COMMITTEE ON CHILDREN AND YOUNG PEOPLE

AMENDMENTS TO THE *CHILD PROTECTION (PROHIBITED EMPLOYMENT) ACT 1998* REGARDING CONVICTIONS FOR SERIOUS SEXUAL OFFENCES AND OTHER MATTERS

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In previous reports, the Committee on Children and Young People has indicated its view that employment screening for child-related employment is perhaps the most critical function of the Commission for Children and Yong People.

Following the Committee's examination of Ms Gillian Calvert, Commissioner for Children and Young People, regarding the annual report of the Commission for Children and Young People for the 2000-2001 financial year, it was noted that there may be a need to consider a number of statutory and regulatory amendments relating to the processes involved in the employment screening of people who work with children and young people.

The Committee on Children and Young People considers that it is appropriate that where there are proposed legislative amendments to the role and functions of the Commission for Children and Young People, such proposals should be referred to the Committee for examination.

This report of the Committee documents the consideration of a possible amendment to the employment screening provisions of the *Child Protection (Prohibited Employment) Act 1998*, as well as two other possible amendments relating to the employment screening process.

The proposed amendments relate to:
- the question of 'spent convictions' for proven criminal sexual offences for persons involved in child-related employment
- intent, incitement and conspiracy offences relating to criminal sexual offences for persons involved in child-related employment
- ensuring that completed disciplinary proceedings involving police officers that relate to child abuse, sexual misconduct or acts of violence

Acknowledgments

The Committee on Children and Young People is grateful for the opportunity to consult with the Commissioner for Children and Young People, Ms Gillian Calvert, on the matters considered in this report. The Committee is also grateful for the involvement of the Childrens Legal Issues Committee of the Law Society of New South Wales and the Legislation and Policy area of the Attorney Generals Department in the consultation process.

As in previous reported work of the Committee, I am particularly grateful for the co-operative approach to the work of my colleagues, the other Members of the

Committee, in seeking to ensure that the welfare of children and young people is the paramount consideration in all matters involving the children and youth of New South Wales.

I am also grateful for the assistance of the Committee Secretariat: the Manager, Mr Ian Faulks, Ms Rachel Callinan, Project Officer, Ms Rachel Dart, Committee Officer, and Ms Susan Tanzer, Assistant Committee Officer. Rachel Callinan provided the background research and assistance during the public hearing regarding the issues associated with the *Crimes Act 1900* s.579. Rachel Dart provided the background research on the issues associated with the intent, incite and conspiracy offences associated with child sexual crimes and the issue of disciplinary proceedings involving police officers that relate to child abuse, sexual misconduct or acts of violence.

I commend this report to Parliament.

RECOMMENDATIONS

RECOMMENDATION 1: The *Child Protection (Prohibited Employment) Act 1998* and the *Commission for Children and Young People Act 1998* be amended, as appropriate, to provide, clearly and expressly, that the provisions of the *Crimes Act 1900* s.579 do not apply to the definition of a prohibited person and to the employment screening of persons for the purposes of child-related work

RECOMMENDATION 2: Amendments be made to the *Child Protection (Prohibited Employment) Act 1998* to cover the circumstances where:

(a) a person is convicted of intent to commit a Class 1 or 2 offence; and
(b) a person is convicted of conspiracy to commit, or incitement of the commission of, a Class 1 or 2 offence.

RECOMMENDATION 3: The *Commission for Children and Young People Act 1998* be amended to revise the definition of a relevant completed disciplinary proceedings to extend matters relating to the discipline or management of conduct of police officers, dealt with under Part 9 of the *Police Service Act 1990* (both before or after the commencement of the Act).

CONTENTS

Chapter 1

Introduction

1.1 The Committee on Children and Young People has previously indicated that it would be appropriate that where there are proposed legislative amendments to the role and functions of the Commission for Children and Young People, such proposals should be referred to the Committee for examination.

1.2 In discussions following the examination of Ms Gillian Calvert, Commissioner for Children and Young People, regarding the annual report of the Commission for Children and Young People for the 2000-2001 financial year, it was noted that there may be a need to consider further statutory and regulatory amendments that relate to the process of employment screening of people who work with children and young people.

1.3 This report of the Committee on Children and Young People documents the Committee's consideration of the desirability of amendments to the employment screening processes for child-related work.

1.4 The matters considered in this report are:

First, the impact of the *Crimes Act 1900* s.579 on the employment screening program and the prohibition on convicted serious sex offenders working in child-related employment.

Second, inconsistencies that have been identified for the offences of intent, incitement and conspiracy to commit relevant offences in the legislation relating to employment screening.

And third, difficulties encountered by the New South Wales Police Service in furnishing the Commission for Children and Young People with details of relevant disciplinary proceedings being undertaken against employees under the *Police Service Act 1990*.

Chapter 2

Amendments to the children and young people legislation regarding convictions for sexual offences dealt with by way of recognizance or suspended sentence – after 15 years

2.1 In New South Wales the *Crimes Act 1900* s.579 states that if a person is convicted of an offence for which they were sentenced by recognizance, and the person does not breach their recognizance, or commit an indictable offence for 15 years after being convicted, their conviction is to be 'disregarded for all purposes whatsoever'.

2.2 The Committee is very concerned about the impact this provision has on its employment screening program, specifically, the processes of disclosure, verification, and risk assessment for persons engaging in child-related employment, and the prohibition on convicted serious sex offenders working in child-related employment under the *Child Protection (Prohibited Employment) Act 1998*. The *Crimes Act 1900* s.579 effectively creates a loophole which undermines this important child protection initiative in its generality. The loophole exists between the types of offences that are 'serious sex offences' under the *Child Protection (Prohibited Employment) Ac*t and the types of sex offences that could be subject to the provisions of the *Crimes Act 1900* s.579. The consequence is that a conviction for some sex offences neither renders a person a 'prohibited person' or requires such a person to undergo employment screening. A person with conviction for serious sexual conduct involving children may pass through the employment screening process undetected. There is potential therefore that a person with such a conviction could legally work in child-related employment, without the employer knowing of their past and without any assessment of their risk to children having being undertaken.

2.3 It is not easy to define the sorts of sex offences for which a person may have in the past received a sentence by way of recognizance. Over time, sex offences and their punishments have changed and discretion in sentencing means that it is difficult to gain a clear picture of how sentencing and the use of recognizance for sex offenders has been handed down. Indeed, there does not seem to be any consistent reasons why some offenders received sentence by way of recognizance and others did not.

2.4 The Committee has examined two cases where the *Crimes Act 1900* s.579 has been held to apply, compromising the employment screening process put in place to prohibit serious sex offenders from engaging in child-related work (A -v- Commission for Children and Young People & Anor (Director General, Department of Education and Training) [2001] NSWIRComm 194 (28 August 2001); AG -v- Commission for Children and Young People [2001] NSWADT 163). The full text of the judgements in these cases are contained in Appendix 1 and Appendix 2, respectively.

2.5 It appears that when the *Child Protection (Prohibited Employment) Act 1998* and the *Commission for Children and Young People Act 1998* were introduced, the effect of the provision of the *Crimes Act 1900* s.579 was not considered. This omission now needs to be rectified.

2.6 The crux of the issue considered by the Committee has been the appropriate balance between the need to protect children from sex offenders and the view that after a significant period of time, a convicted person who has not re-offended should be considered to have a 'clean record'.

The *Crimes Act 1900* s.579

2.7 The *Crimes Act 1900* s.579 states that where a person is convicted of an offence, or where a finding that a charge of an offence has been proved against any person, the conviction is to be disregarded for all purposes whatsoever (including in relation to civil and criminal proceedings), if the following circumstances apply:

- The sentence for the conviction was suspended or deferred upon the person entering into a recognizance or, in substitution for sentence in respect of the conviction the person was required to enter into a recognizance, or no conviction in respect of the finding was made and the person was discharged conditionally on his or her entering into a recognizance; and
- A period of 15 years has elapsed since the recognizance was entered into and the person has complied with the recognizance during that period and has not, during that period been convicted of an indictable offence on indictment or otherwise or of any other offence punishable by imprisonment or without a finding during that period that a charge of such an indictable or other offence has been proved against the person.

2.8 S.579 was inserted into the *Crimes Act 1900* through the passage of the *Crimes (Amendment) Act 1961*. In regard to the purpose of the section, the then Minister for Justice, the Hon. Jack Mannix MLA, observed during the second reading speech of the amending bill that:

> "It was submitted [by the Law Society of New South Wales] that after a period of 15 years a person who has been given the benefit of a bond and subsequently has not transgressed, should be regarded as having a clean record and should not have the brand of Cain attached to him for life. Justice demands such a provision. Suppose a young man of 16 or 17 years of age were brought before the court, given a bond and then released on his own recognizance. The facts give an indication of the nature of the offence.

