

Western Cape, South Africa

Western Cape Commissioner for Children Act, 2019

Act 2 of 2019

Legislation as at 8 April 2019

FRBR URI: /akn/za-wc/act/2019/2/eng@2019-04-08

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PDF created on 19 April 2024 at 09:42.

Collection last checked for updates: 12 April 2024.

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Western Cape South Africa

Western Cape Commissioner for Children Act, 2019

Act 2 of 2019

Published in Western Cape Provincial Gazette 8076 on 8 April 2019

Assented to on 29 March 2019

Commenced on 15 April 2019 by Western Cape Commissioner for Children Act, 2019: Commencement

[This is the version of this document from 8 April 2019 and includes any amendments published up to 12 April 2024.]

To provide for the appointment of a Commissioner for Children in the province of the Western Cape; and to provide for matters incidental thereto.

WHEREAS there is a need to protect and promote the rights, needs and interests of children in the Province;

AND WHEREAS section 78 of the Constitution of the Western Cape, 1997, establishes the office of a provincial Commissioner for Children and provides that the Commissioner must assist the Western Cape Government in protecting and promoting the interests of children in the Province;

AND WHEREAS further legislation is necessary to provide for certain matters pertaining to that office;

BE IT THEREFORE ENACTED by the Provincial Parliament of the Western Cape, as follows:—

Chapter 1 Definitions

1. Definitions

In this Act, unless the context indicates otherwise—

"**child**" means a person under the age of 18 years;

"**Commissioner**" means the Commissioner for Children established by section 78 of the Provincial Constitution;

"Constitution" means the Constitution of the Republic of South Africa, 1996;

"**organ of state**" means an organ of state as defined in section 239 of the Constitution;

"**Premier**" means the Premier of the Province;

"**Province**" means the province of the Western Cape;

"Provincial Constitution" means the Constitution of the Western Cape, 1997 (Act 1 of 1998);

"**provincial department**" means a department within the Province listed in Column 1 of Schedule 2 to the Public Service Act, 1994 (Proclamation 103 of 1994), and includes the Department of the Premier;

"**Provincial Parliament**" means the parliament of the Province;

"**standing committee**" means the standing committee of the Provincial Parliament whose assignment is or includes children's affairs in the Province;

"**this Act**" includes any regulations issued in terms thereof.

Chapter 2

Appointment and office of Commissioner

2. Appointment

- (1) The Premier must appoint a person as Commissioner for a period of five years, which term is renewable once.
- (2) The standing committee must—
 - (a) by means of notices in the media, in the official languages of the Province, call for nominations by the public of suitable persons to fill the position of Commissioner;
 - (b) publish in the media a list of the names of all nominations received, in the official languages of the Province, calling for objections from members of the public to any names appearing on the list of nominations;
 - (c) consider all nominations and objections received, prepare a shortlist of candidates, and invite every shortlisted person for an interview;
 - (d) forward copies of all the nominations and objections received to the Premier; and
 - (e) table its recommendation for the appointment of a Commissioner in the Provincial Parliament for adoption.
- (3) If the Provincial Parliament adopts the recommendation of the standing committee, the Provincial Parliament must submit the recommendation to the Premier.
- (4) The Premier must, within 21 days of receiving the recommendation from the Provincial Parliament and after considering the nominations and objections provided by the standing committee—
 - (a) appoint the person recommended by the Provincial Parliament as Commissioner; or
 - (b) refer the matter back to the Provincial Parliament for reconsideration and provide reasons for his or her decision.

3. Qualifications for appointment

- (1) The Commissioner must be a South African citizen who —
 - (a) is a fit and proper person; and
 - (b) has proven specialised knowledge of, or relevant professional experience or an academic record in, public policy, human rights or issues affecting children.
- (2) The Commissioner may not, after assumption of duties as Commissioner —
 - (a) be a member of the national Parliament, a provincial legislature or a municipal council;
 - (b) be a member of a national, provincial or municipal public entity or statutory body;
 - (c) be in the service of any organ of state;
 - (d) hold any office in a political party; or
 - (e) hold any office that causes a conflict of interest.
- (3) A person may not be nominated for or appointed as the Commissioner if he or she—
 - (a) has at any time been convicted of—
 - (i) an offence relating to dishonesty or violence; or

- (ii) a sexual offence as defined in section 1 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007 ([Act 32 of 2007](#));
- (b) is unsuitable to work with children as contemplated in the Children's Act, 2005 ([Act 38 of 2005](#)); or
- (c) is an unrehabilitated insolvent.

