



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

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**February 2022**

### **Formal advice on the Draft Children (Convention Rights) (Jersey) Law 202-**

I welcome the draft Children (Convention Rights) (Jersey) Law. The draft Law sets out the arrangements for having due regard to the UNCRC (United Nations Convention on the Rights of the Child) when Ministers, non-executive Members and States Bodies lodge propositions. This means that when preparing a proposition, they must consider how the proposition relates to children's rights - due regard will also require the Minister lodging a proposition to consider whether the proposition maximizes the opportunities available to fulfil children's rights, i.e., in the particular policy context to which the proposition applies. In practice, a proposition will be lodged, and the due regard duty will apply. A Child Rights Impact Assessment (CRIA) is applied to ensure and confirm due regard. As a result, the CRIA may reveal a possible negative impact, as well as revealing opportunities to deliver a stronger positive impact.

Following that, the Minister lodging the proposition has a choice whether to identify steps to mitigate any negative impact or strengthen the positive impact. There is no compulsion to take those steps. However, the benefit is that even if no steps are taken, the CRIA will enhance transparency. It is a matter for stakeholders whether the person lodging proposition is held to account to justify their decision, and if any negative impact is identified. This in turn encourages useful debate.

The UNCRC, together with two of its Optional Protocols<sup>1</sup>, was ratified and extended to Jersey in 2014. As a result of this, Jersey is bound to the UNCRC by international law and is subject to the monitoring and reporting processes of the UNCRC. Article 4 of the UNCRC binds State Parties to *'undertake all appropriate legislative, administrative, and other measures for the implementation of the rights recognized in the*

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<sup>1</sup> Optional Protocol to the Convention on the Rights of the Child (the involvement of children in armed conflict) (2000); Optional Protocol to the Convention on the Rights of the Child (the sale of children, child prostitution and child pornography) (2000).

present Convention.’<sup>2</sup> The UN (United Nations) Committee, which has provided guiding comments on the interpretation and application of the UNCRC, states<sup>3</sup> :

*“Implementation is...action to ensure the realization of all rights in the Convention for all children...”* and welcomes the **“incorporation of the Convention into domestic law, which is the traditional approach to the implementation of international human rights instruments...”**

This draft Law will significantly support the implementation of the UNCRC Article 4 and will help ensure that children have their rights protected, fulfilled and realised.

### **Background**

In 2017, the Independent Jersey Care Inquiry (IJCI) reported on ten fundamental failings. This draft law will support in addressing all the failings; however, this one is particularly relevant:

***‘Failure to keep pace with developments in social policy, childcare practice and social work standards in the developed world.’***

*‘Additionally, although the European Convention on Human Rights (ECHR) was extended to the island in 1953, the island failed to keep pace with international initiatives in respect of common rights of children and the adoption of principles that should underpin systems of care, including juvenile justice systems. Elsewhere, the UN Declaration on the Rights of the Child 1959 laid the foundation for children being seen as individuals with rights and stressed the importance of children being raised in loving, nurturing environments with access to good educational opportunities. The UN Convention on the Rights of the Child 1989 (UNCRC)<sup>16</sup> was signed and ratified in the UK within a year but took a further quarter of a century to be adopted in Jersey.’<sup>4</sup>*

The IJCI stated that there were lessons to be learned from Jersey’s past failings. One was to stay connected. *‘Jersey must ensure not only that childcare and youth justice legislation, policy and practice are compliant with current standards in the developed world, and with ECHR and UNCRC principles, but also that legislation policy and practice are regularly being informed and evolving in line with research and developments.’<sup>5</sup>*

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<sup>2</sup> [General Comment No.5 \(2003\): General measures of implementation of the Convention on the Rights of the Child.](#)

<sup>3</sup> [General Comment No.5 \(2003\): General measures of implementation of the Convention on the Rights of the Child.](#)

<sup>4</sup> Independent Jersey Care Inquiry Chapter 12 12:53

<sup>5</sup> Independent Jersey Care Inquiry Chapter 12 12.85

The IJCI made several recommendations. Recommendation 5 was regarding legislation and the acknowledgement that *‘in the area of legislation and policy, there is still a significant amount of work required’* and *‘that legislation for children in Jersey was almost invariably lagging behind positive developments in the UK and beyond.’*<sup>6</sup> This proposed draft Law will be significant in ensuring that children’s rights are paramount in the development of legislation, policy and practice.

