



Federal Department of Home Affairs FDHA
Inselgasse 1
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electronic mail to kinderjugend@bsv.admin.ch

Winterthur, March 28th 2024

Statement on the consultation process for the “Amendment of the Ordinance on the Promotion of Extra-curricular Work with Children and Adolescents (PCAO)” within the context of the implementation of Motion 19.3633 “Ombuds Office for Children’s Rights”

Dear Federal Councillor
Dear Ms Wüthrich
Dear Sir, Dear Madam

In a letter dated 15 December 2023 from the then Head of Department, Federal Councillor Alain Berset, you invited us to comment on the preliminary draft and the explanatory report on the above-mentioned matter. We gladly accept this offer and would like to thank you for the opportunity.

As a private-law ombuds office for children, we have been working to strengthen children’s rights in Switzerland since 2021. Thanks to the experience gained by the predecessor organisation and the staff who worked there before transferring to the ombuds office, we have now been active in the field of legal advice for children for seventeen years. Motion 19.3633 submitted by the then Council of States member Ruedi Noser is therefore a key concern for us. We are convinced that a public-law ombuds office could be even more effective in providing the services that we have been covering in the model and pilot project, which is set to run until the end of 2025. This is particularly apparent when one considers the fact that a public-law office would have a right to information and would be officially authorised to make recommendations and to serve as intermediary. There would also be an even stronger incentive for the professionals involved to reach solutions swiftly by actively working together. On the basis of our extensive practical experience and the many discussions that we have had over the years with children and with stakeholders within the justice system and the field of children’s rights, we would like to make the following statements:

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Overview of our position

We welcome the fact that the Federal Council has acknowledged that there are significant shortcomings with regard to ensuring a child-friendly justice system. However, we regret that a proposal has now been submitted for consultation that is not equipped to rectify these shortcomings. The mandate issued by Parliament with this motion remains unfulfilled in key aspects.

It is the view of the Ombuds Office Children's Rights Switzerland that the proposed amendment to the PCAO has little to do with Noser's motion. We therefore do reject this amendment as a means of implementing this motion. We urge the Department to instead develop a dispatch at the level of federal legislation.-This should comply with the core aim of the motion and the legislative demand, namely to create an Ombuds Office for Children's Rights that is actually aimed at children and enables them to access justice through national, independent legal advice and intermediary services.

There is clear demand for such an office, which would help children to assert their rights through direct contact – a demand that is not yet sustainably being met. In terms of the principle of subsidiarity, too, there is a clear need for action at the national level. Moreover, we find it incomprehensible that there should be no possibility of activities at the federal level relating to advice and intermediation for children on the basis of the Federal Constitution.

We would like to elaborate on and justify our position in the following:

General statement on the proposal

The most significant shortcoming with respect to children's rights – and by extension the clear and explicit political mandate arising from Motion 19.3633 "Ombuds Office for Children's Rights" – is the lack of a national and independent ombuds office that offers legal advice and intermediary services for children. This is not provided for in the draft submitted for consultation. The proposed amendments to the Ordinance on the Promotion of Extra-curricular Work with Children and Adolescents (PCAO) are limited to strengthening children's rights within the new Swiss Human Rights Institution (SHRI), which conducts research, shares knowledge, advises authorities and brings together stakeholders. Although we welcome the strengthening of children's rights within the SHRI, this has little to do with motion 19.3633 ('Noser'), which calls for a direct and immediate benefit for our country's most vulnerable people. The purpose of such an office would be to inform and advise children about their rights and to serve as intermediary between them and the authorities involved, thereby ensuring that they have access to justice. Children have rights as

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individuals that must be respected by the state. The ombuds office would make sure that children are able to assert their rights.

With the proposed approach, minimal progress might be made at best, but not the hoped-for assurance of a child-friendly justice system and immediate prevention of injustice if children are not kept informed and are not listened to. For this reason, a dispatch to Parliament is needed that puts the key points of the motion into practice and ensures that children have access to justice through a national and independent ombuds office. In this context, the consultation draft reflects neither the immediate needs of children involved in legal proceedings nor the political will of Parliament, which referred the motion more than three years ago.

Understanding, delimitation and added value of an Ombuds Office for Children's Rights

The central task of a national and independent Ombuds Office for Children's Rights would be to ensure that children have access to justice and to the procedural rights guaranteed under Art. 29 of the Federal Constitution (such as the right to be heard and free administration of justice, legal representation as well as the right to equal and fair treatment). At present, this cannot be guaranteed; this is explained in detail on page 3 of the explanatory report, along with other gaps in the current system. In the Swiss legal system, children cannot assert their established rights without additional support if the authorities involved do not implement them. The institutions currently operating at the municipal, cantonal and national levels do not address this problem. By contrast, an independent Ombuds Office for Children's Rights would ensure that children can access justice and simplify their route to doing so on a case-by-case basis. It would provide information and advice, and act as intermediary between the child and professionals in the justice system at all levels of jurisdiction. In particular, intermediation and making recommendations are key tasks of the ombuds office that would enable it to ensure that children's rights and procedural rights are being respected. Such an office represents clear added value for children and for society as a whole. It would be an indispensable and effective addition to the current system,

- giving children their rightful access to justice in situations where existing laws are not adequately applied by authorities and courts and where the parents cannot advocate for the rights of their children for various reasons.
- A national and independent ombuds office for children that can intervene at an early stage and apply its practical experience to improve the system is also worthwhile from an economic perspective. It would prevent injustice and, depending on the point at which it intervenes, implement various types of preventive measures, thereby preventing high consequential costs from being incurred. In this way, a national and independent ombuds office would also empower children to become

more resilient, which is an essential foundation stone for independent and autonomous living. Resilience has been shown to be particularly crucial in the early years of life, as many changes occur during the early stages of life. Traits such as self-efficacy, adaptability, problem-solving skills or the early assumption of personal responsibility are strengthened. In economic terms, this combination leads to an excellent cost-benefit ratio.

