

Reference: Care of Children in Jersey Review Panel
Draft Commissioner for Children and Young People (Jersey) law 201-

To: The Chairman of the Care of Children in Jersey Review Panel of the State of Jersey
With reference to concerns raised about the extent of the powers that the Commissioner would have, if the draft law was adopted, to request information from relevance authorities (Article 8), we provide comments relating to the Review Panel's Terms of Reference.

Response provided by:

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Within the 'States of Jersey Draft Commissioner for Children and Young People (Jersey) Law 201 - 'it is stated that:

'Article 8 requires certain relevant authorities to supply information in their possession to the Commissioner, when requested for the purposes of the Commissioner's functions. Those relevant authorities are not required to comply with that request if expressly prohibited from doing so by another enactment or rule of law such as the rule in relation to legal professional privilege, would enable a relevant authority to refuse to supply the information requested. In the case of a relevant authority which is a "scheduled public authority" as described in Schedule 1 to the Freedom of Information (Jersey) Law 2011 (the "Freedom of Information Law"), that authority may refuse to supply information to the Commissioner if the request were to be treated as if it had been made under the Freedom of Information Law and the authority, in those circumstances, was able to rely on one of the permitted grounds for refusal set out in Article 9 of the Law. If an authority declines to supply information on that basis, then the Commissioner's request is treated as if it had been made under the Freedom of Information Law in the first place, thereby affording the Commissioner appeal rights under that Law' (States Greffe, 2019, p. 29).

Comments in relation to the Panel's Terms of Reference

Terms of Reference 1: 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.

Comments:

It can be argued that the Commissioner's powers set out in Article 8 of the draft Law fall short of the standard set out in the inquiry.

Recommendation 1 of the Independent Jersey Care Inquiry (the Inquiry) relates to appointing an 'independent Commissioner to have responsibility for the oversight of all matters concerning the welfare and wellbeing of children and young people in Jersey' (States Greffe, 2017, para 13.7 p. 50). It advocates that the 'post of Commissioner for Children in Jersey be established and enshrined in States' legislation in a manner consistent with the UN Principles Relation to the Status of National Institutions (the Paris Principles)' (Ibid.).

The Paris principles state that 'within the framework of its operation, the national institution shall... hear any person and obtain any information and any documents necessary for assessing situations falling within its competence.' (United Nations, 1993)

Article 8 of the draft Law contains provisions relating to provision of information to the Commissioner. This section creates a power of discretionary refusal to such requests by public authorities. This power may be exercised where:

1. The local authority is of a class specified in Schedule 1 of the Freedom of Information (Jersey) Law 2011 (the FoI Law),
2. The request were to be treated as though it were made under the Freedom of Information Law, and,
3. Permitted grounds of appeal in Article 9 of the FOI Law apply.

The scheduled public authorities include important functions such as the States Greffe, Ministers and The Judicial Greffe. The Commissioner may be tasked with reviewing the actions of political decision makers in giving effect to his/her duties, and such investigations can be stymied by use of this right of refusal. 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.

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' (our italics). However, like other Commissioners within the United Kingdom, the Commissioner does have power to conduct an investigation and when he/she does this, he/she has significant powers to require a person to give evidence and/or produce documents.

Terms of Reference 2: Examine and compare the powers of the Commissioner to request information in relation to similar legislation in other jurisdictions.

Comments:

As noted in the draft Law (States Greffe, 2019, p. 6), Children's Commissioners have been established across the United Kingdom. They were created respectively by:

- Care Standards Act 2000 (Wales)
- Commissioner for Children and Young People (Scotland) Act 2003
- Commissioner for Children and Young People (Northern Ireland) Order 2003
- Children Act 2004 (England)

As also stated in the draft Law (States Greffe, 2019, p. 6), the remit of the role of the Commissioners share a duty to promote rights and, to some extent, powers to investigate complaints. However, as Jane Williams points out (2005, p. 40), at 'a very practical level, there are differences in their powers to assist individual children by advising and otherwise giving support in individual cases, and in their powers to investigate complaints'.

It is noted that the Jersey legislation as currently drafted provides the Commissioner with power to conduct formal investigations (Article 10) (States Greffe, 2019, p. 29). Under Article 12, where a formal investigation is initiated, the Commissioner has power to request evidence from a witness and/or to produce documents (Ibid.). However, under Article 12(7) these documents can be redacted 'if Article 8(3) or (6) applies in relation to any information contained in that document.' (Ibid., 48).

