



Children's Commissioner for Jersey Promoting and Protecting Children's Rights

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

Autonomy and self-determination are core human rights principles. They are consistently protected such as through Article 12 of the United Nations Convention on the Rights of the Child (UNCRC), which was extended to Jersey in 2014. All children and young people have the right to not be deprived of their liberty with very limited exceptions under Article 37 of the UNCRC, and indeed all individuals have similar protections under the Human Rights (Jersey) Law¹.

Any interference with rights must be strictly necessary, proportionate, for the shortest possible period of time and non-discriminatory. The provisions contained within the draft Regulations propose significant reductions in the protections established in Jersey Law, and engage an array of rights protections under international law including the right to a standard of living adequate for the child's physical, mental, spiritual, moral and social development² and the right to privacy and family life³.

I note efforts to embed protections such as the inapplicability of these provisions unless the Minister for Health and Social Services has declared an extraordinary period under Regulation 1 of the Covid-19 (Mental Health) (Jersey) Regulations 202-. Further, I note that there are efforts to embed a test of necessity and an assessment of an individual's best interests.

However, I have concerns around how the necessity test and proportionality assessment would be conducted, and how considerations would be weighted. 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? 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.

I note that the 2016 law recognises that a person who is deemed to lack capacity may "at some time have capacity"⁴ yet this is not reflected in the current provisions. Relying on a previous assessment of capacity therefore would significantly dilute rights protections here.

Further, there must be appropriate access to timely review, and an accessible appeals process. This includes access to legal support and advocacy to be able to navigate a complex system and effectively advocate for the rights of individuals. Further oversight is required to provide additional checks and balances on these provisions.

¹ Article 5, Schedule 1

² Article 27, UNCRC

³ Article 16, UNCRC

⁴ See Article 6, Capacity and Self-Determination (Jersey) Law 2016

The recent United Nations Global Study on Children Deprived of their Liberty categorically stated that “Deprivation of liberty means deprivation of rights, agency, visibility, opportunities and love. Depriving children of liberty is depriving them of their childhood.”⁵

This amendment requires appropriate scrutiny and debate which is not possible due to the late publication of the Proposition. The Office of the Children’s Commissioner for Jersey was not consulted on these amendments at any stage. As a National Human Rights Institution, I feel obliged to raise the Human Rights issues and to bring them to the attention of the Minister and States Assembly prior to debate so that they can consider the Human Rights issues when making their decisions.

Human rights under international law continue to apply in Jersey and are universal international minimums, not optional. Rights are there to protect children and adults alike and are just as necessary, if not more so, in times of crisis. I therefore strongly advise that the Proposition is withdrawn to allow appropriate debate, scrutiny, and additional safeguards to be pursued. I would suggest that consideration be given regarding the time required to re-lodge an amendment be temporarily reduced, provided that it is in response to Covid-19, to try to mitigate any negative consequences of a 3-week delay. There would need to be some safeguards but that would at least allow the negative consequences of this proposition to be addressed.

⁵ Seventy-fourth session of the United Nations General Assembly: Promotion and protection of the rights of children A/74/136