



New South Wales

## **Ombudsman Amendment (Child Protection and Community Services) Bill 1998 (No 3)**

### **Explanatory note**

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

This Bill is cognate with the *Commission for Children and Young People Bill 1998 (No 2)*.

### **Overview of Bill**

The objects of this Bill are:

- (a) to extend the jurisdiction of the Ombudsman in respect of child protection matters, and
  - (b) to make further provision with respect to the notification and investigation of child abuse, and
  - (c) to facilitate the co-operative exercise of the functions of the Ombudsman and the Community Services Commission with respect to child protection and community service matters, and
  - (d) to make other related changes.
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## 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 giving effect to the amendments to the *Ombudsman Act 1974* set out in Schedule 1.

**Clause 4** is a formal provision giving effect to the amendments to the *Community Services (Complaints, Appeals and Monitoring) Act 1993* set out in Schedule 2.

## Schedule 1 Amendment of Ombudsman Act 1974

**Schedule 1 [1]** inserts a new Part 3A into the *Ombudsman Act 1974* (proposed sections 25A–25J). The proposed new Part generally sets out the Ombudsman's role in relation to child abuse allegations and child abuse convictions against employees of certain government and non-government agencies ("designated agencies").

Proposed section 25A defines relevant expressions used in the new Part. **Child abuse** is defined to mean:

- (a) assault (including sexual assault) of a child, or
- (b) ill-treatment or neglect of a child, or
- (c) exposing or subjecting a child to behaviour that psychologically harms the child,

whether or not, in any case, with the consent of the child.

**Designated government agency** is defined to mean:

- (a) the Department of Education and Training (including a government school), the Department of Community Services, the Department of Health, the Department of Sport and Recreation, the Department of Juvenile Justice or the Department of Corrective Services,
- (b) an area health service within the meaning of the *Health Services Act 1997*,
- (c) any other public authority prescribed by the regulations for the purposes of this definition.

**Designated non-government agency** is defined to mean:

- (a) a non-government school within the meaning of the *Education Reform Act 1990*, or

- (b) a child care centre, or residential child care centre, that is licensed or required to be licensed under the *Children (Care and Protection) Act 1987*, or
- (c) a substitute residential child care agency, or
- (d) any other body prescribed by the regulations for the purposes of this definition.

Proposed section 25B imposes a general duty on the Ombudsman to keep under scrutiny the systems for preventing child abuse by employees of designated agencies and other public authorities, and for handling and responding to child abuse allegations and child abuse convictions against those employees.

Proposed section 25C imposes an obligation on the heads of designated agencies to notify the Ombudsman of any child abuse allegations or convictions against employees and of details of disciplinary action taken or proposed to be taken.

Proposed section 25D authorises the disclosure by the heads or other employees of designated agencies of information about child abuse allegations or convictions against employees to the Ombudsman. The proposed section enables the Ombudsman to pass on any such information to the police or other investigative agencies, or to the proposed Commission for Children and Young Persons, despite the secrecy provisions of the Principal Act.

Proposed section 25E enables the Ombudsman to monitor the progress of any investigation by a designated agency into child abuse allegations or convictions against employees of the agency.

Proposed section 25F requires the head of a designated agency to report to the Ombudsman on the results of an investigation monitored by the Ombudsman and on the action taken as a result of the investigation.

Proposed section 25G enables the Ombudsman to conduct an independent investigation into a child abuse allegation or conviction against an employee of a designated agency (or into any inappropriate handling of or response to any such allegation or conviction). The Ombudsman may require the agency to defer its investigation, and may provide recommendations to the agency on the action that should be taken.

Proposed section 25H ensures that the disclosure of information under the above provisions of new Part 3A is not prevented or restricted by any other Act or law and that the persons making disclosures are protected from liability.



Proposed section 25I extends the obligation to report under proposed section 25C and the authority to disclose information under proposed section 25D to all public authorities in respect of employment-related child abuse.

Proposed section 25J ensures that the provisions of the Principal Act (including those on investigations and reports) relating to the actions of public authorities apply to matters arising under the above provisions of the new Part 3A.

**Schedule 1 [2]** is a consequential amendment.

**Schedule 1 [3]** ensures that the exclusion of employment matters from the jurisdiction of the Ombudsman does not affect the Ombudsman's jurisdiction under the above provisions of the new Part 3A.

