THE CHILDREN’S COMMISSIONER: DO WE NEED ANOTHER HERO?

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Abstract

The main issue discussed in this paper is the need to establish the office of the Children’s Commissioner in Malaysia. The paper will briefly discuss the shared aim of a commissioner appointed in two countries; Norway and New Zealand, their powers and functions of the two offices in upholding children’s rights since its inception. Exploration on these topics will provide understanding on their true functions in protecting children and will provide a framework for a similar body in Malaysia. This will enable us to rationalize the formation of an analogous position in Malaysia and the model of a desired commissioner needed by the country to secure future for our children. Discussion is also focused on the idea that the children of Malaysia deserve no less and the appointment of a commissioner will enable our children to grow and develop in an encouraging environment where their rights are fully preserved, the safety, security and best interest are paramount consideration and their needs are fulfilled.

INTRODUCTION

The momentum for creating the office of a children’s commissioner can be attributed to the global support towards acknowledgement of children’s rights evidenced in many international document including the 1924 Geneva Declaration on the Rights of the Child adopted by the League of Nations1 and later followed by the United Nation’s Declaration on the Rights of the Child in 19592. 30 years

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1 The 1924 Declaration declared that- 
(1) The child must be given the means requisite for its normal development, both materially and spiritually; 
(2) The child that is hungry must be fed; the child that is sick must be nursed; the child that is backward must be helped; the delinquent child must be reclaimed; and the orphan and the waif must be sheltered and succored; 
(3) The child must be the first to receive relief in times of distress; 
(4) The child must be put in a position to earn a livelihood, and must be protected against every form of exploitation; 
(5) The child must be brought up in the consciousness that its talents must be devoted to the service of fellow men.

2 The gist of the ten principles contained in the Declaration are as follows: 
(1) Every child, without any exception shall be entitled to these rights without distinction or discrimination. 
(2) The child shall enjoy special protection, given opportunities and facilities to enable him to develop physically, mentally, morally, spiritually and socially in a healthy and normal manner and in conditions of freedom and dignity. 
(3) The child shall be entitled from his birth to a name and a nationality. 
(4) The child shall enjoy the benefits of social security. He shall be entitled to grow and develop in health; special care and protection including adequate pre-natal and post-natal care and the right to adequate nutrition, housing, recreation and medical services. 
(5) Physically, mentally or socially handicapped child shall be given the special treatment, education and care required by his particular condition. 
(6) The child needs love and understanding and shall grow up in the care and under the responsibility of his parents. Children without a family or without adequate means of support are the responsibility of the society and the public authorities. 
(7) The child is entitled to receive education, free and compulsory, in the elementary stages and shall have full opportunity
later, the United Nation Convention on the Rights Of A Child 1989 (UNCROC) was adopted in which under Article 4, it requires state parties to undertake all appropriate legislative, administrative, and other measures for the implementation of the rights recognized in the Convention. To this effect, the Children's Commissioner was seen as a mean to fulfil the requirement 3.

The establishment of children's commissioner pioneered by Norway in 1981 (which was before the adoption of the United Nation Convention on the Rights Of A Child 1989) was aimed at promoting the interests of children in the society. Today, more countries in Europe (Austria, Belgium, Iceland, Sweden and United Kingdom), New Zealand and Australia have created the office with a common ground to protect children. All of the commissioners have almost similar objectives but armed with different legislations and provision and their practice differ to some extent. It is believed by international audience that the children's commissioner is an effective tool to deliver children's rights envisaged in the UNCROC.

Countries across the globe share almost similar experience with children but some suffered greater agony. Among the most significant catastrophe affecting children includes the war in Afghanistan and Iraq, the tsunami that devoured more than 200,000 lives, the devastating earthquake in Pakistan, civil war in Sudan and famine in African countries.

THE PRESENT POSITION OF CHILDREN IN MALAYSIA


Nevertheless, the protection provided has not been proven effective nor adequate since the number of abuse and neglect cases are relatively high, there are children who are not in school, a large number of them are still subject to

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for play and recreation. The best interests of the child shall be the guiding principle of those responsible for his education and guidance; that responsibility lies in the first place with his parents.
(8) The child shall in all circumstances be among the first to receive protection and relief.
(9) The child shall be protected against all forms of neglect, cruelty and exploitation, shall not be admitted to employment before an appropriate minimum age and in no case be caused or permitted to engage in any occupation or employment which would prejudice his health or education, or interfere with his physical, mental or moral development.
(10) The child shall be protected from practices which may foster any form of discrimination.

discrimination\(^4\) and some are exploited as cheap labours\(^5\). For victims of abuse and neglect, the rehabilitation programme provided is not holistic\(^6\) while the effectiveness of treatment and correctional programme for delinquent children and juvenile are still questioned. The impact of globalisation over children is frequently discussed but measures and effort to cushion the impact was not laid down. Price increase has indirect impact to children, parents are becoming more stressful, they spent more time to work in order to gain more and less time are spent with the children. As a result, children are forced to make decision which proved to be wrong.

