

To: Care of Children in Jersey Review Panel, Scrutiny Office

From: Dragan Nastic, Senior Policy and Advocacy Advisor, UNICEF UK

I would appreciate it if you could consider this submission to the Care of Children in Jersey Review Panel Scrutiny Review concerning the Draft Commissioner for Children and Young People (Jersey) Law 201.

I would like to present my opinion on the Jersey Commissioner's powers to request information as set out in Article 8 of the draft Law. I address principally the following points in your Terms of Reference:

- Identify and examine whether the Commissioners powers to request information (as set out in Article 8 of the draft Law) are in keeping with the international standards.
- Examine and compare the powers of the Commissioner to request information in relation to similar legislation in other countries.
- To establish whether the powers as set out in Article 8 will allow the Commissioner to effectively discharge her duties.

The United Nations Children's Fund (UNICEF) works in 190 countries and territories to promote the rights of every child, everywhere, in everything the organization does. UNICEF is the only organization specifically named in the Convention on the Rights of the Child as a source of expert assistance and advice. Among other activities, UNICEF supports countries to ratify and implement the Convention and its Optional Protocols.

I am privileged to have been working with a number of partners in the States of Jersey to develop and put in practice ways of embedding the Convention (CRC) in law and policy. I congratulate the States of Jersey on ratifications of the Convention in 2014 and applaud excellent progress achieved so far.

Key point and recommendation

It is of great concern that the proposed powers to be given to the Commissioner for Children and Young People (CCYP), as set out in Article 8 of the draft law, fall well short of the minimum international standards and can undermine the independence and effectiveness of the Commissioner for Children in Jersey.

It is recommended that Article 8 is revised as a matter of urgency in a manner consistent with the UN Principles Relating to the Status of National Institutions (the Paris Principles) and the General Comment No.2, "The role of independent national human rights institutions in the promotion and protection of the rights of the child (2002)" published by the UN Committee on the Rights of the Child.

Human rights have been a core concern of the United Nations since its inception. The responsibility to respect, protect and fulfil human rights lies with States. They ratify international human rights instruments and are required to create mechanisms to safeguard human rights. The governance of human rights is complex and diffuse. All parts of government are involved, together with other kinds of national institutions and civil society: an independent judiciary, law enforcement agencies, effective and representative legislative bodies, and education systems with human rights programmes at all levels. Among these, national human rights institutions (NHRIs) occupy a central position.

The Children's Commissioner for Jersey is a national human rights institution.

National human rights institutions are unique and do not resemble other parts of government: they are not under the direct authority of the executive, legislature or judiciary although they are, as a rule, accountable to the legislature either directly or indirectly. They are at arm's length from the Government and yet funded exclusively or primarily by the Government. National human rights institutions are not only central elements of a strong national human rights system: they also "bridge" civil society and Governments; they link the responsibilities of the State to the rights of citizens and they connect national laws to regional and international human rights systems.

The Paris Principles set out what a fully functioning NHRI is and identify six main criteria that these institutions should meet to be successful:

- Mandate and competence: a broad mandate based on universal human rights standards;
- Autonomy from Government;
- Independence guaranteed by statute or constitution;
- Pluralism, including through membership and/or effective cooperation;
- Adequate resources;
- Adequate powers of investigation

An institution operating in conformity with the Paris Principles will also have the authority to "hear any person and obtain any information and any documents necessary" for examining the questions it takes up. National human rights institutions should have the power to inquire into or investigate any question. This reinforces the principle of independence: it is the institution itself that will set the agenda for inquiries.

In addition to "hear any person and obtain any information and any documents necessary for assessing situations...", The Paris Principles require that an institution should have other powers, which should be clearly defined and legally entrenched in legislation, include: ■ The power to compel the production of documents and witnesses; ■ The power to conduct on-site investigations as necessary, including powers to visit detention facilities, etc.; ■ The power to call parties to a hearing; and ■ The power to hear and question every individual (including experts and representatives of government agencies and, if appropriate, private entities) who, in the opinion of the investigating body, has knowledge concerning the issue under investigation or is otherwise in a position to assist the investigation.

It is important to reiterate that the success of an institution in fulfilling its obligations with regard to investigation also depends directly on its being given the necessary powers and resources to carry out the function effectively and efficiently. And that is an obligation of the State.

Article 5(h) of the Draft Commissioner for Children and Young People (Jersey) Law 201 provides that the CCYP has the function of 'looking into, or formally investigating any matter relating to the rights of children and young people'. Article 12 of the draft law provides the CCYP with a power to require a person to give evidence or produce documents.

