



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

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Deputy Robert Ward

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Dear Deputy Ward

Draft Commissioner for Children and Young People (Jersey) Law 201-

I am writing in response to your letter dated 28 February 2019, requesting my views on the Draft Commissioner for Children and Young People (Jersey) Law 201 - Article 8 'Provision of Information to Commissioner'. You have asked me to confirm whether the current draft of Article 8 will allow the Children's Commissioner to effectively carry out the duties as set out within Article 4 'Primary Function of the Commissioner' and Article 5 'General Functions of the Commissioner.' You also ask if I have any general comments about Article 8 in relation to the Panel's Terms of Reference.

I feel it is important that we do not lose sight of why there has been a Children's Commissioner appointed, and the context in which the Law has been drafted. Therefore, I will begin by referring to the Independent Jersey Care Inquiry (IJCI).

Background of the Independent Jersey Care Inquiry

In July 2017, the IJCI published its report and made eight recommendations. The first recommendation was to appoint a Children's Commissioner.

Frances Oldham QC's opening paragraph in the Executive Summary is a reminder of why a Children's Commissioner has been appointed to ensure independent oversight of the interests of children and young people in Jersey...

"Our remit has been to establish what went wrong in Jersey's child care system over decades. That there were failings is not in dispute. Those failings impacted on children already at a disadvantage, whether through family circumstances, a crime committed against the child or even a crime committed by the child. For many children who were removed from home situations deemed harmful or unsatisfactory, the States of Jersey proved to be an ineffectual and neglectful substitute parent."

Indeed, the Panel concluded "...we believe that, as late as the end of the Inquiry's hearings, aspects of Jersey's services for children remained not fully fit for purpose. In the light of all the evidence that it has heard, the Panel considers that children may still be at risk in Jersey and that children in the care system are not always receiving the kind or quality or care and support that they need."

The IJCI exposed how, for decades, Jersey failed the children and young people who were in the care of the Government or otherwise needed support. The Inquiry showed that this was a systemic failure of public services, Government and society. The Inquiry set out 10 systemic failures and made it clear that these needed to be addressed as the underlying causes of service failings, not just in children's services, but across the States as a whole so that the Government start to put children and young people at the heart of decision making. The broader cultural changes, fundamental to underpinning and sustaining the transformation for children, go well beyond the delivery of the recommendations.

One of ten systemic failures was to establish a culture of openness and transparency. *'Openness and transparency must characterise the culture of public services.'*¹ *'... the perception of cover-up stemmed from outdated attitudes of defensiveness, poor communication and an absence of a culture that valued and promoted public accountability.'*² *'This will be achieved only by a cultural shift throughout the States of Jersey and its services to promote greater transparency in decision making and greater openness in communication.'*³

Paris Principles

The IJCI recommended that:

"the post of Commissioner for Children in Jersey be established and enshrined in States' legislation in a manner consistent with the UN Principles Relating to the Status of National Institutions (the Paris Principles)."

The Paris Principles are a set of international standards which were adopted by the United Nations General Assembly in 1993. The Principles are accepted internationally as the litmus test of an institution's legitimacy and credibility. The Principles set out an expectation that a human rights institution should have adequate powers of investigation to allow the fulfilment of its mandate and function

The Paris Principles remain the main touchstone against which to conduct a general assessment of national human rights institutions (NHRI), that assessment being relevant to the establishment of the Jersey Commissioner, as recommended by the IJCI. Other considerations informing the general assessment of the role of the Commissioner as a NHRI in Jersey are also relevant to the development of the Law. Such considerations include guidance issued by the United Nations (UN), the Commonwealth Secretariat, the UN Committee on the Rights of the Child and the European Network of Ombudsmen for Children.

In its General Comment No.2, the UN Committee on the Rights of the Child sets out its own expectation around the role and powers of children's commissioners. In doing so it points out children's vulnerability to human rights violations and the challenges they experience in accessing remedy and redress. The Committee states that children's commissioners therefore require:

"...such powers as are necessary to enable them to discharge their mandate effectively, including the power to hear any person and obtain any information and document necessary for assessing the situations falling within their competence."

