regulations bring forward changes to existing provisions relating to the manner in which significant restriction on liberty assessments can be carried out during the extraordinary period. This includes changes to existing controls and safeguards designed to protect the interests of people subject to significant restrictions on liberty, in order to maintain their human rights. Hence the provisions can only be activated if the Minister declares an extraordinary period.

Those provisions include:

#### **Powers to grant interim authorisations**

The draft Regulations set out that the Minister may, on receipt of a written application, authorise the manager of a care facility<sup>1</sup> 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.

Under the 2016 Law, a standard authorisation would only be granted by the Minister on the completion of an assessment, carried out by means of one or more interviews, namely by a Capacity and Liberty Assessor (an officer appointed by the Minister with relevant experience, i.e. social worker, nurse, occupational therapist, etc.), and/or a registered medical practitioner where there is no prior medical evidence of lack of capacity. Where there is existing medical evidence of lack of capacity, the assessment can be carried out solely by the Capacity and Liberty Assessor. The purpose of these assessments is to provide the Minister with assurance that –

- the individual lacks capacity (in relation to giving consent to the arrangements for his or her care or treatment in the relevant place); and
- it necessary to impose measures in the interest of the individual’s health or safety; and
- the measures proposed are in the individual’s best interests.

Whilst an interim authorisation process does not require the assessment to be undertaken in the manner as currently set out in the 2016 Law (as explained above), it does seek to maintain these assurances in the following way:

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<sup>1</sup> In the context of the 2016 Law, a care facility could include a hospital, an approved care home, or another establishment regulated under the [Regulation of Care \(Jersey\) Law 2014](#).

Lack of capacity (test of capacity – in relation to the proposed care arrangements):

A manager can only apply for an interim authorisation in relation to an individual if there is prior medical evidence of lack of capacity. This is different from the standard authorisation processes which allow for evidence of medical lack of capacity to be determined by the registered medical practitioner as part of the assessment process. Nonetheless, as set out above, under the 2016 Law an assessment can still be carried out solely by a Capacity and Liberty Officer where there is prior medical evidence of lack of capacity.

The written application provided by the manager must include evidence of a diagnosis of mental disorder or impairment, i.e. the person has already been determined to lack capacity. This is an essential safeguard, and in material terms reflects the position under the 2016 Law, as the Minister cannot proceed with interim authorisation without this evidence.

It should be noted that amendments to capacity legislation were not included in the UK's emergency provision. Jersey's 2016 Law differs from the UK's Mental Capacity Act 2005, in that the 2016 Law includes the requirement for a current clinical assessment (a visit by a registered medical practitioner or person's G.P. as part of the assessment), for an authorisation of a significant restriction on liberty. The UK assessments can rely on medical records detailing impairment within the last year. For the purposes of an interim authorisation, Jersey law would echo the UK, in that authorisation could be granted on previous medical evidence only (for example a G.P.'s diagnosis of dementia), where the attendance of a registered medical practitioner is not practicable). In addition, managers can 'self-authorise' significant restrictions of liberty under UK Law for up to 14 days, which is not the case under Jersey law.

Necessity

The application must also include a statement by the manager to explain why the significant restriction on liberty should be in place. The manager must also confirm that it is not practicable for a standard authorisation to be carried out, or it would result in undesirable delay (putting the individual at risk).

The draft Regulations stipulate that the manager should provide details that allow the Minister to conclude that, without the care, the individual concerned would suffer serious harm or would be at significant risk, and therefore the restrictions are needed to provide necessary care and treatment to avoid such outcomes.

Best interests requirement

The manager is required to demonstrate that the significant restriction on liberty is in the best interests of the individual. Evidence of this could include meetings with family or clinical reviews to demonstrate that the individual's needs have been properly reviewed.

**Consultation and conditions of authorisation**

In granting an interim authorisation, the draft Regulations include additional safeguards by placing a statutory duty on the Minister to consult –

- (a) the individual's health and welfare guardian (where powers have been granted under a Lasting Power of Attorney), if available and it is practicable to do so;
- (b) any person the manager has included in their application as being appropriate to consult with, for example family members.

The Minister may also consult with any other person considered appropriate for the determination of the application.

### **Access to Independent Capacity Advocate and the Mental Health Review Tribunal**

The draft Regulations clarify the position on access to elements within the 2016 Law. Firstly, they ensure that an individual who is the subject of an interim authorisation would be able to access the Mental Health Review Tribunal, in the same way as those subject to a standard authorisation. Secondly, they make provision for the appointment of an Independent Capacity Advocate to represent the person who is the subject of an interim authorisation, in circumstances where the person would be appointed such an Advocate under the 2016 Law if a standard authorisation had been granted.

