

STATES OF JERSEY



DRAFT COMMISSIONER FOR CHILDREN AND YOUNG PEOPLE (JERSEY) LAW 201- (P.18/2019): AMENDMENT

**Lodged au Greffe on 15th April 2019
by the Chairmen's Committee**

STATES GREFFE

PAGE 43, ARTICLE 8 (provision of information to Commissioner) –

For the text of Article 8 substitute –

- “(1) A relevant authority must supply the Commissioner with such information in that authority's possession as the Commissioner may reasonably request for the purposes of the discharge of the Commissioner's functions under Articles 4 (primary function of the Commissioner) and 5 (general functions of the Commissioner).
- (2) The information supplied must be information which that relevant authority would, apart from paragraph (1), lawfully be able to disclose to the Commissioner.
- (3) Information supplied by a relevant authority under paragraph (1) must be supplied in such manner and within such period as the Commissioner may reasonably specify.
- (4) A relevant authority may, despite not receiving any request from the Commissioner to supply information for the purposes of the discharge of his or her functions under any of Articles 4 and 5, supply any such information it holds to the Commissioner if the authority would not be prevented from so doing under paragraph (2).
- (5) The States may, by Regulations, amend this Article for the purpose of making further provision about the supply of information to the Commissioner.”.

CHAIRMEN'S COMMITTEE

REPORT

Background and Context

1. [P.18/2019](#) *Draft Commissioner for Children and Young People (Jersey) Law 201-* (hereafter “the draft Law”) was lodged by the Minister for Children and Housing on 12th February 2019. The draft Law is designed to give effect to Recommendation 1 of the Report of the Independent Jersey Care Inquiry (“IJCI”) ([R.59/2017](#)) which calls for the appointment of a Children’s Commissioner and for the post to be enshrined in legislation.
2. The Care of Children in Jersey Review Panel (hereafter “the Review Panel”) was re-established in August 2018 in order to scrutinise the policy and legislative changes arising from the IJCI and, as such, was deemed the appropriate Panel to review the draft Law and undertake any additional scrutiny if required.
3. The Review Panel was initially briefed on the draft Law on 3rd December 2018 by the Children’s Commissioner, her Officers, and Officers from the Department of Strategic Policy, Performance and Population. Further to this briefing, the draft Law was presented to the Council of Ministers, and underwent further discussion and changes until it was formally lodged. During this time, the Council of Ministers agreed to amend Article 8 (Provision of Information to the Commissioner) to its current form.
4. At the time of lodging, the reasons for the significant change in Article 8 had not been communicated in detail to the Review Panel. In order to understand the reasons for this change, the Panel wrote to the Minister for Children and Housing and requested the rationale behind the current drafting of the Law. Within his response, the Minister explained that –

“The draft Law will limit the extent of the obligation on relevant authorities to disclose information to the Commissioner, and limitations are intended to reflect a balance between the roles of the Commissioner, and pursuit of statutory functions, on the one hand and the nature of the authorities and information which they possess, on the other. As such, while relevant authorities are not prohibited from supplying information to the Commissioner, Article 8 seeks to enable some qualification of the extent of the obligation to supply information. In the case of certain relevant authorities, enabling reliance (by reference) on the absolute and qualified exemptions set out in the Freedom of Information (Jersey) Law 2011 is considered to achieve the intended policy balance.”¹

5. Given the significant changes to the wording of the Article from that which the Panel was originally briefed on, it was agreed that the Article would require further review. The Review Panel therefore established the following Terms of Reference –
 - (i) Identify and examine whether the Commissioner’s powers to request information (as set out in Article 8 of the draft Law) are in keeping with the recommendations made by the Independent Jersey Care Inquiry.

¹ [Letter - Minister for Children and Housing to Chairman of the Care of Children in Jersey Review Panel p.2](#)

- (ii) Examine and compare the powers of the Commissioner to request information in relation to similar legislation in other jurisdictions.
 - (iii) Consult with the Children’s Commissioner and her team to establish whether the powers, as set out in Article 8, will allow her to effectively discharge her duties.
 - (iv) Consult with academics specialising in children’s rights law and policy to gather professionally informed views on Article 8.
6. The Review Panel wrote to a wide range of groups and individuals to gather their views on the Article. These included – the Children’s Commissioner; existing Children’s Commissioners in the United Kingdom; academics specialising in children’s rights law and policy; and local organisations working with children, young people and their families. The Review Panel also consulted with the Information Commissioner and the Attorney General.
7. In total, the Review Panel received 11 submissions from a wide range of people, including – the Children’s Commissioner, Commissioner for Children and Young People in Scotland; a Senior Policy Adviser at UNICEF; local organisations; and academic specialists. The Review Panel would like to thank all those who contributed.
8. From the submissions received, a unanimous view was presented that the current drafting of Article 8 would **significantly limit** the power of the Commissioner to request information relevant to the discharge of their duties under Article 4 (Primary functions of the Commissioner) and Article 5 (General functions of the Commissioner). The Review Panel therefore agreed that an amendment to the draft Law was required. The following sections will explain the Panel’s amendment and set out the rationale for the changes.