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.

The limitation imposed by Article 8 contradicts the nature and status of the CCYP. The CCYP must be more than an ordinary citizen in the lives of children. In the eyes of international human rights law, the CCYP, as a NHRI, should have a unique position. This is an obligation on the States of Jersey.

There is a checklist for assessing compliance with the Paris Principles. It identifies the Paris Principles and the minimum requirements to satisfy them. It is helpful in assessing an institution's compliance with the Paris Principles.

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

Please see:

National Human Rights Institutions: History, Principles, Roles and Responsibilities

United Nations, New York and Geneva, 2010

https://www.ohchr.org/Documents/Publications/PTS-4Rev1-NHRI_en.pdf

Page 53, METHODS OF OPERATION (examination of issues)

Let me now elaborate on the powers to request information in similar legislation in other countries.

UNICEF and the UN Office of the High Commissioner for Human Rights (OHCHR) have undertaken several comparative reviews and surveys on the global level to examine the law and practice.

Research and responses have identified challenges and weaknesses, including inadequate funding, a need for technical assistance related to organizational and resource management, knowledge of the international human rights system, the importance of fostering relationships with public bodies and civil society, and the follow-up to NHRI recommendations by their Governments.

The research conducted by UNICEF¹, looking at more than 200 children's commissioners/ombudsman in 70 countries, shows that it is essential for independent institutions to have a strong mandate to obtain information and evidence. One important tool for this is subpoena power, whereby institutions can compel the production of evidence or summon witnesses to testify; failure to comply is associated with a civil or criminal sanction. More than half of the countries with an independent institution have given it such powers.

UNICEF research shows that of the states that have an independent children's rights institution, more than half have equipped their institutions with powers to obtain information and access documentation. In other cases, tools for compliance primarily include a request for disciplinary sanctions and special reports to parliament; this implies reliance on goodwill rather than enforceable means. In El Salvador and Peru, for example, independent institutions publish in their annual reports to parliament the names of public officials who have failed to provide requested information.

National human rights institutions cannot generally enquire into matters concerning the armed forces, the security services and/or Government decisions on international relations. These restrictions do not contradict the letter of the Paris Principles, but even they do go against their spirit. The UN Sub-Committee on Accreditation's general observations provide that:

"The scope of the mandate of many national institutions is restricted for national security reasons. While this tendency is not inherently contrary to the Paris Principles, it is noted that consideration must be given to ensuring that such restriction is not unreasonably or arbitrarily applied and is exercised under due process (para. 5.2)."

The CRC Committee on the Rights of the Child has gone further and has called on States parties to remove any restrictions, including on obtaining information, that prohibit or prevent independent human rights institutions for children from carrying out investigations related to the defence forces, national security and the military.²

The membership criteria for the European Network of Ombudspersons for Children (ENOC) states that full membership is only available if, amongst other things:

"There are no provisions in the legislation which limit the institution's ability to set its own agenda in relation to this function, or which prevent it carrying out significant core functions suggested in the Paris Principles and ENOC Standards."

In conclusion,

¹ Championing children's rights, UNICEF, 2013

² Concluding Observations of the CRC Committee on Ireland, CRC/C/OPAC/IRL/CO/1, 14 February 2008, paras. 8–9

- as presently drafted, Article 8 will undermine the effectiveness of the Office of the CCYP to hold the relevant authorities in the States of Jersey to account for their children's rights obligations.
- the proposal places a severe limitation on the powers necessary to effectively conduct investigations and inquiries thus preventing the Commissioner to safeguard children in Jersey from the harms that ensue when their rights are violated.
- the proposal is not in line with the minimum UN standards.
- the proposal negates the very nature and status of the CCYP as a sui generis institution in international law.

The UN General Assembly resolution 60/154 National institutions for the promotion and protection of human rights, adopted at the 64th plenary meeting on 16 December 2005,

“Notes with satisfaction the efforts of those States that have provided their national institutions with more autonomy and independence, including by giving them an investigative role or enhancing such a role, and encourages other Governments to consider taking similar steps;”

I would like to echo this call and urge the States of Jersey to amend Article 8 of the draft in order to provide a strong legal authority to obtain any information necessary for an examination the Commissioner is undertaking. This legal authority is a prerequisite for any institution with the power to investigate.

Dragan Nastic

16 March 2019

Senior Policy and Advocacy Advisor

UNICEF UK

dragann@unicef.org.uk