



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

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Dear Minister

Advice on safeguarding the rights of the child in the criminal justice system of Jersey during the COVID-19 pandemic

The past weeks have brought about a profound change in the lives of everyone as the spread of Coronavirus (COVID-19) has triggered the implementation of stringent measures by States in an attempt to combat it. In Jersey, COVID-19 (Screening, Assessment and Isolation) (Jersey) Regulations 2020 came into force on 28 March 2020 (Emergency Regulation)¹ imposing numerous restrictions upon the day-to-day operation of the jurisdiction, including the requirement for the social distancing and 'lock-down' of all non-essential activities. Prior to that, on 23 March 2020 temporary measures were adopted by the Royal Court until at least 30 April 2020 to ensure that the court proceedings can continue during the pandemic.² The combined effects of these measures upon those coming into contact with the criminal justice system are significant as the requirements for the social distancing and 'lock-down' are substantial restrictions upon the way individuals are able to interact with the criminal justice actors. These restrictions will have particularly negative effect upon children appearing before the courts. It is therefore paramount that due consideration is given by policy makers as to how to mitigate negative effects thus ensuring compliance with the international law on the rights of the child. There is an urgent need for clear, express advice to all criminal justice actors, including the police, Youth Court, legal profession and Centeniers to ensure that all appropriate participants of the system are aware of the way children in contact with the criminal justice system should be treated during the pandemic. Regrettably such has not been yet been issued. In order to assist that process, the Children's Commissioner for Jersey (the Commissioner) has prepared the present Advice in accordance with Section 5 (1) of the Commissioner for Children and Young People (Jersey) Law 2019.³

¹ [COVID-19 \(Screening, Assessment and Isolation\) \(Jersey\) Regulations 2020](#)

² Channel 103 '[Coronavirus: Royal Court Contingency Plans In Place](#)' (19 March 2020)

³ [Commissioner for Children and Young People \(Jersey\) Law 2019](#).

I. Detaining a child during COVID-19 pandemic

Article 37 (b) of the United Nations Convention on the Rights of the Child (UNCRC) requires that the arrest, detention or imprisonment of the child is used only as a measure of last resort and for the shortest period of time. This is the basic premise of child justice which has not been suspended by the present public health emergency. It is therefore paramount that any measures which are put in place to combat the pandemic respect this requirement. The Commissioner is particularly drawing the attention of law enforcement agencies to the following three situations:

(1) Arrests pursuant to the Emergency Regulation

The Emergency Regulation puts in place numerous restrictions the violations of which may lead to an arrest. It is possible that a child would be found to be in breach of the Emergency Regulation. However, the Commissioner draws attention to the World Health Organisation (WHO) highlighting the particular needs of the children during the pandemic, noting that children may respond to stress created by the measures introduced to combat the pandemic in different ways such as being more clingy, anxious, withdrawing, angry or agitated.⁴ It is therefore crucial that the law enforcement are aware of **different ways a child may respond to the restrictions introduced by the Emergency Regulation** and understand these reactions as normal for someone at that age and stage personal of development.⁵

Moreover, **no child should be arrested for the breach of the Emergency Regulation** since Section 10 of that Regulation charges the person responsible for the child with the duty to secure child's compliance with the Regulation. It follows from there that any breaches of the Emergency Regulation cannot be attributed to a child and a child cannot be lawfully arrested for any breach of the Emergency Regulation.

(2) Arrests outside the Emergency Regulation

Noting that detention of the child should be a measure of last resort, as stipulated by Article 37 (b) of the UNCRC, and taking into account the public health emergency in Jersey by imposing strict social distancing rules, the Commissioner urges the police to avoid arresting children so as not to expose them to unnecessary risk of infection, trauma and harm. In the current circumstances **children should not be arrested unless it is a truly exceptional case where the public are at risk of death or serious personal injury.**

(3) No arrested child held in custody and the right to challenge the detention

If in exceptional circumstances the arrest of a child takes place during the pandemic, such **a child should not be held in custody** other than in the most exceptional circumstances. The Commissioner has been informed that in relation to children held at the police station, the Attorney General's Guidance on the

⁴ WHO '[Helping children cope with stress during the 2019-nCoV outbreak](#)'

⁵ See also UN Press Release [UN experts call for urgent action to mitigate heightened risks of violence against children](#) (7 April 2020).

Overnight Detention of Children and Youths of September 2019⁶ still applies. The Commissioner however has already raised a number of concerns over this Guidance and wishes to reiterate those which also prompt the Commissioner to restate that no child should be held in custody other than in truly exceptional circumstances.

