



New South Wales

## **Child Protection (Prohibited Employment) 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 prohibit the employment of a person who has been convicted of a serious sex offence (a "prohibited person") in child-related employment, and
  - (b) to require an employer to seek a disclosure from a person as to whether the person is a prohibited person when employing a person in child-related employment.
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## Outline of provisions

### Part 1 Preliminary

**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** defines certain words and expressions used in the proposed Act. In particular, *child-related employment* is defined as meaning any employment of a kind specified in the definition that primarily involves direct unsupervised contact with children. The employment specified includes, for example, employment in schools, child care centres and detention centres.

*Employment* is defined as the performance of work under a contract of employment, as a self-employed person or as a subcontractor, the performance of work as a volunteer for an organisation and the undertaking of practical training as part of an educational or vocational course.

*Employer* includes a person who, in the course of a business, arranges for the placement of a person in employment with others and a person who engages a person under a contract to perform work.

**Clause 4** provides an exemption from the provisions of the proposed Act in circumstances where the employment concerned involves only children or relatives of the prohibited person or of the prohibited person's spouse, or involves only children or relatives of the employer or of the employer's spouse and the prohibited person is a relative of the employer or of the employer's spouse.

The clause also provides an exemption from the provisions of the proposed Act requiring an employer to request a disclosure of whether a prospective employee in child-related employment is a prohibited person if the employment concerned involves only children or relatives of the employer or of the employer's spouse.

**Clause 5** defines the expression *prohibited person* for the purposes of the proposed Act. That expression means a person who has, whether before or after the commencement of the proposed Act, been found guilty by a court of a serious sex offence. *Serious sex offence* is defined as meaning an offence involving sexual activity or acts of indecency punishable in New South Wales by penal servitude or imprisonment of 12 months or more. The expression also includes such offences committed outside New South Wales, offences relating to child prostitution and child pornography and other prescribed offences.



## **Part 2    Offences**

**Clause 6** makes it an offence for a prohibited person to apply for, undertake or remain in child-related employment. During the period of 3 months from the commencement of the proposed Act, a prohibited person (other than a self-employed person) who is in child-related employment at that commencement does not commit an offence by remaining in that employment if the person discloses to the employer, within 1 month after that commencement, that the person is a prohibited person and complies with any requirement of the employer concerning unsupervised contact with children during that 3-month period. During the period of 3 months from the commencement of the proposed Act, a prohibited person who is a self-employed person and is in child-related employment at that commencement does not commit an offence by remaining in that employment if the person takes all reasonable steps available in the circumstances to prevent or restrict himself or herself from having unsupervised contact with children during that 3-month period.

**Clause 7** makes it an offence for an employer to employ a person in child-related employment without requiring the person to disclose whether or not he or she is a prohibited person. An employer is required to obtain that disclosure, within 6 months after the commencement of the proposed Act, from an employee in child-related employment at that commencement, but is exempt from this requirement if he or she has carried out an official criminal record check on the person within the period of 2 years preceding that commencement. A person in child-related employment at the commencement of the proposed Act is guilty of an offence for failing to disclose, within 1 month of receiving notice to do so by the person's employer, whether or not he or she is a prohibited person. A person is guilty of an offence for making any false statement in a disclosure under the proposed Act.

The clause makes it clear that there is no need for a person to make a disclosure if the person ceases to engage in the child-related employment concerned within 1 month of being required to make the disclosure.

**Clause 8** makes it an offence for an employer to commence employing, or continue to employ, in child-related employment a person that the employer knows is a prohibited person. A period of 3 months is allowed from the commencement of the proposed Act before this offence operates. However, during that time the employer must take all reasonable steps available in the circumstances to prevent or restrict the prohibited person from having unsupervised contact with children.