> Certainly, it points to the fact that it was not a substantial transgression." (Minutes of the Proceedings of the Legislative Assembly of New South Wales, 29 November 1961, p.3388.)

2.9 The *Crimes Act 1900* s.579 is applicable to all types of offences, including sexual offences, as long as the requirements of the section regarding sentencing and re-offending are satisfied. The purpose of the *Crimes Act 1900* s.579 is to allow a person who has complied with the conditions of their recognizance and has not re-offended for 15 years to have a 'clean slate'.

2.10 However, the Committee considers that, in the case of sex offences, the interest of children and the obligation of authorities to protect children from sex offenders is the paramount policy consideration. It is the Committee's view that unlike other offences, sex offences should always be made known to child protection authorities.

The C*hild Protection (Prohibited Employment) Act 1998* and the operation of the *Crimes Act 1900* s.579

2.11 The *Child Protection (Prohibited Employment) Act 1998* prohibits a 'prohibited person' from working in child-related employment. A prohibited person is a person convicted of a 'serious sex offence' as defined by the Act. A 'serious sex offence' is defined (generally) as offences involving sexual activity or acts of indecency punishable by imprisonment for 12 or more months.[1] A person who is registrable within the meaning of the *Child Protection (Offenders Registration) Act 2000* is also a prohibited person.

2.12 The operation of the *Crimes Act 1900* s.579 excludes some past sex offenders from being defined as a 'prohibited person', that is, those persons who were convicted of a sex offence and sentenced by way of recognizance and who have complied with the recognizance and have not re-offended in 15 years.

2.13 Two applications, heard by the Industrial Relations Commission and the Administrative Appeals Tribunal in 2001, considered the application of the *Crimes Act 1900* s.579 in the context of the *Child Protection (Prohibited Employment) Act 1998.* These tribunals concluded that a conviction that falls within the ambit of s.579 must be 'disregarded for all purposes whatsoever', that is, it cannot be considered when determining whether the *Child Protection (Prohibited Employment) Act 1998* - and the provisions which render a 'serious sex offender' a prohibited person for child-related employment - applies to that person. Hungerford J, in the judgement for A -v- Commission for Children and Young People & Anor held that it was appropriate to recognise:

> "… the presumption that in enacting the *Child Protection (Prohibited Employment) Act,* the legislature did not intend to contradict what was an existing and long-standing (for nearly 40 years) beneficial provision in the form of s.579. It is to be emphasised that the section allows individual persons relief

[1] A more complex definition is contained in the section then set out here and includes attempting or conspiracy or incitement to commit an offence.

> against continuing stigma of a conviction for an offence or a finding that a charge for an offence has been proven against them…the presumption is reinforced by the rule that the legislature intends both statutes to operate in their own terms, and in their own particular areas of concern, unless by clear and express words the earlier provision be derogated from, in whole or in part, by the later provision." (see page 46, this report)

A later judgement, in the Administrative Decisions Tribunal, relied on the arguments considered by Hungerford J (AG -v- Commission for Children and Young People [2001] NSWADT 163).

2.14 The Commission for Children and Young People is a party to all proceedings when a person is making an application for exemption from the *Child Protection (Offenders Registration) Act 2000*. The Commission has since appealed the two decisions to the Supreme Court. The appeals are not expected to be heard until the end of 2002. The Commission has commented:

> Ms CALVERT (COMMISSIONER FOR CHILDREN AND YOUNG PEOPLE): "Could I just say that in fact there are a total of six applications for exemption in the Administrative Decisions Tribunal that have been bound over pending the outcome of our current appeal in relation to the two cases that I think have been circulated. All of the convictions for the applicants have been deemed to be spent convictions under section 579 and the range of convictions include solicit male for act of indecency, where the victims were aged 12 and 13, indecent assault of a male person where the victim was aged nine, carnal knowledge, there are two applications, indecent assault on a female aged less than 16, the victim was in fact aged 13, and indecent assault of male persons, victims aged 13 and 14 years; so it gives you some idea of the sorts of offences that we can't even get to look at because of the operation of section 579 of the *Crimes Act 1900*." (Minutes of Evidence, Friday 15 March 2002, p.7)

and later:

> Ms CALVERT (COMMISSIONER FOR CHILDREN AND YOUNG PEOPLE): "So in relation to the existing six offences or six applications, it is things like indecent assault, or an act of indecency on 12 and 13 year olds. We cannot even get to look at that and review whether there are any other things that might give rise to a concern that we would then want to either oppose or not oppose that application, so in effect there are going to be sex offenders in the community who have not been assessed by the tribunals." (Minutes of Evidence, Friday 15 March 2002, p.8)

2.15 It is the view of the Committee that all 'serious sex offenders' should be considered 'prohibited persons', and thus prevented from working in child-related employment, unless it is determined that they are exempt under the *Child Protection (Prohibited Employment) Act 1998* s.9. If such a legislative amendment was to be implemented, a person whose criminal record would otherwise fall within the ambit of the *Crimes Act 1900* s.579 could apply for an exemption from the Industrial Relations Commission or the Administrative Decisions Tribunal, as relevant. The Commission for Children and Young People and these tribunals would then be in a position to examine evidence, including the past conviction(s), to determine whether the person poses a risk to children.

Spent convictions provisions of the *Criminal Records Act 1991*

2.16 An exemption of the relevant children and young people legislation from the operation of the *Crimes Act 1900* s.579 would be consistent with the operation of the 'spent convictions' provisions of the *Criminal Records Act 1991* in relation to convictions for sexual offences.

2.17 The *Criminal Records Act 1991* implements a scheme to limit the affect of a person's conviction for a relatively minor offence if the person completes a period of crime-free behaviour. On completion of the period, the conviction is to be regarded as spent and, subject to some exceptions, is not to form part of the person's criminal history.

2.18 The spent convictions provisions relate to relatively minor offences and do not apply certain specified offences, including sexual offences and convictions for which a prison sentence of more than 6 months has been imposed.[2] There is a wide ranging definition of 'sexual offences' under the *Criminal Records Act 1991*.

2.19 The Committee believes that sex offences should be excluded from the operation of the *Crimes Act 1900* s.579 in the context of the employment screening for people engaging in child-related work and the prohibited persons legislation, just as they are excluded from the spent convictions provisions.

2.20 The Committee notes advice from representatives of the Attorney general's Department that:

> Mr WILLOUGHBY (ATTORNEY GENERAL'S DEPARTMENT): The spent conviction scheme comprising section 579 of the *Crimes Act 1900* and the *Criminal Records Act 1991* was already under review by the Department and that review has continued. (Minutes of Evidence, Friday 15 March 2002, p.7)

2.21 The Committee believes that the issues raised regarding prohibited persons and the employment screening of people engaging in child-related work should proceed independently of the more general review process by the Attorney General's Department regarding spent convictions.

Retrospectivity

2.22 The Committee believes that any amendments should have a retrospective aspect. People who once would not be considered prohibited persons, or would not have their convictions known in relation to an employment screening check should, pursuant to the amendments, find themselves covered.

[2] Section 7. Note that 'prison sentence' does not include a sentence by way of periodic detention or the detaining of a person under a control order.

2.23 The Committee notes that retrospectivity is limited by the *Child Protection (Prohibited Employment) Act 1998* to those offences which remain a crime within New South Wales currently:

> The Hon. PETER PRIMROSE MLC (VICE CHAIR): "Just briefly, can I ask would the retrospective nature apply to crimes that are no longer considered crimes?"
>
> Ms CALVERT (COMMISSIONER FOR CHILDREN AND YOUNG PEOPLE): "No, because there is a section in the *Child Protection (Prohibited Employment) Act 1998* which says if an offence is no longer considered an offence in New South Wales, then it is not considered an offence under the child sexual assault offences; so, for example, the homosexuality offences are not covered, because they are no longer considered an offence." (Minutes of Evidence, Friday 15 March 2002, p.14)

Amendments to the children and young people legislation to exclude the operation of the *Crimes Act 1900* s.579

2.24 The employment screening provisions of the *Commission for Children and Young People Act* states that employment screening is mandatory for preferred applicants for certain child-related employment. Employment screening is administered by the Commission for Children and Young People and other Approved Screening Agencies. Employment screening covers checks on any relevant criminal records, apprehended violence orders or disciplinary proceedings against a person being checked. A risk assessment report is then written and given to the employer who can use it when determining whether to hire the person. If the employer chooses not to hire the person, the employer must inform the Commission.