Moreover the Commissioner wishes to remind that the Committee on the Rights of the Child (CRC) in its General Comment No. 24 requires that “every child arrested and deprived of his or her liberty should be brought before a competent authority within 24 hours to examine the legality of the deprivation of liberty or its continuation”.⁷ This has been accepted as a standard requirement by other UN bodies⁸ and has been repeated in a Model Law on Juvenile Justice drawn up by the Centre for International Crime Prevention (now known as the United Nations Office on Drugs and Crime (UNODC)).⁹ Crucially, this right is non-derogable and therefore cannot be suspended even during the times of public emergency.¹⁰

II. The fair trial guarantees for children during COVID-19 pandemic

The impact of the temporary measures introduced by the Royal Court are likely to have a significant impact upon children who are awaiting or undergoing trial proceedings or sentencing.

(1) Fair trial guarantees

The Commissioner has been informed that during the pandemic the Youth Court is intending to operate only via video-link although the exact modalities are still being examined. The Commissioner has been also informed that proper legal representation is an issue of a particular concern and is being examined.

It must be recalled that even during the present pandemic all defendants, including children, should still be able to exercise their rights fully and effectively even if they are not physically present in the court and/or are unable to meet with their lawyers in person.¹¹ In relation to children specifically, it must be recalled that even during the normal circumstances children may struggle to effectively participate in the court proceedings. Now that proceedings may take place via video-link, their ability to take part in the proceedings effectively will likely be further hampered. Moreover, the Commissioner wishes to point out research which indicates that children appearing over video-link are less likely to be granted bail, more likely to be remanded to youth detention accommodation and that children sentenced over video-link are more likely to receive custodial sentences.¹²

⁶ [Attorney General’s Guidance on the Overnight Detention of Children and Youths](#) of September 2019.

⁷ Committee on the Rights of the Child. [General comment No. 24 \(2019\) on children’s rights in the child justice system](#). UN Doc CRC/C/GC/24 at para 90.

⁸ For example, the United Nations Working Group on Arbitrary Detention consistently requires that children arrested should be brought before the judicial authority within 24 hours of their arrest to enable them to challenge the legality of such detention. See, for example, A/HRC/WGAD/2019/29 at para 55. See also Global study on children deprived of liberty (2019). UN Doc A/74/136 at para 89.

⁹ United Nations Office on Drugs and Crime. [Justice in Matters Involving Children in Conflict with the Law. Model Law on Juvenile Justice and Related Commentary \(2013\)](#); Article 33(3) at p. 24.

¹⁰ [A/HRC/30/37](#) at paras 11 and 47 (a) (b).

¹¹ Fair Trials ‘[Safeguarding The Right To A Fair Trial During The Coronavirus Pandemic: Remote Criminal Justice Proceedings](#)’ p. 3; see also International Commission of Jurists [The Courts and COVID-19](#)

¹² Gibbs, P. [Defendants on video – conveyor belt justice or a revolution in access?](#) October 2017.

(2) The Commissioner therefore urges that **only essential court hearings proceed via the video-link** with the requisite modifications to ensure that the child is able to effectively participate in the proceedings. To this end, the effective implementation of **the right to legal assistance** is of particular importance and it is the duty of the Youth Court to ensure that such is effectively provided to every child defendant free of charge. Every effort should be made to facilitate the child's involvement in the hearing, including regular breaks so the legal representative can communicate directly with their client to explain what is happening and check their understanding.¹³ Moreover, no remote hearing should proceed without a supporting adult who is able to be present and participate in the remote hearing to support the child¹⁴. In particular, the child's social worker should be involved, alongside an advocacy worker and/or a person the child has identified as a supportive, trusted adult.¹⁵

(3) Diversion

The Commissioner has been informed that the Parish Hall Enquiries, which constitute the diversion system for children in Jersey have been suspended and being provisionally re-listed for September 2020. The Commissioner welcomes this, noting that in normal circumstances most children suspected of committing offences should be dealt with by diversion,¹⁶ the appropriate response during the pandemic therefore would be for the police to release them under investigation until the "lock-down" is lifted and the Parish Hall Enquires can resume.

