



New South Wales

Child Protection (Working with Children) Bill 2012

Explanatory note

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

Overview of Bill

The objects of this Bill are as follows:

- (a) to require people engaged in paid or unpaid work with children to obtain a working with children check clearance (a *clearance*),
- (b) to prohibit the granting of clearances to persons convicted of, or charged with, the murder of a child, serious sex offences and other specified offences,
- (c) to specify the circumstances in which applicants for or holders of clearances will be subject to detailed risk assessment to determine whether they pose a risk to the safety of children,
- (d) to confer on the Commission for Children and Young People (the *Commission*) functions relating to the granting and refusal of applications for clearances and the assessment of applicants and holders and other related functions,
- (e) to provide for reviews of decisions of the Commission and for applications by disqualified persons who wish to work with children,
- (f) to provide for the establishment of a working with children register and databases by the Commission,

- (g) to provide for the mandatory provision of information to the Commission by employers, the NSW Police Force and others for the purposes of the proposed Act,
- (h) to make consequential amendments to other Acts,
- (i) to enact consequential savings and transitional provisions.

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 sets out the object of the proposed Act.

Clause 4 provides that the safety, welfare and well-being of children and, in particular, protecting them from child abuse, is the paramount consideration in the operation of the proposed Act.

Clause 5 defines certain words and expressions used in the proposed Act.

Part 2 Restrictions on child-related work

Division 1 Child-related work

Clause 6 defines when a worker is taken to be engaged in *child-related work* for the purposes of the proposed Act. A worker is so engaged if engaged in work for, or in connection with, work prescribed by the regulations that is work in education and care services, child care services, mentoring and counselling services for children, child protection services, schools, private tuition, detention centres for children, residential services for children, sporting and other venues used primarily by children, child health services, disability services, transport services for children and religious organisations. Persons employed in specified roles, including approved providers or managers of education and care services, are also classified as being engaged in child-related work.

Clause 7 also defines a worker as engaging in *child-related work* if the worker's work involves access to confidential records or information about children and the employer requires the worker to obtain a clearance. The requirement may be made or revoked only with the approval of the Commission.

Division 2 Mandatory requirements for child-related work

Clause 8 makes it an offence to engage in child-related work unless the worker holds a clearance or has a current application for a clearance. It will also be an offence for a worker to engage in child-related work at any time while subject to an interim bar.

Clause 9 makes it an offence for an employer to commence employing or to continue to employ a worker in child-related work if the employer knows or has reasonable cause to believe that the worker is not the holder of a clearance and does not have a current application for a clearance or that the worker is subject to an interim bar.

Division 3 Additional persons who must obtain clearances

Clause 10 requires an adult who resides for more than 3 weeks at a home where an education and care service is provided, or at the home of an authorised carer, to obtain a clearance. The designated agency that authorises the authorised carer or the approved provider of the education and care service must ensure that the adult complies with the proposed section.

Clause 11 provides for the screening by the Commission of persons applying to adopt a child as if they were applicants for a clearance.

Part 3 Working with children check clearances

Division 1 Classes of clearances

Clause 12 provides for volunteer and non-volunteer classes of clearances and provides that the holder of a volunteer clearance may engage in paid work for a transitional period of up to 30 consecutive days.

Division 2 Applications for clearances

Clause 13 provides for applications for working with children clearances.

Division 3 Risk assessment of applicants and holders

Clause 14 makes a person subject to an *assessment requirement* if any of the matters specified in proposed Schedule 1 apply to the person.

Clause 15 requires the Commission to conduct a risk assessment of a person to determine whether the person poses a risk to the safety of children if the person is an applicant for or holder of a clearance who is subject to an assessment requirement. Assessments may also be conducted if the Commission becomes aware that a clearance has been granted on wrong or incomplete information or if the Commission otherwise decides to conduct an assessment. The Commission may consider matters relating to the matters that caused the assessment, including the seriousness of any offences, the age of the person and victim when they occurred and the likelihood of repetition when assessing risk.

