

South Australia

Commission of Inquiry (Children in State Care) Act 2004

An Act to provide for a Commission of Inquiry into allegations of failure on the part of government agencies, employees or other relevant persons to investigate or appropriately deal with allegations concerning sexual offences against children under the guardianship, custody, care or control of the Minister responsible for the protection of children; to provide evidentiary powers and immunities in connection with the inquiry; and for other purposes.

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Legislative history

The Parliament of South Australia enacts as follows:

1—Short title

This Act may be cited as the *Commission of Inquiry (Children in State Care) Act 2004*.

3—Interpretation

In this Act—

authorised person means—

- (a) the Commissioner; or
- (b) any person appointed to assist in the conduct of the Inquiry;

child means a person under 18 years of age;

Commissioner means the person appointed to conduct the commission of inquiry under section 4;

evidentiary material means any document, object or substance of evidentiary value or possible evidentiary value to the Inquiry;

Inquiry means the commission of inquiry established under this Act;

sexual offence means a sexual offence within the meaning of section 4 of the *Evidence Act 1929*.

4—Constitution of commission

- (1) A commission of inquiry is established with the terms of reference set out in Schedule 1.
- (2) The commission is to be constituted by a person appointed by the Governor.
- (3) An appointment made under subsection (2) will be on conditions determined by the Governor.
- (4) If the person appointed by the Governor is a Judge or former Judge within the meaning of the *Judges' Pensions Act 1971* then the following provisions will apply in relation to the person so appointed despite the provisions of that Act:
 - (a) the person will, while holding office under this Act, be taken to be in judicial service within the meaning of, and for the purposes of, the *Judges' Pensions Act 1971*; and
 - (b) if relevant, the person will be taken not to have retired or resigned from judicial service for the purposes of the *Judges' Pensions Act 1971* until he or she completes his or her term of office under this Act.
- (5) For the purposes of subsection (4), the term of office of the relevant person will be determined to have come to an end on a day fixed by the Attorney-General by notice in the Gazette.

5—Procedure

- (1) In conducting the Inquiry, the Commissioner—
 - (a) will not be bound by any rules or practices as to procedure or evidence, and may inform himself or herself in such a manner as the Commissioner thinks fit; and
 - (b) must seek to adopt procedures that will facilitate a prompt, cost-effective and thorough investigation of any matter relevant to the Inquiry; and
 - (c) may refer any matter to an expert for advice, investigation or report; and

- (d) may refer any person to any agency or other service so that the person can obtain counselling or support; and
 - (e) may refer any matter that may come to the attention of the Commissioner but that is not directly relevant to the Inquiry to any other person or agency (as the Commissioner thinks fit); and
 - (f) must take all reasonable steps to avoid prejudicing any criminal investigation or prosecution.
- (2) Subject to subsection (3), the Commissioner must, in conducting the Inquiry, take evidence in private.
 - (3) The Commissioner may conduct any part of the proceedings (including the taking of evidence) in public if the Commissioner considers it in the public interest to do so.
 - (4) However, the Commissioner must comply with any request by a person providing evidence or information or making submissions to the Inquiry that the evidence, information or submission be received in private.
 - (5) The Commissioner may, as the Commissioner thinks fit, refuse to inquire into, or to continue to inquire into, a matter if the Commissioner considers the matter to be frivolous, vexatious or not sufficiently relevant to the Inquiry.
 - (6) A person must not, in placing evidence before the Inquiry, knowingly make a false allegation against another person with an intention to cause injury or harm to the other person.

Maximum penalty: \$10 000.

6—Power to require attendance of witnesses etc

- (1) An authorised person may issue a summons requiring a person to appear before the Inquiry at a specified time and place to give evidence or to produce evidentiary material (or both).
- (2) A summons to produce evidentiary material may, instead of providing for production of evidentiary material before the Inquiry, provide for production of the evidentiary material to an authorised person nominated in the summons.
- (3) An authorised person may administer an oath or affirmation to a person appearing before the Inquiry.