Following the IJCI, proposition P.63/2017 was debated and unanimously agreed by the States Assembly. The States Assembly agreed to request the Chief Minister, in conjunction with the Children’s Commissioner, to consider the desirability of giving the UNCRC a similar status to the European Convention on Human Rights in Jersey by incorporating the UNCRC into domestic legislation.

In 2017 the Council of Ministers agreed to adopt an incremental approach to incorporating the convention into domestic legislation, beginning with a ‘due regard’ model of indirect incorporation. Ministers also committed to review the option to directly incorporate the convention, once they had considered the findings of the independent review of the alignment of Island’s legislation with the UNCRC. I published this – the Legislative Gap Analysis – in 2020. This significant piece of research commissioned by the Minister has led to a reprioritisation of children’s policy which is much welcomed.

In 2019 the IJCI returned and noted that *‘Jersey has agreed to incorporate the United Nations Convention on the Rights of the Child (UNCRC) on a “due regard” basis’... ‘it will be incumbent on the States of Jersey to ensure that full and proper regard is paid to the UNCRC principles in all future legislation and policies and that the Commissioner has oversight to ensure compliance with this positive commitment.’*

The draft legislation should promote better consideration of children’s rights, it should ensure children’s rights are at the forefront of decision-making and should ensure closer attention is paid to children’s rights. The due regard duty therefore makes it more likely that children will receive their rights.

The draft Children (Convention Rights) (Jersey) Law makes provision for, and gives further effect to, the rights and obligations set out in the UNCRC.

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<sup>6</sup> IJCI Chapter 13 Page 59 Para 13.31

I have consulted with children and young people and their voices are represented in this report in the form of direct statements from them.

I note the amendment of the Commissioner for Children and Young People (Jersey) Law 2019 as set out in Article 13 and have no concerns regarding those amendments.

### **Response**

This response examines the **Draft Children (Convention Rights) (Jersey) Law** through the lens of children's rights, as established in the UNCRC.

To review the draft Law, it is imperative to establish how the Law will serve to **respect, protect and fulfil** the rights of children, as established in UNCRC. It is important to remember that children are rights bearers, and the Government of Jersey is duty bearer to these rights, and as such has specific obligations to children that are set out in the UNCRC. The obligation to **respect** means that states must refrain from interfering with or curtailing the enjoyment of human rights. The obligation to **protect** requires states to protect individuals and groups against human rights abuses. The obligation to **fulfil** means that states must take positive action to facilitate the enjoyment of basic human rights.

As a signatory to the UNCRC, there is an obligation under Article 4 which requires the states to implement the Convention. The General Principles of the UNCRC provide a framework that will enable the Government to meet its ambition to put children first. The three "passions" in the Government's Children and Young People's Plan 2019-23 are those of protecting children's rights, reducing inequalities, and promoting wellbeing.

In looking at the regulations through a children's rights lens, particular attention should be given to the four general principles of the UNCRC, which are:

- **non-discrimination** (UNCRC Article 2)
- the **best interests** of the child (UNCRC Article 3)
- the right to **life, survival and development** (UNCRC Article 6)
- and the right of the child to **participation** (UNCRC Article 12)

These proposed changes to legislation will establish duties on public authorities that will contribute to the realisation of children's rights. **A Children's Rights Approach** is consistent with these duties and will help public sector bodies to understand their children's rights obligations and meet their statutory duties. Similarly, a range of organisations in the private and non-governmental sectors in Jersey have a significant part to play in the implementation of children services, and therefore have an obligation to contribute toward better realisation of children's rights. A Children's Rights Approach will help organisations in the private and public sectors give effect to children's rights.

The five principles of a Children's Rights Approach are:

- Embedding children's rights
- Equality and non-discrimination to children
- Empowering children
- Participation of children
- Accountability to children

**Embedding children's rights** - this should be at the core of legislation, policy and practice in Jersey and this draft legislation is a step towards direct incorporation which will fully embed children's rights. The Government's ambitions in the Government Plan should be underpinned by children's rights. This draft legislation will enable children to realise their rights through better law drafting and policy making and implementation. This is because it will set out the duty for Ministers, non-executive Members and States Bodies to give due regard to the UNCRC and give balanced consideration to children's rights when making decisions about the formulation of policy or of a proposition, or an amendment to a proposition.



**Equality and Non-discrimination** - the Children's Rights Impact Assessment (CRIA) is part of this draft legislation and will promote equality and tackle direct and indirect discrimination through the assessment of decisions and acknowledging unfair and unequal negative impacts.

