

Deputy Rob Ward  
Chair, Care of Children in Jersey Review Panel  
C/o: [REDACTED] Scrutiny Office  
Morier House  
St Helier  
JE1 1DD

[REDACTED]

11<sup>th</sup> March 2019

Dear Deputy Ward,

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

Thank you for your letter of 28 February 2019 in which you request the views of my office on the Draft Commissioner for Children and Young People (Jersey) Law 201.

I understand you are seeking opinion on the Jersey Commissioner's powers to request information as set out in Article 8 of the draft Law and in particular:

- Whether these powers are in keeping with the recommendations made by the Independent Jersey Care Inquiry
- Whether they are comparable to the powers set out for Commissioners in similar legislation in other jurisdictions
- Whether the powers as set out in Article 8 will allow the Jersey Commissioner to effectively discharge her duties as set out in Article 4 and 5

The report of the Jersey Independent Care Inquiry 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)."*

As you will be aware, 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. Among other matters, 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.

Furthermore, 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."*

Articles 4 and 5 of the draft law define the Jersey Commissioner's functions. I would make particular reference to Article 5(h) which provides that the Commissioner has the function of

*"5(h) looking into, or formally investigating any matter relating to the rights of children and young people;"*

The operation of this function is further elaborated upon in Part 3 of the draft Law, including at Article 12, a power to require a person to give evidence or produce documents.

However, I note that the draft Law significantly restricts the Commissioner's power to require public bodies to provide information to an investigation. 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.

The rationale for this restriction is not clear to me. The role and mandate of a children's commissioner necessarily involves holding the organs of the state accountable to their human rights obligations. To effectively exempt public bodies from the scope of the Commissioner's investigatory powers severely limits her ability to fulfil that role and to protect children's human rights. 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.

As requested, I would draw a comparison with my own office, whose powers are set out in the Commissioner for Children and Young People (Scotland) Act 2003 (the 2003 Act). Section 7 provides that one of the functions of my office is to carry out investigations into:

*(a) whether, by what means and to what extent a service provider has regard to the rights, interests and views of children and young people in making decisions or taking actions that affect those children and young people (such an investigation being called a "general investigation");*

*(b) whether, by what means and to what extent a service provider had regard to the rights, interests and views of a child or young person in making a decision or taking an action that affected that child or young person (such an investigation being called an "individual investigation").*

In order to fulfil this function, Section 9 of the 2003 Act provides that:

*"The Commissioner may require any person—*

*(a) to give evidence on any matter within the terms of reference of an investigation; or*

*(b) to produce documents in the custody or control of that person which have a bearing on any such matter."*

Failure to comply with a requirement to give evidence or produce documents is an offence punishable on conviction by a fine or by up to three months imprisonment.

Unlike the draft Jersey Law, the power set out in the 2003 Act applies in full to public bodies. It is only limited in two respects.

Firstly, by a provision that the Commissioner may not impose a requirement on any person whom the Scottish Parliament could not require, under section 23 of the Scotland Act, to attend its proceedings for the purpose of giving evidence or to produce documents.

In broad terms, this means that it must be in relation to a matter within the devolved competence of the Scottish Parliament and cannot be applied to:

- a Minister of the Crown,
- a judge
- a tribunal member (only in connection to the discharge of their functions)
- a Procurator Fiscal (but only where the evidence or documents might prejudice criminal proceedings or be contrary to the public interest, and only where specific authorisation to refuse has been granted by the Lord Advocate)

Secondly, a person is not obliged to provide evidence or documentation which they would be entitled to refuse to provide in court proceedings (for example if it were covered by legal professional privilege).

By linking the scope of my office's powers to those of the Scottish Parliament and the Scottish courts, the 2003 Act recognises the purpose and legitimacy of the office's investigatory function as a mechanism of human rights scrutiny and accountability. The draft Law does not provide the same important recognition to the Jersey Commissioner.

In conclusion, I do not regard the provisions in Articles 8(3) and 8(4) as providing the Commissioner with sufficient power to exercise her mandate and formally investigate matters relating to children's rights. I do not believe they meet the test demanded by the Paris Principles or the UN Committee on the Rights of the Child. They therefore fail to deliver on the recommendation of the Jersey Independent Care Inquiry.

I trust that this is helpful to your deliberations.

Your sincerely



**Bruce Adamson**  
**Children and Young People's Commissioner Scotland**