



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

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# Indirect Incorporation of the United Nations Convention on the Rights of the Child: Consultation Response

## Who we are

The Children's Commissioner for Jersey was established to promote and protect children and young people's rights. The Children's Commissioner works for every child and young person in Jersey who is:

- Under the age of 18
- Under the age of 25 if they have a disability, have been care experienced or have been sentenced under the Young Offenders Law
- Placed off-island for their care or treatment

The Commissioner for Children and Young People (Jersey) Law 2019 established the role of the Commissioner, and set out the powers and actions the Commissioner can take. These include:

- Providing children and young people with information about their rights.
- Supporting children and young people to complain.
- Working with people and organisations who provide services to help them to solve any problems or complaints at the earliest opportunity.
- Asking for information from people providing services to children and young people.
- Visiting places where children and young people are cared for, accommodated or receive services and speak to them.
- Investigating cases where the rights of children and young people have not been respected and suggest how things could be improved.
- Going to court for children and young people in certain circumstances.

Further information on the role of the Commissioner and the wider office is available on our website at [www.childcomjersey.org.je](http://www.childcomjersey.org.je)

## Introduction

We welcome the opportunity to respond to the Government's consultation on children's rights in Jersey. The United Nations Convention on the Rights of the Child (UNCRC) is a powerful piece of international law which sets out the minimum standard for rights protections that the State has an obligation to uphold. It is the most widely and rapidly ratified treaty, and encompasses a range of civil and political rights as well as cultural, social and economic rights. Written 30 years ago, and ratified by the United Kingdom in 1991, the UNCRC was extended to Jersey in 2014. The obligations however have yet to be brought fully into Jersey law through the incorporation of the UNCRC.

We are supportive of steps to better protect children's rights, and welcome the due regard duty being brought into Jersey law. We are clear however that the proposal being consulted on falls short of the requirements as set out by the United Nations Committee on the Rights of the Child and therefore call for the full and direct incorporation of the UNCRC into Jersey law, as well as the Due Regard duty proposed in this consultation.

Our key points are as follows:

- We welcome this step forward in embedding children’s rights considerations into decision making in Jersey, however this is the first step and not the end of the journey. Full and direct incorporation of the UNCRC is necessary to protect, respect and fulfil the rights of children and young people in Jersey
- Children and young people know their rights, we need to make these a reality in Jersey
- We welcome the duty for Ministers to undertake Child Rights Impact Assessments (CRIAs). This should be mandatory for all those acting on behalf of the State in order to mainstream rights protections, and all CRIAs should be published to allow for scrutiny and transparency
- Jersey has a real opportunity to show leadership on children’s rights protections. Full and direct incorporation, alongside a duty to consider children’s rights throughout the decision-making process through Child Rights Impact Assessments would demonstrate that Jersey can be a leader internationally on protecting, respecting, and fulfilling children’s rights.

## Introduction

The implementation of the UNCRC is monitored by the United Nations Committee on the Rights of the Child (the Committee). Whilst the UNCRC and Committee do not prescribe the exact methods or mechanisms for protecting rights under domestic law, Article 4 commits States to “undertake all appropriate legislative, administrative, and other measures for the implementation of the rights recognized in the present Convention”.

General Comment No. 5 expanded on what is meant by these general measures of implementation, which has been supplemented by tailored recommendations to States Parties during their Concluding Observations. General Comment No. 5 sets out that general measures of implementation:

“are intended to promote the full enjoyment of all rights in the Convention by all children, through legislation, the establishment of coordinating and monitoring bodies - governmental and independent - comprehensive data collection, awareness-raising and training and the development and implementation of appropriate policies, services and programmes.”

It further clarified that a comprehensive review of all laws and policies to monitor for compliance “States parties need to ensure, by all appropriate means, that the provisions of the Convention are given legal effect within their domestic legal systems.”

Concluding Observations for States Parties have further expanded that these measures must be comprehensive and consistent in their application<sup>1</sup>, but the Committee has also made clear that there is no prescriptive way as to how to implement these obligations, leading to different approaches. The duty to have due regard to children’s rights has emerged as one of the mechanisms of implementation.