The Amendment

9. *Article 8(1)* as set out in the proposed amendment states that a relevant authority must supply the Children’s Commissioner with any information it holds, which the Commissioner may reasonably request for the purposes of discharging their duties, as set out in Articles 4 and 5 of the draft Law.
10. *Article 8(2)* as set out in the proposed amendment states that a relevant authority is not required to supply information to the Commissioner where it is not lawfully able to do so. In effect, where a person exercising public functions has discretion to disclose confidential information under other legislation; it must do so as long as the request is reasonable. It should not, however, create a legal gateway that overrides other legislation (e.g. if legislation restricts confidential information to certain people or for certain purposes). This directly mirrors the powers of the English Children’s Commissioner, which was the original policy intention of the draft Law as explained by the Children’s Commissioner in her submission.²
11. *Article 8(3)* as set out in the proposed amendment states the means by which the Commissioner may receive any requested information. Under this paragraph, the Commissioner may set out the form in which they wish to receive the information,

² [Submission – Children’s Commissioner Jersey](#)

and also the reasonable timeframe for the relevant authority to deliver any information.

12. *Article 8(4)* as set out in the proposed amendment provides relevant authorities the ability to disclose information to the Commissioner where they have not been expressly requested to disclose that information. The draft Law does not prohibit relevant authorities from providing information to the Commissioner unless he or she asks them for it. Therefore, if relevant authorities wish to pro-actively assist the Commissioner by providing information without waiting for a request, this paragraph would ensure that, subject to the exemptions in the amended paragraph (2), they are able to do so. The Commissioner would then be assured that the information has been shared with lawful authority.
13. *Article 8(5)* as set out in the proposed amendment provides the States Assembly with a future-proofing mechanism, in the event that this particular Article requires future adjustment or clarification to deal with unexpected developments or future policy development decisions. The Regulations could, in theory, provide the States Assembly with the opportunity to set out a more detailed framework for supply of information to the Commissioner, if so required.

Ability to request information

14. One of the main themes emerging from the submissions was how the ability for the Commissioner to request information would be severely limited by the draft Law. In fact, several submissions highlighted that the lodged draft of Article 8 would place the Commissioner's powers to request information on par with a member of the Public under the [Freedom of Information \(Jersey\) Law 2011](#) (the "FoI Law").
15. The Children and Young People's Commissioner in Scotland explained that the current drafting, when viewed alongside Article 12 (Formal Investigations: witnesses and documents), would certainly limit the power of the Commissioner –

"In fact, reading Article 12 alongside the provisions in Article 8(3) and 8(4), the draft Law has the effect of providing the Commissioner with no more power to seek and receive information from public bodies than the average man or woman in the street."³

16. This view was shared by the Children's Commissioner⁴, local organisations working with children and young people, and a Senior Policy and Advocacy Adviser from UNICEF –

Brightly

We are concerned that using the Freedom of information (Jersey) Law 2011 as a barrier to requesting information significantly weakens the Commissioner's role and powers, indeed this caveat gives the Commissioner no more power to request information than that available to a lay person."⁵

³ [Submission – Commissioner for Children and Young People Scotland](#)

⁴ [Submission – Children's Commissioner Jersey](#)

⁵ [Submission – Brightly](#)

“Brighter Futures

This would appear to limit the Commissioner’s power to request information to perform the duties as set out in Articles 4 and 5.”⁶

“Dragan Nastic, Senior Policy and Advocacy Adviser, UNICEF

However, provisions in Article 8(3) and 8(4) significantly limit the powers of the CCYP to seek information, and therefore limit their capacity to discharge the functions of the office. The proposal as presently drafted does little more than confirm the powers of the CCYP to compel the provision of information as equivalent to those of the ordinary citizen.”⁷

17. This view was echoed by multiple respondents, especially from academics specialising in children’s rights law and policy. Dr. Simon Hoffmann from the Observatory on Human Rights of Children, Swansea University, stated the following in relation to this concern –

“The proposal as presently drafted would do little more than confirm the powers of the CCYP to compel the provision of information as equivalent to those of the ordinary citizen. This is otiose as these powers already exist without the need for confirmation.”⁸

