Covid-19 (Capacity and Self-Determination) (Jersey) Regulations 2020

Consultation Response

Introduction

The Capacity and Self-Determination (Jersey) Law 2016[1] passed into law in 2018. It was the first occasion in which a piece of legislation existed in Jersey relating to meeting the needs of adults (16 and above) who are assessed as lacking the capacity to make their own decisions, whether in relation to health and care arrangements or financial matters. Prior to this, a capacity policy had existed, but this was not sufficient in providing all of the safeguards necessary to ensure that the rights of people deemed to lack capacity were properly upheld.

The Law contains a chapter (Part 5) which deals with Significant Restrictions of Liberty and the statutory arrangements associated in authorising them. These arrangements reflect but are not identical to the Deprivation of Liberty Safeguards (DOLS)[2] in England and Wales.

The Law facilitates the making of an Urgent Authorisation, which can last for up to 28 days and is not renewable, and a more comprehensive Standard Authorisation which can last for up to 12 months and which is renewable. These Authorisations relate to people who are residing in a 'relevant place' i.e. a care home or a hospital.

[1] Capacity and Self-Determination (Jersey) Law 2016. https://www.jerseylaw.je/laws/enacted/Pages/L-30-2016.aspx

[2] Mental Capacity Act 2005. SCHEDULE A1: Hospital and care home residents: deprivation of libertyhttp://www.legislation.gov.uk/ukpga/2005/9/schedule/A1

The current difficulties relating to the Covid-19 pandemic affect the provision of care in care homes and hospitals. The States of Jersey Assembly considered it necessary to provide for the making an Interim Authorisation.

Whilst such an Authorisation would need to be approved by the Minister for Health and Community Services (as do both Urgent and Standard Authorisations), it would enable the arrangements relating to a Standard Authorisation to be applied differently if public health requirements relating to Covid-19 precluded the granting of a Standard Authorisation in the usual way. Specifically, they would enable that a care home manager to make an application for an Interim Authorisation without the need for an assessment by an independent assessor.

This amendment would be made by Regulation[3] and the Care Commission is requested to respond to the content of these Regulations.

Response

The Jersey Care Commission responds to the provision of these Regulations as follows:

It is both appropriate and reassuring that Article 60A only applies if an extraordinary period is declared by the Minister.

However, the Commission is of the view that it is possible to use a combination of existing legislation and current practical arrangements to meet the need associated with authorising a Significant Restriction on Liberty (SRoL).

[3] Covid-19 (Capacity and Self-Determination) (Jersey) Regulations https://statesassembly.gov.je/AssemblyPropositions/2020/P.47-2020.pdf

The Commission has not formally consulted with representatives of care providers but is aware of no demand from managers of care homes (or of any other regulated activities), that any such change in this law or any other provision be made.

The Commission is aware of a substantial backlog in unprocessed applications for Standard Authorisations. This number is understood to presently stand at approximately 107[4]. The Commission is concerned that each of these outstanding applications are likely to represent, to some degree, an interference with a person's right to liberty as defined within Article 5 of the European Convention of Human Rights[5] and that none have yet been authorised in accordance with Article 38 (2) of the Capacity and Self-Determination (Jersey) Law 2016.

The Commission is of the view that the granting of Interim Authorisations may have the unintended consequence of increasing this backlog. The Commission would ask the Minister to clarify how these deferred authorisations will be reviewed at the end of the 'extraordinary period' and the basis upon which the various outstanding authorisations might be prioritised. Similarly, the Commission seeks reassurance that this information will be provided to care home managers.

The Commission acknowledges that the granting of an Interim Authorisation is dependent upon the satisfaction of the Minister that this is appropriate. The Commission understands that in practice, the granting of an Urgent Authorisation is a delegated function in that the Mental Health Law Administrator is required to authorise any such arrangements on behalf of the Minister. It is unclear as to whether the Administrator would have a similar role in respect of Interim

[4]DRAFT COVID-19 (CAPACITY AND SELF-DETERMINATION) (JERSEY) REGULATIONS 202- (page 5) https://statesassembly.gov.je/AssemblyPropositions/2020/P.47-2020.pdf

[5] European Convention on Human Rights https://www.echr.coe.int/Documents/Convention_ENG.pdf

Authorisations. If so, our understanding is that the role of the Administrator in this regard is to ensure that the legalities of the application are in order rather than to confirm the necessity or appropriateness of the application itself. As such, the Commission is not assured that this provision constitutes a sufficiently robust safeguard.

Article 60D stipulates the various beliefs which a manager should reasonably have prior to making an application. These are that:

- P lacks capacity in relation to giving consent to the arrangements for his or her care or treatment;
- **it is necessary, in the interests of P's health or safety, to impose a significant restriction on P's liberty;**
- **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;**
- the restriction on P's liberty is a proportionate response to –
  the likelihood of P's suffering any harm, and
  the seriousness of that harm, should it occur; and
- it is not practicable or would result in undesirable delay for a standard authorisation to be granted.