¹ 12.88

² 12.89

³ 12.89

Article 8 Duty to provide information to the Commissioner

The **Law Drafting Instructions** were formulated by a working party consisting of the Director of Children's Policy, the Law Officer's Department and the Children's Commissioner's office. An overview of the policy direction for the Jersey Children's Commissioner was presented to the Corporate Strategy Board on 12 June 2018 and to the Council of Ministers on 04 July 2018.

In these instructions it was set out clearly that the Law should provide for a duty upon any persons exercising functions of a public nature to provide the Children's Commissioner with information that the Jersey Commissioner requests if the request is reasonable, and it is information that the body is able to disclose lawfully to the Commissioner. The effect of this is, for example, is that where a person exercising functions of a public nature has discretion to disclose confidential information under other legislation, it must do so, so long as the request is reasonable. However, it should not create a legal gateway that overrides other legislation, for example, where that legislation restricts disclosure of confidential information to certain specified persons or for certain purposes⁴. For the avoidance of doubt, the Law should not prohibit the Children's Commissioner from receiving information from other persons, e.g. public authorities, relevant to the Commissioner's purposes, in circumstances in which the Children's Commissioner has not specifically requested such information.

The Children's Commissioner for England has similar power to access information in the Children's Act 2004:

Children's Act (England) 2004

Provision of information to Commissioner

- (1) Any person exercising functions of a public nature must supply the Children's Commissioner with such information in that person's possession relating to those functions as the Commissioner may reasonably request for the purposes of the primary function or the function under section 2D.
- (2) The information must be information which that person would, apart from subsection (1), lawfully be able to disclose to the Commissioner.

Draft 4 (dated 19 November 2018) of the **Commissioner for Children and Young People (Jersey) Law** was presented to the Care of Children in Jersey Review Panel on 03 December 2018 for scrutiny.

Article 8 of the draft Law stated:

Provision of information to Commissioner

- (1) A relevant authority must supply the Commissioner with such information in that person's possession relating to those functions as the Commissioner may reasonably request for the purposes of the Commissioner's functions under Articles 4 and 5.
- (2) The information must be information which that person would, apart from paragraph (1), lawfully be able to disclose to the Commissioner.
- (3) This paragraph applies where the Commissioner has not made a request under paragraph (1).
- (4) Where paragraph (3) applies, the Commissioner is not prohibited from receiving information from a relevant authority which is for the purposes of the Commissioner's functions under Articles 4 and 5.

The policy intention as set out in the Law Drafting Instructions are clearly seen in the Draft Law version 4.

However, the Law as lodged has an entirely different version of Article 8. This Law as lodged in effect limits the extent of the obligation on relevant authorities to disclose information to the Children's Commissioner. Articles 8(3) and 8(4) of the draft Law has the effect of providing the Commissioner with no more power to seek and receive information from relevant authorities than any other person can access through the Freedom of Information Law. Version 4 of the draft Law

⁴ See section 2F of the English Act.

recognises that some information subject to legal advice privilege should remain exempt and that is not disputed. Nevertheless, the Children's Commissioner should have access to information beyond that which would be made available to a member of the general public under an FOI request.

Conclusion

In my opinion, as the Children's Commissioner recruited specifically in shadow form to provide expert advice on the drafting on the Law, **Article 8 does not provide the Commissioner with sufficient power to effectively carry out the duties** as set out within Article 4 'Primary Function of the Commissioner' and Article 5 'General Functions of the Commissioner.'

The draft Law in relation to **Article 8 does not meet the test demanded by the Paris Principles** or the UN Committee on the Rights of the Child.

The draft Law in relation to **Article 8 fails to deliver on the recommendations of the IJCI**. In order to achieve greater transparency in decision making and greater openness in communication, and in order to tackle the perception of cover-up, then the Law must provide the Children's Commissioner with enough powers to enable them to hold the Government of Jersey to account to their human rights obligations. The draft Law seeks to exempt relevant authorities from the scope of the Children's Commissioner's powers, and this severely limits the Commissioner's ability to fulfil that role and to protect children's human rights – the very purpose that the IJCI sought to achieve.

Please accept this report as my written submission. I welcome the opportunity to speak directly with the Panel.

Yours sincerely



Deborah McMillan
Children's Commissioner