### **Part 3 Exemptions by declaration**

**Clause 9** enables the Administrative Decisions Tribunal and, in certain cases, the Industrial Relations Commission to make an order declaring, on application by a prohibited person, that the proposed Act is not to apply to the person in relation to a specific offence. Such an order must not be made unless the tribunal is satisfied that the person concerned does not pose a risk to the safety of children. The tribunal may place conditions on such an order. The Commission for Children and Young People is to be a party to any proceedings for an order. If an order is refused, a prohibited person may not apply again for such an order until 5 years has elapsed from the date of the tribunal's refusal.

### **Part 4 Miscellaneous**

**Clause 10** makes it clear that the proposed Act does not prevent a prohibited person from being transferred by an employer to employment that is not child-related employment.

**Clause 11** provides that the proposed Act binds the Crown.

**Clause 12** provides that the proposed Act prevails over any other Act or law to the extent of any inconsistency and makes it clear that the Industrial Relations Commission or any other court or tribunal has no jurisdiction to order the re-instatement, re-employment or compensation of a person as a result of the person being removed from employment in accordance with the proposed Act.

**Clause 13** provides for proceedings for offences under the proposed Act or regulations to be brought before a Local Court constituted by a Magistrate sitting alone.

**Clause 14** provides for proceedings for offences in relation to officers of corporations.

**Clause 15** enables regulations to be made for the purposes of the proposed Act.

**Clause 16** requires the Minister to review the operation of the proposed Act within 5 years of the date of assent to the proposed Act.



New South Wales

# Child Protection (Prohibited Employment) Bill 1998 (No 3)

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New South Wales

## **Child Protection (Prohibited Employment) Bill 1998 (No 3)**

No , 1998

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### **A Bill for**

An Act to prohibit the employment in child-related employment of persons found guilty of committing certain serious sex offences; and for related purposes.

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Clause 1 Child Protection (Prohibited Employment) Bill 1998 (No 3)

Part 1 Preliminary

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

## **Part 1 Preliminary**

### **1 Name of Act**

This Act is the *Child Protection (Prohibited Employment) Act 1998*.

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### **2 Commencement**

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

### **3 Definitions**

In this Act:

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*child* means a person who is under 18 years of age.

*child-related employment*:

(a) means any employment of the following kind that primarily involves direct contact with children where that contact is not directly supervised:

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(i) employment involving the provision of child protection services,

(ii) employment in pre-schools, kindergartens and child care centres (including residential child care centres),

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(iii) employment in schools or other educational institutions (not being universities),

(iv) employment in detention centres (within the meaning of the *Children (Detention Centres) Act 1987*),

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(v) employment in refuges used by children,

(vi) employment in wards of public or private hospitals in which children are patients.



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- (vii) employment in clubs, associations or movements (including of a cultural, recreational or sporting nature) having a significant child membership or involvement,
- (viii) employment in any religious organisation, 5
- (ix) employment in entertainment venues where the clientele is primarily children,
- (x) employment as a babysitter or childminder that is arranged by a commercial agency,
- (xi) employment involving fostering or other child care, 10
- (xii) employment involving regular provision of taxi services for the transport of children with a disability,
- (xiii) employment involving the private tuition of children, 15
- (xiv) employment involving the direct provision of child health services,
- (xv) employment involving the provision of counselling or other support services for children,
- (xvi) employment on school buses, 20
- (xvii) employment at overnight camps for children, and
- (b) includes any other employment of a kind prescribed by the regulations, but does not include any employment of a kind excluded by the regulations.
- conviction** includes a finding that the charge for an offence is proven even though the court does not proceed to a conviction. 25
- employer** includes:
- (a) a person who, in the course of business, arranges for the placement of a person in employment with others, or
- (b) a person who engages a person under a contract to perform work. 30

**employment** means (subject to the regulations):

- (a) performance of work under a contract of employment, or
- (b) performance of work as a self-employed person or as a subcontractor, or
- (c) performance of work as a volunteer for an organisation, or 5
- (d) undertaking practical training as part of an educational or vocational course.