4. Removal and suspension

- (1) The Commissioner may be removed from office only on —
 - (a) the grounds of misconduct, incapacity or incompetence;
 - (b) a finding and recommendation to that effect by the standing committee; and
 - (c) the adoption by the Provincial Parliament of a resolution calling for the Commissioner's removal from office.
- (2) The Premier —
 - (a) may suspend the Commissioner from office at any time after the start of the proceedings of the standing committee regarding the Commissioner's removal from office; and
 - (b) must remove the Commissioner from office upon adoption by the Provincial Parliament of the resolution in terms of subsection (1)(c) calling for the Commissioner's removal from office.

5. Vacancy

- (1) The position of Commissioner becomes vacant if —
 - (a) the term of office of the Commissioner expires; or
 - (b) the Commissioner —
 - (i) dies;
 - (ii) tenders his or her written resignation at least three calendar months before the date on which the Commissioner wishes to vacate office, unless the Premier allows a shorter period in a specific case; or
 - (iii) is removed from office as contemplated in [section 4](#).
- (2) If the Commissioner is suspended as contemplated in [section 4\(2\)\(a\)](#) or a vacancy arises as contemplated in subsection (1), the Premier may appoint an acting Commissioner after consultation with the Provincial Parliament, until such time as the suspension is removed or a new Commissioner is appointed as contemplated in [section 2\(4\)\(a\)](#).
- (3) If a vacancy arises as contemplated in subsection (1), the procedure to appoint a Commissioner as contemplated in [section 2\(2\)](#) to (4) must be followed.
- (4) In the circumstances contemplated in subsection (3), the standing committee must call for nominations as contemplated in [section 2\(2\)\(a\)](#) within 30 days of the vacancy arising.

Chapter 3

Powers and duties of Commissioner

6. Principles governing Commissioner's actions

In the exercise and performance of his or her powers and duties, the Commissioner must—

- (a) act independently, impartially and without fear, favour or prejudice;
- (b) subject to section 231 of the [Constitution](#), have regard to the principles and rights laid down in international treaties, conventions and agreements affecting children;
- (c) have regard to the [Constitution](#), other national legislation pertaining to children and the Provincial [Constitution](#);
- (d) strive to promote and protect the rights, needs and interests of children in all areas of society in the Province; and
- (e) strive to ensure that children in the Province have access to the office of the Commissioner.

7. Monitoring

- (1) The Commissioner must —
 - (a) monitor the impact of services delivered by provincial organs of state on the rights, needs and interests of children;
 - (b) monitor the impact of provincial policy and provincial legislation on the rights, needs and interests of children; and
 - (c) establish provincial monitoring systems for the protection and promotion of the rights, needs and interests of children in the Province.
- (2) The monitoring systems contemplated in subsection (1)(c) must—
 - (a) in particular be aimed at the rights, needs and interests of children with regard to health services, education, welfare services, recreation and amenities, and sport;
 - (b) provide for the collection of appropriate data and necessary information; and
 - (c) identify the patterns, causes and consequences of any negative effect on the rights, needs or interests of children, to assess the promotion and protection of the rights, needs and interests of children by the Western Cape Government.
- (3) The Commissioner must, after consultation with the relevant organs of state, establish mechanisms and procedures for the Commissioner to co-ordinate the matters contemplated in subsections (1) and (2).
- (4) The Commissioner must strive to build co-operative relations with—
 - (a) the heads of provincial departments, in order to monitor—
 - (i) the rights, needs and interests of children in the Province;
 - (ii) subject to section 231 of the [Constitution](#), the implementation of international treaties, conventions and agreements affecting children;
 - (iii) the rights, needs and interests of children in home care, foster care, temporary safe care, and child and youth care centres;
 - (iv) the rights, needs and interests of children in hospitals, healthcare facilities and home-based community health programmes;

