

Commission for Children and Young People Amendment Bill 2005

Explanatory note

This explanatory note relates to this Bill as introduced into Parliament.

Overview of Bill

The object of this Bill is to amend the *Commission for Children and Young People Act 1998* (the **Principal Act**) as follows:

- (a) to confer on the Commission for Children and Young People (the **Commission**) the functions of encouraging organisations to develop their capacity to be safe and friendly for children and of developing and administering a voluntary accreditation scheme for programs for sex offenders,
- (b) to enable the Commission to compel certain information to be produced to enable it to carry out certain functions,
- (c) to incorporate into the Principal Act provisions currently contained in the regulations that relate to special inquiries conducted by the Commission and other matters,
- (d) to incorporate into the Principal Act the provisions of the *Child Protection (Prohibited Employment) Act 1998* (relating to prohibitions on employment in child-related employment),
- (e) to include in the categories of persons who are prohibited from engaging in child-related employment (**prohibited persons**) persons who are convicted of offences committed as adults of intentionally wounding or causing grievous bodily harm to a child where the adult was more than 3 years older than the child,
- (f) to restrict the right of a prohibited person to apply for a review of the prohibition if the person is a person convicted of the murder of a child, certain sexual offences involving a child or of offences involving the production of child pornography,
- (g) to change references to employment screening to references to background checking,
- (h) to extend the offences to be checked as part of background checking procedures for employees in child-related employment,
- (i) to provide for recent previous background checks on potential short-term employees to be used to satisfy requirements under the Act to carry out background checks on such employees,
- (j) to make other minor and consequential amendments and amendments of a savings and transitional nature.

The Bill also repeals the *Child Protection (Prohibited Employment) Act 1998* and the *Commission for Children and Young People Regulation 2000*.

Outline of provisions

Clause 1 sets out the name (also called the short title) of the proposed Act.

Clause 2 provides for the commencement of the proposed Act on a day or days to be appointed by proclamation.

Clause 3 is a formal provision that gives effect to the amendments to the *Commission for Children and Young People Act 1998* set out in Schedule 1.

Clause 4 is a formal provision that gives effect to the amendments to the Acts set out in Schedule 2.

Clause 5 repeals the *Child Protection (Prohibited Employment) Act 1998* and the *Commission for Children and Young People Regulation 2000*.

Schedule 1 Amendment of Commission for Children and Young People Act 1998

Functions of Commission

Schedule 1 [1] amends the long title to the Principal Act to reflect the additional functions being conferred on the Commission and the incorporation in that Act of the provisions formerly contained in the *Child Protection (Prohibited Employment) Act 1998*.

Schedule 1 [8] amends section 11 of the Principal Act to confer on the Commission the function of determining or intervening in applications by persons prohibited from engaging in child-related employment for a review of that prohibition (**review applications**).

Schedule 1 [11] amends section 11 of the Principal Act to confer on the Commission the function of encouraging organisations to develop their capacity to be safe and friendly for children and the function of developing and administering a voluntary accreditation scheme for programs for persons who have committed sexual offences against children.

Schedule 1 [12] substitutes section 14A of the Principal Act. The proposed section enables the Commission, by notice in writing, to require a government agency to provide it with information (including documents) relevant to whether a person poses a risk to the safety of children for the purposes of preparing submissions to the Industrial Relations Commission or the Administrative Decisions Tribunal or considering a review application. The proposed section also enables the Commission, by notice in writing, to require other persons to provide information relevant to whether a person poses a risk to the safety of children for the purpose of considering any such application.

Schedule 1 [13] amends section 15A of the Principal Act to enable information obtained by the Commission in the exercise of its functions (other than relating to the Child Death Review Team) to be used for the purpose of making a report to the Director-General of the Department of Community Services under section 27 (Mandatory reporting) of the *Children and Young Persons (Care and Protection) Act 1998*.

Schedule 1 [14] amends section 15A of the Principal Act to make it clear that certain protected reports under the *Children and Young Persons (Care and Protection) Act 1998* may be produced to the Commission but remain subject to protections.

Schedule 1 [15] inserts proposed section 15B into the Principal Act. The proposed section enables the Commission, by notice in writing, for the purposes of exercising its monitoring and auditing functions relating to prohibited persons and background checking, to require a government agency or any other person to provide the Commission with statements or documents. It will be an offence to fail to comply with such a notice or knowingly provide false or misleading information.

Special inquiries by Commission

Schedule 1 [17] amends section 20 of the Principal Act to incorporate a provision currently contained in the regulations that enables the Commission to authorise persons to appear and be heard at special inquiries conducted by the Commission if the Commission is satisfied that they are substantially and directly interested in the subject-matter of the inquiry.

Schedule 1 [18] inserts proposed sections 20A and 20B into the Principal Act to incorporate provisions currently contained in the regulations. Proposed section 20A prohibits legal representation at special inquiries conducted by the Commission unless the Commission is satisfied that it is necessary or desirable in the public interest or for the safety, welfare or well-being of a child. Proposed section 20B enables the Commission, if satisfied that it is necessary or desirable in the public interest or for the safety, welfare or well-being of a child, to direct that certain evidence or information relating to a private hearing of a special inquiry not be published except in the manner or to the persons specified by the Commission.