**prohibited person**—see section 5.

#### 4 Child-related employment to which Act does not apply

- (1) This Act does not apply to the employment of a person in child-related employment if: 10
  - (a) all the children with whom the person is required to have contact in that employment are related to the person, or
  - (b) all the children with whom the person is required to have contact in that employment are related to the employer and the person is related to the employer. 15
- (2) In addition, section 7 does not apply to employment of a person in child-related employment if all the children with whom the person is required to have contact in that employment are related to the employer. 20
- (3) For the purposes of this section, a person is **related** to another person if:
  - (a) the person is a relative of the other person, or
  - (b) the person is the guardian of the other person or a person having the custody of or parental responsibility for the other person (otherwise than as the holder of a public office), or 25
  - (c) the spouse of the person is related to the other person (as referred to in paragraph (a) or (b)).
- (4) In this section: 30

**relative** of a person means the spouse, parent, child, grandparent, grandchild, uncle, aunt, brother, sister, niece or nephew of the person, whether the relationship is of the whole or the half-blood and whether the relationship is natural or depends on the adoption of a person. 35

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*spouse* of a person includes any person who is living with that other person as that other person's partner on a bona fide domestic basis.

## 5 Prohibited persons

- (1) For the purposes of this Act, a ***prohibited person*** means a person convicted of a serious sex offence, whether before or after the commencement of this subsection. 5
- (2) For the purposes of this Act, a person is not a prohibited person in respect of an offence if an order in force under section 9 declares that this Act is not to apply to the person in respect of the offence. 10
- (3) In this section:
- serious sex offence*** means (subject to subsections (4) and (5)):
- (a) an offence involving sexual activity or acts of indecency that was committed in New South Wales and that was punishable by penal servitude or imprisonment for 12 months or more, or 15
- (b) an offence, involving sexual activity or acts of indecency, that was committed elsewhere and that would have been an offence punishable by penal servitude or imprisonment for 12 months or more if it had been committed in New South Wales, or 20
- (c) an offence under sections 91D–91G of the *Crimes Act 1900* (other than if committed by a child prostitute) or a similar offence under a law other than a law of New South Wales, or 25
- (d) an offence under section 578B or 578C (2A) of the *Crimes Act 1900* or a similar offence under a law other than a law of New South Wales, or
- (e) an offence of attempting, or of conspiracy or incitement, to commit an offence referred to in the preceding paragraphs, or 30
- (f) any other offence, whether under the law of New South Wales or elsewhere, prescribed by the regulations.



- (4) An offence that was a serious sex offence at the time of its commission is not a serious sex offence for the purposes of this Act if the conduct constituting the offence has ceased to be an offence in New South Wales.
- (5) An offence involving sexual activity or an act of indecency is not a serious sex offence for the purposes of this Act if the conduct constituting the offence:
  - (a) occurred in a public place, and
  - (b) would not have constituted an offence in New South Wales if the place were not a public place.

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## Part 2 Offences

### 6 Offences relating to prohibited persons

- (1) **Offence of applying for, undertaking or remaining in child-related employment**  
 A prohibited person must not: 5
- (a) apply for child-related employment, or
  - (b) undertake child-related employment, or
  - (c) remain in child-related employment.
- Maximum penalty: 100 penalty units, or imprisonment for 12 months, or both. 10
- (2) **Defence**  
 It is a defence to a prosecution for an offence against this section if the defendant establishes that he or she did not know, at the time of the commission of the offence, that the employment concerned was child-related employment. 15
- (3) **Transitional provisions relating to persons other than self-employed persons**  
 A person who is in child-related employment at the commencement of this section (other than a self-employed person) and who is a prohibited person at that commencement does not commit an offence under this section by remaining in that employment during the period of 3 months after that commencement if: 20
- (a) the person discloses to his or her employer, within 1 month of that commencement, that he or she is a prohibited person, and 25
  - (b) the person complies with any requirement of his or her employer concerning unsupervised contact with children during that 3-month period.
- (4) **Transitional provisions relating to self-employed persons** 30  
 A self-employed person who is in child-related employment at the commencement of this section and who is a prohibited person at that commencement does not commit an offence under this section by remaining in that employment during the period of 3

months after that commencement if the person takes all reasonable steps available in the circumstances to prevent or restrict himself or herself from having unsupervised contact with children in the course of that employment during that 3-month period.

