



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

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### **Formal advice on the Draft Children and Young People (Jersey) Law 202-**

I welcome the draft Children and Young People (Jersey) Law. The draft Law substantially strengthens existing Legislation – the Children (Jersey) Law 2002. Current legislation is not sufficiently rights-based nor adapted to children's needs, and it predates Jersey becoming a signatory to the United Nations Convention on the Rights of the Child (UNCRC). This Draft law will make the necessary provision to promote and support the wellbeing of children and young people and will safeguard the welfare of children and young people.

#### **Background**

In 2017, the Independent Jersey Care Inquiry (IJCI) reported on a fundamental failure:

***'Failure to have in place an adequate legislative framework that prioritises the welfare of children in need or at risk (in respect of both child welfare and youth offending matters). Jersey's childcare legislation has lagged behind that of other jurisdictions in the UK and elsewhere in the developed world – often by decades. This has meant that whole generations of children have endured sub-standard provision and outdated attitudes. For example, while English childcare was significantly overhauled in 1989 to reflect advances in research and practice, it took another 13 years before Jersey passed a modern Act (the Children (Jersey) Law 2002), by which time England was well on the way to enacting a new Children Act 2004 to reflect advances, particularly in the area of assessment and management of child protection cases. As Jersey's legislative framework is most closely aligned with that of England, the Panel believes that it is appropriate to model and mirror English legislative developments, tailoring their application to Jersey's needs and taking advantage of the extensive policy and practice guidance that support English childcare law.'***<sup>1</sup>

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<sup>1</sup> IJCI Chapter 12 Page 16 Para 12.46

The IJCI went on to comment: *‘The legislative basis of the Jersey Law has been further weakened by failure to adopt the key underpinning elements of the English Act in their entirety – specifically the failure to recognise in law the concept of a “child in need” and the state’s duty towards such children – which has led to a lack of impetus in tackling the causes of deprivation and of child maltreatment, a lack of clarity about thresholds for intervention and insufficient weight being given to the rights and assessed needs of children and young people.’*<sup>2</sup>

The IJCI made several recommendations. Recommendation 5 was regarding legislation and the acknowledgement that *‘in the area of legislation and policy, there is still a significant amount of work required’* and *‘that legislation for children in Jersey was almost invariably lagging behind positive developments in the UK and beyond.’*<sup>3</sup> Four years on from this recommendation, a draft Law is being proposed which will, to some extent, extend provision to promote and support the wellbeing of children – for example, children with disabilities and children who are in the care of the Minister.

All children should live in a supportive, protective and caring environment that helps them develop their full potential. When a child’s own family is unable, even with support, to provide adequate care for the child, the state is responsible for ensuring appropriate alternative care. Children’s rights in relation to alternative care are strongly grounded in the UNCRC and its Optional Protocols. The primary consideration should always be given to prioritising prevention of unnecessary separation of children from their families and the provision of support, both to the child and their families. By supporting the wellbeing, and by safeguarding the welfare of children, more children will be able to remain living with their families.

The draft legislation must guarantee the rights and best interests of the child. In this manner, states should provide legislation that respects, protects and fulfils the rights of every child, including the right to provision, participation and protection, as well as the principle of the best interest of the child. The Children (Jersey) Law 2002 promotes the welfare of the child but it does not expressly prioritise the best interest of the child in matters to which it applies. Under the Children (Jersey) Law, ‘welfare’ is used in preference to best interests in relation to some orders where a child may be separated from their parent(s). The draft Children and Young People (Jersey) Law provides an opportunity to correct this.

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<sup>2</sup> IJCI Chapter 12 Page 16 Para 12.49

<sup>3</sup> IJCI Chapter 13 Page 59 Para 13.31

I have consulted with children and young people growing up in care, as well as with care leavers, and their voices are represented in this report in the form of direct statements from them.

I note the obligation for the Minister to consult with the Commissioner for Children and Young People before publishing guidance or revised guidance, and I welcome the opportunity to ensure that the guidance is within the spirit and the law of the UNCRC.

### **Response**

This response examines the **Draft Children and Young People (Jersey) Law 202-** through the lens of children's rights, as established in the UNCRC. It is imperative that that the Government of Jersey puts children's rights at the centre of this draft legislation. In order to support this, I will set out the relevant UNCRC Articles, General Comments and the Guidelines for the Alternative Care of Children (GACC) adopted by the UN General Assembly in 2010.

In order to review the draft Law, it is imperative to establish how the Law will serve to **respect, protect** and **fulfil** the rights of children, as established in UNCRC. It is important to remember that children are rights bearers, and the Government of Jersey is duty bearer to these rights, and as such has specific obligations to children that are set out in the UNCRC.