## Due Regard

The duty to have due regard to children’s rights is well established, for example through the Rights of Children and Young Persons (Wales) Measure 2011. It provides for the consideration of children’s rights at the earliest possible time, meaning that decisions are truly grounded in rights and not an afterthought. Child Rights Impact Assessments (CRIAs) can provide a robust framework for children’s rights considerations throughout the decision making process. A recent comparative analysis<sup>2</sup> of the UK’s approach to CRIAs outlined key elements of best practice.<sup>3</sup> We would advocate for these to be embedded in the new CRIA system, which include:

- Setting out a clear purpose for CRIA
- Making it mandatory with a clear material scope
- Support at senior levels of government
- Building in resources
- Beginning CRIA as early as possible in the policy development process

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<sup>1</sup> See CO Luxembourg CRC/C/LUX/CO3-4, paragraphs 12-15

<sup>2</sup> Child Rights Impact Assessment (CRIA): A review of comparative practice across the UK, Lisa Payne, Unicef, 2017. Available at [https://downloads.unicef.org.uk/wp-content/uploads/2017/09/Unicef-UK-CRIA-comparative-review\\_FOR-PUBLICATION.pdf?\\_ga=2.269075633.170741958.1580729294-1247536189.1575887630](https://downloads.unicef.org.uk/wp-content/uploads/2017/09/Unicef-UK-CRIA-comparative-review_FOR-PUBLICATION.pdf?_ga=2.269075633.170741958.1580729294-1247536189.1575887630)

<sup>3</sup> Ibid, page 3

- Using a template and guidance to ensure consistency
- Providing training and support on CRIA and the UNCRC
- Being able to access up-to-date, comprehensive and reliable data
- Ensuring children’s views and experiences inform the CRIA
- Opening up the CRIA to external scrutiny through publication/stakeholder involvement

The United Nation’s most recent Concluding Observations<sup>4</sup> recommended that the State:

“(a) Introduce a statutory obligation at national and devolved levels to systematically conduct a child rights impact assessment when developing laws and policies affecting children, including in international development cooperation;  
 (b) Publish the results of such assessments and demonstrate how they have been taken into consideration in the proposed laws and policies.”<sup>5</sup>

We are supportive of the duty for Ministers to have due regard to children’s rights as set out in the UNCRC as set out in phase 1 and agree that the completion of Children Rights Impact Assessments (CRIAs) must be mandatory. We would seek clarity as to the applicability of this to all government departments, which would be essential in order to ensure that children’s rights are considered in the development of all policy and legislation. We are appreciative of having sight of the Preferred Policy Model, which indicates the intention that government departments would be bound to do so however the consultation paper makes reference to Ministers only and we would therefore seek reassurance that mandatory CRIAs are to be required of all government departments. The Committee has been clear that all departments of government have a role to play in protecting, respecting and fulfilling children’s rights, including those which are not traditionally viewed as impacting children such as finance, planning and employment.<sup>6</sup>

Human rights are interdependent and universal, and as such their protection and enjoyment cannot be restricted to departments traditionally viewed as ‘children’s services’. Indeed, a key strength of embedding rights protections is that these are cross-cutting and help to protect against silos. Learning from Wales highlights that CRIAs have been a positive development that have pushed forward understanding of children’s rights and led to greater recognition and consideration in policy development, but the application of CRIAs has proven to be inconsistent<sup>7</sup>. In order to counteract this risk, it is therefore important to ensure that CRIAs are undertaken by all departments on a mandatory basis in order to embed rights protections, and improve understanding. This must sit alongside an effective participation strategy to outline how and when children and young people are engaged with, and should be co-produced and reviewed regularly by children and young people to ensure it is and remains fit for purpose.

We very much welcome the requirement for all elected Members to undertake CRIAs when introducing propositions, which is consistent with the Committee’s recommendations.