**Schedule 1 [4]** excludes from the jurisdiction of the Ombudsman the conduct of a conciliator in relation to the conciliation of a complaint under the *Community Services (Complaints, Appeals and Monitoring) Act 1993*.

## **Schedule 2      Amendment of Community Services (Complaints, Appeals and Monitoring) Act 1993**

**Schedule 2** deals with the relationship between the Ombudsman and the Community Services Commission. At present section 121 imposes a complete bar on the jurisdiction of the Ombudsman in respect of matters within the jurisdiction of the Community Services Commission. That bar is to be removed in respect of the child protection jurisdiction proposed to be conferred on the Ombudsman by the Bill and in respect of matters agreed between them. The Ombudsman and the Commission may enter into reciprocal arrangements regarding the co-operative exercise of their respective functions. Any such arrangement may identify any matters in which the jurisdiction of the Ombudsman is not excluded. Other provisions are made with respect to the exercise of their respective functions in this area.



New South Wales

# **Ombudsman Amendment (Child Protection and Community Services) Bill 1998 (No 3)**

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New South Wales

## **Ombudsman Amendment (Child Protection and Community Services) Bill 1998 (No 3)**

No , 1998

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### **A Bill for**

An Act to amend the *Ombudsman Act 1974* to extend the jurisdiction of the Ombudsman in respect of child protection matters; to amend the *Community Services (Complaints, Appeals and Monitoring) Act 1993* with respect to child protection and community service matters; and for other purposes.

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**The Legislature of New South Wales enacts:**

**1    Name of Act**

This Act is the *Ombudsman Amendment (Child Protection and Community Services) Act 1998*.

**2    Commencement**

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This Act commences on a day or days to be appointed by proclamation.

**3    Amendment of Ombudsman Act 1974 No 68**

The *Ombudsman Act 1974* is amended as set out in Schedule 1.

**4    Amendment of Community Services (Complaints, Appeals and Monitoring) Act 1993 No 2**

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The *Community Services (Complaints, Appeals and Monitoring) Act 1993* is amended as set out in Schedule 2.



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## Schedule 1 Amendment of Ombudsman Act 1974

(Section 3)

### [1] Part 3A

Insert after Part 3:

#### Part 3A Child protection

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##### 25A Definitions

(1) In this Part:

*child* means a person under the age of 18 years.

*child abuse* means:

- (a) assault (including sexual assault) of a child, or 10
- (b) ill-treatment or neglect of a child, or
- (c) exposing or subjecting a child to behaviour that psychologically harms the child,

whether or not, in any case, with the consent of the child.

*child abuse allegation* means an allegation of child abuse against a person or an allegation of misconduct that may involve child abuse. 15

*child abuse conviction* means any conviction of a person, in this State or elsewhere, of an offence involving child abuse, and includes a finding by a court that a charge for such an offence is proven even though the court does not proceed to a conviction. 20

*designated government agency* means any of the following:

- (a) the Department of Education and Training (including a government school), the Department of Community Services, the Department of Health, the Department of Sport and Recreation, the Department of Juvenile Justice or the Department of Corrective Services. 25  
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Schedule 1      Amendment of Ombudsman Act 1974

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(b) an area health service within the meaning of the *Health Services Act 1997*,

(c) any other public authority prescribed by the regulations for the purposes of this definition.

**designated non-government agency** means any of the following: 5

(a) a non-government school within the meaning of the *Education Act 1990*,

(b) a child care centre, or residential child care centre, that is licensed or required to be licensed under the *Children (Care and Protection) Act 1987*, 10

(c) an agency providing substitute residential care for children,

(d) any other body prescribed by the regulations for the purposes of this definition. 15

**employee** of an agency includes:

(a) any employee of the agency, whether or not employed in connection with any work or activities of the agency that relates to children, and  
(b) any individual engaged by the agency to provide services to children (including in the capacity of a volunteer). 20

**head** of an agency means the chief executive officer or other principal officer of the agency. The regulations may specify the person who is to be regarded as the head of a particular agency for the purposes of this definition. 25

**investigation** of a matter includes any preliminary or other inquiry into, or examination of, the matter.

(2) A reference in this Part to a designated government or non-government agency is a reference to a designated government agency or a designated non-government agency. 30

(3) A reference in this Part to a child abuse allegation or a child abuse conviction extends to any such allegation or conviction in respect of a matter occurring before the commencement of this Part. 35

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**25B Ombudsman to keep relevant systems under scrutiny**