Working mothers shift the responsibility to care for their children to care centres and domestic helpers, thus less time are spent with the children and the worst part is, when parents are away the children are not well cared for, neglected and taken for granted, babies die in the cradle, they were fed unattended and thus choked and die, they were shaken vigorously and die and some even purposely abused. Parents negligently put their children in the care of male care taker without considering the negative impact from the decision. Home is not where the children or the young hearts are, they prefer cyber cafes and other entertainment premises. Peer pressures and influence lead their way of life and conduct. Schools are no longer a truly safe place: bullying\(^7\), gang fight, abuse by teachers and blackmailing has become part and parcel of the system. Children are exposed to ex-convicts working around them and who posed danger to their safety and security\(^8\). Sick and terminally ill children are denied medical attention simply because they had no money, some had to beg for medical expenses and some died in the course of applying to the Government Fund for Patients With Chronic Disease. The rest is history.

It is not a fallacy to claim that children are in an ambiguous position, making it difficult to determine their specific situation. While children under the UNCRC are those under the age of 18 years\(^9\), they are actually grouped into various age scales. Children aged between 14-18 are considered juvenile and are deemed to have the capacity to commit crime. Those above 10 but below 12 years are responsible for their criminal act only if they have sufficient maturity of understanding to judge the nature and consequence of his conduct\(^10\). Children

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\(^4\) This refers to the aborigines of the Peninsular Malaysia and natives of Sabah and Sarawak whose right to maintain their customs, culture and rights and interest in their customary land are often encroached. For further insight read more on 32 documented cases of encroachment of Orang Asli land and the land of native of Sabah and Sarawak at http://www.geocities.com/CapitolHill/Parliament/4990/CH4IND.htm


\(^7\) Many present could recall the unfortunate case of Farid Amirul who was beaten to death by his schoolmates.

\(^8\) See for example the case of of Mohd Abbas bin Danus Baksan v Public Prosecutor [2006] 5 MLJ 332

\(^9\) Article 2 of the UNCROC

\(^10\) Section 83 of the Penal Code
below 10 years old are classified as “doli incapax”\(^{11}\) and thus presumed not to have the capacity to commit crime due to the legal presumption that they cannot form the necessary intention or mens rea. Therefore children are differently dealt with under the Penal Code according to their age.

To date we have not witnessed a thorough work or effort by the authority to mark that children has become our priority and the level of education and awareness of the public is never assessed but the writer personally believe it is on an unsatisfactory level due to many incidents and prevalence reported in the newspaper. We are still far behind many other countries in providing laws to protect children. There is no such law to ban physical punishment of children while Sweden introduced such law in 1979, Finland in 1982, Norway in 1987 and most recently Hungary in 2005. Dangerous and damaging exposure of the Internet content were not yet dealt with and children are still primary target of commercial advertisement.

Children’s welfare and development matters in Malaysia are under the responsibility of the Ministry of Women, Family and Community Development while education and related education matters fall under the jurisdiction of the Ministry of Education. Children living in rural area might well be included under the responsibility of the Ministry of Rural Development. As good as they are, none of the body is responsible solely and dominantly for children and their diverse related domain. This paper will look into the possibility and feasibility of setting up a children’s commissioner’s office in Malaysia.

As the benefit and possibility to set up a Children’s Commissioner office in Malaysia is the highlight of this paper, it is then appropriate to look at two similar offices in Norway and New Zealand for a general overview.

**CHILDREN’S COMMISSIONER OF NORWAY AND NEW ZEALAND**

Before embarking to scrutinize the establishment, appointment, duties, powers and functions of the commissioner in both countries, it is perhaps helpful to discuss the reasons for the selection. These countries of choice had different background, while Norway as the first nation to set up the office of children’s commissioner is situated in European continent, obviously not a member of commonwealth countries, practising Scandinavian civil law system and still maintain the constitutional monarch, New Zealand on the other hand had only established the similar office in 2003 and is located in the Pacific region, a commonwealth country practising common law legal system and has no monarch. However both are democratic countries with Parliamentary system of government.