- (v) the rights, needs and interests of children in schools and other educational facilities;
 - (vi) access by children to recreation and sports facilities; and
 - (vii) provincial projects in aid of children;
- (b) the Regional Commissioner of Correctional Services in the Province, in order to monitor the availability and quality of recreational facilities and health services, social development services and educational services for children in prison and children who are in official custody;
- (c) the Provincial Commissioner of the South African Police Service in the Province, in order to monitor the reported number of crimes committed by or against children to optimise co-operation between the South African Police Service and provincial departments that deal with, affect or render a service to children who come into conflict with the law or against whom a crime has been committed;
- (d) the national department responsible for justice, in order to optimise co-operation between that department and provincial departments that deal with, affect or render a service to—
 - (i) child victims of crime;
 - (ii) the office of the Family Advocate;
 - (iii) Family Courts;
 - (iv) Children's Courts;
 - (v) prosecutors dealing with children; and
 - (vi) criminal courts dealing with matters involving children;
- (e) organisations, institutions and agencies that deal with, affect or render a service to children in the Province, in order to monitor practices and promote co-operation between provincial organs of state and such organisations, institutions and agencies on matters regarding the protection of the rights, needs and interests of children; and
- (f) relevant national departments, and municipalities in the Province, where appropriate, in order to monitor legislation, policy, practices and service delivery that affect children.

8. Investigations

- (1) The Commissioner may—
 - (a) conduct or initiate investigations or enquiries regarding any matter falling within the scope of his or her powers or duties; and
 - (b) make recommendations as contemplated in [section 12](#) regarding those investigations or enquiries.
- (2) The Commissioner may receive, seek to resolve, and investigate complaints about services provided by provincial organs of state that affect the rights, needs or interests of children in the Province.
- (3) Subject to this Act, the Commissioner must determine the procedure to be followed in conducting an investigation or enquiry with due regard to the circumstances of each case.
- (4) The Commissioner may carry out an investigation in a matter only if the Commissioner is satisfied on reasonable grounds that the investigation will not duplicate the work of any other organ of state.
- (5) The Commissioner may not carry out an investigation into a matter that is the subject of legal proceedings before a court or tribunal.

9. Research

The Commissioner may—

- (a) conduct or initiate research—
 - (i) regarding any matter falling within the scope of his or her powers or duties; or
 - (ii) aimed at informing the development of policy or practices that are in the interests of children;
- (b) facilitate co-operation with the public sector, private sector, civil society and academic institutions when identifying, undertaking and implementing research contemplated in paragraph (a); and
- (c) provide for input from the public sector, private sector, civil society, academic institutions and members of the public, where applicable, when identifying, undertaking and implementing such research.

10. Education

The Commissioner may develop and conduct information programmes to educate the public about, and foster public understanding and awareness of—

- (a) this Act;
- (b) the [Constitution](#), other national legislation pertaining to children and the Provincial [Constitution](#);
- (c) subject to section 231 of the [Constitution](#), relevant international treaties, conventions and agreements affecting children;
- (d) projects and programmes affecting children in the Province; and
- (e) any other matter falling within the scope of the Commissioner's powers or duties.

11. Lobbying

The Commissioner may—

- (a) lobby members or groups of members of the Provincial Parliament, national Parliament or a municipal council and make recommendations concerning—
 - (i) any system of family law;
 - (ii) any system of indigenous law, customs or practices; or
 - (iii) any existing or proposed legislation, that affects or is likely to affect the rights, needs or interests of children in the delivery of services by provincial organs of state;
- (b) lobby any organ of state, organisation, institution or agency and make recommendations in respect of any existing or proposed policy or practice that affects or is likely to affect the rights, needs or interests of children;
- (c) request co-operation and input from the public sector and private sector when lobbying for policy development or legislative review.

12. Advising and making recommendations

(1) The Commissioner may advise and make recommendations to—

- (a) any organ of state whose policies, legislation or practices affect or is likely to affect the rights, needs or interests of children in the delivery of services by provincial organs of state; and

- (b) any person or organ of state whose policies and practices pertaining to children have been monitored, investigated or researched by the Commissioner.
- (2) When the Commissioner makes a recommendation to any person or organ of state, that person or organ of state must, within a reasonable time stipulated by the Commissioner, report in writing to the Commissioner on their actions in response to the recommendation.
- (3) Any person or provincial organ of state who, either wholly or in part, refuses or fails to implement a recommendation made by the Commissioner must, on request by the Commissioner, within a reasonable time stipulated by the Commissioner, furnish the Commissioner with written reasons for such refusal or failure.