III. Children in detention during COVID-19 pandemic

The WHO has identified people deprived of their liberty, such as prisoners and individuals in other places of deprivation of liberty as more vulnerable to COVID-19 than the general population because of the confined conditions in which they live in very close proximity to each other over prolonged periods of time.¹⁷ The United Nations Office for Drugs and Crime (UNODC)¹⁸ as well as the United Nations Children's Fund (UNICEF)¹⁹ have also confirmed that children deprived of liberty are at a greater risk to contract COVID-19 not only because detention facilities present a particular risk for spread of communicable diseases but also because children are more vulnerable because of the confined conditions and the restrictions in place for accessing a range of services, including health care, mental health and psychological support and education. While children in detention in Jersey do not suffer from overcrowded facilities, their detention nevertheless poses risks in the context of the measures imposed to combat the pandemic. The Commissioner is particularly concerned over:

¹³ Garden Court Chambers [Child Protocol in Criminal Cases](#) (3 April 2020).

¹⁴ The use of teleconferencing facilities for up to 19 participants for example was highlighted in paragraphs 93-96 of *Teesside Gas Transportation Ltd v Cats North Sea Ltd & Ors* [2020] EWCA Civ 503, available at www.bailii.org/ew/cases/EWCA/Civ/2020/503.html

¹⁵ This is provided for in Scotland's Children's Hearing System for example.

¹⁶ *Supra* note 7, at para 16.

¹⁷ WHO Regional Office for Europe '[Preparedness, prevention and control of COVID-19 in prisons and other places of detention Interim guidance 15 March 2020](#)' at p. 1; See also the statement by the International Committee of Red Cross on 7 April [COVID-19: Authorities must protect health of detainees, staff and ultimately surrounding communities](#); see also UN Press Release (25 March 2020) [Urgent action needed to prevent COVID-19 "rampaging through places of detention" – Bachelet](#)

¹⁸ UNODC [Protecting Children deprived of liberty during the COVID-19 outbreak](#). UNODC Technical Assistance Services, at p. 1.

¹⁹ UNICEF and the Alliance for Child Protection in Humanitarian Action [Technical note: COVID-19 and Children Deprived of their Liberty](#).

(1) Children in pre-trial detention

The requirement of the UNCRC to only detain children as a measure of last resort imposes an obligation upon Jersey to seek alternatives to detention.²⁰ As the CRC states in its General Comment No. 24, this requirement also applies to the imposition of pre-trial detention.²¹ In the context of the wide range of public health emergency measures that have been introduced, the permissible justifications for resorting to pre-trial detention have arguably shrunk further. The Commissioner therefore urges **refrain from imposing pre-trial detention upon children** during the pandemic and to **review any existing cases of children in pre-trial detention** so as to seek their release by the use of such non-custodial alternatives such as community placement.

(2) Sentenced children

Noting the particular risk that detention facilities pose for the spread of COVID-19,²² the authorities in Jersey should **release children currently serving sentences** by implementing schemes of early, provisional or temporary release for those detainees for whom it is safe to do so, taking full account of non-custodial measures as provided for in the United Nations Standard Minimum Rules for Non-custodial Measures (The Tokyo Rules)²³ and the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (The Beijing Rules).

If release of a sentenced child is not possible due to the security risk posed by such a child, the Commissioner urges the authorities to ensure that such a **child is not in *de facto* solitary confinement**. The provision of healthcare and especially mental health²⁴, education and family visits should continue during the 'lock-down' period as far as possible and at the very minimum, meaningful family contact via video and audio links must be ensured.²⁵

The Commissioner is aware that currently there is one child serving a custodial sentence in Jersey and appreciates the response received from the Chief Probation Officer in relation to the regime currently applicable to this child. In this letter it is explained that (i) regular Placement Panel meetings are held where the situation of the child is discussed, with the latest meeting being 9 April; (ii) regular cleaning takes place in Greenfields and appropriate action taken in relation to any staff who are symptomatic or indeed diagnosed with COVID-19; (iii) that the child in question is able to access education as well as exercise in the gym; (iv) that the child's safety and health is assessed constantly and medical services would be called if any concerns arise; (v) that the child's visiting rights have not been altered; and (vi) the options of moving the child either to the adult facility or off-island are being considered.

The Commissioner regrets however that all these measures in relation to the only child serving a sentence in Jersey fail to recognise the fundamental tenant of the child justice system as embodied in the UNCRC which requires the best interests

²⁰ Supra note 7, at para 85.

²¹ Ibid, para 86.

²² Supra note 15.

²³ Advice of the Subcommittee on Prevention of Torture to States Parties and National Preventive Mechanisms [relating to the Coronavirus Pandemic](#), adopted on 25 March 2020, at para 9 (2).

²⁴ See [IASC Briefing note on addressing mental health and psychosocial aspects of COVID-19 Outbreak. Version 1.1](#) (February 2020).