In order for children’s rights to be considered fully, there must be training and support available, and these impact assessments must be published to ensure transparency and allow for effective scrutiny. Clarity over how the views of children and young people will be sought is required to ensure that decisions are informed by their experiences and opinions as per their Article 12 rights. Further, access to reliable data is required in order to make informed decisions about what is in children’s best interests.<sup>8</sup>

Phase 2 extends the duty on Ministers to have due regard to children’s rights when exercising all of their powers and does not make CRIAs mandatory, nor does it require any CRIAs to be published. The Preferred Policy Model paper states that CRIAs “represent best practice”, and we would seek clarity as to why this would not therefore be embedded on a mandatory basis. One of the Guiding Principles of the UNCRC as established in Article 3 is that the best interests of the child be a

<sup>4</sup> Concluding observations on the fifth periodic report of the United Kingdom of Great Britain and Northern Ireland, Committee on the Rights of the Child, July 2016 CRC/C/GBR/CO/5

<sup>5</sup> Ibid, paragraph 10

<sup>6</sup> General Comment No. 5, paragraph 37

<sup>7</sup> “The impact of Legal Integration of the UN Convention on the Rights of the Child in Wales”, Equality and Human Rights Commission, Dr Simon Hoffman, and Sean O’Neill (August 2018). Available at [http://www.childreninwales.org.uk/wp-content/uploads/2019/04/The-Impact-of-Legal-Integration-of-the-UN-Convention-on-the-Rights-of-the-Child-in-Wales\\_ENG.pdf](http://www.childreninwales.org.uk/wp-content/uploads/2019/04/The-Impact-of-Legal-Integration-of-the-UN-Convention-on-the-Rights-of-the-Child-in-Wales_ENG.pdf)

<sup>8</sup> Mason, N and Hanna, K (2009) Undertaking Child Impact Assessments in Aetearoa New Zealand local authorities: evidence, practice, ideas. New Zealand: Auckland University of Technology.

paramount consideration, and therefore any reasons as to not conducting and publishing a CRIA should only be done in the best interests of the child, and not simply as a time saving or easier process. Greater transparency leads to better understanding of rights and allows for learning to be shared as to how better protect children's rights. We recognise for example that publishing decisions which relate to a child or family that could make them identifiable may not be in the best interests of the child. We would urge that the government establish a high threshold on the reasoning given for not undertaking a CRIA which must be evidenced to ensure that there is an opportunity to scrutinise decisions and allow for greater accountability.

Phase 3 describes the requirement for duty-bearers to have due regard to children's rights but the use of CRIAs is non-statutory and therefore optional.

The development of policies in Jersey does not solely rest with Ministers and their delegates, but is undertaken by schools, healthcare providers, the police, and other public services. These impact the day to day lives of children and young people, and so embedding protections here can make rights real for children. It is imperative that rights are not perceived to be optional, and therefore if CRIAs are not undertaken on a mandatory basis, it must be accompanied by robust guidance, and clear oversight mechanisms.

We are aware that CRIAs in isolation do not create a cultural change, but they can be an important mechanism to facilitate this when accompanied by other supportive measures such as training for staff. We understand that it is important for CRIAs to not be seen as a 'tick-box exercise' or a form that must be filled out, but as a useful tool to support meaningful considerations of children's rights. We are clear again however that any reasons as to not undertaking CRIAs should be in the best interests of the child, and not simply for procedural convenience. If there is confusion or hesitancy around the use of CRIAs, it would be useful to explore this with duty bearers as to how they would discharge their duty to have due regard. If alternative proposals are presented, we would welcome the opportunity to be involved in this process.

There is a risk that if duty-bearers are not required to undertake a CRIA, it may lead to a variety of separate assessments or reviews being undertaken and therefore lack consistency. This is further heightened if there is not appropriate support, training and oversight as to how the impact on children's rights is assessed and considered. Importantly, it can impact on children and young people's opportunity to see how their rights have been considered when decisions are being made. Children and young people in Jersey are powerful advocates for their rights, and the majority of schools on the island are either registered or have achieved a bronze or above certificate as part of the Rights Respecting Schools programme, so there is a real opportunity for dialogue. The due regard duty is a right to a process, rather than a right to a specific outcome and so it is important to support consistent proactive protections in a transparent and accessible way.

