

LEGISLATIVE ASSEMBLY

COMMISSIONER FOR CHILDREN AND YOUNG PEOPLE BILL, 2005

EXPLANATORY MEMORANDUM

HON SHEILA MCHALE, MLA

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The purpose of this Bill is to establish an office of Commissioner for Children and Young People as an office outside the public service. The Bill invests the Commissioner with certain functions and powers, including to advocate for the wellbeing of children and young people, and to conduct special inquiries in particular circumstances. It will also facilitate the performance of certain functions by the Commissioner under the *Working with Children (Criminal Records Checking) Act 2004* that are currently proposed to be undertaken by the Chief Executive Officer of the Department for Community Development.

The Commissioner will not have the role of investigating particular complaints but will be able to refer those to appropriate investigative agencies.

The Bill also makes amendments to other legislation in consequence of the establishment of the new office of Commissioner for Children and Young People.

The Bill is divided into 8 parts, as follows -

Part 1 - Preliminary

Clause 1: Short title

This clause provides that the Act may be cited as the *Commissioner for Children and Young People Bill 2005*.

Clause 2: Commencement

Subclause (1) provides that the Act is to come into operation on the day it is proclaimed.

Subclause (2) allows for different dates to be set for particular provisions to commence.

Clause 3: Principle that best interests of children paramount

Clause 3 sets out the principle that the paramount consideration of the Commissioner in performing the functions of the Bill, is to be the best interests of children.

Clause 4: **Guiding principles**

Clause 4 sets out the other principles that are to guide the work of the Commissioner.

Clause 5: **Terms used in this Act**

Clause 5 defines certain terms used in the Bill.

Part 2 – Office of Commissioner for Children and Young People

Division 1 – Office of Commissioner for Children and Young People

Clause 6: **Office of Commissioner for Children and Young People established**

Clause 6 constitutes the office of the Commissioner for Children and Young People as an office outside the public service. The employment of the Commissioner is not to be regulated under the provisions of the *Public Sector Management Act 1994*. This will make the Commissioner a statutory office with its own Act, along the lines of the Ombudsman and Auditor General, thus strengthening the independence of the office.

Clause 7: **Appointment of Commissioner**

Clause 7 provides for the appointment of a Commissioner for Children and Young People by the Governor.

Clause 8: **Tenure of office**

The appointment of the Commissioner under Clause 7 is to be limited by Clause 8 to a term not exceeding 5 years and to a maximum of only two such appointments.

Clause 9: **Terms of appointment**

Clause 9 provides that the appointment of the Commissioner is to be full time, and that the appointee is to engage in no other paid employment without the Governor's authority.

Clause 10: **Remuneration and conditions of service**

Clause 10 deals with matters regarding pay and conditions of leave of absence, and provides that the Commissioner's remuneration cannot be reduced during the term of office.

Clause 11: **Casual vacancy**

Clause 11 provides for resignation and removal from office of the Commissioner. The power of the Governor to remove the Commissioner from office is limited by the clause to the grounds of misbehaviour or incompetence, incapacity, or insolvency.

Clause 12: **Appointment of public service officer**

Clause 12 provides for the retention of accrued entitlements, and a right of return to an office on expiration of appointment, in the event that a public service officer is appointed to the office of Commissioner.

Clause 13: **Acting Commissioner**

Clause 13 provides for appointment of an acting Commissioner during periods of vacancy or temporary absence from the position.

Clause 14: **Oath or affirmation of office**

Clause 14 provides for the appointee to take an oath or affirmation of office before the Governor.

Division 2 – Staff and related provisions

Clause 15: **Staff**

Clause 15 provides for the appointment of staff to assist the Commissioner.

Clause 16: **Use of government staff and facilities**

Clause 16 provides for secondment and other arrangements that may be made by the Commissioner to use staff and resources of other government agencies.

Clause 17: **Authorised persons**

Clause 17 provides for the designation of officers by the Commissioner for the purposes of exercising certain powers associated with special inquiries under Part 5.