Analogous provisions can be found in Wales, Scotland and Northern Ireland, but the emphasis tends to be on adhering to rules of procedure rather than on the nature of certain documents. For example, in Scotland, the Commissioner has power to conduct investigations under section 7 of the

Commissioner for Children and Young People (Scotland) Act 2003 (Scottish Parliament, 2003, p. 3). When doing so, under section 9 (Ibid. pp. 3-4) the Commissioner may require any person to give evidence relevant to the investigation, or to produce relevant documents. However, it is also stated under section 9, that he or she 'may not impose such a requirement on any person whom the 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.' (Ibid. p. 4). In Northern Ireland, under the Commissioner for Children and Young People (Northern Ireland) Order 2003 (Statutory Instruments, Northern Ireland, 2003), the Commissioner has power to conduct investigations, including investigations into a complaint made by a child or young person (Ibid., section 12, p. 11), and formal investigations (Ibid. section 16, p. 13). With respect to formal investigations, the Commissioner may require any person to give evidence relevant to the investigation, or to produce relevant documents (Ibid. section 20, p. 17). The Commissioner has the same powers as the High Court for the purposes of the formal investigation but he/she cannot compel a person to give evidence/produce a document if that person could not be compelled to do so in civil proceedings in the High Court (Ibid. section 20, p. 17). A similar approach regarding the Commissioners' powers being the same as the High Court is also included in Welsh legislation (Act of Parliament, 2000, section 74, p. 37).

With regard to Article 8, seemingly the powers closest to those set out in the draft article relate to the powers of the Children's Commissioner in England. Under section 2 of Children Act 2004, and then amended, within the 2014 Children's Act under section 107 (Act of Parliament, 2014, p. 83), the 'primary function' of the Children's Commissioner in England is 'promoting and protecting the rights of children in England.' When exercising this function, the Commissioner can request any person exercising a public function to supply information. This information must be that which the person would 'lawfully be able' to disclose to the Commissioner (Act of Parliament, 2004, section 2, p. 2; Act of Parliament, 2014, section 110, p. 85).

It is suggested that in its consideration of the Jersey Commissioner's powers to require information under Article 8 of the draft Law, the panel might also wish to consider the Commissioner's powers to conduct formal investigations and his/her associated powers to compel evidence.

It should be noted that information which the England Commissioner has the power to request relates to that which a person would 'lawfully be able to disclose'. Thus, the proposed powers of the Jersey commissioner - in which relevant authorities are not required to comply with a request for information if expressly prohibited from doing so by another enactment or rule of law – is in keeping with the powers of this Commissioner.

Terms of Reference 3: To consult with the Children's Commissioner and her team to establish whether the powers set out in Article 8 will allow her to effectively discharge her duties.

and

Terms of Reference 4: Consult with academics specialising in children's rights and policy to gather professional informed view on Article 8

Comments:

We are unable to comment fully on the extent to which the Review Panel have fulfilled requirements in relation to Terms of Reference 3 and 4 as we are not aware of the consultations that have taken place.

Additional Recommendation for Consideration:

Although not directly within the remit of responding to comments the powers of the Commissioner in relation to Article 8, a further point we would like to raise related to Recommendation 2 of the Independent Jersey Care Inquiry 'Giving children and young people a voice' (States Greffe, 2017, paras 13.14- 13.18 pp. 52-54).

While we fully support this, and all other recommendations, there is a distinct lack of reference within the recommendations to supporting children and young people's ability to participate. In our view, Human Rights Education is the most appropriate means of ensuring this is the case. The concern here is that, even if children and young people are supported to have a voice, unless they are provided with an elementary understanding of their agency and how to navigate relationships with others, they will not know and understand that human rights apply to them. Following this they may not have the confidence to speak out in cases of rights violations. This participatory lens should be applied to both 'individual' decisions concerning children (care, private family law, protection) and 'community' decision making (political decisions that will affect young people).

Further to the above, we strongly recommend that consideration be given to developing age-appropriate ways of equipping children and young people with the skills and knowledge need to understand the range of human rights and how these apply to themselves and others, and to have the skills and knowledge needed for them to be capable, and have agency, to enforce their rights and secure fair treatment in cases of rights violations.

In support of our recommendation, we acknowledge that the UK has an obligation under several international instruments, conventions and treaties to provide Human Rights Education in schools. We also acknowledge the current situation in which the children and young people's experience of school-based Human Rights Education is inequitable (Robinson, 2017).

International instruments in support of additional recommendation include:

- Council of Europe (2010) Charter on Education for Democratic Citizenship and Human Rights Education, (Adopted by the Committee of Ministers on 11 May 2010 at the 120th Session)
- United Nations (2006) Declaration on Human Rights Education and Training 2011 General Assembly resolution 66/137
- United Nations (1966) International Covenant on Economic, Social and Cultural Rights
- United Nations (1963) Articles 2 and 7 of the International Convention on the Elimination of All Forms of Racial Discrimination (1969 effective)
- Article 10 of CEADAW, 1979
- Article 29 of the UN CRC
- SDG 4.7 on education for sustainability
- UNDHR Article 26(2)

References

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Act of Parliament (2014) *Children and Families Act 2014* (accessed on 20.03.2019 at http://www.legislation.gov.uk/ukpga/2014/6/pdfs/ukpga_20140006_en.pdf).

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