7—Obligation to give evidence

- (1) If a person refuses or fails—
 - (a) to comply with a summons issued under this Act; or
 - (b) to make an oath or affirmation when required to do so by an authorised person; or
 - (c) to answer a question on a subject relevant to the Inquiry to the best of the person's knowledge, information and belief,

the Supreme Court may, on application by an authorised person, compel the attendance of the person before the Court to give evidence or to produce evidentiary material for the purposes of the Inquiry.

- (2) A person who, without reasonable excuse, refuses or fails—
- (a) to comply with a summons issued under this Act; or
 - (b) to make an oath or affirmation when required to do so by an authorised person; or
 - (c) to answer a question on a subject relevant to the Inquiry to the best of the person's knowledge, information and belief,
- is guilty of an offence and liable to a penalty not exceeding \$10 000.

8—Provision of support

- (1) The Minister must, after consultation with the Commissioner, appoint or engage—
- (a) a person with appropriate qualifications and experience in social work or social administration; and
 - (b) a senior investigations officer with appropriate qualifications and experience,
- to assist in the conduct of the Inquiry.
- (2) The Minister may, after consultation with the Commissioner, appoint other persons to assist in the conduct of the Inquiry.
- (3) The Minister may, after consultation with the Commissioner, engage or appoint a suitably qualified person or persons to provide support or assistance to any person who may wish to place evidence before the Inquiry.
- (4) The Commissioner may, by arrangement with the relevant body, make use of the services of the staff, equipment or facilities of any agency or instrumentality of the Crown (including an administrative unit in the Public Service).

9—Confidentiality and disclosure of information

- (1) Any law requiring a person to keep particular information confidential or in any way restricting the disclosure or publication of information does not prevent a person from providing information in the course of or for the purposes of the Inquiry.
- (2) Where the Commissioner considers it desirable to exercise powers conferred by this subsection in the public interest, or in order to prevent undue prejudice or undue hardship to any person, the Commissioner may, by order—
- (a) direct that any persons specified (by name or otherwise) absent themselves from the place in which the Commissioner is conducting the Inquiry during the whole or a specified part of the proceedings; or
 - (b) forbid the publication of specified evidence, or of any account or report of specified evidence, either absolutely or subject to conditions determined by the Commissioner; or
 - (c) forbid the publication of the name of—
 - (i) a witness before the Inquiry; or
 - (ii) a person alluded to in the course of the Inquiry,and of any other material tending to identify any such witness or person.
- (3) The Commissioner may vary or revoke an order under subsection (2).

- (4) A person who contravenes, or fails to comply with, an order under subsection (2) is guilty of an offence.
Maximum penalty: \$2 000 or imprisonment for 6 months.
- (5) The Commissioner must, in the conduct of the Inquiry and in his or her report on the outcome of the Inquiry, take all reasonable steps to avoid the disclosure of information that may identify, or lead to the identification of—
- (a) a person who has been (or who is alleged to have been) the victim of a sexual offence while a child; or
 - (b) a person who has committed (or who is alleged to have committed) a sexual offence against a child, if the interests of justice so require; or
 - (c) a person who has provided information about a sexual offence (or suspected sexual offence) against a child, if the public interest so requires.

10—Provision of information

- (1) Where this Act requires, or allows, the Commissioner to avoid disclosure of information that may identify or lead to the identification of any person, the Commissioner may use a code or other system of identification under which the Commissioner can separately identify any person, and may provide that identifying information, and any other information obtained during the course of the Inquiry, to the Minister or another public official (including a police officer), as the Commissioner thinks fit.
- (2) Despite any other provision of this Act, the Commissioner must, under an arrangement established with the Commissioner of Police, provide to the Commissioner of Police any information concerning the commission (or alleged commission) of a sexual offence against a child arising during the course of the Inquiry unless—
- (a) the Commissioner has reasonable grounds to believe that the information has already been reported or provided to a police officer and has been recently considered or investigated (or reconsidered or reinvestigated) by the police; or
 - (b) the Commissioner has determined to provide the information to the Director of Public Prosecutions; or
 - (c) the information has been provided by the person who is (or who is alleged to be) the victim of the offence and that person has asked the Commissioner that the information not be provided to the Commissioner of Police or to the Director of Public Prosecutions under this section (but subject to the exception that the Commissioner may provide the information to the Commissioner of Police or to the Director of Public Prosecutions if the Commissioner considers it in the public interest to do so).