2.25 The operation of the *Crimes Act 1900* s.579 prevents relevant information from being considered when making a risk assessment in relation to a preferred applicant. The cases outlined above illustrate the type of individuals who could slip through this loophole. If such individuals were the 'preferred applicant' of an employer and thus required to undergo employment screening, their prior convictions could not be considered in relation to a risk assessment. Note that other information such as whether the person is the subject of an apprehended violence order or disciplinary proceeding could be considered.

2.26 During the roundtable discussion at the public hearing on Friday 15 March 2002, the Committee noted the comments of witnesses representing the Childrens Legal Issues Committee of the Law Society of New South Wales:

> Ms WALKER: "May I make one comment here: that section I think dates from 1961 and I think we would all be aware that the awareness of issues of child abuse and those sorts of matters generally is much greater than it was at that time, so looking at a conviction at the time, looking at the fact of a recognizance and those sorts of things, I think we now know that issues in respect of children need to be addressed and come into the balance in a way that would not have

> been anticipated in 1961 when those comments were made about that particular section of the Act. (Minutes of Evidence, Friday 15 March 2002, p.7)

and later:

> Ms ESCOBAR: I would only like to echo what Ms Walker said, that it is from that children's legal issues point of view that it is important to be able to look behind and to assess relative risk. That would be an important opportunity for the sort of screening to work appropriately across the board. (Minutes of Evidence, Friday 15 March 2002, p.15)

2.27 The Committee has concluded that an amendment to exempt the relevant children and young people legislation from the operation of the *Crimes Act 1900* s.579 should be made. The Committee is of the view that such information is relevant to a risk assessment and should be available for consideration in relation to the assessment. The Committee notes that the Attorney General's Department is already reviewing the relevant legislation. This review should include consultation with key stakeholders including employee and employer organisations.

2.28 The Committee recommends that:

> **RECOMMENDATION 1: The *Child Protection (Prohibited Employment) Act 1998* and the *Commission for Children and Young People Act 1998* be amended, as appropriate, to provide, clearly and expressly, that the provisions of the *Crimes Act 1900* s.579 do not apply to the definition of a prohibited person and to the employment screening of persons for the purposes of child-related work.**

Chapter 3

Amendments to the children and young people legislation regarding sexual offences involving intent, incitement and conspiracy offences

3.1 The Commission for Children and Young People is seeking amendments to the children and young people legislation (*Child Protection (Prohibited Employment) Act 1990* and the *Commission for Children and Young People Act 1998*) to address inconsistencies that the Commission has been identified for offences of intent, incitement and conspiracy to commit relevant offences in each of the Acts.

3.2 In evidence, the Commissioner stated that:

> Ms CALVERT (COMMISSIONER FOR CHILDREN AND YOUNG PEOPLE): The second amendment is a request to amend both the *Child Protection (Prohibited Employment) Act 1998* and the *Commission for Children and Young People Act 1998* to extend to those circumstances where it is criminally proven that a person had the intent to commit a relevant offence or where it is criminally proven that a person had conspired to commit or incited the commission of a relevant offence. This is again really a tidying up exercise. When the legislation was originally passed some offences were left out, primarily the intent and conspiring to commit offences. It does not make sense to exclude those offences if we are wanting to effectively protect children in the workplace, and so we are asking the Committee to support this amendment so that we can be comprehensive and consistent in the application of the *Child Protection (Prohibited Employment) Act 1998* and the employment screening part of the *Commission for Children and Young People Act 1998*. (Minutes of Evidence, Friday 15 March 2002, p.5)

As indicated, the proposal arises as a consequence of unintended technical abnormalities in the relevant legislation.

3.3 The *Child Protection (Offenders Registration) Act 2000* establishes registrable offences, known either as Class 1 or Class 2 Offences. A person convicted of a Class 1 or 2 offence becomes a 'registrable person' and is required to comply with a strict reporting regime. This Act also amended the *Child Protection (Prohibited Employment) Act 1998* and the *Commission for Children and Young People Act 1998* by extending the offences which make a person a 'prohibited person' and extending those offences which can be included for employment screening purposes.

3.4 A registrable person is anyone convicted of offences known either as Class 1 or Class 2 offences. Such a person is required to comply with a strict reporting regime. The registrable offences are as follows:

Class 1 Offence:
- (a) murder of a child;
- (b) sexual intercourse with a child;
- (b1) persistent sexual abuse of a child;
- (c) Attempting, conspiring or inciting any of the above.

Class 2 Offence:
- (a) indecency against or in respect of a child, if the offence is punishable by <12 months in goal;
- (b) Causing or inducing a child to participate in an act of prostitution;
  Engaging as a client with a child in the act of child prostitution;
  Receiving benefit knowing that it is derived (in)directly from an act of child prostitution;
  Knowingly allowing child prostitution to occur in premises which the person is capable of exercising lawful control over;
  Using or procuring a child for pornographic purposes;
- (c) possessing or publishing child pornography;
- (d) attempting, conspiring or inciting any of the above.

3.5 The Committee understands that the *Child Protection (Offenders Registration) Act 2000* (and by association, the other relevant Acts) extends to intent to murder, but not to assaults with intent to commit a sexual offence; and whilst the *Child Protection (Offenders Registration) Act 2000* and *Child Protection (Prohibited Employment) Act 1998* extends to conspiracy and incitement offences, the *Commission for Children and Young People Act 1998* does not, meaning that a person who conspires or incites for a child to be sexually abused, is not subject to the employment screening processes.

3.6 While all these pieces of legislation extend to attempt offences, it is clear that the inconsistencies in relation to intent, incitement and conspiracy offences need to be resolved in all of the Acts. The Committee believes that persons found guilty of such offences may pose a considerable risk to the safety of children.

3.7 The Committee understands that there should be no controversy regarding the amendments as suggested by the Commission. Indeed, Ms Ryan, representing the Childrens Legal Issues Committee of the Law Society of New South Wales commented:

> Ms RYAN: I suppose the point is that this is not the first time there have been inconsistencies amongst legislation, but the thing that is particularly important with this is that all of these Acts relate to child protection and there really needs to be consistency because it just creates confusion and unnecessary work really. (Minutes of Evidence, Friday 15 March 2002, p.17)

3.8 The Committee accepts that it is not unusual, when governments introduce a new direction in law or public policy that there are consequential things that are uncovered as the new law or policy takes effect. In that sense, the proposed amendments are "housekeeping".

3.9 The Committee recommends that:

RECOMMENDATION 2: Amendments be made to the *Child Protection (Prohibited Employment) Act 1998* to cover the circumstances where:

(a) a person is convicted of intent to commit a Class 1 or 2 offence; and

(b) a person is convicted of conspiracy to commit, or incitement of the commission of, a Class 1 or 2 offence.

Chapter 4

Amendments to the Commission for Children and Young People Act 1998 regarding offences involving children – definition of completed disciplinary proceedings relating to police officers

4.1 The *Commission for Children and Young People Act 1998* s.33 defines "relevant disciplinary proceedings" as disciplinary proceedings (in this State or elsewhere) against an employee by the employer or by a professional or other body that supervises the professional conduct of the employee, being completed proceedings involvingchild abuse, sexual misconduct by the employee, or acts of violence committed by the employee in the course of employment.

4.2 The New South Wales Police Service is unable to furnish the Commission for Children and Young People with the details of relevant disciplinary proceedings being undertaken, consistent with other employers. It appears that disciplinary action within the New South Wales Police Service, defined as "employee management action" does not come within the definition of "relevant disciplinary proceedings" as defined by the *Commission for Children and Young People Act 1998*. Thus, under the current legislative arrangements, if the Ministry for Police were to hand over the requisite documents, there may be an exposure to potential civil liability.