- A national and independent ombuds office does not create duplication, would not alter the existing division of powers and thus the authority of the cantons or the authorities and courts, and would not have a negative impact on the responsibilities within the justice system. Rather, it would play a supportive and coordinating role at the national level in order to guarantee implementation of the Federal Constitution, the UN Convention on the Rights of the Child, national and cantonal laws and ordinances, and the guidelines on child-friendly justice. For the benefit of all children in Switzerland, it would ensure that local professionals understand and implement children's rights.

Furthermore, the activities and responsibilities relating to strengthening children's rights in Switzerland that are set out in the Federal draft, which in our view are secondary and are of lower priority, diverge from the ideal model or mandate of an independent institution for children's rights. According to a study commissioned by the Federal Social Insurance Office (FSIO), such an institution should cover seven areas of activity and responsibility, which are: legislation and policy / "quasi-legal" and intermedating tasks / monitoring government compliance / reporting on the situation of children and implementing the UN Convention on the Rights of the Child / education, promotion and awareness-raising in relation to children's rights / participation of children / networking. However, the draft from the Federal Council only touches upon three areas: reporting on the situation of children and implementing the UN Convention on the Rights of the Child; education, promotion and awareness-raising in relation to children's rights; and networking. By contrast, the primary areas of activity called for under the motion would be the legal advisory and intermediating tasks, and the participation of children.

Necessity of an Ombuds Office for Children's Rights

The proposal misses the opportunity to close the gap in the functioning of our justice system. This gap exists because there is no public-law Ombuds Office for Children's Rights. The draft submitted for consultation argues that an ombuds office at the national level would not be suitable from a professional perspective. This demonstrates a misunderstanding of how a national and independent ombuds office operates, serving as an intermediary between children and local specialists, and making recommendations. Children would be able to access a national office in a modern, low-threshold and barrier-free manner, since the younger generations are well versed in making contact via telephone,

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video call, email or chat. Such an office would also be able to intermediate between children and local specialists over the telephone. Where a key specialist is not yet involved at the location in question, a national and independent ombuds office would inform the responsible local authority or the court of the situation and endeavour to bring the relevant specialist on board, be they a (school) social worker, a legal representative, a mediator or a socio-educational family support worker. Furthermore, it is also important that the national ombuds office is equipped with language-regional representations. This is particularly crucial at the systemic level, in other words in the practice-oriented education, promotion and awareness-raising among professionals in relation to children's rights. This kind of representation breaks down language barriers, bridges the gaps between cultures and fosters the all-important acceptance among local professionals. However, an ombuds office does not replace a trained professional. It is always the local specialists who will take the required next steps based on the recommendations, ensuring that the actions taken are focused on the child and offering them direct support. The ombuds office is only involved in specific cases for a brief case management period until the relevant professionals have implemented the children's rights and the procedural rights of the child. There is an obvious need and demand in practice:

- the ombuds office is necessary because the existing laws, for example the right to information, the right to be heard and the right to legal representation, are not applied adequately by government bodies such as authorities and courts, and there is a lack of checks and balances for children.
- By working to create a more child-friendly justice system and supporting quality management within the legal system, it would strengthen children's rights across the board.
- Child-oriented justice has a direct impact on the mental and physical health of affected children and on their resilience; it eliminates the risk of redress becoming necessary further down the line due to a failure to uphold children's rights. This is especially true for children with complex needs, such as those with disabilities, orphans, or children affected by neglect or violence.
- The (small number of) ombuds offices that currently exist in the cantons, cities and municipalities deal exclusively with issues relating to the administrative body in question, and do not handle matters concerning justice. In addition, experience has shown that only adults turn to these offices for help. However, 90 per cent of the enquiries made by children to the current private-law Ombuds Office for Children's Rights relate to justice, not to administrative bodies. In some cases, these enquiries even relate to appeals at the national or international level and therefore fall outside of the scope of responsibility of the cantonal ombuds offices.

- In addition to providing legal advice and intermediary services in individual cases, another key element in improving children's access to justice is putting in work at the systemic level. This can only be done successfully by an office with practical experience. If it is to forge closer links between stakeholders, foster cooperation and ensure the transfer of knowledge (including between the different cantons), an office requires hands-on experience in giving children legal advice and acting as an intermediary between children and local professionals. The strengthening of children's rights within the Swiss Human Rights Institution that is proposed in the consultation draft would lack the practical grounding in this area to have anything other than a slight influence on whether professionals at the local level would implement the rights of children. Parliament would also benefit from having an experienced organisation that it could consult on the impacts of planned legislation on children's rights.
- The national psychosocial emergency helpline 147 is operated by the Swiss charitable foundation Pro Juventute and is open 24 hours a day, 7 days a week. It relies on being able to refer children to a national and independent Ombuds Office for Children's Rights. Twenty per cent of the calls to the private-law Ombuds Office for Children's Rights are triaged by this helpline. The 147 helpline can, for example, offer emergency mental health support to callers experiencing suicidal thoughts; however, unlike an independent Ombuds Office for Children's Rights, it does not intervene causally by intermediating between the child and a local professional.