Clause 16 enables the Commission to request applicants for or holders of clearances to provide information related to the application or clearance. The Commission may terminate an application if the applicant fails to provide requested information within 6 months.

Clause 17 empowers the Commission to impose an interim bar on an applicant for or holder of a clearance if the Commission is of the opinion that it is likely there is a

risk to the safety of children if the applicant or holder continues to engage in child-related work. An interim bar will be in force for 12 months unless earlier revoked or an application for clearance is granted. It will be an offence under proposed section 8 to engage in child-related work while subject to an interim bar.

Division 4 Determination of applications for clearances

Clause 18 prohibits the granting of a clearance to a person convicted of or charged with an offence specified in proposed Schedule 2 (a *disqualified person*), if the offence was committed as an adult. The Commission must grant a clearance to a person subject to a risk assessment if satisfied that the person does not pose a risk to the safety of children. The Commission must also grant a clearance to a person who is not a disqualified person and who is not subject to risk assessment.

Clause 19 requires the Commission to notify applicants (other than disqualified persons) of proposed decisions not to grant clearances and to consider any submissions made by applicants within a period specified for that purpose in the notice.

Clause 20 provides for written notice to be given of a decision to refuse or grant a clearance. If a clearance is granted, the notice must include the person's working with children check number.

Clause 21 prohibits an unsuccessful applicant for a clearance from making a further application for a period of 5 years, except where a person is not found guilty of an offence, a finding of guilt or other relevant finding is quashed or set aside or ceases to have effect or the Commission permits an application to be made.

Division 5 Duration and termination of clearances

Clause 22 provides that a clearance ceases to have effect 5 years after it is granted unless sooner cancelled or surrendered. A new clearance may be applied for up to 3 months before the expiry of the clearance.

Clause 23 requires the Commission to cancel a clearance on becoming aware that the holder is a disqualified person or if satisfied that the holder poses a risk to the safety of children. Notice of the cancellation, containing reasons, must be given to the holder.

Clause 24 provides for the surrender of clearances.

Division 6 Working with children register

Clause 25 requires the Commission to establish a working with children register containing particulars of applications for clearances and particulars of holders of clearances (including their working with children check numbers). The register is to be kept in the manner and form approved by the Commission.

Part 4 Reviews and appeals

Clause 26 prohibits a person from making an application under the proposed Part if the person has been convicted of the murder of a child or the person's application for a clearance has been refused wholly or partly because the person has been charged with an offence and the proceedings have not been finally determined.

Clause 27 confers a right to apply to the Administrative Decisions Tribunal (the *Tribunal*) for a review of a decision to refuse or cancel a clearance within 28 days after notice of the decision is given. An application may also be made for a review of a decision to impose an interim bar if the interim bar has been in force for more than 6 months. Any party to the appeal proceedings may appeal to the Supreme Court on a question of law.

Clause 28 confers on a disqualified person a right to apply to the Tribunal for an order (an *enabling order*) declaring that the person is not to be treated as a disqualified person for the purposes of the proposed Act in respect of a specified offence. It also confers on a person who is ineligible to apply for a clearance (because of a previous refusal) a right to apply to the Tribunal for an order declaring that the person is eligible to apply for a clearance. The Tribunal may also order the Commission to revoke an interim bar or to grant the person a clearance.

Clause 29 enables the Commission to apply to the Tribunal to revoke or vary an enabling order. On such an application, the Tribunal may revoke or vary an enabling order if satisfied that the person concerned poses a risk to the safety of children.

Clause 30 provides that in determining an application under the proposed Part, the Tribunal is to consider matters relating to relevant offences or findings, including the seriousness of the matters, the age of the person and victim when they occurred and the likelihood of repetition. It also enables the Tribunal to order a stay of the operation of a determination of the Commission if an appeal or application is made under the proposed Part for an enabling order. It also disapplies appeal provisions under the *Administrative Decisions Tribunal Act 1997*.

Part 5 Provision of information

Clause 31 re-enacts, with necessary modifications, a provision of the *Commission for Children and Young People Act 1998* (the *CCYP Act*) to confer power on the Commission to require government agencies and other persons to provide information relevant to an assessment of whether a person poses a risk to the safety of children.