4.3 In evidence, the Commissioner summarised the issue, requesting that the Committee to consider:

> Ms CALVERT (COMMISSIONER FOR CHILDREN AND YOUNG PEOPLE): "… an amendment to the *Commission for Children and Young People Act 1998* to revise the definition of a relevant completed disciplinary proceeding to extend to matters relating to the discipline or management of conduct of police officers dealt with under Part 9 of the *Police Services Act 1990*. Because of the particular way in which the relevant disciplinary proceedings are defined under the *Police Services Act 1990* they are currently not captured by the *Commission for Children and Young People Act 1998*. The effect of that is that the Police Service is not required to inform the Commission if they have a completed disciplinary matter that falls under our definition, which is that it is done to a child or in the presence of a child and involves sexual misconduct or physical or child abuse. I am seeking the amendment so that the Police Service is brought into line with every other employing body that is currently covered by the *Commission*

for Children and Young People Act 1998. I think it is a fairly straightforward amendment. " (Minutes of Evidence, Friday 15 March 2002, pp. 4-5)

4.4 In discussions, the Committee has been advised that such an amendment is supported by the Police portfolio.

4.5 The Committee is satisfied that it had always been the intention that the disciplinary proceedings of police officers would be analysed by the Commission for Children and Young People as part of its employment screening processes.

4.6 The Committee recommends that:

RECOMMENDATION 3: The *Commission for Children and Young People Act 1998* be amended to revise the definition of a relevant completed disciplinary proceedings to extend matters relating to the discipline or management of conduct of police officers, dealt with under Part 9 of the *Police Service Act 1990* (both before or after the commencement of the Act).

Appendix 1

A v Commission for Children and Young People & Anor **(Director General, Department of Education and Training) [2001] NSWIRComm 194 (28 August 2001)**

Application pursuant to section 9(1) of the *Child Protection (Prohibited Employment) Act 1998* and application under section 154(1) of the *Industrial Relations Act 1996* for a declaration of right.

1. The applicant, known in these proceedings as "A", has moved the Court to make a declaration of right under s.154(1) of the *Industrial Relations Act 1996* to the effect that he is not a "prohibited person" within the meaning of that expression in the *Child Protection (Prohibited Employment) Act 1998* so that that Act does not apply to him in relation to child-related employment. "A" is currently employed as a secondary school teacher with the Department of Education and Training. If he were to be a prohibited person, so as to make the statute applicable to him, he would be unable to remain or to be continued in such employment unless an order were made by a relevant tribunal, on his application as a prohibited person, declaring the statute was not to apply to him because he did not pose a risk to the safety of children. The importance, therefore, of the status of "A" as a prohibited person is obvious.

2. The basis for the declaration claimed was that the *Child Protection (Prohibited Employment) Act*, which otherwise operated so as to affect the applicant's employment by making him a prohibited person because of a prior conviction which the statute described as a "serious sex offence", did not however apply to "A" by reason of the provisions of s.579 of the *Crimes Act 1900*. That section, as was submitted for the applicant, required the earlier conviction to "be disregarded for all purposes whatsoever" and to "be inadmissible in any criminal, civil or other legal proceedings as being no longer of any legal force or effect". The sole issue, then, raised by the present application concerned the question as to the operation of and interaction between the relevant provisions of the *Child Protection (Prohibited Employment) Act* and the *Crimes Act.*

3. The position taken by the first respondent, the Commission for Children and Young People, was that the competing statutory provisions were inconsistent and where the earlier enacted s.579 of the *Crimes Act* yielded to the later enacted

Child Protection (Prohibited Employment) Act; in any event, s.12(1) of the latter Act was a complete answer against the declaration sought because it explicitly provided that that statute "prevails to the extent of any inconsistency between it and any other Act or law". The second respondent, the Director-General of the Department of Education and Training, also opposed the declaration being made for the same reasons as did the first respondent.

4. Seen in that way, it may be thought the single issue for determination is relatively confined and straightforward. It comes down, it seems to me, to a pure question of statutory construction and the application of the ordinary principles to a determination of the primacy of competing legislation. However, due to the statutory provisions concerned and the apparent purposes of the respective statutes, the resolution of the problem has its own complexities. Even so, the parties were agreed at least as to the context in which the issue arose and the facts necessary to enable a full consideration of the legal question. It is convenient first to refer to that context as to how this situation came about in light of the competing statutory provisions and the course the proceedings then took.

5. On 3 July 2000 the *Child Protection (Prohibited Employment) Act* commenced (see Government Gazette No 73, 23 June 2000, p 5109) and the transitional provisions thereof in s 6(3) provided, in effect, that a prohibited person in child-related employment was allowed to remain in that employment for three months if that status was disclosed to the employer within one month of the commencement date; under s.8(2) thereof, an employer was allowed to continue a prohibited person in employment for three months after the commencement date if all reasonable steps available be taken to prevent or restrict the person from having unsupervised contact with children during that three-month period. "A" made his application on 11 September 2000 to the Commission pursuant to s.9(1) of the *Child Protection (Prohibited Employment) Act* for an order declaring that that Act did not apply to him in respect of a specified offence. On 14 September 2000, I made an order pursuant to s.9(6) staying the operation of the statutory prohibition on the applicant's employment pending the final determination of the matter. Hearing dates for that purpose were fixed for 12, 13 and 20 March 2001.

6. The claim for the declaration arose during the course of the hearing before me, sitting as the Commission, on 20 March 2001 of final submissions in the matter of the application pursuant to s.9(1). It is unnecessary for present purposes to further state the details involved, other than to indicate that on 12 March 1971 the applicant was dealt with by the Court of Quarter Sessions at Sydney on a charge that he contravened in January 1970 when he was 17 years of age the then s.71 (now s.66C) of the *Crimes Act* by carnally knowing a girl under the age of 16 years. On pleading guilty, he was bound over to be of good behaviour and appear for sentence if called upon within a period of two years with the condition that he place himself under the supervision and guidance of the Adult Probation Service. The applicant complied with the terms of the recognizance and has not since transgressed.

7. During her final submissions on 20 March 2001 in reviewing applicable statutes, Ms P.F. Lowson of counsel for the applicant sought and was granted an adjournment to enable consideration of the implications of s.579 of the *Crimes Act*. In the result, at a directions hearing on 28 March 2001, counsel filed in court the present application for declaratory relief under s.154 of the *Industrial Relations Act*. Mr P.F. Singleton of counsel for the first respondent and Ms M. Baker with Ms B. Charlton for the second respondent, very properly and fairly, consented to that course. Although the original proceedings were before the Commission for an order pursuant to s.9(1) of the *Child Protection (Prohibited Employment) Act* on the application of "A" as a prohibited person, it emerged that the relief finally sought was in the nature of a declaration that the applicant was not such a prohibited person. If successful, of course, the applicant would have no need to pursue his original s.9(1) application because not being a prohibited person the *Child Protection (Prohibited Employment) Act* would not apply to him notwithstanding the earlier offence in January 1970 found proven against him and for which in March 1971 he was placed on a bond. Section 154 of the *Industrial Relations Act* requires relief of the nature now sought to be exclusively within the declaratory jurisdiction of the Commission in Court Session and, so, and with the concurrence of the parties at the directions hearing on 28 March 2001, I reconstituted as the Commission in Court Session pursuant to s.176(3) of the *Industrial Relations Act* to deal with the new application. The matter so proceeded to hearing on 23 April 2001 with final written submissions by the parties being filed on 4 May 2001 when the decision was reserved.

8. The respondents initially took the position that the Court did not have jurisdiction to make the declaration sought. However, at the hearing they conceded that indeed jurisdiction did exist. I think the concession was properly made: see Atlantis Relocations (NSW) Pty Ltd v Department of Industrial Relations (Inspector O'Regan) (1997) 99 IR 125 at pp 126-127; Re Glass Workers' Redundancy (State) Award [1998] NSWIRComm 297; and Kellogg (Aust) Pty Ltd v National Union of Workers, New South Wales Branch (1998) 89 IR 391. In Ford v SAS Trustee Corporation (2000) 98 IR 444, I had occasion to make a declaration as to a person's rights under the *Police Regulation (Superannuation) Act 1906* in relation to his entitlement to certain leave and, as to the existence of jurisdiction, observed (at p.476) :

> The fundamental nature of the declaratory power in s.154 of the *Industrial Relations Act* is, in the opinion I hold, based on the existence of a matter about which the Commission (either as the Commission or sitting as the Court) has jurisdiction and even though no consequential relief is or could be claimed. In other words, a declaration of right may be made once there be identified a matter otherwise within the Commission's or the Court's jurisdiction, regardless whether any proceedings exist as to that matter, provided the declaration as sought relates to it.

9. In the present case, the Commission has power to make an order under s.9 of the *Child Protection (Prohibited Employment) Act* declaring that that Act is not to apply to a particular person who is a prohibited person; central to that determination is the status as such of the person concerned. The declaration sought here from the Court, in my view, relevantly relates to a matter within the

Commission's jurisdiction, namely, the matter of the making of an order under s 9 in relation to the applicant as a person alleged to be a prohibited person. It follows, I am satisfied, that the Court has power to make the declaration sought under s.154 of the *Industrial Relations Act* as to whether the applicant is a prohibited person.