#### Duty Bearers

We are supportive of the Government aim "to ensure that the policies, laws and practices which affect Jersey's children and families are shaped by consideration of children's rights, within a vibrant culture of rights-based practice." We recognise the importance of facilitating a cultural change amongst practitioners, indeed research has shown that this is a significantly valuable outcome of the process of incorporation.<sup>9</sup>

"The very process of incorporation raises awareness of children's rights and the CRC in government and civil society. In countries where there has been incorporation (Belgium, Norway, Spain), interviewees felt that children were more likely to be perceived as rights holders and that there was a culture of respect for children's rights."<sup>10</sup>

It is therefore crucial that all those acting on behalf of the State are duty bearers. We would seek clarification as to the reasoning for the distinction of duty bearers being distinct from that of the Human Rights (Jersey) Law 2000, which established that a public authority includes:

"(a) a court or tribunal; and (b) any person certain of whose functions are functions of a public nature".<sup>11</sup>

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<sup>9</sup> The UN Convention on the Rights of the Child: a study of legal implementation in 12 countries; Laura Lundy, Ursula Kilkelly, Bronagh Byrne and Jason Kang

<sup>10</sup> Ibid, page 4

<sup>11</sup> Article 7 (2)

We appreciate that the full protection of children's rights will require additional resources, however improvements to the protection and fulfillment of children's rights or rights more broadly is internationally recognised as being on the basis of progressive realisation. Indeed, this is made clear in the UNCRC in Article 4,<sup>12</sup> and has been elaborated on by the Committee<sup>13</sup>. The Government of Jersey has recently pledged to put children first<sup>14</sup>, a welcomed commitment. It is vital that this commitment is upheld, and that children's rights are protected, respected and fulfilled. We have welcomed the opportunity to support government staff with training on children's rights, and are supportive of government's efforts to improve rights protections however these are existing obligations that the state should already be respecting, and have existed in international law for 30 years.

Indeed, in their report to the UN Committee on the Rights of the Child in 2013, the Government of Jersey stated that "the Bailiwick of Jersey is compliant with the majority of the UNCRC Articles". Six years on, it is important that real, meaningful changes are made to improve rights protections in Jersey through a concrete commitment in legislation to protect, respect and fulfil children's rights in Jersey.

### **The Need for Full and Direct Incorporation**

The duty to have due regard to children's rights is an important mechanism for upstreaming rights protections through preventative measures, adopting a proactive approach. It ensures that children's rights are considered at the beginning of the decision making process and can facilitate a shift towards the creation of systems, structures, policies and legislation which place children's rights at the centre. Strict measures of compliance are vital, but are often retroactive in their application effectively meaning that rights violations occur but that access to redress is provided. Therefore due regard is an important measure to ensure that children's rights are considered and protected prior to decisions and actions being taken, however, in isolation the measure falls short of the requirements as set out by the United Nations Committee on the Rights of the Child.

The Committee made clear that "States parties need to ensure, by all appropriate means, that the provisions of the Convention are given legal effect within their domestic legal systems."<sup>15</sup> They clarify that "Incorporation should mean that the provisions of the Convention can be directly invoked before the courts and applied by national authorities and that the Convention will prevail where there is a conflict with domestic legislation or common practice."<sup>16</sup> Without enforceability and the justiciability of UNCRC rights in Jersey, it does not provide the full and robust protections that are required under international law.<sup>17</sup>

We therefore strongly advocate for the full and direct incorporation of the UNCRC into domestic law, alongside a strengthened due regard duty. We are working with leading academics to support improved understanding of Jersey's compliance with the UNCRC, including engagement work with children and young people in Jersey to learn from their views and experiences. We therefore view this work to be supportive of incorporating the UNCRC and would expect that the bedding in of a due regard model would be a complementary implementation action.