Clause 32 authorises the Director of Public Prosecutions, on receipt of a notice to provide information under proposed section 31, to disclose documents even if they contain other additional information that may be subject to legal professional privilege or other restrictions on disclosure.

Clause 33 authorises the Commissioner of Police to disclose to the Commission information relating to matters that may result in an assessment requirement affecting a person, information relating to a person's criminal history and

information relating to the circumstances of an offence. Such information may include information about spent convictions and criminal charges.

Clause 34 re-enacts a provision of the CCYP Act that enables the disclosure of information about convictions, criminal history, offences and charges by the Commissioner of Police to CrimTrac, police forces of other jurisdictions and interstate screening agencies for the purposes of interstate child-related work screening.

Clause 35 imposes a duty on a reporting body to notify the Commission of the identity of any child-related worker against whom the body makes a finding that the worker has engaged in conduct specified in proposed Schedule 1 (that is, conduct which makes the worker liable to an assessment requirement). Regulations may be made about the notification and related matters. The bodies that are *reporting bodies* include NSW Government agencies, government Departments or public sector agencies, registration or licensing authorities constituted by an Act and other bodies exempt from requirements under the *Ombudsman Act 1974* relating to the reporting of conduct involving actions against children.

Clause 36 re-enacts a provision of the CCYP Act providing for the issue of enforcement notices to reporting bodies to require compliance with obligations under proposed section 35.

Part 6 Functions of Commission

Clause 37 confers on the Commission functions with respect to the establishment and maintenance of databases containing information about Tribunal orders under the proposed Act, findings resulting in assessment requirements, notifications by reporting bodies and employers seeking information about clearances.

Clause 38 enables the Commission to promote public awareness of and provide advice on requirements for clearances and related matters.

Clause 39 requires the Commission to monitor and audit compliance with the proposed Act and regulations made under the proposed Act.

Clause 40 re-enacts a provision of the CCYP Act to confer power on the Commission to issue a notice to compel the provision of information or documents by an officer of a government agency, an employer or an employer body. It will be an offence to fail to comply with such a notice.

Part 7 Miscellaneous

Clause 41 provides that the proposed Act binds the Crown.

Clause 42 re-enacts, with necessary modifications, a provision of the CCYP Act to enable an assessment under the proposed Act, or interstate child-related work screening, to be conducted despite any other Act or law. The proposed section also provides that the proposed Act does not affect any statutory right of an employee in relation to employment or termination of employment, though any court exercising jurisdiction over such a right is required to have regard to the results of any

assessment or application for a clearance and the welfare of children in connection with the employment concerned. The provision is subject to proposed section 47.

Clause 43 re-enacts, with necessary modifications, a provision of the CCYP Act to protect persons carrying out functions relating to assessment and clearances from liability for acts or omissions done in good faith and with reasonable care. Any such person has qualified privilege in proceedings for defamation and is not liable to pay damages or compensation in respect of decisions about applications and clearances.

Clause 44 provides for the issue by the Commission of evidentiary certificates as to clearances, applications and interim bars.

Clause 45 re-enacts, with necessary modifications, a provision of the CCYP Act to prohibit the disclosure of information obtained in connection with the exercise of functions under the proposed Act except in specified circumstances.

Clause 46 re-enacts, with necessary modifications, a provision of the CCYP Act to enable access to certain information under the *Government Information (Public Access) Act 2009*. The provision enables access to information about disciplinary findings that give rise to assessment requirements under the proposed Act.

Clause 47 re-enacts, with necessary modifications, a provision of the CCYP Act to prevent a person from being re-instated contrary to a prohibition on employment under the CCYP Act. It also provides that a court or tribunal does not have jurisdiction under any Act or law to order the re-instatement or re-employment of a person or to order the payment of damages or compensation for removal of employment if the proposed Act prohibits the person from engaging in the employment.

Clause 48 provides that section 579 of the *Crimes Act 1900*, which requires certain convictions or findings of guilt for offences to be disregarded for all purposes, is not to apply in respect of offences specified by the proposed Act for the purposes of identifying a person as a disqualified person or as a person subject to an assessment requirement.