The unique position of an ombuds office for children in the justice system

At the municipal, cantonal and national level alike, Switzerland does not have a single modern, independent public-law ombuds office for children with a low threshold for access that offers legal advice and intermediary services relating to the justice system. Only the private-law Ombuds Office Children's Rights Switzerland is currently fulfilling this function, and this as a time-limited model and pilot project.

The Federal Council has made the assumption that numerous services already exist at the cantonal and municipal level that perform relevant activities and need only be expanded and built upon by the cantons and the municipalities. We surmise that this assumption is based on the study "Independent Children's Rights Institution in Switzerland: the state of play and actions to be taken", which was published on 22 July 2022. However, this study included all institutions that are directly or indirectly involved with children, and the majority of these stakeholders are irrelevant when it comes to evaluating whether there is a need for an independent ombuds office offering legal advice and intermediary services. This is because the stakeholders in question are themselves decision-makers and a part of the justice system (such as CAPA and the Office of the Public Prosecutor), because they do not offer any services directly aimed at children (this is the case for some 55 per cent of the

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stakeholders polled for the study), or because they do not carry out the relevant activity of comprehensive legal advice and intermediation in the justice system. In addition, most of the stakeholders are not accessible to children in a contemporary, low-threshold manner and do not offer any information in easy-to-understand language, translation services or child-friendly websites.

The Federal Council also assumes that the cantons can count on the assistance of numerous private organisations to help close any gaps. However, more than half of the stakeholders surveyed already consider themselves to be insufficiently funded, with this affecting NGOs in particular. Consequently, no major commitment can be expected on the part of these organisations in the absence of funding from the cantons, the municipalities or the Confederation. Alongside funding, the stakeholders themselves consider the most urgent problems to be the inadequate accessibility for children and the gaps in national and cantonal legislation. Furthermore, many of the stakeholders surveyed, in particular private and semi-public organisations, frequently encounter limits on their independence as their work is driven by the priorities of the financial backers.

The need for a national and independent solution

The draft submitted for consultation argues that children and youth policy – and thus the implementation of the UN Convention on the Rights of the Child – is the responsibility of the cantons and so the creation of an Ombuds Office for Children's Rights should also take place at the cantonal level. In making this argument, the FSIO overlooks the fact that the Confederation, too, has a duty to implement the rights of children. For instance, the Confederation is required to ensure children's rights in proceedings at the federal level (SEM, FOSPO) and the notification procedure to the UN Committee on the Rights of the Child (in accordance with the Third Optional Protocol). The Confederation therefore has to take on this task in accordance with Art. 43a of the Federal Constitution because this exceeds the powers of the cantons and requires uniform regulation at the federal level.

By offering legal advice and intermediary services, a true ombuds office would ensure that the rights of children are implemented. It would therefore have a supportive and coordinating role which, as already explained, goes beyond the scope of the cantons and would therefore logically need to be positioned at the national level. There would be significant disadvantages in relying on voluntary solutions at the cantonal level, and focusing exclusively on strengthening children's rights within the Swiss Human Rights Institution without making provisions for legal advice and intermediary services.

- Offering legal advice and intermediation for children requires specialised expertise: legal knowledge across all areas of the law in combination with specific skills in working with children, and the ability to provide support in multiple languages. It would be efficient for a national office to hold this expertise rather than expecting

26 cantons to do so. If done on a voluntary basis, this would take monumental effort, would be virtually impossible to achieve across the board, would take decades and would entail significant operating costs for the Confederation, cantons and municipalities.

- Delegating the task to cantons to be performed voluntarily would result in children's access to justice becoming dependent on their place of residence, which is tantamount to inequality and unequal treatment. By contrast, a national and independent solution would give all children the opportunity to access justice. This would mean equality and justice for all children regardless of where they live. One can easily imagine the extent of such unequal treatment when considering that only seven cantonal ombuds offices for administration have been created over the last 50 years.
- Practical experience in recent years has shown that many cases involve multiple cantons (for instance, in child protection proceedings where a child is on a time-out outside the canton and the two parents live in different cantons). Sometimes, cantons and federal offices are also involved (such as child protection situations involving the national reporting office for sport and a local sports association). In such cases, a national solution is the only way to ensure unbureaucratic, rapid and effective support.
- The small number of cantonal and municipal ombuds offices are limited to concerns that relate to the administrative body in question. They are not responsible for the much more frequent enquiries concerning legal advice for children and intermediary services relating to justice – and certainly not when it comes to appeals at the national or international level.
- At existing cantonal and municipal ombuds offices, ensuring independence with respect to professionals in the administrative system is a challenge. Although this is generally achieved in day-to-day working, it would still be easier for a national ombuds office to ensure its independence.
- Every triage – either via the SHRI or the 147 helpline, which cannot provide legal advice and intermediary services in response to direct enquiries from children and can only refer them – harbours the risk that, in the absence of a national and comprehensive ombuds office, children would not be directed to an ombuds office that is responsible for justice and would not receive any support. While the SHRI can play a positive role when it comes to knowledge transfer and coordination, it is not equipped to provide fast and practical support, to prevent injustice directly, and to ensure that children's procedural rights are upheld without delay.