Part 3 – Functions of the Commissioner

Clause 18: **Functions**

Clause 18 outlines the principal functions of the Commissioner. They are as follows:

- (a) to advocate for children;
- (b) to promote the participation of children in the making of decisions that affect their lives and to encourage government and non-government agencies to seek the participation of children appropriate to their age and maturity;
- (c) to promote and monitor the wellbeing of children generally and to monitor the trends in complaints made by or on behalf of children;
- (d) to initiate and conduct inquiries into any matter, including any written law or any practice, procedure or service, affecting the wellbeing of children;
- (e) to monitor and review written laws, draft laws, policies, practices and services affecting the wellbeing of children;
- (f) to promote public awareness and understanding of matters relating to the wellbeing of children;
- (g) to conduct, coordinate, sponsor, participate in and promote research into matters relating to the wellbeing of children;
- (h) to conduct special inquiries under Part 5;
- (i) on the Commissioner's own initiative or at the request of the Minister; to advise the Minister on any matter relating to the wellbeing of children;
- (j) to consider, and make recommendations in relation to, any written laws, draft laws, reports, policies, practices, procedures or other matters relating to the wellbeing of children that are referred to the Commissioner by the Minister;
- (k) to perform any of the other functions conferred on the Commissioner by or under this Act or any other written law.

Clause 19: Matters relevant to performance of functions

Clause 19 provides for certain processes that must be followed by the Commissioner in the exercise of the Commissioner's functions. These processes are –

- (a) give priority to the interests and needs of aboriginal, vulnerable and disadvantaged children;
- (b) have regard to the United Nations Convention on the Rights of the Child;
- (c) develop means of appropriately consulting with children;
- (d) adopt work practices that so far as practicable, ensure accessibility to and participation by children;
- (e) work in cooperation with government and non-government agencies;
- (f) take reasonable steps to avoid duplicating the functions of other government agencies.

Clause 20: **Powers**

Clause 20 provides that the Commissioner has all the powers necessary for the performance of the Commissioner's functions. These powers include to produce and publish information relating to those functions.

Clause 21: **Request for information**

Clause 21 encourages the exchange of information by government agencies with the Commissioner. It requires government agencies to provide requested information relevant to the Commissioner's functions and provides that such disclosure of information in good faith will not result in civil or criminal liability or disciplinary action because of that disclosure.

Clause 22: **Commissioner not to deal with individual cases**

Clause 22 makes it clear that the Commissioner is not to have the function of dealing directly with the complaints or concerns about particular children.

Subclause (2) preserves the Commissioner's powers to provide information to a child or child's family, refer complaints or concerns about particular children to an appropriate investigative authority or service provider, and to deal with systemic matters that the Commissioner may detect from such referrals or other general matters arising from individual cases.

Clause 23: **Delegation**

Clause 23 provides that the Commissioner may delegate any of the Commissioner's functions to a member of the staff of the Commissioner.

Part 4 – Relationship with Minister

Clause 24: **Independence of Commissioner**

Clause 24 provides that the Commissioner is not subject to direction in relation to performance of the functions of the office, except that the Minister is able to give general policy directions to the Commissioner.

Clause 25: **Minister may give directions**

Clause 25 empowers the Minister to give directions to the Commissioner regarding general policies to be followed.

A direction cannot be given in relation to a particular matter.

Subclause (3) provides that the Commissioner may refuse to follow a general direction in exceptional circumstances. If the Commissioner refuses to follow a direction, reasons must be given in the Commissioner's annual report.

A direction must be tabled by the Minister in Parliament within 14 days, and the text included in the Commissioner's annual report under clause 41.

Clause 26: **Minister to have access to information**

Clause 26 provides for the Minister to have a right of access to information in the hands of the Commissioner.

Clause 27: **Consultation**

Clause 27 establishes processes for consultation between the Minister and the Commissioner.