Clause 49 enables proceedings for offences under the proposed Act to be dealt with summarily before the Local Court.

Clause 50 re-enacts a provision of the CCYP Act to make a director or manager of a corporation liable for an offence under the proposed Act or regulations committed by the corporation if the director or manager knowingly authorised or permitted the contravention.

Clause 51 provides for the service of documents under the proposed Act.

Clause 52 enables the Governor to make regulations for the purposes of the proposed Act.

Clause 53 provides for the review of the proposed Act in 5 years.

Schedule 1 Assessment requirement triggers

Schedule 1 specifies the offences, and stage of proceedings for the specified offences, that will make a person liable to an assessment requirement under the proposed Act. It also specifies findings by reporting bodies about sexual misconduct involving a child and the serious physical assault of a child by a person as conduct that will make the person liable to an assessment requirement under the proposed Act.

Schedule 2 Disqualifying offences

Schedule 2 specifies the offences for which proceedings or a conviction will render a person a disqualified person under the proposed Act.

Schedule 3 Savings, transitional and other provisions

Schedule 3 contains savings, transitional and other provisions consequent on the enactment of the proposed Act.

Schedule 4 Amendment of other Acts

Schedule 4.1 amends the *Children and Young Persons (Care and Protection) Act 1998* to update references.

Schedule 4.2 amends the *Commission for Children and Young People Act 1998* to omit provisions relating to employment screening for child-related work and to omit other related provisions now re-enacted in the proposed Act.

Schedule 4.3 amends the *Criminal Records Act 1991* so as to except applications for clearances from the operation of the provision that excludes spent convictions from being included in legislative references to criminal history or convictions and requirements for disclosure.

Schedule 4.4 amends the *Education Act 1990* to update references.

Schedule 4.5 amends the *Education (School Administrative and Support Staff) Act 1987* to:

- (a) enable the Director-General of the Department of Education and Communities to suspend a permanent employee who is subject to an interim bar, has been refused a clearance (if there is an appeal or the time for an appeal has not elapsed) or who is eligible to apply for a clearance but has not so applied, and
- (b) terminate the employment of a permanent employee whose clearance is cancelled or who does not hold a clearance (other than a person whose employment may be suspended) and require any such person to notify the person's status, and

- (c) provide for the re-instatement or re-employment of a person who obtains a clearance after being dismissed, and
- (d) make other amendments consequential on the enactment of the proposed Act.

Schedule 4.6 amends the *Industrial Relations Act 1996* to remove a reference to proceedings that are no longer dealt with by the Industrial Relations Commission.

Schedule 4.7 amends the *Institute of Teachers Act 2004* to enable the revocation of the accreditation of a teacher who becomes an unauthorised person under the *Teaching Service Act 1980*.

Schedule 4.8 amends the *Ombudsman Act 1974* to enable the Ombudsman to disclose certain information to the Commission.

Schedule 4.9 amends the *Parliamentary Electorates and Elections Act 1912* as a consequence of the amendment of the *Commission for Children and Young People Act 1998* by the proposed Act.

Schedule 4.10 amends the *Teaching Service Act 1980* to:

- (a) enable the Director-General of the Department of Education and Communities to suspend an officer of the Teaching Service who is subject to an interim bar, has been refused a clearance (if there is an appeal or the time for an appeal has not elapsed) or who is eligible to apply for a clearance but has not so applied, and
- (b) terminate the employment of an officer of the Teaching Service whose clearance is cancelled or who does not hold a clearance (other than a person whose employment may be suspended) and require any such person to notify the person's status, and
- (c) provide for the re-instatement or re-employment of a person who obtains a clearance after being dismissed, and
- (d) make other amendments consequential on the enactment of the proposed Act.

Schedule 4.11 amends the *Young Offenders Act 1997* to provide that warnings, cautions or conferences under that Act may be disclosed or taken into account for the purposes of an application for a clearance or an assessment of a person or an application for a review or an enabling order under the proposed Act.