- The legal principles and the remit of the SHRI are already identical to the new tasks and responsibilities proposed by the Federal Council. Consequently, the proposed amendments to the ordinance would not bring any new developments nor, by extension, any improvements with respect to child-oriented justice, since human rights also include children's rights and the SHRI already has a duty to promote children's rights within its sphere of competence.
- The activities of a national and independent Ombuds Office for Children's Rights would not interfere with the existing division of powers between the Confederation and the cantons because it is impartial and it would not provide legal representation or conduct proceedings, but only make recommendations. For this reason, there would be no conflict with the division of tasks and competences either.

From the perspective of subsidiarity, too – a principle which is rightly held in high regard in Switzerland – the need for action at the national level is clear.

The constitutional and legal basis is in place

The consultation draft proposes implementing the motion at ordinance level in the context of the Ordinance on the Promotion of Extra-curricular Work with Children and Adolescents (PCAO), but without addressing the core task of an Ombuds Office for Children's Rights offering legal advice and intermediary services. The Federal Council argues that it would not be possible to fulfil this core task in the context of the Federal Constitution and on the basis of the existing division of tasks and powers between the Confederation and the cantons. However, the explanatory report lacks a comprehensible justification for this.

The existing legal basis in Switzerland offers sufficient scope to implement the core mandate of the motion. It makes it clear that both the Confederation and the cantons have a duty to take account of the special need of children and young people to receive encouragement and protection (Art. 67 para. 1 of the Federal Constitution). Art. 43a of the Federal Constitution even stipulates that the Confederation undertake tasks that the cantons are unable to perform or which require uniform regulation by the Confederation. It should also be borne in mind that the common social goal is set forth in Art. 41 of the Federal Constitution, compelling the Confederation and the cantons to ensure that children and young people are encouraged to develop into independent and socially responsible people and are supported in their health and well-being. In addition to the provisions of its constitution, Switzerland has an international obligation to implement the relevant conventions. The aforementioned Art. 29 "General procedural guarantees" and Art. 29a "Guarantee of access to the courts" of the Federal Constitution should also be noted. Paragraph 1 of Art. 29 declares that every person (including children) has the right to equal and fair treatment in judicial and administrative proceedings and to have their case decided within a reasonable time. Paragraph 2 states that each party to a case (including children)

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has the right to be heard. And paragraph 3, in turn, declares that any person (including children) who does not have sufficient means has the right to free legal advice and assistance unless their case appears to have no prospect of success. If it is necessary in order to safeguard their rights, they also have the right to free legal representation in court.

Against this backdrop, it is difficult to comprehend why the consultation draft assumes that the Confederation does not have the power to guarantee a national advisory and intermediary service, but should be responsible for advising and facilitating networking among authorities. In view of the explicit constitutional provisions and international obligations, it appears obvious that the Confederation has both the authority and the responsibility to take action on this matter. If the Federal Council determines that there are shortcomings in the implementation of Switzerland's obligations, particularly because there are no municipal or cantonal ombuds offices for children that are responsible for justice, the Confederation must step in on a subsidiary basis. It is difficult to fathom why the subsidiary responsibility of the Confederation should be limited merely to advising and facilitating networking among authorities, and should not extend to guaranteeing the provision of comprehensive legal advice and intermediary services by an independent ombuds office for children that satisfy the constitutional principles and the principle of legal equality. According to Art. 43a of the Federal Constitution, the Confederation should undertake tasks that the cantons are unable to perform or which require uniform regulation by the Confederation. This is exactly what was done in the case of the national reporting office for sport. According to the findings in the explanatory report, there are not only deficiencies in advising and facilitating networking among authorities, but also in the support provided in specific situations. The statement that many organisations are already in a position to fulfil this task is not supported by the review, the consultations of the intercantonal committees and the national reports. An Ombuds Office for Children's Rights that is known for its national and supra-cantonal role would also be better placed to intervene in situations involving different cantons or even other countries. It is contradictory to suggest that it is inopportune to impose new tasks on the cantons while at the same time asserting that these very tasks are their responsibility in the light of the conventional obligations. A revision of the PCAO need not burden the cantons with additional duties if a national and independent ombuds office were to be established. We therefore come to the conclusion that the Confederation does indeed have the power and the duty to implement the motion in full.