11—Completion of inquiry and presentation of report

- (1) The Commissioner must complete the Inquiry, and prepare a report on the outcome of the Inquiry, within 6 months after the commencement of this Act or within such longer period as the Governor may, by instrument published in the Gazette, allow.

- (2) If the Governor allows an extension of time for the completion of the Inquiry under subsection (1), the Commissioner must nevertheless, within the period of 6 months referred to in that subsection, provide an interim report on the progress of the Inquiry.
- (3) An interim report under subsection (2) must at least report on allegations of sexual abuse of persons as children while in the various forms of State care other than foster care (insofar as this is reasonably practicable in the circumstances).
- (4) A report of the Commissioner under this section must be delivered to the Governor.
- (5) The Minister must cause a copy of a report from the Commissioner to be laid before each House of Parliament within 3 sitting days after the receipt of the report by the Governor.

12—Protection from proceedings

No proceeding for judicial review or for a declaration, injunction, writ, order or other remedy may be brought to challenge or question—

- (a) any proceeding undertaken in the conduct of the Inquiry; or
- (b) the making of any decision or determination by the Commissioner; or
- (c) the preparation or presentation of a report under this Act.

13—Privileges and immunities

- (1) An authorised person has, in connection with the conduct of the Inquiry, and in respect of any report prepared as part of the Inquiry, the same protection, privileges and immunities as a Judge of the Supreme Court.
- (1a) No subpoena or other process may be issued by a court, tribunal or other authority—
 - (a) requiring a person who is or has been an authorised person, or appointed or engaged under section 8, to appear to give evidence of matters coming to the person's notice in the person's official capacity or former official capacity; or
 - (b) requiring the production of a document, object or substance—
 - (i) that was prepared or made in the course of, or for the purposes of, the Inquiry; or
 - (ii) that is in the possession of the Inquiry or that was in the possession of the Inquiry immediately before completion of the Inquiry,and any such process issued before the commencement of this subsection will be of no force or effect.
- (2) A person who appears before the Inquiry, or who provides evidentiary material to the Inquiry, has the same protection, privileges and immunities as a witness in proceedings before the Supreme Court.
- (3) A legal practitioner who represents a person in connection with the Inquiry has the same protection, privileges, immunities and obligations as counsel involved in proceedings before the Supreme Court.

14—Self-incrimination

Despite a preceding section, if a person is required to provide information or answer a question under this Act and the information or answer would tend to incriminate the person or make the person liable to a penalty, the person must nevertheless provide the information or answer the question but the information or answer is not (except in proceedings for an offence against this Act) admissible in evidence against the person in any criminal or civil proceedings in any court.

15—Further provision relating to mandatory notification

- (1) Subject to subsection (2) (and despite a preceding section)—
 - (a) no evidence of information that discloses the identity of, or would lead to the identification of, a person who has notified a government agency in accordance with an obligation to do so under the *Children's Protection Act 1993* (or a corresponding previous enactment) that he or she suspects that a child has been abused or neglected may be adduced in proceedings before a court without leave of court; and
 - (b) unless such leave is granted, a party or witness in those proceedings must not be asked, and, if asked, cannot be required to answer, any question that cannot be answered without disclosing such information.
- (2) A court cannot grant leave under subsection (1) unless—
 - (a) the court is satisfied that the evidence is of critical importance in the proceedings and that failure to admit it would prejudice the proper administration of justice; or
 - (b) the person (not being a child) to whom the information relates consents to the admission of the evidence in the proceedings.
- (3) An application for leave to adduce evidence under subsection (1)—
 - (a) must not, except as authorised by the court, be heard and determined in public; and
 - (b) must be conducted in such a manner as to protect, so far as may be practicable, the information concerned pending the determination of the application.