18. Furthermore, in the joint submission from Professor Carol Robinson, Professor Dawn Watkins and Michael Olatokun, concern was raised that by giving the Commissioner the same power as a lay member of the Public, the draft Law was in fact insufficient to meet the stated objectives of the Commissioner –

“Arguably, the powers are insufficient to deliver the stated objectives as they place the Children’s Commissioner in the same position as a lay member of the public in requesting information that is required to discharge her responsibilities.”⁹

19. Given the context of the appointment of the Children’s Commissioner, and the need for them to be able to act without fear or favour, the evidence received would suggest that the role would not be able to operate effectively with the potential for requests for information to be refused under the FoI Law exemptions (whether absolute or qualified).

20. Within the submission from the Information Commissioner, he explained that the FoI Law should be used as a tool of last resort for members of the Public when information is not accessible by other means.¹⁰ Furthermore, he explained that independent officers, like other law enforcement officials, should have access to information beyond that which would be made available to a member of the general Public under an FOI request.¹¹ This view was also echoed by the Children’s Commissioner within her submission.¹²

⁶ [Submission – Brighter Futures](#)

⁷ [Submission – Dragan Nastic, Senior Policy and Advocacy Adviser, UNICEF](#)

⁸ [Submission – Dr. Simon Hoffmann](#)

⁹ [Submission – Professor Carol Robinson, Professor Dawn Watkins and Michael Olatokun](#)

¹⁰ [Submission – Information Commissioner](#)

¹¹ [Submission – Information Commissioner](#)

¹² [Submission – Children’s Commissioner Jersey](#)

21. Likewise, the Commissioner for Children and Young People in Scotland explained that the role and mandate of the Commissioner necessarily involves holding state functions to account, and to effectively exempt public bodies from the scope of the investigatory powers would limit the Commissioner’s ability to fulfil the role and protect children’s rights.¹³ This was again strengthened by the evidence received by Dragan Nastic, which pointed towards 2013 research by UNICEF that shows it is essential for independent institutions to have a strong mandate to obtain information and evidence.¹⁴
22. A further concern was raised by the Information Commissioner in relation to potential adjudication of any disputes that may arise from the current drafting of the Law. It was explained that –
- “In some circumstances I may adjudicate that the information should be released; in others I may conclude that it would not be in the public interest for the Children’s Commissioner to have access to that information which could lead me to uphold a decision to deny her access. That would, in my view, likely result in a loss of public confidence in the FoI Law.”¹⁵*
23. Furthermore and importantly so, it was noted in the submission that the timelines within the FoI Law could lead to delays that could put children at risk, particularly in the event of a challenge within the court system.¹⁶

The Paris Principles

24. Another area highlighted often within the submissions was the fact that the current drafting of the Article fell short of meeting the requirements of the UN Paris Principles outlining the duties of National Human Rights Institutions (“NHRIs”).
25. The Paris Principles set out the status and functioning of national institutions for the protection and promotion of human rights, commonly known as National Human Rights Institutions, or NHRIs.¹⁷ They were defined at the first International Workshop on National Institutions for the Promotion and Protection of Human Rights, held in Paris on 7th – 9th October 1991. The conclusions were subsequently adopted by the United Nations Human Rights Commission by Resolution 1992/54 of 1992, and by the United Nations General Assembly in its Resolution 48/134 of 1993.¹⁸
26. The Paris Principles are now broadly accepted as the core test for a National Human Rights Institute’s legitimacy and credibility. An NHRI is defined as an institution with a constitutional and/or legislative mandate to protect and promote human rights.¹⁹

¹³ [Submission – Commissioner for Children and Young People Scotland](#)

¹⁴ [Submission – Dragan Nastic, Senior Policy and Advocacy Adviser, UNICEF](#)

¹⁵ [Submission – Information Commissioner](#)

¹⁶ [Submission – Information Commissioner](#)

¹⁷ [UN Paris Principles Resolution 48/134](#)

¹⁸ [UNDP – OHCHR Toolkit for Collaboration with National Human Rights Institutions.](#)

¹⁹ [UNDP – OHCHR Toolkit for Collaboration with National Human Rights Institutions.](#)

27. The IJCI made specific reference within Recommendation 1 (A Commissioner for Children), that the post of the Commissioner should be established and enshrined in legislation in a manner consistent with the UN Principles Relating to the Status of National Institutions (the Paris Principles.)²⁰
28. In light of the general view that the power to request information under the draft Law would severely limit the Commissioner's ability to discharge their duties, it is unsurprising to find that all the submissions that commented in relation to the Paris Principles felt the draft Law did not meet the required standards. Comments relating to this issue included –