Conclusion and demands

For all of these reasons, we demand that the needs of children and practitioners as well as the political will of Parliament be met, and that the creation of the national and independent Ombuds Office for Children's Rights that is called for in the motion be centred effectively as the objective of the proposal. The legal basis for creating an effective, national and independent Ombuds Office for Children's Rights must be set out in a new dispatch that

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addresses the present shortcomings in the system. In view of the above, we request that you submit a new dispatch to Parliament without delay in accordance with the demands of Motion 19.3633 ('Noser') that fulfils the following tasks and requirements:

- Legal basis
- Public law mandate
- To ensure independence from the executive and the judicial power, the mandate should be issued by a sub-committee (Council of States (cantons) and National Council) of the Political Institutions Committee (PIC) of the Swiss Parliament
- Legal advice and intermediary services
- Promoting and raising awareness of children's rights through practical experience
- Right to information for the purpose of information exchange
- Authorisation to make recommendations
- National, with regional representation in the local languages
- Contemporary, low-threshold, multi-lingual and barrier-free for all children in Switzerland
- Expertise in working with children
- Legal knowledge in all areas of law
- Safeguarding rights in important stages and areas of children's lives, such as early childhood, school, sport, health, divorce/separation of parents, protection of children from physical and psychological abuse, neglect, care leavers, criminal offences, poverty (social welfare), discrimination, racism, migration
- Access to justice and existing complaint mechanisms and safeguarding of rights, including the right to information, to be heard and to legal representation
- Right to appoint an independent legal representative, e.g. before an upcoming foster care placement for children who are not capable of judgement (if the competent authorities and courts do not appoint one themselves)
- Networking and cooperation with all stakeholders in the legal system
- Annual reports to the legislative, executive and judicial powers
- Funding of two million Swiss francs per year: this budget, based on the experience gained from the private-law model project, is necessary and sufficient to fulfil the tasks sustainably and effectively

The ombuds office is intended to serve as an overarching, supporting and coordinating body and to intervene quickly and as the situation demands in cases of violation of rights in order to safeguard the rights of children and young people. The direct work with children and young people will continue to be carried out by local professionals such as (school) social workers, psychologists, mediators, CAPA members, judges, youth prosecutors and other specialist services. These professionals are indispensable when it comes to providing the required help and support at the local level.

Since an ombuds office needs to be independent, objective, transparent, fair and impartial, only intervenes in an intermediary capacity on a short-term basis and as the situation demands, and does not replace local professionals, such an office does not strictly require a right of access to documents. In addition, it would not conduct any proceedings and would have no right of appeal to take legal action. There are local legal representatives for this purpose. The same applies to investigations; here, too, the local investigating authorities hold the responsibility. Furthermore, the ombuds office would not have any systematic power of supervision over federal offices and cantons.

Here we would like to draw your attention once again to our legislative proposal submitted around two years ago to the FSIO, the FOJ, the FCCY, the KOKES and the CDSS for a national public-law Ombuds Office for Children's Rights. As a pilot/model project under private law and a transitional solution, we have incorporated our practical findings as well as the extensive feedback and experience from professional circles and from discussions with relevant specialists. You will find this draft legislation enclosed with this statement.

If you have any questions about our statement or examples from practice, please do not hesitate to contact me as Managing Director of the Ombuds Office Children's Rights Switzerland via the following channels: irene.inderbitzin@kinderombudsstelle.ch / +41 052 260 15 55.

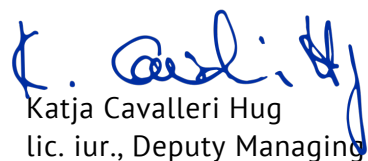
We would like to thank you for recognising and considering our concerns in this statement, and for your continued valuable work to improve children's rights and to ensure the well-being of children in Switzerland.

Best regards

Ombuds Office Children's Rights Switzerland



Irène Inderbitzin
Executive MBA HSG
Managing Director



Katja Cavalleri Hug
lic. iur., Deputy Managing Director
Head of Consulting and Expertise

Enclosures:

Federal act (draft)
on the national parliamentary Ombuds Office for Children's Rights (Ombuds Office for Children's Rights Act, OOCRA)

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Federal Act
on the National Parliamentary Ombuds Office for Children's Rights (Ombuds Office
for Children's Rights Act, OOCRA) *Draft*

of ...

The Federal Assembly of the Swiss Confederation,

based on Article 4 of the Convention on the Rights of the Child¹ and Article 173 para. 2 of the Federal Constitution (Cst.)²,

having considered the Federal Council Dispatch of ...,

resolves:

1. Section: General provisions

Art. ... Purpose

This Act is intended to:

- a. promote, protect and help enforce the rights and interests of minors in Switzerland;
- b. make it easier for minors to establish contact with public authorities;
- c. help prevent or simply resolve conflicts between minors and public authorities as far as possible;
- d. foster an understanding of the rights and interests of minors amongst public authorities and, in this way, help create a child-friendly legal system.

Art. ... Duties

¹ The Ombuds Office has the following duties in relation to individual minors:

- a. it informs and advises minors in legal matters;
- b. it intermediates between minors and public authorities, with the agreement of the minor, in the event of disagreements;
- c. it provides recommendations to public authorities.

² It also undertakes the following duties in the interests of minors:

- a. it advises public authorities on a child-friendly legal system;
- b. it represents the interests of minors in cantonal and federal law-making processes before the legislature and the executive, in particular by taking a position on draft

¹ SR 0.107

² SR 101

Kommentiert [OSKR CH1]: **Alternatively**, e.g. Federal Act on the Ombudsman's Office for Children and Adolescents Short title: Children and Adolescents Ombudsman Act, Children's Rights Ombudsman Act

Kommentiert [OSKR CH2]: **Inspiration**: Laws of the Austrian federal states, Art. 31 DSG

legislation that is significant for minors; it also issues recommendations on the commencement of legislative work

- c. it represents the interests of minors before the judiciary, in particular by taking a position on judgements that are significant for minors.
- d. it reviews the appropriateness and effectiveness of laws and practices on a voluntary basis
- e. it connects with relevant national and international bodies within and outside of the legal system
- f. it reports on its activities on a regular basis
- g. it carries out public relations work, provides information on children's rights and campaigns for a child-friendly legal system.