\(^{11}\) Section 82, Malaysian Penal Code
Norway
The Children's Commissioner of Norway is called the Ombudsman for Children. The name “Ombudsman” is a classical name used for an institution first introduced in Sweden in 1809 to control activities of and prevent abuse by public officials. The name is also used for the Children's Commissioner because it plays almost the same role but from different angle. The office of the Ombudsman for Children has 15 employees who are responsible for various sections and divisions. Its only source of funding is the government grants. Established under the act relating to the Ombudsman for Children passed in the Storting (Parliament of Norway) March 6, 1981, the Ombudsman was appointed by the King for a period of four years. An Ombudsman for Children can only stay in the office not more than a total of eight years. A person to be appointed as the Ombudsman should have varied professional backgrounds.

The duties of the Ombudsman as provided under Section 3 are to promote the interests of children vis-à-vis public and private authorities and to follow up the development of conditions under which children grow up. It further explains that the Ombudsman in particular shall protect the interests of children in connection with planning and study-reports in all fields on his own initiatives or as a hearing instance and to ensure that legislation relating to the protection of children's interests is observed and this includes checking whether Norwegian law and administrative routines are in accordance with Norway's obligations under to the UNCROC.

He shall propose measures that can strengthen children's safety under the law, put forward proposals for measures that can solve or prevent conflicts between children and society and ensure that sufficient information is given to the public and private sectors concerning children's rights and measures required for children.

As an independent office, the Ombudsman may act on his own initiative or at the request of other people and he himself will decide whether an application offers sufficient grounds for action, for instance, further investigation.

The Ombudsman have free access to all public and private institutions for children and all government authorities and public and private institutions for children is responsible to give the Ombudsman the information needed to carry out the duties of the Ombudsman pursuant to this Act notwithstanding the pledge of secrecy. Information that is needed for the accomplishment of the Ombudsman's tasks may also be demanded from others. The implication of this provision is that

14 Section 2 of Act No. 5 of March 1981
15 Section 3 (c), (d) and (e).
16 Section 4.
when information can be demanded, it may also be required that records and other documents be produced.

The Ombudsman has the right to make statements on matters concerning conditions related to his working sphere and he himself may decide to whom these statements shall be directed 17.

Unlike in New Zealand, the Ombudsman for children in Norway is also subject to general instructions laid down by the King for the organisation and procedures of the Ombudsman18. Any function which is not instructed nor described in the instruction shall be carried out independently. The instruction has been changed and amended from time to time to suit the work demand of the Ombudsman.

The Ombudsman in pursuing his duties shall work to ensure that the needs, rights and interests of children are given the necessary consideration in all areas of society although he does not have the authority to decide cases or set aside decisions in the administration19. The term children means, persons up to the age of majority which is 18 years. The Ombudsman is also responsible to ensure that the public is informed about his work and duties and the form he could use is entirely up to him.

Cases to be taken up by the Ombudsman can come from his own initiative or at the request of other people. It is open for anyone to apply to the Ombudsman to take up a case. All application should be made in writing and thus verbal application must be reduced to writing as well20. Application submitted to the Ombudsman shall contain grounds for the application as far as possible and an applicant is required to enclose whatever information and documents available and related to the application. The Ombudsman must first obtain permission from a child before he could deal with a case if the application does not come from the child himself. Where appropriate or when required by law, the permission of the guardian shall be obtained beforehand. However, if the cases so require, the Ombudsman shall have the right to deal with a case even without obtaining any permission. No specific guideline is laid down. This is a discretionary power of the Ombudsman.

In the following circumstances, the Ombudsman is bound to reject applications i.e. when it is concerning specific individual conflicts between a child and his guardians, between the guardians mutually concerning the exercise of parental responsibility and similar matters and applications that partly cover such conflicts21. However if the interests of the child will obviously be neglected if the application is rejected, the Ombudsman may accept the application. When rejecting an application, it is compulsory for the Ombudsman to give for the

17 Section 5.
18 Section 6.
19 Section 1 of the Instruction for the Ombudsman For Children.
20 Section 2.
21 Section 3.
rejection and offer information about any existing instances established for the purpose of handling conflicts of this nature. A rejection by the Ombudsman is final and cannot be appealed.

The Ombudsman also has power to refer and shelve a case when the facts justify him to do so. Shelving of cases is allowed if the Ombudsman finds that application has been made for a situation that does not offer grounds for criticism or for any other follow-up procedure, or when the situation that the application concerns has been remedied or has ceased to exist. Case may be shelved at any stage in the proceedings and anyone who has applied to the Ombudsman shall be informed of the shelving of the case and the reason for this. As in Section 4, shelving is also final and cannot be appealed.