“Children and Young People’s Commissioner, Scotland

*These restrictions would mean that the Commissioner’s powers fall short of the requirements set out in the Paris Principles and by the UN Committee. As a result they are likely to draw adverse comment from the United Nations, the Council of Europe and other international institutions if retained in the legislation.”*²¹

“Children’s Commissioner, Jersey

*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.”*²²

“Dragan Nastic, Senior Policy and Advocacy Adviser, UNICEF

*It is clear that Article 8 is not in keeping with these standards.”*²³

29. Within the submission from Professor Robinson, Professor Watkin and Michael Olatokun, they explained that –

*“The Commissioner’s powers under Article 8 of the draft Law, therefore, falls short of the Paris Principles which gives power to ‘obtain any information and any documents necessary for assessing situations falling within its competence’.”*²⁴

30. Within the response from the Minister for Children and Housing setting out the reasons for the current drafting, the exact same point was given as justification as to why the Law had been altered –

*“International Standards recommend that NHRIs should be accorded such powers as are ‘necessary’ to enable them to discharge their mandate ‘effectively’, including the power to obtain any information ‘necessary’ for assessing the situations falling within their competence ... The scope and extent of powers provided to NHRIs is, therefore, to be assessed in view of their mandate, the context in which they operate and, as indicated by necessary, may be balanced against other considerations.”*²⁵

²⁰ [Independent Jersey Care Inquiry Report](#), Volume 3: Recommendations and Appendices p.50

²¹ [Submission – Commissioner for Children and Young People Scotland](#)

²² [Submission – Children’s Commissioner Jersey](#)

²³ [Submission – Dragan Nastic, Senior Policy and Advocacy Adviser, UNICEF](#)

²⁴ [Submission – Professor Carol Robinson, Professor Dawn Watkins and Michael Olatokun](#)

²⁵ [Letter - Minister for Children and Housing to Chairman of the Care of Children in Jersey Review Panel p.2](#)

31. It is clear that the emphasis has been placed on different words within the same sentence, which has ostensibly created 2 different interpretations of the guiding principle. Whilst the Review Panel understands interpretation is key to the development of policy underpinning legislation, it is concerned that the current interpretation of the draft Law, whilst semantically in keeping with the guiding principle, is not in fact in the spirit of it.
32. Within the submission from Dragan Nastic, he explained that NHRIs cannot generally enquire into matters concerning the armed forces, security services and/or Government decisions on international relations. He then went on to explain that although these do not contradict the Paris Principles, they do go against their spirit.²⁶
33. Within the UN Sub-Committee on Accreditation’s general observations, it was provided that –
- “The scope of the mandate of many national institutions is restricted for national security reasons. Whilst this tendency is not inherently contrary to the Paris Principles, it is noted that consideration must be given to ensuring such restriction is not unreasonably or arbitrarily applied and is exercised under due process (para. 5.2)”.*²⁷
34. The CRC Committee on the Rights of Child has gone further and has called on States’ parties to remove any restrictions, including on obtaining information that prohibits or prevents independent human rights institutions for children from carrying out investigations related to the defence forces, national security and military.²⁸
35. Given the context of the appointment of the Children’s Commissioner, and given that the advice from the UN is that NHRIs should have unfettered access to information relevant to their role (and have suggested that this also apply to security services and the military), the Review Panel supports the view that the current drafting of the Law does not meet the test of the Paris Principles.

Exemptions to requesting information

36. Within the submissions to the Panel’s review, reference has been supplied to some of the exemptions that may apply for the Commissioner when requesting information. These have been broadly agreed as relating to information that could be lawfully provided. It was highlighted in the letter from the Minister for Children and Housing that the powers of the Children’s Commissioner for England did not create a legal gateway that overrides other legislation.²⁹
37. Within the original draft of the Law that the Review Panel was briefed on, it was stated that the information must be information which a person would lawfully be

²⁶ [Submission – Dragan Nastic, Senior Policy and Advocacy Adviser, UNICEF](#)

²⁷ [Submission – Dragan Nastic, Senior Policy and Advocacy Adviser, UNICEF](#)

²⁸ Concluding observations of the CRC Committee on Ireland, CRC/C/OPAC/IRL/CO/1, 14 February 2008, paras. 8–9

²⁹ [Letter - Minister for Children and Housing to Chairman of the Care of Children in Jersey Review Panel p.3](#)

able to disclose to the Commissioner.³⁰ The amendment therefore reflects this policy position within paragraph (2). The Council of Ministers were presented with the policy direction for the draft Law in July 2018,³¹ and the Children’s Commissioner explained in her submission about the content of the instructions –

