

Comments on The Review of the Commissioner for Children and Young People Act 2006

Hon Barbara Scott - 15 June 2015

Recommendation 5

This recommendation is in direct opposition to the Act, the goals, and the concerns of all those who supported the establishment of a Children's Commissioner. It was considered that a vital part of the Children's Commissioner's Office was a state-wide network of children's advisory committees. This was to be a major bulwark against the Commissioner's Office becoming just another public service instrument. It was expected that such a network would considerably enhance public recognition and respect for the Children's Commissioner. Paragraph 4.83 on page 57 of the review document further outlines the need for such advisory committees:

4.83 The review considers that advisory committees under section 52 also provide a potential mechanism for the Commissioner to ensure that the interests of particular groups of children and young people are taken into account in the performance of the Commissioner's functions. One means of ensuring that the Commissioner remains in an ongoing position to advocate for and address the needs and interests of Aboriginal and Torres Strait Islander children would be through the formation of an advisory committee with representatives of non-government agencies concerned with the rights, interests and well-being of Aboriginal and Torres Strait Islander children and young people. It would also be open to the Commissioner to form advisory committees to represent the needs and interests of other groups of vulnerable children and young people if the Commissioner considered this would assist his or her obligation under the Act to have special regard to those needs and interests.

The wording of the section on advisory committees was a matter of much discussion and amendment during the legislation process in order to ensure that these advisory committees were established. It is, therefore, very disappointing that, after eight years of operation, there is little evidence of such a network of committees.

Rather than effectively neutering section 52 as suggested by Recommendation 5, it should be strengthened by replacing 'may' in 52(1) with 'must' (this would remove the necessity for the words "subject to subsection (2)") and the word 'should' in 52(2) with 'must'. The new section would read:

52. Establishment etc. of advisory committees

(1) The Commissioner must establish advisory committees and reference groups to assist in the performance of the Commissioner's functions.

(2) The Commissioner must establish advisory committees consisting of children and young people, who the Commissioner considers are from a broad range of socio-economic and cultural backgrounds and age groups, to assist in the performance of the Commissioner's functions. These committees must be established in regional areas as well as the metropolitan area.

The Standing Committee may wish to reinforce this issue with the new Commissioner.

Recommendation 8

Compulsory pre-primary education commenced in 2013. This major change was introduced without public consultation and the Children's Commissioner was not even informed, let alone asked to comment. This occurred despite the fact that the Cabinet Handbook requires government agencies to consult with relevant stakeholders in the course of developing proposals that are to be submitted for Cabinet's consideration, to ensure that all relevant information and views are provided for Cabinet to make an informed decision.

Unfortunately it seems the only mechanism that will ensure agencies consult with the Children's Commissioner when introducing policy changes that affect children is the heavy hand of legislation. I have attached amendments to the Act (Appendix One) with explanatory comments that will achieve this goal.

Recommendation 12

Recommendation 12 is excellent although largely already achieved in the Act. The final sentence needs to be amended by adding "except in extraordinary circumstances". The sentence would then read:

The Commissioner should not have a role in investigating the substance of individual complaints that are received, except in extraordinary circumstances.

The circumstances would have to be most extraordinary since one would expect that most investigations that could not be referred neither to the Police nor to the Department for Child Protection could be referred to the Parliamentary Ombudsman.

If this investigatory/child ombudsman responsibility is to be added to the Commissioner's role then the Commissioner must become fully a Parliamentary Commissioner in the same manner as the Ombudsman and the CCC. Links in the Act to the Executive must be removed especially the ability of the Minister to direct the Commissioner and to make regulations governing the Commissioner. This must become the sole responsibility of the Parliament through the Standing Committee.

I have attached amendments (Appendix Two) that will enable the Commissioner to investigate individual cases when the circumstances are exceptional, rendering normal avenues of investigation inappropriate or impossible and that ensure she/he now only has one master, the Parliament.

Recommendation 13

Recommendation 13 reads:

That the Commissioner's jurisdiction in undertaking the child abuse complaints support function extend to 'government agencies' and 'service providers' as those terms are currently defined in the Act.

This appears to be a mistake as 'government agencies' and 'service providers' are already covered in this respect in Recommendation 12. The preceding paragraph suggests it should read:

That the Commissioner's jurisdiction in undertaking the child abuse complaints support function extend to any child who comes forward with a disclosure of child abuse.
If it is not a mistake, then there is the need for an additional recommendation.