Activities of the Ombudsman are regulated by Chapters I-III of the Public Administration Act and the Freedom of Information Act 1970. A case must be clarified before the Ombudsman can make any statement relating to it. Clarified is interpreted as and it is the Ombudsman himself who will determine steps that should be taken to clarify the circumstances in the case. It is the duty of the Ombudsman to preserve secrecy about the source of information he has used especially when the source has expressly requested secrecy or if the Ombudsman finds this appropriate on behalf of the child.

When a case has been taken up and not shelved, the Ombudsman shall personally adopt a standpoint on the case and the opinion of the Ombudsman shall be formulated as a written statement together with the grounds for his opinion. To whom the statement is directed will depend on the decision of the Ombudsman and it can be directed including to the press and the broadcasting corporation or others of which in the opinion of the Ombudsman is expedient.

No opinion shall be expressed on the position in regard to the law when the Storting's Ombudsman for Public Administration has made a statement or when the courts has made a decision of a situation or when a matter has been brought before the courts for a decision. He is also prohibited from expressing opinion in cases that are under police investigation and where children might have been exposed to acts in violation with the law, as far as somebody is under suspicion or indicted. Nevertheless, the Ombudsman may criticise the factual and legal situation that has been revealed in the statement of the Ombudsman for Public Administration's.

An Annual Report shall be submitted to the Minister each year encompassing the Ombudsman activities and it shall be available to the public for viewing, assessment and feedback.

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22 Section 4 & 5.
23 Section 6.
24 Section 7.
25 This is the Ombudsman that deals with complaint from the public against administrative bodies.
26 Section 8.
New Zealand
The office of the Children’s Commissioner of New Zealand is created by the Children’s Commissioner Act 2003 that allows the Commissioner to inquire into any matter affecting children and young people in any service or organisation and investigate the actions of the Department of Child, Youth and Family Services of the country. The position is an independent authority and it aims to promote children’s and young people’s well being through advocacy, consultation, monitoring, research and investigation.

The Children’s Commissioner Act 2003 is more elaborate and detail as compared to the equivalent act that created Ombudsman for Children in Norway. This might have been the result of time factors and inclusion of ‘best practice’ provision. The Act confers additional functions and powers on the Commissioner so that he could give the UNCROC a better effect in New Zealand. The Commissioner is required to have regard to the Convention in carrying out the functions and powers. In order to enhance the effectiveness of the Commissioner’s investigative and inquiry functions, he was given express powers to obtain information and documents, and to apply for access to court records. The rule of the thumb is, the Commissioner must have regards to the UNCROC, the principle that the Commissioner should give serious consideration to the views of children and take those views into account and the principle that the Commissioner should recognise the diversity of children in New Zealand in performing or exercising the functions or powers under this Act.

As enunciated in Section 12, the general functions of the Commissioner are described as to investigate any decision or recommendation made, or any act done or omitted, in respect of any child in that child’s personal capacity, to promote the establishment of accessible and effective complaints mechanisms for children and to monitor the nature and level of complaints, to raise awareness and understanding of children’s interests, rights, and welfare as well as to raise awareness and understanding of the UNCROC. He shall undertake and promote research on any matter related to the welfare of children and to act as an advocate for children’s interests, rights, and welfare generally, and, in that regard, to advance and monitor the application of the UNCROC by departments of State and other instruments of the Crown.

The Commissioner is responsible to present reports relating to the UNCROC or to the interests, rights, or welfare of children generally when such issues arises in proceedings before any court or tribunal when requested by the court or tribunal; or counsel representing any party to the proceedings; or counsel representing any child who is the subject of the proceedings; or counsel assisting the court or tribunal. He shall receive and invite representations from members of the public on any matter that relates to the welfare of children and increase public

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27 Best practice here means the standard approved and recommended internationally.
28 Section 3 of the Children’s Commissioner Act 2003.
29 Ibid Section 11.
awareness of matters that relate to the welfare of children. In relation to decisions that affect the lives of children, he shall promote the participation of children in those decisions; and promote an approach to children’s views that and gives due weight to those views in accordance with the age and maturity of the relevant child.