13. Request for matters to be monitored, investigated or researched

- (1) Any person may request the Commissioner to take up a matter for monitoring, investigation or research in terms of the powers conferred and duties imposed on the Commissioner by this Act.
- (2) Subsection (1) does not affect the power of the Commissioner in terms of this Act to take up a matter for monitoring, investigation or research on his or her own initiative.
- (3) A request in terms of subsection (1) for a matter to be taken up by the Commissioner for monitoring, investigation or research must, as far as possible, be in writing and in the format determined by the Commissioner.
- (4) A request contemplated in subsection (3) must contain—
 - (a) the name and address of the person requesting or initiating the matter;
 - (b) reasons why the Commissioner should monitor, investigate or research the matter;
 - (c) a summary of the evidence supporting the belief that the matter should be monitored, investigated or researched, to the extent that such evidence is available;
 - (d) the names and addresses of persons or organs of state alleged to be involved, to the extent that such information is available;
 - (e) a description of any document or material that should be considered; and
 - (f) a copy of the document or material referred to in paragraph (e), if available.
- (5) The Commissioner may dispense with the requirements contemplated in subsection (4) if the request contemplated in subsection (3) is made by a child.
- (6) In the circumstances contemplated in subsection (1), if the request is made by a child, the Commissioner must provide for child-friendly procedures.
- (7) The decision to monitor, investigate or research a matter is entirely in the discretion of the Commissioner, subject to [section 6](#).

14. Child participation

- (1) The Commissioner must encourage the involvement of children in the work of the Commissioner.
- (2) The Commissioner must take reasonable steps to—
 - (a) ensure that children are made aware of the powers and duties of the Commissioner;
 - (b) ensure that children are informed of the ways in which they may communicate and obtain a response from the Commissioner; and
 - (c) consult children and organisations that work with children on the work to be undertaken by the Commissioner. (3) The Commissioner must develop and keep under review a strategy for involving children in the work of the Commissioner in accordance with this section.

15. Additional powers and duties

- (1) To enable the Commissioner to exercise and perform the powers and duties contemplated in [section 8](#), the Commissioner may—
 - (a) accompany any member of the South African Police Service when that member is exercising powers of search and seizure in respect of any matter regarding the interests and protection of children;
 - (b) subpoena any person or give notice to any person to appear before the Commissioner to give evidence, or to produce any book, report, document or object in his or her possession or under his or her control, at the time and place stipulated in the subpoena or notice;
 - (c) administer an oath or affirmation to any person appearing as a witness before the Commissioner.
- (2) The subpoena or notice contemplated in subsection (1)(b) must be signed and issued by the Commissioner, and served by the Commissioner or any other person authorised by the Commissioner to do so, in the same manner as a subpoena or notice, as the case may be, for a witness in proceedings of the High Court.
- (3) A person appearing before the Commissioner may be assisted by a legal representative at his or her own cost.
- (4) Any evidence or answer given or statement made by a person appearing before the Commissioner pursuant to a subpoena or notice contemplated in subsection (1)(b) may not be used against that person in any court, except in criminal proceedings where that person is tried for perjury or an offence contemplated in [section 26\(c\)\(iv\)](#) or (v).

16. Reporting

- (1) The Commissioner must—
 - (a) report annually to the Provincial Parliament—
 - (i) in accordance with section 79(2)(a) of the Provincial [Constitution](#); and
 - (ii) on the activities of the office of the Commissioner, the performance of its functions and the achievement of its objectives; and
 - (b) disseminate and report on the information derived from investigations, monitoring and research to the Premier and other relevant provincial organs of state in a way that, in the opinion of the Commissioner, would assist the Western Cape Government to protect and promote the rights, needs and interests of children.
- (2) The Commissioner may submit a special report to the Provincial Parliament at any other time on any matter regarding the implementation of this Act that, in the opinion of the Commissioner, should not be deferred until the submission of the annual report.