Schedule 1—Terms of reference

1—Interpretation

In this Schedule—

child in State care means a child who was, at the relevant time, a child who had been placed under the guardianship, custody, care or control of a designated Minister or another public official, or the former body corporate known as the *Children's Welfare and Public Relief Board*, under a relevant Act;

designated Minister means a Minister responsible for the administration of a relevant Act;

relevant Act means the *Children's Protection Act 1993* or a corresponding previous enactment dealing with the protection of children;

sexual abuse means conduct which would, if proven, constitute a sexual offence.

2—Terms of reference

- (1) The terms of reference are to inquire into any allegations of—
 - (a) sexual abuse of a person who, at the time that the alleged abuse occurred, was a child in State care; or
 - (b) criminal conduct which resulted in the death of a person who, at the time that the alleged conduct occurred, was a child in State care,(whether or not any such allegation was previously made or reported).
- (2) The purposes of the inquiry are—
 - (a) to examine the allegations referred to in subclause (1); and
 - (b) to report on whether there was a failure on the part of the State to deal appropriately or adequately with matters that gave rise to the allegations referred to in subclause (1); and
 - (c) to determine and report on whether appropriate and adequate records were kept in relation to allegations of the kind referred to in subclause (1) and, if relevant, on whether any records relating to such allegations have been destroyed or otherwise disposed of; and
 - (d) to report on any measures that should be implemented to provide assistance and support for the victims of sexual abuse (to the extent that these matters are not being addressed through existing programs or initiatives).
- (3) The inquiry is to relate (and only to relate) to any conduct or omission occurring before the commencement of this Act.
- (4) The inquiry need not (but may, if relevant) relate to a matter that has been the subject of the Review within the meaning of the *Child Protection Review (Powers and Immunities) Act 2002*.
- (5) The person conducting the inquiry must not purport to make a finding of criminal or civil liability.

Legislative history

Notes

- Amendments of this version that are uncommenced are not incorporated into the text.
- Please note—References in the legislation to other legislation or instruments or to titles of bodies or offices are not automatically updated as part of the program for the revision and publication of legislation and therefore may be obsolete.
- Earlier versions of this Act (historical versions) are listed at the end of the legislative history.
- For further information relating to the Act and subordinate legislation made under the Act see the Index of South Australian Statutes or www.legislation.sa.gov.au.

Principal Act and amendments

New entries appear in bold.

Year	No	Title	Assent	Commencement
2004	33	<i>Commission of Inquiry (Children in State Care) Act 2004</i>	5.8.2004	18.11.2004 (<i>Gazette 18.11.2004 p4359</i>)
2004	43	<i>Commission of Inquiry (Children in State Care) (Miscellaneous) Amendment Act 2004</i>	18.11.2004	18.11.2004 (<i>Gazette 18.11.2004 p4359</i>)
2006	17	<i>Statutes Amendment (New Rules of Civil Procedure) Act 2006</i>	6.7.2006	Pt 17 (s 62)—4.9.2006 (<i>Gazette 17.8.2006 p2831</i>)
2006	18	<i>Commission of Inquiry (Children in State Care) (Privileges and Immunities) Amendment Act 2006</i>	6.7.2006	6.7.2006

Provisions amended

New entries appear in bold.

Entries that relate to provisions that have been deleted appear in italics.

Provision	How varied	Commencement
<i>s 2</i>	<i>omitted under Legislation Revision and Publication Act 2002</i>	6.7.2006
s 10		
s 10(2)	amended by 43/2004 s 4(1), (2)	18.11.2004
s 13		
s 13(1a)	inserted by 18/2006 s 3	6.7.2006
s 15		
s 15(1)	amended by 17/2006 s 62(1), (2)	uncommenced—not incorporated
s 15(2)	amended by 17/2006 s 62(3)	uncommenced—not incorporated
s 15(3)	amended by 17/2006 s 62(4)	uncommenced—not incorporated
Sch 1		
cl 1		

child in State care amended by 43/2004 s 5

18.11.2004

Historical versions

18.11.2004