With or without request, he shall report to the Prime Minister on matters affecting the rights of children. He could inquire into and report on any matter including any enactment or law, or practice or procedure that relates to the welfare of children. Independence is the heart of the Ombudsman function. He must act independently in performing his statutory functions and duties, and exercising his statutory powers unless expressly provided otherwise in this or another Act. To ensure that views of children are taken into account in the exercise or performance of the Commissioner’s functions, the Commissioner must develop means of consulting with children from time to time and he must consult with children, using the means developed under subsection (1), where practicable, before making any significant recommendation in the exercise or performance of the Commissioner’s functions.

Although it is the duty of the Ombudsman to conduct investigation, he must have to the question whether the rights or the welfare and interests of 1 or more children have been prejudiced in his course of his investigation. A decision or recommendation, or any act or omission, of a court or a tribunal is beyond the jurisdiction of the Commissioner and he may not investigate the bodies and if any matter is the subject of proceedings before a court or a tribunal, the Commissioner may not commence or (if the Commissioner has commenced an investigation) continue an investigation into the matter until the proceedings are finally determined by the court or tribunal. Subject to conditions under subsection (2) are satisfied, the Commissioner may, by notice in writing, require any person to provide the Commissioner or a specified employee of the Commissioner with any information the Commissioner requires; to produce to the Commissioner or a specified employee of the Commissioner any document in the custody or under the control of that person, and to allow copies of, or extracts from, any such document to be made or taken or to furnish to the Commissioner or to a specified employee of the Commissioner copies or extracts from documents in the custody or under the control of that person.

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30 Section 14 (1).
31 Section 14 (2).
32 Section 17.
33 Section 18 (1), (2).
34 Section 20 (2) (2) The conditions are that—
(a) the Commissioner believes, on reasonable grounds, that the exercise of the powers conferred by that subsection are necessary to enable the Commissioner to carry out an investigation; and
(b) the person to whom a notice under that subsection is to be given has failed to comply with a previous request to provide the Commissioner, within a reasonable time, with the information or document extract required by the notice; and
(c) the Commissioner believes, on reasonable grounds, that—
(i) it is not reasonably practicable to obtain the information or document from another source; or
(ii) for the purposes of the investigation, it is necessary to obtain the information or document to verify or refute information obtained from another source.
A person served with notice under Section 20 to provide information or document must, without charge, comply with the requirement stated in the notice in the manner and within a period (not less than 20 working days after the notice is given to the person) specified in the notice unless the information or document would be privileged in a court of law. Failure to comply with an order under this section without reasonable excuse or knowingly or recklessly provides information that is false or misleading in any material particular is an offence and may be fined not exceeding $2,000.

The Commissioner and every employee of the Commissioner’s office must maintain secrecy in respect of all matters that come to their knowledge in the course of any investigation but they may disclose any matter that, in the Commissioner’s opinion, ought to be disclosed for the purposes of giving effect to this Act, or the Commissioner’s obligations under any other enactment; or of the Privacy Act 1993. However power conferred to the Commissioner does not extend to any matter that might prejudice the security, defence, or international relations of New Zealand (including New Zealand’s relations with the Government of any other country or with any international organisation); or any interest protected by the Official Information Act 1982; or the maintenance of the law, including the prevention, investigation, or detection of offences; or any matter that might involve the disclosure of the deliberations of Cabinet; or any information, answer, document, paper, or thing obtained by the Commissioner by reason only of compliance with a requirement made under section 20(1).

The Commissioner may apply to the court to inspect the record if the Commissioner believes on reasonable grounds that access to a record of a court is required for an investigation. The Commissioner must not make any comment that is adverse to a person in any report or statement made under this Act, if the Commissioner has not given the person an opportunity to be heard. Procedure for the investigation under this Act may be regulated by the Commissioner that he thinks fit, as long as it is not inconsistent with the Act.

The officeholder or a former officeholder or a person who is or has been an employee of the Commissioner is protected from civil or criminal proceedings for anything done or omitted in the course of the exercise or intended exercise of functions under this Act unless it is shown that the person concerned acted in bad faith. He or she may not be called to give evidence in any court, or in any proceedings of a judicial nature, in respect of anything that comes to the

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35 Section 21 (1), (2).
36 Section 21 (3), (4).
37 Section 22 (1).
38 Section 22 (2) (a), (b), (c).
39 Section 22 (3), (4).
40 Section 24.
41 Section 25.
42 Section 26.
43 Section 27 (2).
knowledge of the person concerned in the exercise of functions or powers under this Act.