Schedule 1 [16] amends section 20 of the Principal Act to omit a power to make

regulations restricting the publication or disclosure of evidence at a special inquiry.

Prohibited employment

Schedule 1 [19] amends the heading to Part 7 of the Principal Act to reflect the fact that the Part will relate to additional aspects of safeguards relating to child-related employment.

Schedule 1 [20] inserts a heading for the new Division 1 of Part 7 of the Principal Act.

Schedule 1 [21] substitutes sections 31 and 32 of the Principal Act to include in the objects of Part 7 the protection of children by prohibiting certain persons from being engaged in child-related employment and to make the safety and welfare of children, and protecting them from abuse, the paramount consideration in the operation of the Part.

Schedule 1 [22] amends section 33 of the Principal Act to insert definitions, formerly contained in the *Child Protection (Prohibited Employment) Act 1998*, including definitions of **child-related employment**, **employer** and **employee**. These definitions will now apply to Part 7 in place of the previous definitions of those terms.

Schedule 1 [30] inserts proposed section 33A into the Principal Act. The proposed section re-enacts a provision of the *Child Protection (Prohibited Employment) Act 1998* and provides that the background checking provisions of the Principal Act, and the provisions placing prohibitions on child-related employment, do not apply to employment solely concerning children related to the relevant person or children of an employer to whom the person is related.

Schedule 1 [31] inserts proposed Division 2 of Part 7 (Prohibitions on child-related employment) into the Principal Act. The proposed Division re-enacts the provisions of the *Child Protection (Prohibited Employment) Act 1998*, which identify persons who are prohibited from engaging in child-related employment (proposed section 33B) and make it an offence for prohibited persons to apply for, undertake or remain in child-related employment (proposed section 33C) and an offence to employ a person in child-related employment without enquiring of the person whether they are a prohibited person (proposed section 33D) and to employ in child-related employment a person that the employer knows is a prohibited person (proposed section 33E). The category of persons who are prohibited is extended by adding persons who have been found guilty, as adults, of intentionally wounding or causing grievous bodily harm to a child who is more than 3 years younger.

The proposed Division also re-enacts provisions relating to orders declaring that the prohibition provisions do not apply to persons in respect of particular offences. The re-enacted provisions enable the Commission, the Industrial Relations Commission and the Administrative Decisions Tribunal (the **relevant tribunals**) to make such an order on application by a prohibited person (proposed sections 33H and 33I) and set out the requirements for making such an order (proposed section 33J). Procedural provisions relating to stays, multiple applications, notice to the Commissioner of Police and the limits on the jurisdiction of the Industrial Relations Commission are re-enacted (proposed sections 33L–33O). Other provisions making it clear that a prohibited person may be transferred to other employment (proposed section 33Q) are also re-enacted.

In addition, persons found guilty of the murder of a child, certain child sexual assault offences and certain child pornography offences will be prohibited from seeking a review of their prohibited status (proposed section 33G). However, persons convicted of an offence involving sexual intercourse with a child not more than 3 years younger may make an application for an order with the leave of the Commission or a relevant tribunal. The provisions also make it clear that the applicant for an order must establish that he or she does not pose a risk to the safety of children. Proposed section 33M is a new provision that enables the Commission to apply to a relevant tribunal for a review of an order (including an order made by

the Commission). Proposed section 33P is a new provision that enables regulations to be made to establish a scheme that will require self-employed persons to obtain, display and produce certificates that they are not prohibited persons. Proposed section 33R enables the Commission to advise persons on their prohibited person status. Proposed section 33S confers monitoring and auditing functions on the Commission.

Schedule 1 [53] inserts proposed section 52, which re-enacts a provision of the *Child Protection (Prohibited Employment) Act 1998* that provides that a prohibition on employment under the Principal Act prevails to the extent of inconsistency with any other Act or law and removes the jurisdiction of the Industrial Relations Commission or any other court or tribunal to make orders for the re-instatement or re-employment of, or payment of compensation to, a person employed contrary to a prohibition under the Principal Act.

Background checking of employees

Schedule 1 [2] changes all references in the Principal Act to employment screening to references to background checking. **Schedule 1 [9], [32], [39] and [49]** make consequential amendments.

Schedule 1 [3] amends section 3 of the Principal Act to replace the definition of **employment screening** with a definition of **background checking**.

Schedule 1 [10] amends section 11 of the Principal Act as a consequence of the background checking provisions being included as Division 3 of Part 7 of the Principal Act, rather than comprising the whole of Part 7.

Schedule 1 [27] amends section 33 of the Principal Act to include a criminal record relating to child-related personal violence offences or offences involving indecent filming committed in relation to children as matters for which a check is to be made as part of background checking of a person who is employed or has applied to be employed in child-related employment. **Schedule 1 [26]** makes a consequential amendment.