### **Duration of interim authorisations**

An interim authorisation can be granted for no more than 90 days, whereas, a standard authorisation under the 2016 Law can be granted for up to 12 months. If an interim authorisation is in place on 30th September or when the extraordinary period ends, the authorisation remains in place until the authorisation's specified end date (which may be after 30th September).

### **Current status of authorisations in Jersey**

It should be noted that there are currently 107 outstanding applications related to significant restrictions on liberty<sup>2</sup>. This backlog has arisen from a deficit of trained medical assessors and Capacity and Liberty Assessors. Additional funding has been provided to rectify this problem, leading to the establishment of an operational team in February 2020. This enhanced team had immediately started to deliver results (prior to Covid-related access restrictions to care homes). In February 2020, only 8 standard authorisations were processed, but this rose to 25 in March 2020. At the point at which post-Covid 'business as usual' resumes, the operational team will be able to continue the work started on reducing the existing backlog, as they will be able to recommence care home visits.

It is important to note that 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, except for the following conceivable circumstances –

- 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.
- If an individual was objecting to any restrictions already imposed via an outstanding objection, an interim authorisation could be used to provide for a review of these restrictions.

### **Financial and manpower implications**

There are no financial or manpower implications for the States arising from the adoption of these draft Regulations.

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<sup>2</sup> 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 assessments as many care settings began to restrict visitors).

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## EXPLANATORY NOTE

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These Regulations, if passed, will make temporary amendments to the Capacity and Self-Determination (Jersey) Law 2016 (“the Law”) during an extraordinary period declared by the Minister for Health and Social Services (“the Minister”). These amendments relate to the circumstances where a manager of a hospital, approved care home or other similar establishment may impose a significant restriction on a person that would otherwise amount to a deprivation of liberty.

*Regulation 1* inserts new provisions into the Law.

Article 60A is an Order-making power that allows the Minister to declare the start of an extraordinary period if the Covid-19 outbreak in Jersey is limiting the ability to carry out assessments for the purpose of standard authorizations for imposing significant restrictions on liberty under Part 5 of the Law and it is proportionate and necessary to make the Order. The Order may declare a period of up to 28 days. The Order may be amended to reduce the period or to extend the period. Each extension may be for a period of up to 28 days.

Article 60B provides that the new provisions apply only where the Minister has declared an extraordinary period by an Order made under the new Article 60A.

Article 60C allows a restriction to be imposed under Article 38 of the Law where an interim authorization has been granted by the Minister under new Article 60F.

Article 60D sets out the circumstances where a manager may apply for an interim authorization and what must be included in the application. To make an application the manager must reasonably believe that it is not practicable or would cause undesirable delay for a standard authorization to be granted, that the person it applies to lacks capacity and it is necessary in the person’s interests to impose a significant restriction. One of the pieces of information that must accompany the application is supporting evidence of lack of capacity.

Article 60E provides that when an application is received, the Minister must consult with the person’s health and welfare attorney or guardian if one exists unless it is not practicable to do so. The Minister must also consult with any other person the manager has included in the application as one appropriate to be consulted and may consult any other person the Minister considers appropriate.

Article 60F provides for authorizing of the restriction and the information that the authorization must contain. The Minister may authorize the restriction and may impose conditions. The authorization lasts for up to 90 days.

Article 60G provides that Articles 51 and 55 of the Law apply to interim authorizations as they apply to standard authorizations. Article 51 makes provision for the appointment of an independent advocate to represent the person in respect of whom the application has been made. Article 55 provides for the review of an authorization by the Mental Health Review Tribunal established under Part 7 of the Mental Health (Jersey) Law 2016.

Article 60H provides that the inserted Articles expire on 30th September 2020.

*Regulation 2* provides for the title by which the Regulations may be cited. The Regulations will come into force on the day after they are made.







Jersey

## DRAFT COVID-19 (CAPACITY AND SELF-DETERMINATION) (JERSEY) REGULATIONS 202-

Made [date to be inserted]

Coming into force [date to be inserted]

**THE STATES** make these Regulations under Article 2 of the Covid-19 (Enabling Provisions) (Jersey) Law 2020<sup>1</sup> –

### 1 Temporary amendment of the Capacity and Self-Determination (Jersey) Law 2016

After Article 60 of the Capacity and Self-Determination (Jersey) Law 2016<sup>2</sup> there is inserted –

#### “60A Power to declare that an extraordinary period exists

- (1) This Article applies if the Minister is satisfied that –
  - (a) the disruption caused by the Covid-19 outbreak in Jersey is limiting the ability to carry out assessments for the purpose of standard authorizations for imposing significant restrictions on liberty under Part 5; and
  - (b) it is proportionate and necessary to make the Order described in paragraph (2).
- (2) The Minister may, by Order, declare the start of an extraordinary period and the end of that period, being no later than 28 days after the start.
- (3) Despite Article 11 of the Interpretation (Jersey) Law 1954<sup>3</sup>, the provision declaring the end of the period may not be amended other than –
  - (a) to declare an earlier end; or
  - (b) to declare a later end, being no later than 28 days after the commencement of each Order making such an amendment.