The office was involved to prepare the New Zealand Action Plan on Human Rights where they work closely with the Human Rights Commission. It also organised debate on violence against children and received feedback from the public concerning the right of parents and caregivers to discipline children physically. Meetings with counterparts in Australia were also held to discuss review work, policy development, new service initiatives, research and so on. The office made 15 site visits to offices of the Department of Child, Youth and Family services around New Zealand in 2005 and continues to provide advocacy training to improve communication between school and family and to make sure that schools conduct disciplinary process fairly and in accordance with the guidelines. In terms of advice in policy development, monitoring work, increasing public awareness of children's rights and advocacy, the office had excellently reached more than have been targeted for the year 2005. The office had proved that it can make significant contribution towards the betterment of the condition and rights of children in New Zealand.

**DOES MALAYSIA NEED A CHILDREN'S COMMISSIONER?**

Law serves various purposes. It is a method used to protect, safeguard and ensure harmonious coexistence of adults and children. To protect and safeguard, law can either be enacted to create specific act for the purpose of protecting interests and rights of children or create bodies with special aim of championing children issues and thus reflecting the stand of the government. Black’s Law Dictionary, Sixth Edition, page 884 explained law as:

> "That which is laid down, ordained, or established. A rule or method according to which phenomenon or actions co-exist or follow each other. Law, in its generic sense, is a body of rules of action or conduct prescribed by controlling authority, and having binding legal force. That which must be obeyed and followed by citizens subject to sanctions or legal consequences is a law. Law is a solemn expression of the will of the supreme power of the State. The “law” of a state is to be found in its statutory and constitutional enactments, as interpreted by its courts, and, in absence of statute law, in rulings of its courts."

In reality, there are no specifications of countries said to be in need of the commissioner but as long as we have ratified the UNCROC, setting up the office of a Children’s Commissioner will help the implementation and observation of the Convention in the country. By looking at the present situation of children, their survival, challenges and related maltreatment and neglect and how children

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44 Section 27 (3).
issues were easily forgotten and ignored, it is believed that Malaysian children are indeed in need of a champion who could focus on promoting and advocating children’s rights.

By saying that we need special or additional representation of children’s rights and interests doesn’t mean that other large and small groups within society may need special representation too. For children, there are special cases that made it rather urgent for the authority to quickly form an independent and focused position that will look into children matters, consistently and with firm focus. Some of the elements of the special case that can be made for children are:

1. Healthy development and active participation of the children are crucial to the healthy and prosperous future of any society. Together with this we must also give priority and concern for the environment as this will safeguard the planet where they will live on.

2. As members of the human race, children are considered individuals – their status is equal to adults and they should not be regarded as possessions of parents, products of the State or people-in-the making. Government of a state has a moral responsibility to recognize the human rights of children as individual citizens.

3. Children are totally dependent. They become independence with the help and guidance of adults. Their dependence and developmental state make them vulnerable. They are more affected by the conditions under which they live, by violence, by poverty, by poor housing, environmental pollution than the adults.

4. Even though parents are normally the first and most vigorous defenders of the human rights of their children, they can and do abuse children’s rights. Violence to children within the family is common and traditional attitudes can prevent or delay respect for the child’s own views and feelings and would have impact on their development to become active, participating citizens. Parents, families, governments and other carers have to be reviewed to uphold children’s rights and this is the role of an independent office such as the Commissioner.

5. Actions and inactions of the government affect children, including the policy, the law, and the practice.

6. There is no part for children in political process, they have no vote, no representation in the Parliament, in the legislative process and is most other process.

7. Children are facing difficulties is using and benefiting the legal system and cannot easily have access to courts to protect their rights. To respond their concerns, complaints and remedying their rights requires special arrangements.

8. Current changes in the societies are having disproportionate impact on children, the family structures, employment patterns, economic and so on.

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HOW DO WE START?

Is it possible to set up an independent Children’s Commissioner in Malaysia, a multi racial country with diverse culture and religion? The first step in responding to the question is by assessing the need for an independent office for children in our country. This has been answered in the preceding section.

The next thing to do is to decide and determine the aim of the office. We must decide the aims that are relevant\(^{47}\) to our country and this may include to promote full implementation of the UNCROC, to promote a higher priority for children at all level of administration, to improve public attitudes towards children; to influence law, policy and practice, to promote effective use of resources for children; to provide a channel for children’s views and other aims/ objective appropriate\(^{48}\).