Schedule 1 [29] amends section 33 of the Principal Act to incorporate provisions currently contained in the regulations that exclude certain apprehended violence orders and certain offences and criminal records from matters that are to be covered by background checking. **Schedule 1 [23]–[25] and [28]** make consequential amendments.

Schedule 1 [32] and [36] change references to “Part” to “Division” as a consequence of the background checking provisions being included as Division 3 of Part 7 of the Principal Act, rather than comprising the whole of Part 7.

Schedule 1 [33] amends section 34 of the Principal Act to replace a requirement that background checking include an assessment of risk to children involved in child-related employment of a person with a requirement that it include an estimate of the risk to children involved in such employment, having regard to all the circumstances of the case, including any risk arising from the particular workplace.

Schedule 1 [34] and [46] make consequential amendments.

Schedule 1 [37] amends section 35 of the Principal Act to provide for the amendment and revocation and the publication of guidelines made by the Minister under that section. **Schedule 1 [35]** makes a consequential amendment.

Schedule 1 [38] amends section 36 of the Principal Act to make it clear that the Commission may update and correct entries in its database of relevant apprehended violence orders and child protection prohibition orders made against persons and relevant employment proceedings completed against persons.

Schedule 1 [41] removes a reference in section 37 of the Principal Act to the *Child Protection (Prohibited Employment) Act 1998* (which is being repealed) and clarifies the duty to carry out background checking of religious officials engaged in child-related employment. Currently, it extends to Ministers of religion and members of religious organisations, as amended it will extend to ministers, priests, rabbis,

muftis or other like religious leaders or spiritual officials of religions.

Schedule 1 [42] inserts proposed section 37A. The proposed section provides for background checking carried out within the previous 12 months to be used to fulfil the duty to carry out background checking for employees who are to be employed for less than 6 months and who are being employed in the same kind of child-related employment for which the checking was carried out. If the employer is not the same employer as the employer for whom background checking was carried out, the background check must be one carried out by an employer-related body approved by the Minister. **Schedule 1 [40]** makes a consequential amendment.

Schedule 1 [43] amends section 38 of the Principal Act to enable employer-related bodies to disclose information gained in background checking to employers other than those for whom the checking was undertaken. This will enable disclosure for the purposes of proposed section 37A.

Schedule 1 [44] amends section 38 of the Principal Act to enable information relating to relevant criminal records, relevant apprehended violence orders and child protection prohibition orders obtained in background checking to be disclosed to an employer or employer-related body situated outside New South Wales and approved by the Minister.

Schedule 1 [45] amends section 39 of the Principal Act to remove the duty of an employer to notify the Commission of relevant employment proceedings against a person where the allegations in respect of which the proceedings were brought are found to be vexatious or misconceived. It also provides that relevant employment proceedings are taken to be completed (and therefore reportable to the Commission) if the employer has determined the proceedings, whether or not any right of appeal or review has been exercised or exhausted.

Schedule 1 [47] omits sections 41 and 42 of the Principal Act (which are to be re-enacted and extended as proposed sections 48A and 48B) and inserts proposed section 41. Proposed section 41 enables the Commission, by notice in writing, to require an employer to comply with background checking duties, duties to report completed relevant employment proceedings and to notify of applicants rejected on the grounds of estimates of risk arising from background checking. It will be an offence to fail, without reasonable excuse, to comply with a notice.

Schedule 1 [48] inserts proposed section 43A into the Principal Act. The proposed section enables an employer to amend or withdraw a notification of relevant employment proceedings against a person or of the rejection of a person for employment on the grounds of risk, if the employer determines that the notification was incorrect or wrongly made.

Schedule 1 [50] omits section 45 of the Principal Act, which provided for the staged implementation of employment provisions.

Schedule 1 [51] inserts proposed sections 48A and 48B which extend the protection from liability provisions, and the offences relating to unauthorised disclosure of information, to the exercise of functions relating to prohibited persons, in addition to background checking functions.

Other amendments

Schedule 1 [4]–[7] update references to a repealed Act.

Schedule 1 [52] amends section 49 of the Principal Act to extend the period within which proceedings for offences must be commenced from 6 months to 2 years.

Schedule 1 [54] amends section 53 of the Principal Act to provide for a review of the Principal Act as soon as possible after 5 years from the date of assent to the proposed Act.

Schedule 1 [55] amends Schedule 3 to the Principal Act to enable savings and transitional regulations to be made as a consequence of the enactment of the proposed Act.

Schedule 1 [56] inserts savings and transitional provisions into Schedule 3 to the

Principal Act as a consequence of the enactment of the proposed Act.

Schedule 2 Amendment of other Acts

Schedule 2 amends the following Acts to replace references to the *Child Protection (Prohibited Employment) Act 1998* with references to the provisions of that Act as re-enacted in the Principal Act:

Administrative Decisions Tribunal Act 1997

Child Protection (Offenders Registration) Act 2000

Education Act 1990

Industrial Relations Act 1996

Institute of Teachers Act 2004