Appendix One
Requirement to Seek The Views of The Commissioner

Delete all Part 4 of the Act and replace with the following:

Part 4 — Relationship between Commissioner and agencies

25. *Policy proposals by government agencies*
- (1) A government agency must notify the Commissioner of any policy proposal.
 - (2) The notification required under subsection (1) must be given at a time that will enable the Commissioner to give proper consideration, and inform the government agency of the Commissioner's views in relation to, the policy proposal.
 - (3) Without otherwise limiting the Commissioner's powers to publish information, upon receiving notification of a policy proposal under subsection (2) the Commissioner must publish information that the Commissioner considers sufficient to inform children and young people of the policy proposal and the likely effects that the policy proposal will have on children and young people to whom it will apply.
 - (4) A government agency must take into account the views of the Commissioner under subsection (2) in relation to a policy proposal and must inform the Commissioner of any amendment to the policy proposal after having taken into account the Commissioner's views.
26. *Commissioner's role in relation to discriminatory policies*
- (1) Where the Commissioner considers that a policy of a government agency or a non-government agency is unfairly discriminatory against children and young people by reason only of that status, the Commissioner may request that the agency alter or abandon the policy within a specified time.
 - (2) If an agency fails or refuses to alter or abandon a policy within the time specified in a request made by the Commissioner under subsection (1) the Commissioner must refer the matter to the Commissioner for Equal Opportunity under the *Equal Opportunity Act 1984*.
27. *Consultation*
- The Commissioner and any Minister, at the request of either, are to consult together, either directly or through appropriate representatives, in relation to any aspect of the Commissioner's functions relevant to that Minister.
28. *Meaning of "policy" and "policy proposal"*
- In this Part —

“policy” means any legislation, policy or practice relating to the interests or welfare of children and young people whether as individuals or as a group or class.

“policy proposal” means any proposal under which a government agency proposes to adopt a new policy or alter an existing policy.

Part 4 of the Act deals with the Commissioner’s relationship with the Minister, as explained under Recommendation 12 this can no longer continue. If the Commission were a government agency this section of the bill would be essential to ensure accountability. Accountability is ensured by an oversight committee of the Parliament in the same way as the Parliamentary Commissioner and the CCC.

The amendment deletes Part 4 and replaces it with a new Part 4 dealing with the relationship between the Commissioner and agencies. It introduces two important components of the Commissioner’s advocacy role.

Clause 19(g) of the bill requires the Commissioner to:

“monitor and review written laws, draft laws, policies, practices and services affecting the well-being of children”. This is one of the primary functions of the Commissioner yet there is no clause requiring government agencies to actually inform the Commissioner of policy proposals that may affect the well being of children.

Would anyone seriously expect the Water Corporation to ask permission to build its desalination plants and conduct an environmental impact study unless the Environmental Protection Act forced it to?

Similarly does anyone seriously expect the Health Department to inform the Children’s Commissioner of a draft proposal to stop new born hearing tests or further cut funding to children’s therapeutic services so that the waiting time to see a speech therapist will be increased from six months to twelve? I think we all know the answer.

It was disappointing that the Government of the day did not include these clauses in the bill at the outset. Compared to the Environmental Protection Act the amendment is very conservative. In brief, the new Clause 25 deals with policy proposals by government agencies. It requires government agencies to notify the Commissioner of policy proposals that affect children at a time that will allow the Commissioner time to provide advice on the proposal to the government agency before the proposal is implemented. Without this clause the Commissioner would be operating in an information vacuum. The Commissioner cannot force agencies to accept advice but can require them to give reasons for not so doing.

The clause does not in any way affect the time at which a Minister or Government may announce its policies. A smart minister would of course like to know what the Commissioner is going to say about a proposal before announcing it.

It is important to note that this function will involve a considerable work load for the Commissioner.

New Clause 26 deals with unreasonable discrimination against children and allows the Commissioner to request agencies to modify policies or practices that so discriminate. If they decline the advice the Commissioner must refer the matter to the Equal Opportunity Commissioner. There is an extensive procedural framework under the EOC Act to address age discrimination and appropriate qualifications where the discrimination is reasonable.

New Clause 27 deals with consultation with Ministers of the Crown and is a slightly altered version of old Clause 28 ensuring that all Ministers, not just the Attorney General, may consult with the Commissioner and vice versa at the request of either party.

New Clause 28 defines “policy and “policy proposal” in this part.

Appendix Two

Individual Case Support & Investigation & Parliamentary Commissioner Amendments

Replace 19(c) with:

(c) to protect, promote, and monitor the rights, interests and well-being of children and young people whether as individuals or as members of the community;

This empowers the Commissioner to investigate individual cases and adds the very important word ‘protect’ to the phrase: “promote and monitor the rights, interests and well-being of children”

Replace 19(k) with:

(k) on the Commissioner’s own initiative or at the request of the Standing Committee, to provide advice on any matter relating to the well being of children and young people;

Replace 19(l) with:

(l) to consider, and make recommendations in relation to, any written laws, draft laws, reports, policies, practices, procedures or other matters relating to the well-being of children and young people that are referred to the Commissioner or the Standing Committee;

These two amendments remove the ability of the Minister to direct the Commissioner but does not prevent any Minister seeking the Commissioner’s advice.

Section 22, insert after subsection (2) :-

(3) No obligation to maintain secrecy or other restriction upon the disclosure of information obtained by or furnished to a government agency or service provider, or an officer or employee of a government agency or service provider, whether imposed by any enactment or by any rule of law, applies to the disclosure of information in response to a request by the Commissioner for information under subsection (2).