Part 5 – Special inquiries

Clause 28: **Establishment of special inquiries**

Clause 28 authorises the Commissioner to conduct a special inquiry into a matter affecting children (either on the Commissioner's initiative or at the Minister's request). Before holding a special inquiry, the Commissioner is required to consult with the Minister.

Clause 29: **Notice of special inquiries**

Clause 29 requires the Commissioner to give public notice of a special inquiry.

Clause 30: **General conduct of special inquiry**

Clause 30 deals with the general conduct of a special inquiry. Special inquiries are to be conducted with as little formality as possible, and in a way that promotes participation in and understanding of children. The Commissioner may determine its own procedures, obtain information in whatever manner the Commissioner wishes and consult whomever the Commissioner wishes.

Clause 31: **Hearings**

Clause 31 enables the Commissioner to conduct hearings for the purposes of a special inquiry. The Commissioner may call for written submissions before a hearing begins. Hearings are to be held in public, unless the Commissioner decides that a hearing in private is required for reasons of confidentiality for any other reason. Representation of persons giving evidence and other participants in a special inquiry may be permitted by the Commissioner.

Clause 32: Powers relevant to special inquiry

Clause 32 empowers the Commissioner to require persons to attend or produce documents to a special inquiry. The Commissioner may also administer oaths or affirmations for the purpose of taking evidence.

Clause 33: Failure to comply with notice

Clause 33 provides for penalties for failing to attend a hearing, produce documents, take an oath or affirmation or to answer a question, without a lawful excuse. A maximum penalty of a fine of \$12,000 or imprisonment for 12 months is available.

Clause 34: Incriminating answers or documents

Clause 34 preserves the privilege against being required to give self-incriminating evidence in a special inquiry.

Clause 35: Legal professional privilege

Clause 35 preserves the application of legal professional privilege in a special inquiry.

Clause 36: Power of entry

Clause 36 provides for a person authorised by the Commissioner (defined in clause 5 to mean a person designated by the Commissioner under clause 17) to have the power to enter any residential or business premises or other private property for the purposes of a special inquiry. The power of entry can only be exercised with the consent of the occupier or owner, or with a warrant issued under clause 37.

Clause 37: Warrants

Clause 37 provides for a Children’s Court Magistrate to issue a warrant to an authorised person for the purposes of exercising the power of entry under clause 36.

Clause 38: Disruption of special inquiry

Clause 38 provides for a penalty for wilfully insulting the Commissioner or interrupting or obstructing a special inquiry. A maximum penalty of a fine of \$12,000 or imprisonment for 12 months is available.

Clause 39: False information

Clause 39 provides for knowingly providing false answers or information to a special inquiry. A maximum penalty of a fine of \$12,000 or imprisonment for 12 months is available.

Clause 40: Protection for certain persons

Clause 40 protects persons who in good faith provide information to a special inquiry from liability for any loss or damage.

**Part 6 – Reporting
Division 1 - Reports**

Clause 41: Annual report

Clause 41 requires the Commissioner to prepare annual reports of its operations, which under clause 48 must be laid before Parliament and under clause 49 must be published.

Clause 42: Reports on special inquiries

Clause 42 requires the Commissioner to prepare a report on the findings of any special inquiry. Such reports must be tabled and published in accordance with clauses 48 and 49.

Clause 43: Reports on other matters

Clause 43 empowers the Commissioner to make a report on any general inquiry, review or research or other matter, which must also be tabled and published in accordance with clauses 48 and 49.

Division 2 – General provisions

Clause 44: Meaning of “report”

Clause 44 defines the term report to include annual reports, reports of special inquiries, and reports on other matters as detailed in clauses 41, 42 and 43.

Clause 45: Recommendations

Clause 45 allows the Commissioner to include in its reports recommendations for changes to laws, practices and policies that are appropriate to safeguard and promote the wellbeing of children.