*“Equality means everybody has the same thing. Equity is where everybody gets what they need... Our friend has a hearing aid to hear properly. She is treated equally but with equity. She gets what she needs.”*

**Empowering children** – children's rights should empower children and young people, so they are better able to take advantage of their rights, and to engage with, influence and hold accountable the people and organisations that affect their lives. In the draft law Article 10 places a general obligation on duty bearers to take appropriate and proportionate steps to promote knowledge and understanding amongst persons within their own sphere of influence or operation, of the UNCRC and its Optional Protocols. This duty is intended to give effect to the obligation stated in article 42 of the UNCRC.

*“Knowing about children rights make me feel safe and treated fairly.”*

**I recommend that this should be explicitly set out in the children’s rights scheme to promote knowledge and understanding amongst children and young people specifically.** By knowing about their rights, children will be empowered and more able to exercise their rights.

**Participation of children** - Article 12 of the UNCRC recognises the right of children and young people to express their views freely in respect of matters which affect them, and that the views of the child be given due weight in accordance with the age and maturity of the child. Jersey does not have a national participation strategy, and this means that children are not always provided with meaningful opportunities to express their views and for their views to be taken into account.

*‘It means we have a voice.... decisions are made with us, not for us.’*

**I recommend that the Children’s Rights Scheme as set out in Article 12 of the draft law sets out how duty bearers will proactively identify opportunities for children and young people to have their voices heard as part of the policy, legislation and decision-making process. I recommend that a national participation strategy with agreed standards and principles be developed to support this. The children’s rights scheme itself should be structured around the children’s rights approach.**

**Accountability to children** - children’s human rights give rise to obligations which demand accountability. Authorities should be accountable to children for decisions and actions which affect their lives. Children should be provided with information and given access to procedures which enable them to question and challenge decision-makers. Accountability requires effective monitoring of children’s rights standards as

well as effective remedies where there is a failure to meet these standards. For this to be effective authorities need to be transparent and provide reasons for their decisions and actions. The IJCI recommended that there be a clear means for children to raise complaints and they recommended that the complaints process be reviewed. The draft law sets out in Article 10(1)(b) how those complaints will be handled in a child friendly manner, with information regarding how to make a complaint and to whom, as well as information on how to escalate a complaint.

*“Make sure you hear and understand what children and young people are saying”*

**I recommend that the current Government complaints process be adapted to provide a child-friendly complaints process for children and young people. This will enable children to complain when they feel that the duty bearers have not complied with the due regard duty when making decisions that affect their lives.** All duty bearers should be encouraged and supported to have child-friendly complaints processes in place. Children and young people will continue to have recourse to the Office of the Children’s Commissioner who may assist the child in the making of a complaint. Publication of the CRIA as set out in Article 7(7) of the draft law is to be welcomed as this will promote transparency and enable children and young people to challenge how duty bearers are implementing the due regard duty.

The children’s rights scheme is crucial as it sets out the arrangements for facilitating the fulfillment of the duty to have due regard. In the future I would like to see (in line with UNCRC General Comment 5) the **development of an Island strategy** for the co-ordination of the ongoing implementation of the Convention in Jersey. This would form an additional commitment to accountability and independent monitoring of performance against children’s rights standards.

**Further detailed comment on the draft law -**

**Duty to have due regard to the Convention on the Rights of the Child** - the cross-cutting and pervasive approach is welcomed as is the Children’s Rights Impact Assessment (CRIA). I acknowledge the exemptions in Schedule 2 which appear to limit the scope of CRIA - which is a key tool in determining the impact of policy and laws on children's rights. Although for the most part the decisions exempted by Schedule 2 appear benign in children's rights terms, the purpose of CRIA is to confirm whether this is the case. Removing the requirement of CRIA altogether from some areas means that decisions which appear benign, but which in fact have the potential to have significant impact on children, may slip through the

CRIA net. However, I do also acknowledge the role of discretion in Article 8(2), and I would hope that, over time, the language of children's rights and the completion of CRIAs becomes customary practice amongst duty bearers.

The due regard duty is restricted in phase one to a narrow range of **Ministerial duty-bearer** functions. I understand that this is part of the gradual incremental process of adapting Ministerial decision-making to due regard, however its effect will be to limit the application of due regard, and therefore CRIA, to a narrow range of functions. I can see that deferring due regard and the CRIA as pervasive duties is seen as necessary and desirable to provide time for administrative processes to adapt, and any administrative burden to be monitored, nevertheless I must point out that in practice this means that proper recognition and embedding of children's rights is further delayed.