(4) Subject to subsection (3), a person is not compelled for the purpose of a request for information by the Commissioner under subsection (2) to provide any information or produce any document which he or she could not be compelled to provide or produce in proceedings before a court.

Section 22(3) delete the words:

“unless such disclosure contravenes a law relating to secrecy or confidentiality”

The amendments to this section remove the line:

“unless such disclosure contravenes a law relating to secrecy or confidentiality” and replace it with provisions from Clause 20 of the Parliamentary Commissioner Act 1971 allowing such information to be sought. This is particularly important in the case of children as almost all information relating to children is by law secret or confidential. It would be impossible for the Commissioner to seek even the most basic information from DCD, Justice Department, Police etc if the line were to stand. The Ombudsman function will require the Children’s Commissioner to be able to access information from Government on a day to day basis.

Note that under this provision, which is limited to requests for information from

government for the general exercise of functions, as opposed to the provisions relating to the conduct of a special inquiry, the usual rights to refuse to give the information up – that is, legal professional privilege, public interest immunity, self incrimination etc. have NOT been affected.

Delete Section 23 and substitute:-

23. Complaints to the Commission

(1) The Commissioner may investigate or otherwise take any action within his or her power in relation to a complaint made by, or any other matter relating to, an individual child or young person, if the Commissioner is satisfied that the circumstances of the complaint or other matter are exceptional.

(2) In all other matters, the Commissioner must assist the child or young person to access appropriate services to review the complaint or other matter.

The Act prohibits the Commissioner from investigating individual complaints. Despite this the proposed amendment is still restrictive, the Commissioner may only investigate an individual complaint if it is exceptional, in all other cases the child must be assisted to access appropriate services.

Delete Part 4

Part 4 of the Act deals with the Commissioner's relationship with the Minister, as explained this can no longer continue. If the Commission were a government agency this section of the Act would be essential to ensure accountability. Accountability is ensured by an oversight committee of the Parliament (the Joint Standing Committee) in the same way as the Parliamentary Commissioner and the CCC.

Replace Clauses 29, 30 with:

(1) The Commissioner may conduct a special inquiry into a matter affecting the well being of children and young people.

(2) Subject to subsection (3) the Commissioner may cause a notice of a special inquiry to be published in any manner that the Commissioner considers appropriate.

(3) If the Commissioner establishes a special inquiry under subsection (1) which may affect the interests of any government agency or non-government agency, or any officer or employee of any government agency or non-government agency, then the Commissioner must give a notice of the special inquiry to the principal officer of the agency and, in the case of a government agency, the relevant Minister.

(4) A notice under this section must specify —

(a) the matter to which the inquiry relates;

(b) the period during which the inquiry is to be held;

(c) details of any hearings that are to be held;

(d) the manner in which submissions to the Commissioner may be made.

New Clause 29 replaces Clauses 29 and 30 of the Act. The amendments remove ministerial oversight and give discretion about publicity. As children are involved there may be times when it is inappropriate to publicize an inquiry this should be compared with the secrecy provisions of the Children's Court. Unfortunately the Act requires that all special inquiries be advertised. The amendments also ensure that

the relevant Minister, not just the Attorney General, as in the Act, and the agency CEO are notified if the Commissioner establishes a special inquiry that may affect that Minister's interests.

Section 31(3), delete the words "and the regulations" and substitute:-
"any Rules of Parliament made under this Act"

As discussed regulations are instruments of the Executive, The Parliamentary Commissioner Act 1971 overcomes this problem by using the "Rules of Parliament" concept. The regulation making power in Section 63 of the Act is replaced by Section 12 of the Parliamentary Commissioner Act 1971, "Rules of Parliament"

Section 48, replace 'Minister' where it occurs with 'Minister and Standing Committee'.
This section does not give the Minister the power to direct the Commissioner but it is reasonable that the government be informed in advance of reports the Commissioner intends to publish, this applies equally to the Standing Committee.

Section 56, delete "Minister" and substitute:- "Commissioner".
Remuneration is determined on the recommendation of the Public Sector Commissioner.

Delete section 61(1)
This refers to old section 26

63. Rules of Parliament

(1) Rules of Parliament may be made for the guidance of the Commissioner in the exercise of the Commissioner's functions and for the other purposes for which Rules of Parliament may be made under this Act.

(2) Subject to this Act the functions of the Commissioner shall be exercised in accordance with the Rules of Parliament made under this Act.

(3) The Rules of Parliament referred to in this section are rules that have been agreed upon both Houses of Parliament in accordance with the rules and orders thereof.

(4) Rules of Parliament made under this Act must be published in the *Government Gazette*.

(5) Section 42 of the *Interpretation Act 1984* does not apply to Rules of Parliament made under this Act.

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As stated earlier when addressing the amendment to Section 31(3), regulations are instruments of the Executive. The Parliamentary Commissioner Act 1971 overcomes this problem by using the "Rules of Parliament" concept. This amendment comes from Section 12 of the Parliamentary Commissioner Act 1971, "Rules of Parliament".