**60B Temporary provision during the Covid-19 outbreak**

Articles 60C to 60G apply where the Minister for Health and Social Services has declared an extraordinary period by an Order made under Article 60A.

**60C Temporary provision permitting significant restriction on liberty**

M may lawfully impose on P a significant restriction on liberty under Article 38 if, in respect of P, an interim authorization has been granted by the Minister under Article 60F.

**60D Application for an interim authorization**

- (1) M may apply to the Minister for an interim authorization if M reasonably believes that –
  - (a) the duty imposed by Article 43(3) applies to M;
  - (b) P lacks capacity in relation to giving consent to the arrangements for his or her care or treatment;
  - (c) it is necessary, in the interests of P's health or safety, to impose a significant restriction on P's liberty;
  - (d) it is in P's best interests to be provided with care or treatment in circumstances which would amount to a significant restriction on P's liberty;
  - (e) the restriction on P's liberty is a proportionate response to –
    - (i) the likelihood of P's suffering any harm, and
    - (ii) the seriousness of that harm, should it occur; and
  - (f) it is not practicable or would result in undesirable delay for a standard authorization to be granted.
- (2) An application under paragraph (1) must be in writing, in such form as the Minister may require, and must contain the following matters –
  - (a) P's name;
  - (b) M's name and the name of any other registered person concerned;
  - (c) the name and address of the relevant place;
  - (d) the grounds for the application;
  - (e) the nature and extent of the proposed restriction on P's liberty;
  - (f) the names of any person listed in Article 44(5) whom M considers it appropriate for the Minister to consult; and
  - (g) a report containing the information set out in paragraph (3).
- (3) The report must –
  - (a) set out M's assessment regarding the matters in paragraph (1)(b) to (e) and include supporting evidence of diagnosis of impairment or disturbance in the functioning of P's mind or brain; and

- (b) state whether to M's knowledge P has made an advance decision to refuse treatment under Part 3, and if so set out the terms of that decision.

#### **60E Consultation with appropriate persons**

Upon receipt of an application under Article 60D the Minister –

- (a) must, if practicable, consult –
  - (i) any person on whom authority has been conferred by a health and welfare LPA,
  - (ii) P's guardian, if any, and
  - (iii) any other person named in the application as a person whom M considers it appropriate for the Minister to consult; and
- (b) may consult with any other person whom the Minister considers appropriate.

#### **60F Interim authorization**

- (1) This Article applies where –
  - (a) the Minister is satisfied that the application under Article 60D is duly made; and
  - (b) where practicable, any appropriate persons have been consulted in accordance with Article 60E.
- (2) Where this Article applies, the Minister may authorize the imposition of significant restrictions on P's liberty for a period of no longer than 90 days beginning with the day of the authorization.
- (3) As soon as practicable following an authorization under paragraph (2) the Minister must give notice in writing to M, which must specify –
  - (a) P's name;
  - (b) M's name and the name of any other registered person concerned;
  - (c) the date on which and the period during which the authorization is to take effect;
  - (d) the nature and extent of the significant restrictions on P's liberty which are permitted to be imposed by the authorization; and
  - (e) any conditions or directions relating to the imposition of such restrictions.
- (4) Nothing in this Article permits the Minister to authorize a significant restriction on P's liberty which conflicts or would conflict with a valid advance decision made by P under Part 3.

**60G Application of Articles 51 and 55**

Articles 51 and 55 apply to an interim authorization in the same way that they apply to a standard authorization.

**60H Expiration of this Article and Articles 60A to 60G**

- (1) Subject to paragraph (2), this Article and Articles 60A to 60G expire on 30th September 2020.
- (2) Where an interim authorization is in place on 30th September 2020, or when the extraordinary period ends, that authorization remains in place until the end of the period specified in the authorization.”.

**2 Citation, commencement and expiry**

These Regulations may be cited as the Covid-19 (Capacity and Self-Determination) (Jersey) Regulations 202- and come into force on the day after they are made.

## ENDNOTES

### Table of Endnote References

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<i>1</i>	<i>L.2/2020</i>
<i>2</i>	<i>chapter 20.040</i>
<i>3</i>	<i>chapter 15.360</i>