10. Further, the respondents conceded, again properly in my view, that if it be found the applicant was not a prohibited person then the declaration should be granted even though such relief be discretionary. The circumstances for the grant of declaratory relief, I agree, are discretionary: see Ford (98 IR at pp 450-451). In pointing out that the applicant originally believed the *Child Protection (Prohibited Employment) Act* applied to him and so disclosed the earlier offence to the employer, Ms Lowson said the application under s.9 was made because without the protection of such an order the applicant bore the risk of prosecution for an offence against s.6(1) of the statute for which the maximum penalty was 100 penalty units or imprisonment for 12 months, or both. Counsel submitted :

> The applicant submits that this case appropriately falls within the principles applicable to the granting of a declaratory order. The question raised by the application is not theoretical. It directly affects the applicant's action both in relation to the proceedings commenced pursuant to s 9 of the Act and more broadly and more importantly in relation to his ongoing employment. Similarly the applicant has a real and direct interest in the outcome of the application. Finally the Commission for Children and Young People and the Department of Education and Training, being respondents in the Commission proceedings, are properly interested parties in the declaratory order application and are in a position to address any of the issues raised by this application.

11 I am satisfied that if the applicant be found not to be a prohibited person then it is only appropriate to grant to him the relief sought. I accept the force in that respect of the circumstances as outlined by Ms Lowson and the concession made by the respondents.

12 The *Child Protection (Prohibited Employment) Act* was assented to on 8 December 1998 and, as I have said, commenced on 3 July 2000. It is necessary to review its main provisions as they affect the present issue. As its long title states, it is "An Act to prohibit the employment in child-related employment of persons found guilty of committing certain serious sex offences; and for related purposes". The wide-ranging scope of the statute may be seen from the definition in s.3 of "child-related employment", as follows :

> **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:
>
> (i) employment involving the provision of child protection services,
>
> (ii) employment in pre-schools, kindergartens and child care centres (including residential child care centres),

(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*),
(v) employment in refuges used by children,
(vi) employment in wards of public or private hospitals in which children are patients,
(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,
(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,
(xii) employment involving regular provision of taxi services for the transport of children with a disability,
(xiii) employment involving the private tuition of children,
(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,
(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.

(Par (a) (iii) has direct application in the present case.)

13. Section 3 defines "conviction" in this way :

> **conviction** includes a finding that the charge for an offence is proven even though the court does not proceed to a conviction.

14. Of present importance, s.3 defines a "prohibited person" by reference to s.5 which identifies such a person as one "convicted of a serious sex offence". Section 5 states :

> **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.

(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.

(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

(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

(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

(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

(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.

15. The offences relating to prohibited persons, and which establish the prohibitions on such a person applying for, undertaking or remaining in child-related employment and in an employer commencing or continuing in child-related employment a prohibited person, are dealt with in Pt 2, specifically ss.6 and 8 therein; s.7 requires an employer to ascertain whether an employee is a prohibited person and establishes offences in respect thereof. Part 3 - Exemptions by declaration, contains the important provisions of s.9, in the following terms :

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.

(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:

(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.

(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:

(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,

(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,

(e) the seriousness of the prohibited person's total criminal record,

(f) such other matters as the tribunal considers relevant.

(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 in support of the making of the order.

(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.

(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.

(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.

16. Part 4 (ss.10 to 16) contains various miscellaneous provisions - an employer who removes a prohibited person from child-related employment may transfer the person to employment of a different kind: s.10; the statute binds the Crown in right of New South Wales: s.11; the manner for the taking of proceedings for an offence and offences by corporations, a director or manager thereof are specified: ss.13 and 14; regulations may be made necessary or convenient to be prescribed for carrying out or giving effect to the statute (none have as yet been made): s.15; and the statute is to be reviewed by the Minister to determine whether its policy objectives remain valid and whether its terms remain appropriate for securing those objectives: s.16. Importantly for the argument in the present matter, s.12 provides :

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.

17 Section 579 of the *Crimes Act*, said by the respondents to be inoperable for the purposes of serious sex offences dealt with in the *Child Protection (Prohibited Employment) Act* but relied on by the applicant to exclude his status as a prohibited person, is in the following terms :

579 Evidence of proceedings dealt with by way of recognizance after 15 years

(1) Where, following the conviction of any person for an offence or a finding that a charge of an offence has been proved against any person, whether the conviction or finding was before or after the commencement of the *Crimes (Amendment) Act 1961*:

(a) sentence in respect of the conviction was suspended or deferred upon the person entering into a recognizance or, in substitution for sentence in respect of the conviction, the person was required to enter into a recognizance, or no conviction in respect of the finding was made and the person was discharged conditionally on his or her entering into a recognizance, and

(b) a period of fifteen years has elapsed since the recognizance was entered into:

(i) without the recognizance having been forfeited during that period or a court having found during that period that the person failed to observe any condition of the recognizance, and

(ii) without the person having, during that period, been convicted of an indictable offence on indictment or otherwise or of any other offence punishable by imprisonment (otherwise than under section 82 of the *Justices Act 1902* as amended by subsequent Acts) or without a finding during that period that a charge of such an indictable or other offence has been proved against the person,

the conviction or finding shall, where that period expired before the commencement of the *Crimes (Amendment) Act 1961*, as on and from that commencement, or, where that period expires or has expired after that commencement, as on and from the expiration of that period:

(c) be disregarded for all purposes whatsoever, and

(d) without prejudice to the generality of paragraph (c), be inadmissible in any criminal, civil or other legal proceedings as being no longer of any legal force or effect.

Without prejudice to the generality of the foregoing provisions of this section, any question asked of or concerning that person in or in relation to any criminal, civil or other legal proceedings otherwise than by his or her counsel, attorney or agent or other person acting on his or her behalf may be answered as if the conviction or finding had never taken place or the recognizance had never been entered into.

(2) Notwithstanding the provisions of subsection (1), where in any criminal, civil or other legal proceedings the person first referred to in that subsection, by himself or herself, his or her counsel, attorney or agent or other person acting on his or her behalf, otherwise than in answer to a question that can, in accordance with the last paragraph of that subsection, be answered in the negative, makes an assertion that denies the fact that the conviction or finding took place or that the recognizance was entered into, then the conviction, finding or recognizance is admissible:

(a) in those proceedings, as to the character, credit or reputation of the person so referred to,

(b) in any prosecution for perjury or false swearing founded on the assertion.

The non-disclosure of the conviction, finding or recognizance in the making or giving of a statement or evidence as to the good character, credit or reputation of the person so referred to shall not of itself be taken, for the purposes of this subsection, to mean that the statement or evidence contains such an assertion.

(3) In this section ***legal proceedings*** includes any application for a licence, registration, authority, permit or the like under any statute.

(4) This section does not affect the operation of section 55 of the *Defamation Act 1974*, or the operation of section 178

(Convictions, acquittals and other judicial proceedings) of the *Evidence Act 1995*, for the purposes of section 55 of the *Defamation Act 1974*.

18. Section 579 appears in Pt 16 of the *Crimes Act* which, by reason of its mention in the Second Schedule thereof, makes effective s.3 of the statute to this effect :

3 Application of certain Parts of Act

The sections mentioned in the Second Schedule, so far as their provisions can be applied, shall be in force with respect to all offences, whether at Common Law or by Statute, whensoever committed and in whatsoever Court tried.

19. It should be added that the purpose of the *Crimes Act*, as its long title states, is "An Act to consolidate the Statutes relating to Criminal Law".

20. For the sake of completeness only, I interpose reference to the *Criminal Records Act 1991* as another piece of legislation, with s.579 of the *Crimes Act*, concerned to limit the effect of a person's conviction for a relatively minor offence if the person completes a period of crime-free behaviour. It does so by making the relevant conviction "spent". However, the *Criminal Records Act* in s.7(1), amongst other specified offences, excludes from its operation convictions for sexual offences so that it may be disregarded for present purposes in considering the *Child Protection (Prohibited Employment) Act*. Attention, therefore, is limited to the effect of s.579 of the *Crimes Act*.