As a signatory to the UNCRC, the Government of Jersey must place the child, and the rights of the child, at the centre of development of law, policy and practice. The General Principles of the UNCRC provide a framework that will enable the Government to meet its ambition to put children first. The three "passions" in the Government's Children and Young People's Plan 2019-23 are those of protecting children's rights; reducing inequalities; and promoting wellbeing.

Children in Jersey must receive adequate care because it is an essential step in securing the realisation of their rights. This is especially important for children in the care of the Minister and other children whose families require support.

In looking at the regulations through a children's rights lens, particular attention should be given to the four general principles of the UNCRC, which are:

- **non-discrimination** (UNCRC Article 2)
- the **best interests** of the child (UNCRC Article 3)
- the right to **life, survival and development** (UNCRC Article 6)
- and the right of the child to **participation** (UNCRC Article 12)

These are recognised as being particularly “special” as they help to interpret all the other rights in the UNCRC and play a fundamental role in their realisation. See Appendix 1 for further details.

### **Respect, Protect and Fulfil**

The obligation to **respect** means that states must refrain from interfering with or curtailing the enjoyment of human rights. The obligation to **protect** requires states to protect individuals and groups against human rights abuses. The obligation to **fulfil** means that states must take positive action to facilitate the enjoyment of basic human rights.

From a rights-based perspective, the Law should be framed around the progressive realisation of the rights of children. This makes clear that there is a minimum standard beneath which no child must fall but that Jersey is aiming higher for its children and is committed to building on and enhancing this standard to improve children’s experiences, including the experience of being looked after.

Children are rights holders in their own regard, and the state must recognise its role as duty bearer to children. **This is a particular obligation to children growing up in care.** Good care is typified by secure, good-quality living arrangements with carers who offer warm, personal and practical help. Children in care have a right to each of those things – security, quality of life and living arrangements, and caregivers who offer a loving home – and the realisation of each right will lead to good care. These proposed regulations should support the realisation of these rights. I therefore welcome Part 6 which contains provisions regarding **Corporate Parenting**. New duties and responsibilities for public authorities, schools, day care and other bodies operating at arm’s length from the States of Jersey will provide a shared responsibility to ensure that children in the care of the Minister or those leaving care are supported to thrive. The lack of a framework for corporate parenting and the lack of statutory basis was mentioned by Ofsted in their inspection of the Jersey’s children’s social work service in 2018. It is critical that this draft

legislation develops a statutory framework of corporate parenting clearly setting out responsibilities for looked after children. This was the first recommendation in the Ofsted report.<sup>4</sup>

The UNCRC set out the most relevant articles and General Comments on family environment and alternative care in their Reporting Guidelines. These UNCRC Articles are particularly concerned with children growing up in alternative care and those children who grow up in families in need of support:

- Article 2 Non discrimination
- Article 3 Best Interest of the child
- Article 5 Parental Guidance and the child's evolving capacities
- Article 6 The right to life, survival and development
- Article 9 Separation from parents
- Article 10 Entering or leaving countries for family reunification
- Article 12 Right to be heard
- Article 18 (1-3) assistance to parents, development of services for the care of children
- Article 19 Protection from harm
- Article 20 When deprived of the family environment, the child has the right to special protection and assistance
- Article 21 Adoption
- Article 23 Rights of disabled children
- Article 25 Right to review of treatment whilst in care
- Article 27 Child's right to an adequate standard of living
- Article 28 Right to education
- Article 34 Sexual exploitation of children
- Article 39 Children have the right to support to recover from abuse and trauma

The General Comment No.7 on implementing child rights in early childhood also applies.

The CRC Committee also requires states to take account of the Guidelines for the Alternative Care of Children (GACC) adopted by the UN General Assembly in 2010.<sup>5</sup> The Reporting Guidelines and GACC

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<sup>4</sup> Jersey Care Commission. Making a Difference; Driving Improvement. September 2018

<sup>5</sup> General Assembly resolution 64/142 A/RES/64/142

confirm a number of areas that governments should address when reporting on progress on family environment and alternative care. Those elements pertinent to this draft Law include:

- Parental responsibility and guidance
- Separation from parents
- Family Reunification
- Children deprived of family environment
- Periodic review of placements

While not all the areas covered in the Reporting Guidelines require states to introduce legislative measures of implementation, it is anticipated that legislative measures, including framework legislation, will be amongst the measures introduced. Therefore, the proposed Law should focus on addressing these articles and guidelines where they are not covered in other primary legislation. It is therefore welcomed that the draft Law provides for services for children with a health or development need and children affected by disability, as legislation to support those children and young people is absent from existing legislation.