#### The need for clarity

Many countries around the world have incorporated the UNCRC into their domestic law. In monist legal systems, treaties become part of domestic law as soon as the State has ratified the treaty. The UK's dualist system, which requires further action by the state to give international treaties full effect in domestic law, is further complicated when considering Jersey's relationship with the UK and its framework as an independent, self-governing island with its own legal system. The dualist system often leads to confusion as to the applicability of international law. For example, in the UK case of *R (on the application of SG and others (previously JS and others)) (Appellants) v SSWP (Respondent)*, Lord Kerr considered:

"Standards expressed in international treaties or conventions dealing with human rights to which the UK has subscribed must be presumed to be the product of extensive and enlightened consideration.

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<sup>12</sup> See also Article 28

<sup>13</sup> Paragraphs 7-8, General Comment No. 5 (2003) General measures of implementation of the Convention on the Rights of the Child CRC/GC/2003/5

<sup>14</sup> <https://www.gov.je/news/2018/pages/statesmemberssignchildrenpledge.aspx>

<sup>15</sup> Paragraph 19, General Comment No. 5 (2003) General measures of implementation of the Convention on the Rights of the Child CRC/GC/2003/5

<sup>16</sup> Ibid, paragraph 20

<sup>17</sup> Ibid, paragraphs 24 – 25

There is no logical reason to deny to UK citizens domestic law's vindication of the rights that those conventions proclaim. If the government commits itself to a standard of human rights protection, it seems to me entirely logical that it should be held to account in the courts as to its actual compliance with that standard."

Submissions have been made to the court in Jersey which invoke the UNCRC, for example in *Re Bradley*<sup>18</sup>, it was held that "the Court should read domestic law in practice to the fullest extent as compatible with the international obligations which the island has incurred" and whilst the argument around children's access to legal representation was not "addressed in full", in the court's initial view the procedure did not breach the Convention. This is indicative of the difficulties in applying the Convention whilst ratified yet not fully incorporated. It would lead to further legal clarity and indeed support the Government of Jersey's stated aims of Jersey being the best place to grow up if these rights are fully and directly incorporated into Jersey law.

Children and young people in Jersey have demonstrated their knowledge and awareness of their rights through communicating with the Commissioner's Office, and through initiatives such as the Rights Respecting Schools programme, however, rights remain out of reach in many instances, given the dearth of protections under domestic law. We have welcomed developments such as the adoption of the Children and Education (Amendment) (Jersey) Law 2019 which made corporal punishment against the law, however this sectoral approach to reform is too slow, and risks important rights protections 'falling through the cracks'. Children's rights are interdependent and universal, and therefore a sectoral approach does not provide adequate safeguards in order to protect, respect and fulfil the full complement of rights as enshrined in international law.

## **Conclusion**

Overall, we welcome the step forward to entrench rights protections in the systems and structures which impact on children's enjoyment of their rights, however it is imperative that an enhanced due regard duty is the first step towards full and direct incorporation. The duties outlined in the UNCRC were enshrined 30 years ago, and are not aspirational but international minimum standards. Jersey reiterated its commitment to children's rights through extending the Convention in 2014, however it is vital that further steps are taken to make rights real for children and young people in Jersey. Many nations around the world have or are currently incorporating the UNCRC, including Sweden and Iceland, whilst in the UK the Scottish Government has committed to incorporate the UNCRC into Scots law "to the maximum extent possible within the powers of the Scottish Parliament".<sup>19</sup> There is rich learning to be drawn from and a network that can help to support Jersey in doing so here.

Jersey is a small island with a real opportunity to show leadership and priorities children's rights. The proposed Children's Law reform which seeks to give access to early help a statutory footing, the right to advocacy, the establishment of corporate parent duties as well as a drive towards more integrated services all represent significant shifts forwards, yet without the right framework these may not work as intended. The UNCRC provides a robust framework to drive forwards developments in children's rights, adopting a holistic approach and allowing for learning from other nations in order to support the Government of Jersey to achieve its aim of making Jersey the best place to grow up.

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<sup>18</sup> [2017]JRC126

<sup>19</sup> <https://consult.gov.scot/children-and-families/uncrc/>