The next step is to identify existing institutions that promote and protect the human rights of children and to verify it is sufficient and suitable to achieve aims determined earlier. We shall check the list of all kinds and forms of organisation that are involves in promoting and protecting human rights and children rights and to assess whether these organisation is sufficient to achieve the aim. Is there any existing national human rights institutions\(^{49}\)? Are there any structures or institutions established through the constitution or a key statute to promote and protect children’s rights?\(^{50}\) Are there any structures or mechanisms established in Parliament?\(^{51}\) Do we have any permanent mechanisms/institutions established in federal government to promote and protect children’s rights?\(^{52}\)

Other questions are; do we have any permanent mechanisms/institutions established in regional/local government to promote and protect children’s rights? Are there any mechanisms for the investigation and resolution of concerns or


\(^{48}\) Other aims are:

- to encourage government and the public to give proper respect to children’s views;
- to collect and publish data on the situation of children and/or encourage the government to collect and publish adequate data;
- to promote awareness of the human rights of children among children and adults;
- to conduct investigations and undertake or encourage research;
- to review children’s access to, and the effectiveness of, all forms of advocacy and complaints systems, for example in institutions and schools, and including children’s access to the courts;
- to respond to individual complaints from children or those representing children, and where appropriate to initiate or support legal action on behalf of children.

\(^{49}\) Malaysia has SUHAKAM but their objectives and aims are not focused on children.

\(^{50}\) Malaysia does not have this, we only have the Ministry of Women, Family and community development but their task is spearheaded and not all matters related to children are under the Ministry’s jurisdiction. Furthermore there is no special department or division dedicated to children’s issue.

\(^{51}\) Not of our knowledge

\(^{52}\) Not any so far, the relevant department that deals with orphanage is the Social Welfare Department but then again the department is also responsible towards other group of the society.
complaints raised by children and their representatives? Is there any organisations providing advocacy for children? Do inter-governmental organisations work actively to promote and protect children’s rights? How about the NGOs and NGO alliances which focused on children’s rights or other bodies, for example professional or academic or research institutes, involved in monitoring children’s rights? Are existing structures that we have in Malaysia sufficient to fulfil the aims and the needs? To be true to ourselves, the answer is no and that is why Malaysia should set up such office so that children’s rights will be preserved to ensure better adults in the future.

The next vital question is what sort of independent office for children should be established? Should we establish a separate independent human rights institution for children or should we incorporate it by ensuring a distinct focus on children’s rights within a national human rights institution such as the SUHAKAM?

An independent office set up through legislation specifically to promote the rights of children and to protect them as practised in Norway, Australia, New Zealand, United Kingdom and many European countries has the ability to take a distinctive and exclusive children’s perspective and provide a high profile individual that children can relate to. This office is specifically designed to relate to children and it will emphasise the priority which should be accorded to children. An independent office will be able to take on specific tasks relevant to the particular situation of children and finally will guarantee a distinct budget devoted to children’s rights.

By establishing a commissioner for children within a national human rights organisation or institution, children’s matters and concerns tend to stray and get lost in adult agendas. The institution may not be accessible to children and the children themselves may not identify it or use it because the institution is primarily designed for adults. There could be conflicts on whose issues shall become priorities, the adults or the children, and of course constraint of budget.

THE MODEL OF CHILDREN’S COMMISSIONER FOR MALAYSIA

Scrutiny on legal provisions and practice other countries have shown that there are four essential components a commissioner’s work of commissioners. The components are: an exclusive focus on children, the ability to influence law, policy and practice proactively and reactively; the ability to review children’s access to all forms of advocacy and complaints systems (including the courts), and their

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53 European Network of Ombudspersons for Children. 2002. Standards For Independent Human Rights Institutions For Children http://www2.ombudsnet.org/documents. 20 February 2006. This Network aims to encourage the full implementation of the UNCROC, to lobby for children’s rights, to share information, strategies and approaches and to promote the development of an independent office for children.

54 Refer to the Ombudsman for Children in Norway, Children’s Commissioner of New Zealand, Australia and United Kingdom.
effectiveness including the power to initiate or support legal actions on behalf of children; and the ability to conduct investigations and undertake or encourage research and promote awareness of rights among children and adults.

The Children’s Commissioner needs to be independent. The office be expressly provided with certain statutory powers and authority under the law, have an exclusive focus on children and be accessible to them; and should be adequately resourced by an act of Parliament.

i. Independent

It is believed that the Children’s Commissioner must be an independent statutory position. It has to be independent of government so that it will be able to criticise and to influence governments for change. The Commissioner should be free from political pressure or any political party. To ensure independence, the UNICEF\textsuperscript{55} proposed the following safeguards:

- Appointment be made in consultation with independent children’s rights organisations;
- The structure of should represent a Federal policy rather than a particular party or government;
- Funding for the office should be guaranteed over a period of time and the resource should be decided by Parliament, not the government;
- The appointed Commissioner must be given the freedom to the office’s agenda. However it is important that governments consult their commissioners on policy proposals.