### **Parental Responsibility and Guidance (Articles 5 and 18(1) and (2))**

The CRC Committee is particularly concerned about:

- The primacy of parents, caregivers and ‘the family’ in the development of the child, including through recognition of the evolving capacities of the child
  - The role of the State in supporting parents and caregivers in this role, including through the reduction of harmful deprivations, disruptions and distortions in children’s care; and taking action where young children’s wellbeing may be at risk
  - The development of a systematic approach to law and policy making to provide for rights-based, multi-sectoral strategies to ensure that the best interests of the child are always the starting point for planning and service provision
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Children have the right to be brought up by both parents, if possible. When this is not possible, they should be cared for. This is further explained in Article 20.

I therefore welcome the inclusion of Part 4, the provision of services for children with health or development needs, and Part 5, the statutory wellbeing assessment and plan. This will enable action to be taken at an early stage when children's wellbeing may be at risk.

### **Separation From Parents (Article 9)**

UNCRC Article 9 requires that a child should only be separated from their parents if it is in the best interests of the child. Whether this is the case or not should be determined by competent authorities and should be subject to judicial review. The child (as well as all other interested parties) should have the opportunity to make their views known in any proceedings and should retain the right to maintain regular direct contact with both parents unless it is not in the child's best interests. Issues of particular concern are identified as:

- That a child who has been relinquished or abandoned is able to access information about their origins
- That there is an assessment of the child's situation to consider whether reintegration would be in the best interests of the child, which takes into account the child's immediate safety and wellbeing, as well as their longer-term care and development, and covers the child's personal and developmental characteristics
- The existence of frameworks to provide for adequate alternative care options, with priority to family and community-based solutions, and to ensure the availability of a range of alternative care options for emergency, short-term and long-term care, and a regulatory framework to ensure a standard process for the referral or admission of a child to alternative care
- That the removal of children from their families should always: be subject to thorough investigation; be in accordance with the best interests of the child and only used as a measure of last resort

I therefore welcome Part 7, which contains provisions regarding support for children who are looked after, especially the provision of a wellbeing assessment and corresponding plan. I particularly welcome the provision in Part 7 that appoints personal advisers and enables staying-put arrangements to be statutory.

*'Leaving care advisors are so important – mine was my "ladder": she was there for me, helping me to climb one step at a time. She helped me to believe in myself and helped me believe that I could be anyone and I was not "written off". My leaving care advisor did a brilliant job – she really made a difference to my life. She was amazing! I would probably be in prison if it wasn't for her. She helped me achieve.'*

### **Children Deprived of Family Environment (Article 20)**

Article 20 requires a child deprived of their family environment to be given special protection, including through legislation. The Committee's General Comments and the GACC require that alternative care should be implemented in accordance with the law, and when placement is necessary, due regard should be paid to continuity in a child's upbringing, and to the child's ethnic, religious, cultural and linguistic background.

The GACC set out steps the state must take to meet their obligations to children in alternative care. Several of these could be addressed in legislation:

- Facilitation of contact, not just with family but with other people the child is close to, including friends, neighbours and previous carers, and ensuring that children in alternative care because of parental imprisonment or prolonged hospitalization have the opportunity to maintain contact with their parents and receive any necessary counselling and support in that regard
- Access for children in alternative care to a person of trust in whom they may confide
- Access to an effective complaints mechanism
- Mechanisms to designate the legal right and responsibility to make decisions to an individual or competent entity, in consultation with the child
- Stipulation that all agencies and facilities must be registered and authorised to operate by social welfare services or another competent authority, and that failure to comply with such legislation constitutes an offence punishable by law. Authorisation should be granted and regularly reviewed by the competent authorities on the basis of standard criteria
- Ensure and maintain complete, accurate, up-to-date and confidential records which can be made available to the child, and to the child's parents, within the limits of the child's right to privacy and confidentiality



- Laws and regulations to prohibit the recruitment and solicitation of children for placement in residential care by agencies, facilities or individuals
- The need for special and appropriate measures to protect children in informal care from abuse, neglect and all forms of exploitation
- The need for alternative care accommodation to reach health and safety standards which, along with supervision, ensures that children can be protected from abuse
- Ensuring that measures aimed at protecting children in alternative care do not unnecessarily restrict their liberty and are in accordance with the law
- Introducing measures to ensure that children in alternative care are not stigmatised
- Prohibiting disciplinary measures or behaviour management that amount to torture, cruel, inhuman or degrading treatment, including solitary confinement, physical or psychological violence, and taking measures to ensure such practices are punishable by law
- Making sure any use of force or restraint is in accordance with the law