The Commission notes that the two beliefs highlighted mirror the beliefs which are already required in Article 42 of the Capacity and Self-Determination (Jersey) Law 2016, in order that a manager of a relevant place makes an application for an Urgent Authorisation. However, the remaining beliefs are not included within the

requirements relating to an Urgent Authorisation. It is in respect of these aspects that the Commission has particular concerns.

It is noted that in respect of a Standard Authorisation, a Capacity and Liberty Assessor (CLA) may undertake an assessment in respect of a Significant Restriction on Liberty (SRoL), relying upon prior medical evidence of lack of capacity, where this exists. However, such evidence would not be enough to authorise an SRoL. Rather, the CLA needs to satisfy themselves that the person being assessed lacks capacity about the decision and that the intended significant restriction is genuinely in that person's best interests.

In respect of an Interim Authorisation, a care home manager would be able/required to provide medical evidence of a lack of capacity without undertaking a formal assessment of capacity themselves. The Commission is concerned that a diagnosis of (for example), dementia could be presented as de facto evidence that a person lacks capacity to consent to significant restriction/s being imposed on their liberty. 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.

Capacity is time and decision specific. It is not normally permissible for holistic statements relating to a person lacking capacity to be used as the basis for an assessment (indeed this would contradict the fundamental principle of 'no assumption of a lack of capacity'). It may be acknowledged that broad beliefs relating to a person's capacity might lead a manager to make an application for an Urgent SRoL. However, such provision can last for no longer than 28 days and would

require that a formal and detailed assessment by at least one appropriately trained professional be undertaken in order that authorisation exceeds this period.

The Commission believes that it is also worthy of note that a formal diagnosis of a mental disorder (which is defined in the Mental Health (Jersey) Law 2016[6] as 'any disorder or disability of the mind'), will not always relate to a formal medical diagnosis. The Commission is concerned that there is an actual or potential conflation in respect of diagnosis and capacity. It should be maintained that it is possible for a person to lack capacity in relation to a decision and to lack a formal diagnosis of a mental disorder, as it is for a person to have such a formal diagnosis and to possess capacity in relation to the making of a decision.

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

The Commission accepts that managers and other care home staff are required to form judgements pertaining to capacity regularly as part of their professional role. The Commission also recognises that managers are required to make a judgement relating to an individual's capacity in completing Form 1 Capacity and Self-Determination (Jersey) Law 2016[7], when making an application for an Urgent Authorisation. However, the Commission does not accept that it is appropriate for

[6] Mental Health (Jersey) Law 2016 https://www.jerseylaw.je/laws/enacted/Pages/L-29-2016.aspx
[7] Form 1 Capacity and Self-Determination (Jersey) Law 2016 https://soj/depts/HSS/_layouts/15/WopiFrame.aspx?sourcedoc=/depts/HSS/Documents/Read%20only%20forms/F%20Significant%20Restriction%20of%20Liberty%20Form%20CSDL%2020191118%20AL.docx&action=default&DefaultItemOpen=1

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. As a point of reiteration, the Commission does not accept that it is acceptable for a manager to be reliant upon a pre-existing medical opinion relating to an individual's capacity and particularly not for this length of time.

Similarly, the Commission accepts that managers need to make decisions pertaining to risk as part of their role in managing a care home and that this extends to undertaking risk assessments and in measuring/weighing risk against the imposing of restrictions. The Commission recognises that managers are required to state that significant restrictions are in the interests of a person's health or safety, in completing Form 1 Capacity and Self-Determination (Jersey) Law 2016, when making an application for an Urgent Authorisation. However, the Commission does not accept that managers should be required to make and to justify such decision-making in the context of a Significant Restriction which may be authorised for up to 90 days.

In summary, the Commission acknowledges that the Form 1 application includes information relating to capacity and to the necessity associated with the imposing of an Urgent Significant Restriction on Liberty. It is recognised that managers are required to provide this information in order that an Urgent Authorisation be granted by the Minister. However, there is a fundamental difference between Urgent and Interim authorisations and commensurately, to the level of responsibility associated in making such applications.

This difference relates to the purpose of these authorisations and to their respective time periods. Urgent authorisations are intended to facilitate significant restrictions in

situations where such an imposition is immediately required. Urgent Authorisations in Jersey may last for a period of no longer than 28 days. By way of comparison, the Urgent Authorisation associated with the Deprivation of Liberty Safeguards (DoLS), which is equivalent legislation in England and Wales, may last for a period of up to 7 days and may, with permission, be renewed for a further 7 days. The provision in Jersey of 14 days over and above that which is available under DOLS, should, in the Commission's view, afford ample time for the arranging of a Standard Assessment. The addition of a further 62 days to the period in which a person may be lawfully detained without a Standard Assessment having been facilitated, is, in the view of the Commission, excessive.