Clause 46: Adverse matters in report

Clause 46 provides that where a report would include material adverse to a person or body, the person or body the subject of the adverse material must be given the opportunity to make representations to the Commissioner on those matters. This is to comply with principles of natural justice.

Clause 47: Minister to be provided with draft reports

Clause 47 requires the Commissioner to provide the Minister with a draft of each of its reports to Parliament. The Minister may comment on a draft report and require the Commissioner to consult about it. Any comments from the Minister are to be included in the draft report, but the Commissioner is not bound to make any changes to its draft report because of any comment of the Minister or consultation that takes place.

Clause 48: Reports to be laid before Parliament

Clause 48 provides for a copy of a report of the Commissioner to be laid before each House of Parliament.

Clause 49: Publication of reports

Clause 49 provides that the Commissioner must, to the extent appropriate, publish a version of each report in a form that is suitable for children. The Commissioner is also enabled to publish reports in whatever way is considered appropriate.

Part 7 – Advisory committees

Clause 50:- Establishment of advisory committees

Clause 50 provides for the appointment of an expert advisory committee, a youth advisory committee and such other advisory

committees as the Commissioner considers appropriate to assist the Commissioner in the exercise of its functions.

Clause 51: Membership

Clause 51 provides for appointment of members of advisory committees by the Commissioner.

Clause 52: Functions

Clause 52 provides for the Commissioner to determine the functions of advisory committees.

Clause 53: Procedures

Clause 53 provides for advisory committees to determine their own procedures, but this is subject to the control and direction of the Commissioner.

Clause 54: Remuneration and allowances

Clause 54 provides for remuneration of members of advisory committees.

Part 8 – Miscellaneous

Clause 55: Obstruction

Clause 55 provides that it is an offence to hinder or obstruct any person performing functions under the proposed Act. A maximum penalty of a fine of \$12,000 or imprisonment for 12 months is available. A refusal to consent to a request to enter property under clause 36 is expressed not to constitute an offence of hindering or obstruction.

Clause 56: Protection from liability for wrongdoing

Clause 56 protects the Commissioner, members of advisory committees and any other persons performing functions under the proposed Act from liability in tort for anything done or omitted in good faith in the execution of those functions. The State is similarly protected from liability.

Clause 57: Confidentiality of information

Clause 57 provides for an offence for a person carrying out functions under the proposed Act to breach the confidentiality of information obtained under the proposed Act. A maximum penalty

of a fine of \$12,000 or imprisonment for 12 months is available. Certain disclosures are permissible where this is done:

- in performance of functions under the proposed Act;
- when investigating or prosecuting an alleged offence;
- as required or authorised under a statute;
- with the consent of the Minister or person to whom the information relates;
- in circumstances prescribed in regulations.

Disclosure of depersonalised information and other statistics is expressly permitted.

Clause 58: Supplementary provision for laying document before Parliament

Clause 58 provides for a procedure for laying of documents before Parliament when a House of Parliament is not sitting.

Clause 59: Protection for proceedings in Cabinet

Clause 59 provides for exemption in respect of a special inquiry or a requirement to provide documents to the Commissioner for Cabinet documents.

Clause 60: Regulations

Clause 60 gives the Governor a general regulation making power. Regulations are anticipated in relation to the conduct of hearings, control of the publication of evidence at hearings, and for offences punishable by a monetary fine.

Clause 61: Review of Act

Clause 61 requires the Minister to review the proposed Act after 5 years.

Clause 62: Consequential amendments

Clause 62 provides for consequential amendments to the following Acts:

- *Constitution Acts Amendment Act 1899* to include the Commissioner in Schedule V Part 1 Division 2, relating to the qualification of occupants of certain offices for membership of the legislature.
- *Financial Administration and Audit Act 1985* relating to annual financial reporting and associated matters.

- *Working with Children (Criminal Record Checking) Act 2004* to replace various references to the CEO of the Department for Community Development with respect to carrying out the criminal record checking function to the Commissioner. Further amendments are made to distinguish references to the Commissioner of Police in that Act.