- (1) The Ombudsman is to keep under scrutiny the systems:
  - (a) for preventing child abuse by employees of designated government or non-government agencies or of other public authorities, and 5
  - (b) for handling and responding to child abuse allegations, or child abuse convictions, involving those employees.
- (2) For that purpose, the Ombudsman may require the head of any such agency to provide information about those systems and their operation. 10

**25C Reporting of child abuse allegations or convictions to Ombudsman**

- (1) The head of a designated government or non-government agency must notify the Ombudsman of the following: 15
  - (a) any child abuse allegation, or child abuse conviction, against an employee of the agency of which the head of the agency becomes aware.
  - (b) whether or not the agency proposes to take any disciplinary or other action in relation to the employee and the reasons why it intends to take or not to take any such action, 20
  - (c) any written submissions made to the head of the agency concerning any such allegation or conviction that the employee concerned wished to have considered in determining what (if any) disciplinary or other action should be taken in relation to the employee. 25
- (2) The notification must be made as soon as practicable and, in the case of the notification of a child abuse allegation or child abuse conviction, must be made, in any event, within 30 days of the head of the agency becoming aware of the allegation or conviction (or within such further period as may be agreed to by the Ombudsman). 30 35



Schedule 1      Amendment of Ombudsman Act 1974

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- (3)    The head of the agency must make arrangements within the agency to require employees of the agency to notify the head of the agency of any such child abuse allegation or conviction of which they become aware.
- (4)    This section does not apply to the notification of any matter that is of an exempt class or kind determined by the Ombudsman and notified to the agency concerned. 5

**25D Disclosure to Ombudsman of information about child abuse**

- (1)    The head or other employee of a designated government or non-government agency may disclose to the Ombudsman or an officer of the Ombudsman, any information that gives the head or other employee reason to believe that child abuse by an employee of the agency has occurred. 10  
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- (2)    The Ombudsman or an officer of the Ombudsman may disclose information about child abuse obtained under this section or any other provision of this Part to police officers and other relevant investigative agencies, or to the Commission for Children and Young People, despite anything to the contrary in section 34. 20

**25E Monitoring by Ombudsman of investigations**

- (1)    The Ombudsman may monitor the progress of the investigation by a designated government or non-government agency concerning a child abuse allegation, or child abuse conviction, against an employee of the agency if the Ombudsman considers it is in the public interest to do so. 25
- (2)    The Ombudsman or an officer of the Ombudsman may be present as an observer during interviews conducted by or on behalf of the agency for the purpose of the investigation and may confer with the persons conducting the investigation about the conduct and progress of the investigation. 30



- (3) The head of the agency is to provide the Ombudsman with such documentary and other information (including records of interviews) as the Ombudsman may from time to time request with respect to the investigation.

**25F Results of investigation and action taken to be reported to Ombudsman** 5

- (1) This section applies to an investigation concerning a child abuse allegation, or child abuse conviction, against an employee of a designated government or non-government agency that the Ombudsman monitors under this Part. 10
- (2) The head of the agency must, as soon as practicable after being satisfied that the investigation has been concluded:
- (a) send to the Ombudsman a copy of any report prepared by or provided to the head of the agency as to the progress or results of the investigation, and copies of all statements taken in the course of the investigation and of all other documents on which the report is based, and 15
- (b) provide the Ombudsman with such comments on the report and statements as the head of the agency thinks fit, and 20
- (c) inform the Ombudsman of the action that has been taken or is proposed to be taken with respect to the child abuse allegation or conviction the subject of the investigation. 25
- (3) After receiving that material and information, the Ombudsman may require the head of the agency or any officer involved in the investigation, or both of them, to provide such additional information as the Ombudsman considers necessary to enable the Ombudsman to determine whether the child abuse allegation or conviction was properly investigated and whether appropriate action was taken as a result of the investigation. 30 35