21. The *Child Protection (Prohibited Employment) Act* was enacted cognately with two other bills which became the *Commission for Children and Young People Act 1998* and the *Ombudsman Amendment (Child Protection and Community Services) Act 1998*. It is apparent that the three pieces of legislation are historic and unique in their terms. As the Minister observed in moving the second reading of the bills (*Hansard*, Legislative Assembly, 21 October 1998, p.8739), they "responded to key recommendations of the Wood royal commission paedophile inquiry"; the Minister added (at p.8742) :

> The Child Protection (Prohibited Employment) Bill (No 3) will implement recommendation 139 of the Wood royal commission. Consultation on the bill has been extensive. The object of the bill is to prohibit persons with convictions for serious sexual offences from working in positions of child-related employment. Its provisions form an integral part of the employment screening system, that are low cost and are easily undertaken by employers. Under the bill, all current and prospective employees will be asked to declare whether they have any convictions for a serious sex offence. If they do, they will be prohibited from applying for, or continuing to work in, positions involving direct unsupervised contact with children. Sexual offences that have been decriminalised, and offences that fall within the category of "act of decency" but are not of a sexual nature, are not caught by the provisions of the bill. There will be a

> public education campaign when the bill is proclaimed to assist employers and employees become aware of their new responsibilities.
>
> Together, these three bills represent a major step forward for the advancement of children's interests and their protection from harm. Acting on the recommendations of the royal commission gives us the chance to ensure the best possible protection for our children. The proposals I have outlined today have been refined through extensive consultation with all interested stakeholders. The Government believes that the best possible response has been made to the original recommendations of the Wood royal commission and to the range of issues raised in subsequent consultations.

22 However, during the second reading debate in the Legislative Council (*Hansard*, Legislative Council, 12 November 1998, p 9768) the Hon. Patricia Forsythe indicated (at p.9771) the Opposition's support for the bills but, in referring to the role of the Commission for Children and Young People (the first respondent here) in the employment screening process, observed (at p.9775) :

> Getting the employment screening process right is fundamental to the commission's success and to balancing the rights of children to be protected with the rights of employees. That balance may be a fine one, and time will tell. ... The last thing we need is to throw out the rights of employees while enhancing the rights of children. ... Screening procedures are built upon the need to protect children and acknowledge employees' rights.

23. Ms Forsythe added, in the context of "the balance" referred to earlier, the following specific comments as to the objective of the subject Act (at p.9776) :

> I now turn to the Child Protection (Prohibited Employment) Bill (No 3). At first glance this bill seems simple and objective. Its intent is to prohibit the employment of any person convicted of a serious sex offence in child-related employment. The person is to be classified as a prohibited person. Under the bill an employer must seek a disclosure as to whether a person employed in a child-related role is a prohibited employee. The employer must take action to remove the employee from child-related work.

24. During the same debate, the Hon P.T. Primrose issued the following warning (at p.9778) :

> I support the legislation, but add a note of caution, which, I am sure, will be alluded to by other honourable members. I doubt that any member of this Chamber or, indeed, the overwhelming bulk of our community would object to the overall aims or goals of the proposed legislation. Considerable consultation has taken place. This groundbreaking legislation highlights a number of antinomies in the debate about rights, freedoms and so on, which point to the need for extensive consultation. ...
>
> ... It is vital when considering this legislation to make it clear that anyone who raises concerns about liberties within our society is not a paedophile and does not support paedophilia, and that other valid concerns and

> rights have to be taken into account. In this debate there must be clear, open and honest acknowledgement of the rights of everyone.

25. Section 579 of the *Crimes Act* has a longer statutory history. It was first enacted by the *Crimes (Amendment) Act 1961* and consisted of sub-ss.(1), (2) and (3) as in their present terms; by the *Defamation Act 1974*, sub-s.(4) was added and later the then reference therein to "section 23 of the *Evidence Act 1898*" was replaced by the *Evidence (Consequential and Other Provisions) Act 1995* with "section 178 (Convictions, acquittals and other judicial proceedings) of the *Evidence Act 1995*". It has remained in that form to the present time.

26. In moving the second reading of the amending bill in 1961, the then Minister observed during the debate (*Hansard*, Legislative Assembly, 29 November 1961, 3387 at p.3388) :

> The final matter covered by the bill arose from representations made by the Law Society. It was submitted that after a period of fifteen years a person who has been given the benefit of a bond and subsequently has not transgressed, should be regarded as having a clean record and should not have the brand of Cain attached to him for life. Justice demands such a provision. Suppose a young man of 16 or 17 years of age were brought before the court, given a bond and then released on his own recognizance. This fact gives an indication of the nature of the offence. Certainly, it points to the fact that it was not a substantial transgression. Some years later this person might when applying for a licence of some kind or another be required to complete an application form. Thus his past record might come before a licensing court, or the organisation to which his application is directed, although in the intervening period he has not transgressed and has been a first-class citizen.

It should be emphasised that the example given by the Minister is completely consistent with the circumstances of the offence committed here by "A", how he was dealt with by the Court of Quarter Sessions and his subsequent record. It now comes to confront him 30 years later, on the respondents' case, on the passage of the *Child Protection (Prohibited Employment) Act* as a prohibited person.

27. The parties provided written submissions outlining their respective positions and supplemented them orally at the hearing. May I say that in facing the present task I found the submissions to be most helpful and I am grateful to counsel for their assistance in dealing with the present statutory conundrum; and one, I might add, of quite some importance having in mind the stated purposes of the two sets of competing legislation.

28. On the one hand, it seems to me, the *Crimes Act* in s.579 is concerned to do justice to a person who transgressed more than 15 years ago by committing an offence for which the benefit of a bond was allowed for what was an offence found by the sentencing judge not to be a substantial transgression. On the other hand, the *Child Protection (Prohibited Employment) Act* has the purpose of

prohibiting the employment in child-related employment of persons found guilty of committing a serious sex offence ("serious" in the sense as deemed by the legislation of the *offence* but not, I emphasise, in terms of the *degree of criminality of the offender* in the circumstances as found by the sentencing judge), without any explicitly stated time-limitation period, in order to protect children against possible harm unless a relevant tribunal finds that the person concerned does not, according to specified criteria, pose a risk to the safety of children. It would be all too expedient, but I think a denial of a proper consideration of the applicant's situation in terms of his now crystallised rights under s.579 for in excess of 15 years, to look at the apparent purpose of the *Child Protection (Prohibited Employment) Act* and to find he is a prohibited person simply because he was convicted as having committed the subject offence. Thus, one must, on the approach I consider proper, review the essential interaction between the competing statutes to ascertain according to the ordinary rules the respective limits of their operation.

29. Ms Lowson's primary position was straightforward. Counsel submitted that because s.579 laid down that the applicant's conviction or finding of guilt was to be disregarded "for all purposes whatsoever", then, on the ordinary meaning of those words, which are of the widest possible application, the prior offence in January 1970 "is to be disregarded for all purposes including statutory provisions, which in turn means that it is to be disregarded for the purposes of the *Child Protection (Prohibited Employment) Act*". Counsel relied on what Kirby P said in R v Sales (1989) 42 A Crim R 297 at p 298 as to the effect of s.579, as follows :

> I am also concerned about the use made by the sentencing judge of the previous conviction of the applicant. That conviction occurred long ago in 1972. It should not have been taken into account: see *Crimes Act 1900* (NSW), s 579. The instruction of Parliament is clear. It is to be "disregarded for all purposes whatsoever". People should be entitled to live down such old convictions. The trial judge should not, in my opinion, have had any regard whatever to the spent conviction and sentence imposed in respect of it out of deference to Parliament's instruction in that regard.

30. The essential submission of Mr Singleton by reference to the various statutory provisions was that the answer to the present question was to be found in "the intention of the Parliament in enacting the *Child Protection (Prohibited Employment) Act*". It was put that "the two enactment's cannot be given full and unqualified application to the applicant" so that they were "inconsistent"; it was emphasised by Mr Singleton that neither party suggested the repeal, either expressly or by implication, of s.579 by the *Child Protection (Prohibited Employment) Act*, rather the present case raised an instance of limited inconsistency. Counsel referred to the purpose of that Act, the specificity of its terms compared to s.579 of the *Crimes Act* and the express words in s 12(1) as demonstrating clearly, as counsel put, "that s.579 yields and the present application for a declaration should be refused". Indeed, and although certain maxims of statutory construction could be called in aid to support his proposition, counsel relied upon the terms of s.12(1) as being "a complete answer to the present application and alone requires the dismissal of the application".