The **statutory requirement of the CRIA** under Article 6(3) is consistent with calls from the Committee on the Rights of the Child for States to embed the CRIA. It is also noted in research as something that may be necessary to ensure consistent application of CRIA to all decisions likely to affect children's rights.

The very purpose of CRIA screening is to determine whether there is likely to be an impact on children, and if so, whether to proceed to a full CRIA. The risk is that discretion may introduce the very risk that screening seeks to avoid, i.e. that some decisions which will impact on children will not be subject to a full CRIA. The Office of the Children's Commissioner commits to monitoring this aspect of the Draft Children's (Convention) Law with a view to reviewing it after a period of time.

I note that any a decision to amend Schedule 2 is subject to CRIA (as an amendment to an existing Law). This is a possible safeguard to the above.

**Article 6(8)** Nothing prevents an Article 6 duty-bearer from **completing a full assessment, should they wish to do so**. This introduces discretion. Article 6 duty-bearers are Ministerial duty-bearers. I would suggest that a proper assessment of the impact of policy and Law decisions on children's rights should always be the choice of Ministerial duty-bearers. I would suggest that the child rights scheme provides guidance as to when a Ministerial duty-bearer should or should not exercise their discretion to carry out CRIA. They could decide not to carry out a CRIA even if it is abundantly clear that the decision will have an impact on children. Research suggests that where CRIA is discretionary there is a tendency to disregard



its application, even to policies likely to impact on children. I understand that the risk of requiring a CRIA for everything is that the quality and value of the CRIA is diminished, and it becomes a mere tick box exercise. There is a balance to be struck and the Children's Commissioner will monitor the use of discretion.

**Article 7(8)** This is a complicated provision and seems to be intended to deal with a particular contingency. Its very complexity may mean it is difficult to monitor to ensure it is properly applied. In any event, the general tenet of the Article runs contrary to CRIA good practice which demands that **CRIA should be carried out as early as possible in the policy decision-making process** (see e.g., UNCRC General Comment 5 section E). There is no obvious good reason why a duty-bearer who seeks to lodge a proposition should not apply a CRIA when preparing the proposition and therefore be in a position to include it when the proposition is lodged. This seems to run contrary to the notion that a CRIA should be carried out as early as possible in the policy decision-making process. The risk is that a CRIA will be deferred until after the proposition is lodged, at which point research would suggest that it may be too late to make a material difference. Of course, I do understand that, on occasion, it may be necessary to reduce the minimum lodging period - nevertheless where possible the CRIA should be expedited.

**Article 9 Public Authority duty bearers.** I am pleased to note that the Parishes, Andium Homes, Autism Jersey, Family Nursing, Jersey Childcare Trust, and Jersey Sport have already identified themselves as public authority duty bearers. Whilst they must have due regard when making decisions, the preparation of a CRIA is discretionary. I hope that over time the list of Public Authority duty bearers increases, and that discretion is used wisely.

### **Conclusions**

I am incredibly pleased that we are starting to hear the language of children's rights in the States Assembly. CRIAs are already being completed and are stimulating debates on children's rights issues, which is one of the objectives in introducing this legislation.

I am also heartened to see a few public authorities already signing up to be duty bearers. They are the coalition of the willing in civil society and have a significant role in implementing the general measures of the Convention on the Rights of the Child.

In 2017 Ministers called for the impact of legislation on children's rights to be considered and published. In 2018 Ministers asked me to provide options on how to incorporate children's rights into domestic law. Following this, a decision was made to progress a due regard model in law. The incremental approach to incorporation of the UNCRC into Jersey Law is understandable, beginning with this due regard model.

I broadly support the draft Law in principle. I understand the concerns around the possible administrative costs and burden; however, I have set out my concerns about the elements of the draft Law that appear to weaken or undermine the impact of the Draft Children's (Convention) Law. I repeat my earlier comment that in the gradual incremental process of adapting Ministerial decision-making to due regard, its effect will be to limit the application of due regard, and therefore CRIA, to a narrow range of functions until 2023. Deferring due regard and the CRIA as pervasive duties may be seen as necessary and desirable to provide time for administrative processes to adapt. Nevertheless, it needs to be noted that in practice this means that proper recognition and embedding of children's rights is further delayed. This can be partly mitigated through clarifying discretion in the child rights scheme. The Office of the Children's Commissioner will support the completion of CRIAs and will monitor their use and will advise on quality.

This draft Law will significantly support the implementation of UNCRC Article 4 and will help to ensure that children have their rights protected, fulfilled and realised. I urge States Assembly members to support this draft legislation which is fundamental to improving the rights of all children and young people in Jersey.