²⁵ Penal Reform International. [Coronavirus: Healthcare and human rights of people in prison](#).

of the child to be the driving force for any decisions concerning that child. The Commissioner finds it particularly striking that the letter fails to explain what alternatives to remaining in custody in Greenfields have been considered and why none of such alternatives have been found to be suitable. Rather, the approach of the Placement Panel appears to take the necessity to keep the child in custody as the overriding consideration and all the measures put in place are aimed at ensuring that the child remains detained.

The Commissioner cannot accept that remaining in detention during the outbreak of COVID-19 in Jersey serves the best interests of the child in question. Although the child has been able to access education and sports, the child remains in *de facto* solitary confinement which in itself is a breach of international law.²⁶ Moreover, as stipulated by the CRC in its General Comment No. 24, every detained child should be provided with, *inter alia*, a physical environment and accommodation conducive to the reintegrative aims of residential placement; provided with opportunities to associate with their peers; have frequent contact with the wider community and receive adequate physical and mental health care throughout the stay in the facility.²⁷ The prevailing public health emergency means that none of these obligations can be effectively met. The Commissioner is particularly concerned over the adequate provision of the mental health support for the child, noting that even during the pandemic and the emergency measures, the mental health provision must remain. Furthermore, due to the present approach in Jersey to test only those who become symptomatic, the child in Greenfields remains at a serious risk to being exposed to COVID-19.

(3) The Commissioner therefore calls for the conditional safe release of the child during the COVID-19 pandemic with the requisite supervision and safeguarding. Safeguarding the right to health

The right to health belongs to everyone, including all children and thus children in detention too.²⁸ As recently confirmed by the United Nations Special Rapporteur on the right to physical and mental health, “Everyone, without exception, has the right to life-saving interventions and this responsibility lies with the government. The scarcity of resources or the use of public or private insurance schemes should never be a justification to discriminate against certain groups of patients”.²⁹ The Commissioner therefore calls for **testing, diagnosis and public health measures (including the provision of personal protective equipment) to be immediately implemented in all detention facilities where children are or may be held**. Any child in detention displaying COVID-19 symptoms must receive appropriate medical care, including urgent hospitalisation as required.

(4) Independent oversight

Although the measures enacted by the Emergency Regulation impose a number of restrictions on the way oversight bodies are able to exercise their mandate, the Commissioner recalls that **these restrictions cannot serve as a blanket excuse to deny access to detention facilities to oversight bodies**. As the United Nations Subcommittee on the Prevention of Torture has stated, oversight bodies

²⁶ Supra note 7 at para 95 (h).

²⁷ Ibid, at paras 95 (b), (d) and (e).

²⁸ See also Article 24 of the UNCRC.

²⁹ UN Press Release [No exceptions with COVID-19: “Everyone has the right to life-saving interventions” – UN experts say](#) (26 March 2020). See also [‘Statement of principles relating to the treatment of persons deprived of their liberty in the context of the coronavirus disease \(COVID-19\) pandemic issues by the European Committee for the Prevention of Torture’](#) of 20 March 2020 CPT/Inf (2020)13 (19 March 2020).

should “continue exercising their preventive mandate during the pandemic, including visits to places of detention when possible, bearing in mind the legitimate social contact restrictions, and the “do no harm” principle”.³⁰ This statement echoes the views of the European Committee on the Prevention of Torture.³¹ Therefore oversight bodies, including the Commissioner, should be permitted appropriate access to all detention facilities in Jersey. Further, Independent Reviewing Officers, the Children’s Rights Officer, as well as independent advocacy services can play a role in ensuring more regular checks and balances in the intervening period.

17 April 2020

Yours sincerely



Deborah McMillan

Children’s Commissioner for Jersey

c.c. Mark Rogers, Director General CYP, Education & Skills
Robin Smith, Chief of Police
Mike Cutland, Chief Probation Officer
Julian Blazeby, Director General, Justice and Home Affairs
Sam Mezec, Minister for Children and Housing

³⁰ UN Press Release [COVID-19: Measures needed to protect people deprived of liberty, UN torture prevention body says](#) (30 March 2020). See also Advice of the Subcommittee on Prevention of Torture to the National Preventive Mechanism of the United Kingdom of Great Britain and Northern Ireland [regarding compulsory quarantine for Coronavirus, adopted at its 40th session](#) (10 to 14 February 2020) and supra note 19.

³¹ Supra note 27, the European Committee for the Prevention of Torture.