**25G Investigation of child abuse by Ombudsman**

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|-----|---|----|
| (1) | The Ombudsman may conduct an investigation concerning any child abuse allegation, or child abuse conviction, against an employee of a designated government or non-government agency of which the Ombudsman has been notified under this Part or otherwise becomes aware.   | 5  |
| (2) | The Ombudsman may also conduct an investigation concerning any inappropriate handling of or response to any such child abuse allegation or child abuse conviction, whether on the Ombudsman's own initiative or in response to a complaint.   | 10 |
| (3) | The Ombudsman may exercise any conciliation or other relevant powers under this Act in connection with an investigation by the Ombudsman.   | 15 |
| (4) | The head of the agency is to defer an investigation into the matter if the Ombudsman notifies the head that the Ombudsman intends to investigate the matter under this Act and that the investigation by the agency should be deferred.   | 20 |
| (5) | At the conclusion of an investigation by the Ombudsman, or on a decision by the Ombudsman to refer the matter back to the agency, the Ombudsman is to provide the agency with any recommendations for action to be taken with respect to the matter, together with any necessary information relating to the recommendations. | 25 |

**25H Protection and other provisions relating to disclosures of information**

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|-----|---|----|
| (1) | A provision of any Act or law that prohibits or restricts the disclosure of information does not operate to prevent or restrict the disclosure of information (or affect a duty to disclose information) under this Part. | 30 |
| (2) | If a disclosure of information is made under this Part, no liability for defamation or other civil liability is incurred because of the disclosure.   | 35 |

- (3) Nothing in this Part affects any obligation or power to provide information apart from this Part.

**25I Extension of reporting and disclosure provisions to all public authorities**

The obligation to report under section 25C, and the authority to disclose information under section 25D, with respect to designated government agencies extend to public authorities that are not designated government agencies if the child abuse concerned arises in the course of employment with the public authority.

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**25J Application of other provisions of this Act**

- (1) The provisions of this Act apply in respect of a matter arising under this Part even though the matter does not involve the conduct of a public authority, subject to any modifications prescribed by the regulations.
- (2) For that purpose, a reference in those provisions to a public authority includes a reference to a designated government or non-government agency and its employees.

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**[2] Section 25A Application of Part 4**

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Re-number the section as section 25AA.

**[3] Schedule 1 Excluded conduct of public authorities**

Omit item 12. Insert instead:

**12 Conduct of a public authority relating to:**

- (a) the appointment or employment of a person as an officer or employee, and
- (b) matters affecting a person as an officer or employee.

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Schedule 1      Amendment of Ombudsman Act 1974

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unless the conduct:

- (c) arises from the making of a protected disclosure (within the meaning of the *Protected Disclosures Act 1994*), or
- (d) relates to a child abuse allegation or child abuse conviction (within the meaning of Part 3A of this Act), or to the inappropriate handling or response to such an allegation or conviction. 5

**[4]      Schedule 1**

Insert after item 27: 10

- 28**      Conduct of a conciliator in relation to the conciliation of a complaint under the *Community Services (Complaints, Appeals and Monitoring) Act 1993*.



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## **Schedule 2    Amendment of Community Services (Complaints, Appeals and Monitoring) Act 1993**

(Section 4)

### **Section 121**

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Omit the section. Insert instead:

#### **121 Jurisdiction of Commission and Ombudsman**

- (1) Conduct of a public authority that could be, or is or has been, the subject of a complaint to the Commission or of an appeal to the Tribunal may not be the subject of a complaint under the *Ombudsman Act 1974*, except:
  - (a) a matter arising under Part 3A (Child protection) of that Act, or
  - (b) a matter of a class or kind referred to in subsection (3).
- (2) The Commission and the Ombudsman may enter into arrangements regarding the co-operative exercise of their respective functions.
- (3) Any such arrangement may provide that matters of a specified class or kind that could otherwise be the subject of a complaint under the *Ombudsman Act 1974* should not be excluded from being the subject of such a complaint by this section.
- (4) Any such arrangement may also provide for the furnishing to the Ombudsman of copies of complaints received by the Commission under this Act.
- (5) The Commission and Ombudsman are empowered and required to exercise their functions in conformity with any relevant arrangements entered into under this section.
- (6) Without limiting subsection (5), the Commission and the Ombudsman may disclose to each other any information obtained by them in relation to any matter within their respective jurisdiction.

- (7) Arrangements under this section are to be published in the Gazette by the Commission and the Ombudsman. However, a failure to do so does not affect the validity of the arrangement.

OMBUDSMAN AMENDMENT (CHILD PROTECTION AND COMMUNITY SERVICES)  
BILL (NO. 3)

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Schedule of the amendment referred to in the Legislative Council's Message  
of 19 November 1998.

Page 7, clause 25F. Insert after line 35:

- (4) In subsection (3), *appropriate action* includes (without limitation) any penalty for the making of a child abuse allegation that is shown to be false and malicious.
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