***‘The complaints procedure is not strong either, and there’s no follow-up even if a complaint is made – no response, no feedback or action.’***

Part 9 of the draft Law contains provisions regarding independent advocates and complaints. I am pleased to see that some of the recommendations made in my Review of Independent Advocacy are being followed up in this draft legislation to ensure that advocacy is statutory and independent. Part 8, Article 42, sets out the role of independent reviewing officers, and this is to be welcomed. Their independence from Government must be clearly stated in this draft legislation. 42(9) states that the IRO may refer a case to the chief officer for children and young people’s services. However, that chief officer holds no statutory role, and this may be a conflict of interests in some cases. I would suggest that this be amended so that the IRO may refer the case to JFCAS and/or the Children’s Commissioner, who can consider the case for proceedings for breaches of children’s human rights. The draft law falls short of the power to issue statutory guidance for IROs.

### **Right to a voice (Article 12)**

***‘Children and young people should be involved and should be listened to.’***

The requirement to take account of the ascertainable wishes and feelings of the child when action is taken under the current Children (Jersey) Law 2002 does not apply to child assessment orders or emergency

protection orders. The draft Law must ensure that the wishes and feelings of the child is taken into account in the proposed wellbeing assessment. I am pleased to note that in Part 4, Article 14(4), there is provision in statute to ascertain the wishes and feelings of the child, and that they are to be given due consideration. In Part 5, Article 20(4), reference is made to the views of the child taking into account the child's age and maturity. I would advise that this be changed to reflect UNCRC observations on the child's evolving capacities.

***'I'm not invited to meetings. Decisions are made without me.'***

### **Areas for consideration**

#### **Right to privacy**

Part 3 Article 3(5) refers to a probation officer's assessment of a child carried out in connection with a Parish Hall Enquiry (PHE). I would query the relevance of that information being shared as part of a wellbeing assessment under UNCRC Article 16 Right to Privacy. This is because the PHE process is a diversionary process, and this may be a breach of privacy. The right to privacy must also be considered under Part 2, Article 4, co-operation to promote wellbeing. Whilst co-operation is to be welcomed, the disclosure of information must have regard to the child's right to privacy. Any sharing of information must be lawful, proportionate, and necessary.

#### **Safeguarding partners**

Part 2, Article 5, sets out the arrangements to safeguard the welfare of children and refers to safeguarding partners. However, this does not set out in statute the Safeguarding Partnership Board which appears to be a missed opportunity. The 2018 review of the SPB made several recommendations, one of which was: *'We recommend that a legislative framework for safeguarding in the States of Jersey should be a priority for the new Government following the May 2018 elections. At the very least we would recommend that a duty to co-operate is introduced.'*<sup>6</sup> Whilst the duty to cooperate is set out in the draft legislation, it does not put the SPB on any statutory footing as a Board.

#### **Children's Strategic Plan**

In Part 3, Article 7, I welcome the inclusion of a Children's Strategic Plan in the draft Law. In July 2018, I recommended to the Corporate Strategy Board that there should be a statutory children's plan that sets out the collective aim of what they want to achieve by working closely together – as One Government and

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<sup>6</sup> A Review of Jersey's Safeguarding Partnership Boards Contact Consulting June 2018

as a partnership of agencies who are focused on making things better for children, young people, and their families. In September 2018, Ofsted reported that the *'lack of a children's plan has meant that the work of the strategic partnership lacks vision, governance and structure.'* I am pleased to read in 7(3) that the plan **must** be developed in consultation with persons considered appropriate by the Minister; however, I am disappointed that 7(3) states that this **may** include children. I would recommend that this be changed to **must**.

In that same report I recommended that a strategic partnership for children and young people be formed, preferably under statute, which will give leadership and direction to the Plan. This draft Law makes no provision for a statutory partnership board.

### **Non-discrimination**

As explained earlier in this advice, non-discrimination is a general principle. Part 4, Article 8(a), refers to the provision of assistance for children with a health or development need. I am concerned that this appears in the draft Law to be subject to the means of the child and each of their parents. The provision of support to children should not depend on the financial or other status of their parent, as children are rights holders in their own right. Means-tested assistance may be seen as discriminatory.