Art. ... Scope

¹ The Ombuds Office's activities extend to all public authorities at federal, cantonal and municipal level as well as other experts who have regular contact with minors as part of their profession.

² Public authorities are:

- a. the executive, the legislature and the judiciary at federal, cantonal and municipal level;
- b. bodies external to the administration such as corporations, institutions, companies, foundations and private individuals, insofar as they fulfil the public duties assigned to them.

2. Section: Advising minors

1. Information and advice

Art. ... Information and advice

¹ On request, the Ombuds Office informs and advises minors about their rights, in particular in proceedings under administrative, civil and criminal law. In doing so, it carries out its own analysis of the respective case.

² It refers queries that are not of a legal nature or that are already covered by other, more suitable services to the relevant body. As well as this, it refers administrative law matters to the cantonal and communal ombuds offices if such offices exist.

Kommentiert [OSKR CH3]: Cf. e.g. § 3 Ombuds Act Zug, § 89 f. VRG ZH; § 2 Ombuds Act Baselland

Kommentiert [OSKR CH4]: Association of Parliamentary Ombudsman Offices: <https://www.ombudsstellen.ch/ombudsadressen/#parlamentarische-ombudsstellen>

2. Intermediary service

Art. ... Intermediary service

The Ombuds Office is non-partisan and acts as an intermediary between minors and public authorities if required. It is not authorised to issue orders or directives; however, it may:

- a. provide the minor with advice regarding their future conduct;
- b. discuss the matter with the public authority;
- c. issue the public authority with a recommendation if necessary. It also shares this recommendation with the minor and other parties involved at its own discretion.

² The public authorities are obligated to cooperate with the attempts made by the Ombuds Office to provide intermediary assistance. They acknowledge the Ombuds Office's recommendations and review whether and how they can implement the recommendations. They promptly inform the Ombuds Office and the minor in question of the measures they intend to adopt or of the reasons as to why they have rejected the recommendations.

³ The Ombuds Office may issue its recommendations orally or in writing and, if appropriate, may request a written response from the public authority.

Art. ... Access to the justice system

¹ Through its intermediary work, the Ombuds Office secures access to the justice system, in particular to the cantonal, national and international appeals procedure and to mediation services. It ensures that, if appropriate, the relevant authority appoints free legal representation to act for the minor.

Kommentiert [OSKR CH5]: Inspiration: e.g. § 93 VRG ZH

Kommentiert [OSKR CH6]: Requires an adjustment of the relevant procedural provisions

3. Common provisions

Art. ... Access to the Ombuds Office

¹ Minors may contact the Ombuds Office. People close to the minor may contact the Ombuds Office on the minor's behalf.

² Young adults aged under 25 may contact the Ombuds Office in relation to matters in which they are treated as minors or that are the result of legal matters pertaining to the time in which they were a minor.

³ The Ombuds Office facilitates child-friendly and barrier-free access to its services and, in particular, ensures that

- a. the use of services provided by the Ombuds Office is confidential and can be anonymous;

- b. access for minors with disabilities is guaranteed with respect to the necessary financial and human resources;
- c. communication takes place directly in the official languages and English as a minimum. Interpreters are consulted if necessary.

⁴ The Ombuds Office provides its services free of charge.

Art. ... **Right to information**

¹ All public authorities and other bodies concerned with a specific case must provide the Ombuds Office with the required information upon request. In this respect, they are released from their confidentiality obligations.

² Exceptions to this involve information that

- a. concerns the **internal or external security** of Switzerland or other confidential matters relating to foreign affairs;
- b. fall within the scope of **professional secrecy** as defined in Article 321 of the Swiss Criminal Code³.

³ By way of exception, information that comes under the scope of the professional secrecy of doctors may be shared if the person in question consents. This information may also be shared without the consent of the person in question if it relates to physical, sexual or psychological deprivation, abuse and violence against minors.

⁴ All employees of the Ombuds Office are obliged to maintain confidentiality towards third parties and the person who contacted the Ombuds Office to the same extent as the relevant public authorities.

Art. ... **Obligation to cooperate**

All public authorities and other bodies concerned with a specific case are obligated to support the Ombuds Office in fulfilling its duties and to cooperate with clarification work.

Art. ... **Reporting obligation**

¹ All employees of the Ombuds Office must report to the relevant authority if there are concrete indications that the physical, psychological or sexual integrity of a minor is in danger and they are not able to remedy the danger within the scope of their activity. In this respect, they are released from their confidentiality obligations.

Kommentiert [OSKR CH7]: See also e.g. § 8 f. Ombuds Act Zug, Art. 18 Ombuds Act Fribourg, Art. 13 E-Ombuds Act Aargau, Art. 17 VE-BOB;

Kommentiert [OSKR CH8]: Cf. e.g. France (Art. 20), Iceland (Art. 5 para. 1), Luxembourg (Art. 6 para. 2)

Kommentiert [OSKR CH9]: Cf. e.g. France (Art. 20), Belgium - French Community (Art. 4 para. 3)

Kommentiert [OSKR CH10]: Inspiration: France (Art. 20)

Kommentiert [OSKR CH11]: See e.g. § 92 para. 4 VRG ZH and § 17 Ombudsgesetz Zug. Is listed in each case alongside a duty of confidentiality (cf. e.g. § 94a VRG ZH and § 17 Ombudsgesetz Zug).