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**7 Employer to ascertain whether employee is prohibited person**

**(1) Offence of employing person in child-related employment without requiring disclosure**

An employer must not commence employing any other person in child-related employment without first requiring that other person to disclose whether or not that other person is a prohibited person.

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Maximum penalty: 20 penalty units, in the case of a corporation, and 10 penalty units in any other case.

**(2) Transitional provision—offence not to require disclosures of existing employees in child-related employment**

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An employer who, at the commencement of this subsection, employs a person in child-related employment must, within 6 months of that commencement, require the employee to disclose whether or not the employee is a prohibited person unless the person ceases, during that 6-month period, to be engaged in that employment.

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Maximum penalty: 20 penalty units, in the case of a corporation, and 10 penalty units in any other case.

**(3) Transitional provision—exempting employers who have carried out official criminal record checks on employees**

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An employer does not commit an offence under subsection (2) if the employer carried out an official criminal record check on the employee within the period of 2 years immediately preceding the commencement of that subsection and did not discover any information that would lead the employer to believe that the employee was a prohibited person.

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**(4) Offence of failing to disclose**

A person must disclose to the person's employer, within 1 month of receiving notice of a requirement under subsection (2) to do so, whether or not he or she is a prohibited person.

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Maximum penalty: 10 penalty units.



(5) **Exemption from making disclosure where person ceases to engage in child-related employment**

A person does not commit an offence under subsection (4) of failing to make a disclosure to the person's employer if the person ceases to engage in (by resignation or otherwise) the child-related employment concerned within the 1 month period referred to in that subsection.

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(6) **Offence of making false disclosure**

A person must not, in purported compliance with a requirement under this section, make any statement that the person knows is false.

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Maximum penalty (subsection (6)): 100 penalty units, or imprisonment for 12 months, or both.

**8 Employer not to employ prohibited person in child-related employment**

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(1) **Offence of employing prohibited person in child-related employment**

An employer must not commence employing, or continue to employ, in child-related employment a person that the employer knows is a prohibited person.

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Maximum penalty: 100 penalty units, in the case of a corporation, and 50 penalty units in any other case.

(2) **Transitional provision relating to employment during the 3-month period after commencement of this subsection**

An employer does not commit an offence under this section by continuing to employ a prohibited person in child-related employment during the period of 3 months after the commencement of this section if the employer takes all reasonable steps available in the circumstances to prevent or restrict the person from having unsupervised contact with children during that 3-month period.

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## Part 3 Exemptions by declaration

### 9 IRC and ADT may make declarations concerning prohibited persons

- (1) On the application of a prohibited person, a relevant tribunal may make an order declaring that this Act is not to apply to the person in respect of a specified offence. 5
- (2) A *relevant tribunal* is:
  - (a) the Industrial Relations Commission, or
  - (b) the Administrative Decisions Tribunal.
- (3) The Industrial Relations Commission may not make an order under this section unless: 10
  - (a) the person is an employee within the meaning of the *Industrial Relations Act 1996* who is liable to be dismissed from that employment under this Act,
  - (b) the person was such an employee who was dismissed from that employment under this Act. 15
- (4) A relevant tribunal is not to make an order under this section unless it considers that the person the subject of the proposed order does not pose a risk to the safety of children.
- (5) In deciding whether or not to make an order under this section in relation to a person, a relevant tribunal is to take into account the following: 20
  - (a) the seriousness of the offences with respect to which the person is a prohibited person,
  - (b) the age of the person at the time those offences were committed, 25
  - (c) the age of each victim of the offences at the time they were committed,
  - (d) the difference in age between the prohibited person and each such victim, 30
  - (e) the seriousness of the prohibited person's total criminal record,
  - (f) such other matters as the tribunal considers relevant.