However, in noting that the same result would be produced by an application of the maxims of statutory construction, counsel added in his written submissions :

> 16. The first rule is "the usual rule that when there are two public general Acts with inconsistent provisions the later Act prevails, and all the more so if its provision is express and that of the earlier Act is only implied" ... This does not mean that the earlier provision is repealed: it means only that the earlier enactment will yield in a particular instance of inconsistency.
>
> 17. The "cardinal principle" in dealing with inconsistency within Act is "that if there are two inconsistent enactment's, it must be seen if one cannot be read as a qualification of the other" ...
>
> 18. The maxim *generalia specialibus non derogant* is ordinarily applied where an earlier specific statute operates inconsistently (in a given instance) with a later general statute. The cases therefore contain examples in which it has been held that a later general statute did not impliedly repeal an earlier specific statute but, rather, was impliedly subject to the earlier specific statute.
>
> 19. In the present case the opposite situation arises. The earlier enactment, s.579 of the *Crimes Act*, is a general enactment. It applies to all convictions leading to a recognizance (as described in the section). The later statute, the *CP Act*, is the specific one: it applies to only a special few categories of convictions (for serious sex offences) and only for a special purpose (child related employment).
>
> 20. It is easy to read the earlier, general enactment as being subject to the later, specific enactment. This is a case in which it is not necessary to choose between *leges posteriores priores contrarias abrogant* and *generalia specialibus non derogant*: the application of each maxim produces the same result (case references omitted).

31. Ms Charlton for the second respondent adopted the submissions of Mr Singleton.

32. The fundamental propositions of counsel were developed by them in detailed written submissions and with extensive reference to the applicable authorities. It is impracticable here to repeat all that was put, other than to identify the main points and the thrust of the respective cases.

33. In attending to the key issue of consistency as between the competing statutory provisions, Ms Lowson submitted that the respondents' argument really proceeded on the basis that the *Child Protection (Prohibited Employment) Act must* apply to the applicant merely because of his prior conviction in 1971. Counsel reasoned it this way :

> 5. In further addressing the allegation by the respondent of inconsistency between the provisions, the applicant submits that the exclusion of persons covered by section 579 from the operation of the Act is in fact consistent with that Act. The Act uses the blunt instrument of criminal convictions to remove certain persons from employment for the purposes of protecting children. The Act cannot, and does not purport to, remove all persons who may pose a risk to the safety of children from child-related employment. It is consistent with the Act that a person whose criminal behaviour, penalty imposed, and subsequent rehabilitation is recognised by operation of a provision in a criminal statute as diminishing the seriousness of the offence is not relevantly caught by the prohibited person provisions of the Act.
>
> 6. In asserting inconsistency between the Act and section 579 the respondent fails to apply the principle that, in considering the operation of two State Acts there is a presumption that the legislature intended both to operate. ...
>
> 7. In assessing how two Acts may interrelate a court must examine the language of the Acts; the resolution of any question of consistency is not to be based upon the application of a maxim. ... (case references omitted)

34. Ms Lowson concluded with the general proposition that the respondents had not established any inconsistency. Even if inconsistency were found, said counsel, such that the *Child Protection (Prohibited Employment) Act* impliedly repealed s.579, then s.30 of the *Interpretation Act 1987* operated to preserve the rights afforded to the applicant by s.579. In the result, Ms Lowson summarised the position thus :

> The applicant submits that at its highest the respondent's case is put on the basis that, because the Act is intended to protect children, the Commission should infer an inconsistency which in turn should be addressed by repealing section 579 so as to take away a crystallised right earned and enjoyed by the applicant since March 1986. As such it cannot succeed and the applicant is entitled to the declaratory orders sought.

35. The significance of s.12(1) in resolving the present issue in favour of the respondents was said by Mr Singleton to involve the question of the legislature's intention in enacting it. Guidance in that respect was to be obtained from the legislature's "manifest policy that child protection was more important than the cleaning of criminal slates". Therefore, so counsel said, "the Parliament in s.12 intended to sweep away the effect (in the limited context of child-related employment) of all and any laws upon which a person might otherwise be able to rely to avoid the full impact of the CP Act." Although the applicant here became eligible in March 1986 for the benefits which s.579 bestowed, such that, as Ms Lowson had said, those rights had "crystallised", Mr Singleton submitted that no different result arose than if the period of 15 years had not been completed before the commencement of the *Child Protection (Prohibited Employment) Act*. Mr Singleton reasoned the matter in the following way :

11. In considering whether or not a different result arises in cases in which the 15 year period mentioned in s.579 expires before the commencement of the *CP Act* it is relevant to consider the nature of the benefit conferred by s.579. The nature of that benefit is not one - such as the annulment of a conviction or a pardon - that crystallises or is *completed* at a particular point in time. Rather, it is a benefit that *commences* at a particular point in time and continues thereafter (to be exercised from time to time when the need arises). Unlike an annulment or a pardon, which is more fundamental, the benefit conferred by s.79 must be *exercised* from time to time. Even though that continuing benefit might, because of s.30 of the *Interpretation Act 1987*, survive the repeal of s.579 by legislation amending the *Crimes Act* (a question that need not be decided here), the benefit only exists to the extent that s.579 provides. In other words, the benefit does not "take root" but remains dependant on, and sourced to, s.579.

12. Even if it be assumed that the benefit conferred by s.579 on the present applicant was a substantive right that "crystallised" in 1986, whenever the issue arises (as it does now) he can only avail himself of the benefit by relying on s.579. (In this respect it would not matter whether s.579 remained on the statute books or had been repealed and the reliance was coupled with reliance on s 30 of the *Interpretation Act 1987*.) Even though he need not declare s 579 each time he relied on it, there would nevertheless be such reliance. In other words, once the crystallisation occurs the right remains a statutory right, not some right of another or more fundamental nature divorced from the *Crimes Act*. Thus the exercise of the right entails reliance on s.579. Thus a conflict arises between s.579 and the *CP Act*.

13. The benefit conferred on the present applicant by s.579 - even if it "crystallised" in 1986 and even if by 1986 the section had "done its work" - is the product of s.579. If that benefit has the effect of allowing the applicant to work in child-related employment it does so because s.579 has that effect. That would be an effect in direct contradiction of the effect of the *CP Act*. Section 579 of the *Crimes Act* therefore conflicts with the *CP Act* even if the benefit it conferred had "crystallised" in 1986.

36. Finally, in emphasising the role played by s.12(1) of the statute, Mr Singleton submitted :

15. Subsection 12(1) expressly provides for "any" other enactment to yield to the *CP Act*. "Any" is not a term that merely *implies* that s.579 is covered: it *expressly* provides that s.579 is included. It expressly provides that every statutory provision ever (previously) enacted by the Parliament is included. As noted ... such an express provision does not need to make specific reference to individual earlier enactment's.

16. All that need by implied (if implication is needed at all) is that s.12 means what it says and that where s.12 provides for the *CP Act* to prevail over s.579 it also provides that the *CP Act* prevails over the

> effect and operation of s.579 and that therefore the benefit conferred by s.579 will not stand in the way of the full operation of the *CP Act*.
>
> 17. In this case what falls for determination is whether or not the effect and operation of s.579 is inconsistent with the effect and operation of ss.5 and 6 of the *CP Act*. If there is an inconsistency then there is no doubt that s.12 expressly provides that the *CP Act* overrides s.579.

37. The present task confronting the Court is the effect the two State Acts concerned have upon each other, that is, whether there is any inconsistency between them. If there is, then, in my view, s.12(1) of the *Child Protection (Prohibited Employment) Act* would operate to prevail over s.579; if there is not, then, in my view, the applicant would be entitled to the declaration in the terms sought. In Totalizator Agency Board v TAB Agents' Association of New South Wales (1995) 36 NSWLR 594 at p.604; (1995) 59 IR 36 at p.45, I made the general observation (with which Cahill Dep CJ agreed) in considering whether inconsistency existed between two State statutes that I regarded "the primary approach under the ordinary rules of interpretation as being the very strong presumption that the legislature had no intention of contradicting itself by enacting the later statute but intended both statutes to operate". Reliance for that proposition, which I continue to regard as the correct position, was placed on Re Applications of Shephard [1983] 1 NSWLR 96 at pp.106-107 and Butler v Attorney-General for the State of Victoria (1961) 106 CLR 268 at p.276 per Fullagar J. In Butler, Kitto J observed (at p.280) that "the question must be whether they could stand together, 'live together'". This approach to the way in which apparently competing statutory provisions were to be viewed, was subject to the following comment by Gaudron J in Saraswati v R (1991) 172 CLR 1 at pp.17-18 :

> It is a basic rule of construction that, in the absence of express words, an earlier statutory provision is not repealed, altered or derogated from by a later provision unless an intention to that effect is necessarily to be implied. There must be very strong grounds to support that implication, for there is a general presumption that the legislature intended that both provisions should operate and that, to the extent that they would otherwise overlap, one should be read as subject to the other ...More particularly, an intention to affect the earlier provision will not be implied if the later is of general application ... and the earlier deals with some matter affecting the individual ... Nor will an intention to affect the earlier provision be implied if the later is otherwise capable of sensible operation. The position was stated by Lord Selborne in Seward v The "Vera Cruz" (1884) 10 App Cas 59 at p 68, as follows :
>
> > "where there are general words in a later Act capable of reasonable and sensible application without extending them to subjects specially dealt with by earlier legislation, you are not to hold that earlier and special legislation indirectly repealed, altered, or derogated from merely by force of such general words, without any indication of a particular intention to do so."