To enable the Commissioner to exercise his role and functions more effectively, it is also suggested that similar office is established at the state level to support its work and that more children can be reached. The United Kingdom has one Commissioner for every state; Wales, Northern Ireland, Scotland and England. In New Zealand, the government establish another two Commissioner’s office in Auckland and Christchurch.

ii. Permanent statutory power

The Commissioner must be established by legislature, appointed and given authority to carry out its functions in an Act. It tenure of office must be secure. Duration of appointment shall be for a period of five years with the possibility of reappointment. This is similar to the duration of office of the members of the Parliament.

iii. Exclusive focus on children

The working sphere of a Commissioner must be exclusively focused on children and their rights and interests. Children must be encouraged to participate in

\textsuperscript{55}UNICEF. 1997. Innocenti Digest No. 1. Florence: UNICEF International Child Development Centre
decision making of matters that have impact on them. According to Van Beuren, the participation of children ought to be valued if the hallmark of a democratic society is a plurality of expressed opinion and contributions by those living in it. The following functions, roles and responsibilities are important for an effective Commissioner:

- make recommendations to the Minister as to laws which should be made to ensure the rights of children and young people;
- review of proposed and existing laws, policies, resources allocations and practices relating to children
- conduct inquiries;
- make reports to Parliament;
- conduct research around relevant issues;
- promote varied and targeted public education programs;
- perform an advocacy role;
- power to intervene in cases involving the rights of children and young people at the systemic level;
- develop mechanisms to consult with and promote meaningful dialogue with children and young people.

iv. Adequate Resources

Decision on funding allocation should lie with the Parliament rather than the government. It has to become a commitment of all members of Parliament so that there will be support for this position. Children matters should not be treated as a political matter, taken up during election and shelved when the election is over or taken up by a government but then shelved when there is a change of government. The allocation ought to commensurate with the nature of the Commissioner’s responsibilities, duties, functions and the aims it aspires to achieve.

The Commissioner should be guided by the UNCROC in pursuing his duties and functions and the UNCROC shall become the framework of the office. Other related international document ratified by the government that apply specifically to children or having an impact on children should also be the guiding principles. Above all, the rule of the administrative law shall be observed at all times.

Which name are we going to adopt? We have a number of names to choose from; the Children’s Commissioner, the Commissioner for Children, Commissioner for Children and Young People, Ombudsman For Children or the Ombudsman for Children and Young People.

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57 Such as the principles of natural justice, duty to give reasons and rules applied on discretionary powers.
CONCLUSION: DO WE NEED ANOTHER HERO?

Each and every law and regulation has its own role to play. Laws are intended to protect and control. The writer believed that Malaysian children deserve no less than the rest of the world. Aren’t we convinced that we need a Commissioner to carry out the role of hero for the children? There are, of course, complex issues to be worked out in terms of his exact role and remit, statutory powers and responsibilities and the relationship with other statutory authorities. We need someone who could best represent children’s interests and advocate their needs, challenge public authorities and investigate complaints.

Our children need a Commissioner who will champion their rights and ensure that their needs are considered by all levels and arms of government and every element of a society. Crucially the Commission must be independent and properly funded. The Commission should, on an ongoing basis, review and report on proposed and existing laws, practices and policies which relate to children. Laws, practices and policies can never be complete in the first place; it needs reform and review from time to time for improvement.

Children’s Commissioner should promote public education programs about the Convention as required by Article 42 of the UNCROC by which governments are to “make the principles and provisions of the Convention widely known, by appropriate and active means, to adults and children alike.”

Inquiries in response to a reference or at its own initiatives must be conducted and the Commissioner must have the capacity to exercise powers related to the production of evidence and the protection of witnesses. However, the available protection system should still be in place and not be excluded. The establishment of a Children’s Commissioner does not rule out equivalent bodies for other segments of the society such as for the disabled or women or even the elderly. The potential benefit expected from the Children’s Commissioner is so great that many countries have cannot refuse to have its office in their country.

In front of us is an opportunity to shape new arrangements for protecting children and upholding their rights that we should not miss. This is the time to put Malaysia at the cutting edge of world practice. Our children need a new hero who will become their champion, knight with the shining armour and statutory watchdog.

Everyone has a duty to protect children and we shall work hand in hand; the government, the society and the independent office of the commissioner to ensure meaningful safeguard is in place.

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