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- (6) On an application under this section, the relevant tribunal may stay the operation of a prohibition under this Act pending the determination of the matter.
- (7) The Commission for Children and Young People is to be a party to any proceedings for an order under this section. The Commission may make submissions in opposition to or support of the making of the order. 5
- (8) If a relevant tribunal refuses to make an order under this section, the prohibited person is not entitled to make an application for an order under this section in respect of that offence until after the period of 5 years from the date of the tribunal's refusal, unless the tribunal otherwise orders at the time of refusal. 10
- (9) Orders under this section may be made subject to conditions.
- (10) A relevant tribunal that makes an order under this section must notify the Commissioner of Police of the terms of the order. 15
- (11) The following applies to proceedings before the Administrative Decisions Tribunal under this section:
- (a) the Tribunal may not award costs.
  - (b) an appeal lies on a question of law to the Supreme Court by any party to the proceedings. 20



Clause 10 Child Protection (Prohibited Employment) Bill 1998 (No 3)

Part 4 Miscellaneous

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## **Part 4 Miscellaneous**

### **10 Prohibited person may be transferred to other employment**

This Act does not prevent an employer who removes a prohibited person from child-related employment in accordance with this Act from transferring the person to employment of a different kind. 5

### **11 Act binds Crown**

This Act binds the Crown in right of New South Wales and, in so far as the legislative power of Parliament permits, the Crown in all its other capacities. 10

### **12 Relationship with other Acts and laws**

- (1) This Act prevails to the extent of any inconsistency between it and any other Act or law.
- (2) The Industrial Relations Commission or any other court or tribunal does not have jurisdiction under any Act or law to order the re-instatement or re-employment of a person or employee contrary to a prohibition on employment imposed by this Act, or to order the payment of damages or compensation for any removal from employment in accordance with this Act. 15

### **13 Proceedings for offences** 20

Proceedings for an offence against this Act or the regulations are to be taken before a Local Court constituted by a Magistrate sitting alone.

### **14 Offences by corporations**

- (1) If a corporation contravenes, whether by act or omission, any provision of this Act or the regulations, each person who is the director of the corporation or who is concerned in the management of the corporation is taken to have contravened the same provision if the person knowingly authorised or permitted the contravention. 25  
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- (2) A person may be proceeded against and convicted under a provision pursuant to this section whether or not the corporation has been proceeded against or been convicted under that provision.
- (3) Nothing in this section affects any liability imposed on a corporation for an offence committed by the corporation against this Act or the regulations. 5

### 15 Regulations

- (1) The Governor may make regulations, not inconsistent with this Act, for or with respect to any matter that by this Act is required or permitted to be prescribed or that is necessary or convenient to be prescribed for carrying out or giving effect to this Act. 10
- (2) In particular, regulations may be made for or with respect to:
- (a) the manner and form of disclosures and requests for disclosures to be made under this Act, including the manner in which offences may be described in such disclosures or requests, or 15
- (b) the circumstances in which a person is taken to have requested or made a disclosure under this Act.
- (3) The regulations may create offences punishable by a penalty not exceeding 100 penalty units. 20

### 16 Review of Act

- (1) The Minister is to review this Act to determine whether the policy objectives of the Act remain valid and whether the terms of the Act remain appropriate for securing those objectives. 25
- (2) The review is to be undertaken as soon as possible after the period of 5 years from the date of assent to this Act.

Clause 16 Child Protection (Prohibited Employment) Bill 1998 (No 3)

Part 4 Miscellaneous

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- (3) A report on the outcome of the review is to be tabled in each House of Parliament within 12 months after the end of the period of 5 years.



## CHILD PROTECTION (PROHIBITED EMPLOYMENT) BILL (NO 3)

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

Page 4, clause 3, line 7. Insert at the end of the line:

- (e) , or  
performance of work as a minister of religion or other member of a religious organisation.
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