17. Functioning of Commissioner

- (1) Other provincial organs of state must assist and protect the Commissioner to ensure the independence, impartiality, dignity and effectiveness of the office of the Commissioner.
- (2) No person or organ of state may interfere with or obstruct the functioning of the Commissioner or his or her staff.

18. Access to information and institutions

- (1) Subject to the Promotion of Access to Information Act, 2000 ([Act 2 of 2000](#)), and the Protection of Personal Information Act, 2013 ([Act 4 of 2013](#)), all persons or organs of state that deal with, affect

or render a service to children must, at the Commissioner's request, provide information regarding any matter falling within the scope of the Commissioner's powers or duties.

- (2) All organs of state that deal with, affect or render a service to children must allow the Commissioner access to their premises for the purposes of carrying out any function of the Commissioner in terms of this Act.
- (3) If the access contemplated in subsection (2) is to school premises, the Commissioner must exercise his or her powers and perform his or her duties in a manner that is the least disruptive to school activities and mindful of a child's right to education.

Chapter 4

Administration of office of Commissioner

19. Staff

- (1) The Director-General of the Province, or another official acting under delegated authority, must appoint, in terms of the Public Service Act, 1994, the staff members required for the exercise or performance of the powers and duties of the Commissioner.
- (2) The staff members contemplated in subsection (1) must in the performance of their functions apply the principles contemplated in [section 6](#).

20. Funding

The Provincial Parliament must appropriate funds within the Province's resources to enable the Commissioner to exercise his or her powers and perform his or her duties in terms of this Act.

21. Remuneration and conditions of appointment of Commissioner

The Premier, with the concurrence of the Provincial Minister responsible for finance, must determine the remuneration and other terms and conditions of appointment of the Commissioner, taking into account the available resources of the Province.

22. Donations

The office of the Commissioner may receive donations, subject to applicable financial prescripts.

Chapter 5

General provisions

23. Liability

The Commissioner is not liable in respect of any reasonable action performed in good faith under any provision of this Act or the Provincial [Constitution](#).

24. Delegation of powers and assignment of duties

- (1) The Commissioner may delegate any of his or her powers or assign any of his or her duties in terms of this Act to a member of his or her staff.
- (2) A delegation or assignment contemplated in subsection (1)—
 - (a) must be in writing;
 - (b) may be made subject to conditions;
 - (c) may be withdrawn or amended in writing by the Commissioner;

- (d) does not prevent the Commissioner from exercising that power or performing that duty; and
- (e) does not divest the Commissioner of the responsibility regarding the exercise of the delegated power or the performance of the assigned duty.

25. Regulations

The Premier, after consultation with the standing committee, may make regulations regarding any matter that he or she considers necessary in order to achieve the objectives of this Act.

26. Offences and penalties

Any person who—

- (a) fails to report in writing to the Commissioner on his or her actions in response to a recommendation by the Commissioner, as contemplated in [section 12\(2\)](#);
- (b) fails to furnish the Commissioner with written reasons for his or her refusal or failure to implement the Commissioner's recommendations, as contemplated in [section 12\(3\)](#);
- (c) has been duly subpoenaed or given notice in terms of [section 15\(1\)\(b\)](#) and who—
 - (i) fails to appear before the Commissioner at the time and place stipulated in the subpoena or notice;
 - (ii) fails or refuses to produce any book, report, document or object specified in the subpoena or notice;
 - (iii) when called upon to do so under [section 15\(1\)\(c\)](#), refuses to be sworn in or to make an affirmation;
 - (iv) fails to answer fully and satisfactorily all questions put to him or her by the Commissioner; or
 - (v) gives evidence or provides information that is false or misleading knowing that it is false or misleading;
- (d) contravenes [section 17\(2\)](#); or
- (e) fails or refuses to furnish information or an explanation regarding a request for information by the Commissioner, as contemplated in [section 18\(1\)](#), or furnishes information that is false and misleading knowing that it is false and misleading, is guilty of an offence and liable on conviction to a fine or imprisonment not exceeding twelve months.

27. Short title and commencement

This Act is called the Western Cape Commissioner for Children Act, 2019, and comes into operation on a date set by the Premier by proclamation in the *Provincial Gazette*.