The 'staying put' arrangements set out in Part 7, Article 40, explain that the duty does not apply if the care leaver were to be in secure accommodation, Youth Offenders Institute, prison or a children's home. This means that those young care-leavers will be treated differently to those care-leavers in foster care, and therefore this part of the draft legislation is discriminatory.

***'Children and young people need a sense of safety and stability.'***

***'There needs to be more help and support with transitions, moving from place to place.'***

### **Right to Education**

Part 8, Article 41, sets out the Minister's duty to promote the educational achievement of looked-after children. This is to be welcomed. In December 2019, Ofsted reported that *'educational outcomes for children in care are poor...too many children are excluded and have limited school attendance.'*<sup>7</sup> The 2018 Jersey Virtual Head annual report stated that *'just 4.2% of looked after children in the past three years have attained 5 A-Cs at GCSE (including English and Maths)'*. I am therefore pleased to see the statutory duty to promote the educational achievement of looked-after children; however, Part 8, Article 41, does

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<sup>7</sup> Jersey Care Commission. Making a Difference; Driving Improvement. December 2019

not set out any functions that will enable the duty to be discharged. It does not put into statute the role of virtual head teacher, and there is no formal reporting mechanism to the corporate parents.

## **Conclusions**

The Government of Jersey is duty bearer to all children in Jersey, who are rights bearers under the UNCRC. When addressing the needs of children who need support, care and protection, the Government is obligated to make an effort, using the maximum available resources, to respect, protect and fulfil the rights of these children.

The proposed draft Law should be seen through a child rights lens, which will enable the Government to take action in order to respect, protect and fulfil the rights of the child.

From a rights-based perspective, the legislation must be framed around the progressive realisation of the rights of children. This makes clear that there is a minimum standard beneath which no child must fall but that Jersey is aiming higher for its children and is committed to building on and enhancing this standard to improve children's experience, including the experience of being looked after.

The language of children's rights is prevalent in this draft legislation. I am pleased to note the UNCRC General Principles on the face of the legislation. However, the language used in the draft regulations does not always take into account the voice of the child. For example, children in care have stated that they do not want to be referred to as looked-after children, yet the draft Law continues to use that phrase. I recommend that use of such terms in the draft regulations be reviewed.

The Commissioner is concerned about the impact of new regulations on existing providers. When the regulations for care homes was implemented, many third-sector providers exited from the provision as they could not meet the standards. For example, contact is currently provided by one third sector provider. Should they not be able to meet the proposed regulations, they may decide to stop providing the service. This will have a profound effect on families relying on the service for family contact. I recommend that the Government, where they are not providers of such services themselves, support third sector organisations to achieve the necessary standards set out by any proposed regulations.

I recommend that a child rights impact assessment be completed on these draft proposals so that the Government can demonstrate how they have protected, fulfilled and respected children's rights in the drafting of this legislation.

***'I want to have a good life. With help and support, young people in care can be successful.'***

Appendix 1:

### **The four general principles of the UNCRC**

**UNCRC Article 2** The principle of non-discrimination grants children the right to be treated equally under the UNCRC, regardless of particular characteristics or family background. This principle underpins the necessity for the Improvement Plan, as children who require state assistance or interference are entitled to the full realisation of all UNCRC rights, as are all children in Jersey.

**UNCRC Article 3** The Government of Jersey must work to respect the right of the child to have their best interests taken as a primary consideration when decisions are made about them. This principle is twofold: first, legislation and policies should always consider potential impact on children in Jersey, and action should be taken to mitigate any negative impact; second, decisions made about individual children should take into account the best interests of that particular child. An individual child's best interest may differ from the broader needs of children in Jersey, so decisions about individual children should be made on a case-by-case basis.

**UNCRC Article 6** Children in Jersey, whether with their families, in care or on the edges of entering or leaving care, have the right to life, survival and development. This right must be carefully considered when making decisions about children, as those who have undergone improper care or have had negative experience in care have a high likelihood of experiencing delays to their development; many UNCRC rights are closely linked to this right, including the right to health and health services (UNCRC Article 24) and the right to education (UNCRC Articles 28 and 29).

**UNCRC Article 12** grants children the right to participation. This right should be discussed both broadly and as it relates to children who are in care or are receiving assistance from the States of Jersey. When a child is removed from their home due to concern for their safety, it is imperative that the child is given the opportunity to express their views, and have them taken into account in line with the child's age and maturity. This participation on the part of the child should continue to be encouraged and sought after throughout the care process, as it is essential to the success of each Driver for Success. Identifying areas where active participation is possible is essential if the report is going to understand the impacts of the care system in Jersey and the Improvement Plan itself.