The Commission has received no intelligence which would lead it to conclude that there is a shortage of either doctors or trained assessors who are able or prepared to undertake such assessments. The Commission notes that similar arrangements to those encompassed within these Regulations do not appear to have been mirrored elsewhere in the British Isles. The Commission recognises that where there have been problems relating to resources associated with the Deprivation of Liberty Safeguards (DOLS), within the context of Covid-19, that creative and innovative solutions have been applied. These have included the use of technology and virtual assessments to support the undertaking of assessments, the temporary reliance upon older/previous assessments to inform decisions relating to mental capacity and the production of a truncated form pertaining to Urgent Authorisations. The Commission notes that primary legislation such as the Mental Capacity Act (2005)[8] has not been amended to meet these challenges.

[8] Mental Capacity Act 2005 http://www.legislation.gov.uk/ukpga/2005/9/contents

Article 60D further stipulates the need for a manager to include specified information in their application. This includes the person's name and other fundamental information which mirrors the requirements of those associated with an Urgent Authorisation. The Commission has no concerns relating to these matters.

However, the Commission is concerned in respect of the added requirement that a manager includes:

- the names of any person listed in Article 44(5) whom the manager considers it appropriate for the Minister to consult;
- a report containing the manager'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 (the person's) mind or brain;
- a statement regarding, whether to (the manager's) knowledge (the person) has made an advance decision to refuse treatment under Part 3, and if so set out the terms of that decision.

It is the Commission's view that these expectations of managers are too high. The Regulations require that a manager must identify any person with authority conferred by the making of a health and welfare Lasting Power of Attorney (LPA); any guardian and any other person whom the manager considers it appropriate for the Minister to consult.

The Commission accepts that in many or most cases, a manager will be able to identify whether a health and welfare LPA or a Guardianship Order is in place. However, in more urgent cases or where the person is not well known to the manager, this information may not be in immediate possession. If such an arrangement was identified in the future and it became apparent that the manager

failed to identify or was unable, at the time of the authorisation, to identify that such an arrangement was in situ, the Commission is concerned as to where the liability for this error or omission may lay. A similar concern relates to the making of an Advance Decision to Refuse Treatment under Part 3 of the 2016 Law. Whilst such risks may exist within the application for an Urgent Authorisation, the Commission perceives that these risks increase incrementally given the additional 62 days associated with an Interim Authorisation.

The Commission has concerns relating to the lack of guidance in respect of whom else a manager might consider to be appropriate for the Minister to consult. In situations where there is (for example), inter-familial animosity, it may prove difficult for a manager to discern who is and who is not appropriate for the Minister to consult.

It is acknowledged that some of these issues already relate to applications for Urgent Authorisations. However, whilst Urgent Authorisations cannot exceed 28 days and, arguably represent a *compromise position* in lieu of a Standard Authorisation being organised, the Interim Authorisation can last for a much longer period. As such, the Commission is concerned that these measures confer too great a level of responsibility upon an individual manager in respect of a decision of this magnitude.

In respect of managers, the Commission recognises the range of skills, qualifications, experience and knowledge which they possess. However, their role is different from that of either a doctor or a Capacity and Liberty Assessor (CLA). It is highly unlikely that managers will be able to provide the specific perspective on legal, ethical and health related matters which doctors and CLA's are able to provide. As such, the Commission would question whether it is appropriate that care home

managers be required to adopt the burdensome role associated with seeking the authorisation of an Interim SRoL.

There is an added concern relating to potential conflicts of interest. In most cases, care home managers are required to manage a function of a business. Part of the processes in assessing a person for admission into a care home and in supporting a person to remain in a care home, have significant financial implications. Whilst it is not the Commission's experience that managers apply this aspect of their role for any purpose other than the best interests of care receivers, it would be naïve to presume that this is never a possibility. Whilst this is probably a small risk in relation to 28-day periods of significant restriction; this risk increases incrementally in relation to a 90-day period of significant restriction (given that the capacity and best interests of the care receiver may not have been independently assessed for up to the full duration of this timescale).

The Commission seeks clarification as to how the Minister would consult with the people identified by the manager. It may be presumed that this would be a delegated function but, in such case, the Commission would wish to understand to whom this delegation would be made. A similar point might be made in respect of the facility in Regulation 60F (3.a), whereby the Minister may impose *any conditions or directions relating to* the authorisation. The Commission seeks clarification as to who would be delegated to impose such conditions and directions.

Conclusion

The Commission is not of the view that the ability to authorise a Significant Restriction on Liberty in this manner, for a period of up to 90 days is proportionate to the potential circumstances which may arise because of Covid-19. It appears to the

Commission that this is an inordinate period given that an assessment by a doctor and an appropriately trained assessor will not have taken place.

For each of these reasons, the Commission does not consider that these Regulations are either proportionate or necessary. The Commission recognises the constraints imposed by Covid-19 may be such that the existing arrangements may need to be applied in a different and more flexible way and that decisions may need to be taken with more limited information. However, it does not accept that an amendment such as this, to legislation which is still relatively new, and which continues to be interpreted and understood by the health and care sector in Jersey, is an appropriate or proportionate response.