Kommentiert [OSKR CH12]: See also e.g. § 8 f. Ombudsman Act Zug, Art. 18 Ombudsman Act Fribourg, § 13 E-Ombudsman Act Aargau

Kommentiert [OSKR CH13]: Cf. Art. 314d ZGB

³ SR 311.0

² Employees also fulfil their reporting obligation if they address their report to the Ombuds Office managing director.

3. Section: Advising public authorities

Art. ... Advice

On request, the Ombuds Office advises public authorities on the rights of minors as well as on the idea of a child-friendly justice system.

Art. ... Knowledge transfer

¹ The Ombuds Office champions national and inter-cantonal knowledge transfer.

The Ombuds Office incorporates practical knowledge from its activities into existing educational opportunities and thereby contributes to the further development of such opportunities. It provides the impetus for new educational opportunities.

4. Section: Ombuds Office for Children's Rights

1. Mandate

Art. ... Awarding of mandates

¹ The Political Institutions Committees elect a non-governmental organisation to operate the Ombuds Office for 20 years on the basis of a mandate. Re-election of the same non-governmental organisation is possible without restriction.

² The mandate is awarded to a non-governmental organisation that undertakes all the duties of the Ombuds Office. The comprehensive mandate ensures knowledge can be transferred from the Ombuds Office's activities into the relevant practices. A distribution of duties to different mandate holders is excluded.

³ The mandate is awarded to a non-governmental organisation that:

- a. operates across the whole of Switzerland;
- b. has extensive knowledge of children's rights and the Swiss justice system;
- c. is a permanent organisation and has links to the federal government and the cantons;
- d. does not carry out any activity that could compromise its independence in carrying out its mandate or that is in any other way incompatible with the duties of the Ombuds Office.

Kommentiert [OSKR CH14]: Cf. e.g. Art. 97 KJG Liechtenstein
The mandate model ensures the greatest possible independence and allows synergies with existing organizations.

⁴ New elections must be preceded by a public call to tender. A sub-committee of the Political Institutions Committees is appointed to carry out new elections.

Kommentiert [OSKR CH15]: Cf. Art. 6 Ordinance on the Municipal Ombudsman's Office, City of Winterthur

⁵ The Political Institutions Committees are responsible for submitting applications for re-election.

Kommentiert [OSKR CH16]: The State Policy Commission prepared the preliminary draft for a federal ombudsman's office on July 4, 2003.

Art. ... Termination

¹ The non-governmental organisation may request to be released from its duties at the end of the respective year in compliance with a two-year notice period.

² The Political Institutions Committees may withdraw the mandate from the non-governmental organisation if the latter loses the ability to carry out the mandate on a permanent basis.

³ In the event of early termination, the mandate is initially only awarded to another organisation for the rest of the term.

2. Management and organisation

Art. ... Composition

¹ The Ombuds Office for Children's Rights is made up of one managing director and one deputy or co-director, as well as the staff required to carry out its duties.

² The provisions on deputisation apply by analogy in the event a co-director is appointed.

Art. ... Election of the managing director

¹ The Political Institutions Committees elect the Ombuds Office managing director for a term of eight years. Re-election is possible without restriction.

² New elections must be preceded by a public call to tender. A sub-committee of the Political Institutions Committees is appointed to carry out new elections.

Kommentiert [OSKR CH17]: Recommendation of VPO+ due to independence

Kommentiert [OSKR CH18]: Cf. Art. 6 Ordinance on the Municipal Ombudsman's Office, City of Winterthur

³ The Political Institutions Committees are responsible for applications for re-election.

³ The Ombuds Office managing director is subject to an employment relationship under private law with the mandated non-governmental organisation.

Art. ... Deputy

¹ The deputy is appointed by the Ombuds Office managing director.

² The requirements of the Ombuds Office managing director apply in equal measure.

Art. ... Requirements of the Ombuds Office managing director

Anyone who fulfils the following criteria is eligible to be appointed the Ombuds Office managing director:

- a. eligible to vote in Swiss federal matters or hold a permanent residence permit as a foreign national;
- b. has not been convicted of any act that would be incompatible with the office;
- c. is solvent or has not been issued with any definitive financial loss certificates;
- d. has comprehensive knowledge of public administration, the Swiss legal system, dealing with minors and conflict resolution methods;
- e. proficient in at least two official languages.

Kommentiert [OSKR CH19]: Cf. e.g. Art. 4 Ombudsman Act Fribourg, Art. 6 Ombudsman Act Geneva, Luxembourg and Belgium

Art. ... Incompatibility

¹ All employees of the Ombuds Office are prohibited from carrying out any activity that could compromise their independence in carrying out their public office duties or that is any other way incompatible with the duties of the Ombuds Office.

² The Political Institutions Committees are responsible for making decisions regarding incompatible activities according to their best judgement.