“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.”³²

38. Given the context of Jersey appointing a Children’s Commissioner and the commitment under the Common Strategic Policy to put children first, the Commissioner should have unfettered access to the information which is required to fulfil her role as set out in Articles 4 and 5. This would send a strong message that the States Assembly is committed to one of its key strategic priorities.
39. A concern that has been raised during the review relates to the disclosure of information which could be seen to be legally privileged information (i.e. legal advice). The Children’s Commissioner stated in her submission that some information subject to legal advice privilege should remain exempt, and noted that this was referenced within the original drafting of the Law that the Panel was briefed on.³³
40. The Review Panel followed up this point in a meeting with the Children’s Commissioner on Monday 8th April. The Commissioner explained that whilst it was acknowledged that some information should remain exempt from disclosure, this was qualified to relate only to information which is not lawfully able to be disclosed by public authorities. It was also acknowledged that the powers of the role should not create a legal gateway to information that could not be disclosed under existing enactments. It was therefore noted that the interpretation of this to include legal advice privilege (as stated in the submission) was misrepresentative of the Commissioner’s view and original drafting of the Law.
41. The amendment acknowledges the fact that the Children’s Commissioner should have access to information above what a member of the Public would be able to receive under a FoI request, as stated previously in this report.³⁴ The Review Panel supports the view that the Commissioner should not be able to access information where an enactment prohibits it from being shared; however, given the context of the Commissioner’s appointment and the standing of the role, it should be able to access reasonable information that would normally be subject to legal advice privilege, especially that relating to children (i.e. where an order has been made to remove a child from their parents). This is therefore reflected in the amendment at paragraph (2).

³⁰ [Submission – Children’s Commissioner Jersey](#)

³¹ [Submission – Children’s Commissioner Jersey](#)

³² [Submission – Children’s Commissioner Jersey](#)

³³ [Submission – Children’s Commissioner Jersey](#)

³⁴ [Submission – Children’s Commissioner Jersey](#)

Meeting the IJCI recommendation

42. A final and salient point that was raised throughout the submissions was that the purpose of this draft Law was to enact Recommendation 1 of the IJCI Report. The Children and Young People’s Commissioner for Scotland³⁵, Brighter Futures³⁶, Dr. Maggie Atkinson³⁷, Professor Robinson, Professor Watkin and Michael Olatokun³⁸ and Family Nursing and Home Care³⁹ all stated that in some way the current drafting of the Law does not meet the requirement of the IJCI Panel’s recommendation.
43. Within the submission from the Children’s Commissioner, further reasoning was given as to why the current drafting did not meet the requirements of the recommendation –

“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.”⁴⁰

44. The Review Panel feels this is a timely reminder of the need for this legislation, and also the context for why it has been brought to the Assembly for debate.

Conclusion

45. The Review Panel has been presented with overwhelming evidence that the current drafting of Article 8 of the Law would severely limit the Commissioner’s power to request information relevant to the performance of the duties as prescribed in the Law. It has also received evidence to suggest that what is currently drafted does not meet the test for the Paris Principles; and also does not meet the recommendation of the Independent Jersey Care Inquiry.
46. The current drafting of the Law provides the Commissioner with no more power than a member of the Public under the FoI Law. Given the mandate, scope and importance of the Commissioner’s role, this is highly undesirable. The Review Panel’s amendment therefore seeks to provide the Commissioner with the necessary power to request information that is in fitting with the status and importance of the role. This is achieved by reflecting the original policy intention which sets out that the Children’s Commissioner should have access to all information that could reasonably be requested for the carrying out of the functions under Articles 4 and 5. It also exempts information from being disclosed if it is not lawfully able to be disclosed under an existing enactment.

³⁵ [Submission – Commissioner for Children and Young People Scotland](#)

³⁶ [Submission – Brighter Futures](#)

³⁷ [Submission – Dr. Maggie Atkinson](#)

³⁸ [Submission – Professor Carol Robinson, Professor Dawn Watkins and Michael Olatokun](#)

³⁹ [Submission – FNHC](#)

⁴⁰ [Submission – Children’s Commissioner Jersey](#)

47. By producing this amendment, the Review Panel's intention is to give the Commissioner the necessary powers to request the information with which they can discharge their duties effectively, whilst at the same time remain in keeping with the Paris Principles and the recommendation of the IJCI.

Financial and manpower implications

48. There are no financial or manpower implications for the States arising from the adoption of this amendment.