Kommentiert [OSKR CH20]: Cf. e.g. § 2 para. 4 Ombuds Act Basel-Stadt, § 14 Ombuds Act Zug, also Art. 26b FADP

Art. ... Deputy and withdrawal

¹ The deputy acts if the managing director of the Ombuds Office is absent for long periods or in cases of bias and has the same duties and powers.

² The same provisions apply to the withdrawal of the managing director as to members of courts. The managing director makes the decision themselves regarding their withdrawal.

³ If both the managing director and the deputy withdraw, the Political Institutions Committees elect a new deputy.

Art. ... Immunity

¹ Criminal proceedings against the Ombuds Office managing director on the grounds of criminal actions that directly relate to their official position or activity may only be initiated with the authorisation of the Political Institutions Committees.

The provisions of the Parliament Act of 13 December 2002⁴ apply by analogy.

Kommentiert [OSKR CH21]: Cf. e.g. Art. 17 ParlG, Venice Principles Principle No. 23

⁴ SR 171.10

Art. ... Termination

¹ The Ombuds Office managing director may request to be released from their duties at the end of the respective month in compliance with a six-month notice period.

² The Political Institutions Committees may relieve the managing director of their duties before their term of office ends if the latter:

- a. commits an intentional or gross breach of their official obligations;
- b. permanently loses their ability to hold office;
- c. is convicted of an act that is not compatible with the office.

³ The managing director must immediately communicate the details of any criminal convictions that transpire over their term of office and that lead to an entry in a private extract in the register of convictions.

⁴ In the event of early termination, a new managing director is initially only elected for the rest of the term.

Art. ... Organisation

¹ The Ombuds Office managing director determines the organisation for fulfilling the duties of the Ombuds Office themselves.

² They are responsible for establishing, amending and terminating employment relationships with staff. Staff work exclusively on the orders of the Ombuds Office managing director.

Art. ... Position and registered office

¹ The Ombuds Office is independent in fulfilling its duties and does not act on the orders of authorities or third parties.

² The Ombuds Office's registered office is the registered office of the mandated non-governmental organisation. The Ombuds Office may establish offices serving specific language regions.

Art. ... Confidentiality

¹ The Ombuds Office managing director, the deputy and the employees are obliged to maintain confidentiality concerning information that becomes known to them exclusively through their activity to the extent that such confidentiality is necessary in the overriding, legitimate interests of the minors in question. The parties are obligated to maintain confidentiality even after their activity has ended.

Kommentiert [OSKR CH22]: Inspiration: § 10 E-Ombudsgesetz Aargau, Art. 26a DSG (Data Protection Officer), Venice Principles

Kommentiert [OSKR CH23]: Inspiration: § 17 Ombudsman Act of the Canton of Zug, § 94a VRG ZH

² In particular, they refuse to testify about observations they have made as part of their activity in administrative, civil or criminal proceedings, unless those involved release them from their confidentiality obligation.

³ The obligation to maintain confidentiality also applies to experts and third parties consulted by the Ombuds Office.

Kommentiert [OSKR CH24]: See Art. 166 para. 1 let. d ZPO, but also e.g. Art. 170 and Art. 173 para. 2 StPO, Art. 16 VwVG in conjunction with Art. 42 BZP. Art. 42 BZP

Art. ... **Reporting**

¹ The Ombuds Office managing director prepares an annual report on the Ombuds Office's activity for the Political Institutions Committees. Specifically, the report presents shortcomings identified in the applicable law and the activities of public authorities, offers suggestions for legislative, organisational or administrative reform and provides information about recommendations issued and their implementation.

² The report is published.

³ The Ombuds Office can publish further reports.

Kommentiert [OSKR CH25]: Inspiration: § 11 of the Basel-Stadt Ombudsman Act

Art. ... **Oversight**

¹ The Control Committees review whether the Ombuds Office is fulfilling its legal duties.

² If the Control Committees request to view documents that contain personal data, the Ombuds Office takes suitable precautions to protect the person and the data.

Kommentiert [OSKR CH26]: Cf. e.g. Art. 13 VE-BOB

5. Section: Financing

Art. ...

¹ The Ombuds Office's costs are borne by the federal government.

² Contributions from the federal government are financed from general funds.

³ The Ombuds Office prepares an annual budget and requests contributions from the Political Institutions Committees in accordance with this.

⁴ The Political Institutions Committees approve the level of contributions in accordance with the Ombuds Office's requested budget.

Kommentiert [OSKR CH27]: Cf. § 14a Ordinance of the Ombudsman's Office of the City of Winterthur

6. Section: Final provisions

Art. ... **Enforcement**

The Federal Assembly issues the legislative implementing provisions relating to the Ombuds Office in the form of ordinances of the Federal Assembly.

Kommentiert [OSKR CH28]: cf. Art. 10 VE-BOB

Art. ... Amendment of another decree

The amendment of previous law is regulated in the appendix.

Art. ... Referendum and entry into force

¹ This law is subject to an optional referendum.

² The Conference for Coordination of the Federal Assembly determines the date on which the law enters into force.

Kommentiert [OSKR CH29]: cf. art. 23 para. 2 VE-BOB

Amendment to previous law

Appendix

The following decrees are amended as follows:

1. ...
2. ...

Kommentiert [OSKR CH30]: Cf. e.g. Appendix VE-BOB: Responsibility Act, Parliament Act