38. The recurring nature of the problem, as manifested in the present case, and the approaches available to its resolution were, in my respectful opinion, helpfully identified by Kirby *P* (with whom Clarke and Handley JJ A agreed) in Royal Automobile Club of Australia, Incorporating Imperial Service Club v Sydney City Council (1992) 27 NSWLR 282 at pp.292-293 under the rubric of "Reconciling incompatible statutory duties", in the following way :

> The problem of reconciling apparently incompatible duties imposed by different statutes, is inherent in our system of legislation. Conflicts arise between duties imposed by Federal and State and surviving Imperial statutes. In respect of inconsistencies between a law of a State and a law of the Commonwealth, s.109 of the Australian Constitution provides its own formula for resolving the inconsistency: see Majik Markets Pty Ltd v Brake & Service Centre Drummoyne Pty Ltd (1991) 102 ALR 621 at 630. So far as conflicts between the obligations imposed by differing State statutes are concerned, such conflicts tend to arise from the very way in which statutes are made. Typically, statutes address a particular subject-matter, often in a comprehensive way. Major areas of conflict with earlier or other statutory provisions may be addressed in terms, for example, by the express repeal of an earlier statute or by saving provisions of which s.317JA(6) of the *Local Government Act 1919* is an illustration. Inevitably, however, because statutes are made in respect of different subject matters at different times, it has proved impossible to ensure against the imposition of contradictory obligations either by the terms of successive statutory provisions or by action envisaged under those provisions.
>
> In some jurisdictions an attempt is made to reduce the risk of such conflicts by the adoption of codification of the law, either comprehensive or with respect to particular subject-matters of legal regulation. But, even within a comprehensive code, it is possible to enact provisions involving an unintended conflict of obligations. Codes, encyclopaedias of legal provisions and nowadays computers can reduce the risk that incompatible obligations will be imposed by statute. But occasionally, with the best will in the world, an instance of oversight will be established. Two statutory provisions will then be presented which appear to impose or contemplate contradictory duties.
>
> Necessarily, the common law has provided rules by which such conflicts are to be reconciled. Those rules are found in the canons of statutory construction. One of them provides that a later provision, inconsistent with an earlier provision, will be taken to have repealed the earlier provision. It invokes the maxim *leges posteriores priores contrarias abrogant*: see, eg, R v Chalak [1983] 1 NSWLR 282 at 284 and Re Application of Shephard [1983] 1 NSWLR 96. In the latter decision it was held that a repeal by implication should not be lightly inferred and should not be found unless it is inevitable and unless the later statute is clearly and indisputably contradictory to the former: see Windeyer J in Butler v Attorney-General for the State of Victoria (1961) 106 CLR 268 at 290.
>
> Another rule of the common law provides that a statute dealing with special or particular subject matter will be taken to provide its own regime to the exclusion of obligations imposed universally by a statute of general application. The Privy Council stated this rule in Barker v Edger [1898] AC 748 at 754:

> "The general maxim is, '*Generalia specialibus non derogant*'. When the Legislature has given its attention to a separate subject, and made provision for it, the presumption is that a subsequent general enactment is not intended to interfere with the special provision unless it manifests that intention very clearly. Each enactment must be construed in that respect according to its own subject-matter and its own terms."

But as the Privy Council said, in a further decision which involved the operation of the *Local Government Act* in its relation to the *Mining Act 1906*, things are "rarely as simple" as Barker v Edger suggested. In Associated Minerals Consolidated Ltd v Wyong Shire Council [1974] 2 NSWLR 681 at 686; [1975] AC 538 at 553-554; Lord Wilberforce explained:

> "... even where the earlier statute deals with a particular and limited subject-matter which is included within the general subject-matter with which the later statute is concerned, it is still a matter of legislative intention, which the courts endeavour to extract from all available indications, whether the former is left intact, or is superseded, and the cases in which the latter has been held are almost as numerous as the former."

39. What emerges, I think, from those authorities of relevance to the present case is the presumption that in enacting the *Child Protection (Prohibited Employment) Act* the legislature did not intend to contradict what was an existing and long-standing (for nearly 40 years) beneficial provision in the form of s.579. It is to be emphasised that that section allows individual persons relief against the continuing stigma of a conviction for an offence or a finding that a charge for an offence has been proven against them. And, it seems to me on the authorities, the presumption is reinforced by the rule that the legislature intends both statutes to operate in their own terms, and in their own particular areas of concern, unless by clear and express words the earlier provision be derogated from, in whole or in part, by the later provision. As Windeyer J observed in Butler (106 CLR at p.90), by reference to what Cleasby B had said in Hill v Hall (1876) 1 Ex D 411 at pp.413-414, "Every affirmative statute is a repeal of a precedent affirmative statute, where its matter necessarily implies a negative; but only so far as it is clearly and indisputably contradictory and contrary to the former Act in the very matter, and the repugnancy such that the two Acts cannot be reconciled". The question here, of course, is whether s.12(1) achieves that or whether viewed against s.579 both provisions can sensibly and conveniently operate together: see Cooper Brookes (Wollongong) Pty Ltd v Commissioner of Taxation (1981) 147 CLR 297 at pp 320-321 per Mason J, as he then was, and Wilson J.

40. During argument, as I have said, it was contended for the applicant by Ms Lowson that there was no inconsistency between the respective provisions; but even if there were, such that the later Act impliedly repealed the earlier section, then, counsel said, s.30 of the *Interpretation Act* operated to preserve the rights accorded already to the applicant by s.579. On the other hand, Mr Singleton

relied on s.12(1) as requiring s.579 to yield to its requirements as to the characterisation of a person as a "prohibited person" so that if there be any inconsistency, and he said there was, then s.12(1) expressly provided that the *Child Protection (Prohibited Employment) Act* prevailed over s.579; counsel denied any question of repeal existed, either expressly or impliedly, in that the section remained available to the applicant for all purposes other than the statute which was restricted to child-related employment. In light of the contest so defined, it is necessary first to focus on the subject matters of the competing provisions and then to construe them in the context of the language used to ascertain the true legislative intent.

41. The *Child Protection (Prohibited Employment) Act* on its face seems plain enough. Its object is the protection of children. That protection, at least in one respect and to which the statute is solely directed, is to be achieved by excluding from child-related employment a person considered inimical to the stated purpose and referred to as a prohibited person: see s.6. Central to the achievement of the protection is who or what class of person is within the description of a prohibited person. The statute defines such a person as one convicted (including a finding that a charge for an offence has been proven but without proceeding to a conviction) of a serious sex offence, whether before or after the commencement of the legislation on 3 July 2000: see s.5. A person may obtain relief against the strictness of those provisions by making an application and obtaining an order that the statute is not to apply to the person in respect of the specified offence: see s.9.

42. Against that, s.579 (with the wide scope of its application to all offences as given by s.3 of the *Crimes Act*) is plain in relation to any offence, including those of the type caught by s.5(3) of the *Child Protection (Prohibited Employment) Act,* that conviction for the offence is to "be disregarded for all purposes whatsoever", "be inadmissible in any criminal, civil or other legal proceedings as being no longer of any legal force or effect" and any question "may be answered as if the conviction or finding had never taken place or the recognizance had never been entered into" on certain conditions being satisfied. Those conditions, in short, are that the person entered into a recognizance and a period of 15 years has elapsed since the recognizance was entered into, provided the person observed the conditions of the recognizance and during that period was not otherwise convicted of an offence or a finding made that a charge had been proved against him.

43. The stated object of the *Child Protection (Prohibited Employment) Act* is to exclude from child-related employment prohibited persons, that is persons convicted of a serious sex offence, unless an order be made declaring the statute inapplicable because they do not pose a risk to the safety of children. In my view, the patent intent of the legislature was the protection of children. However, the statutory scheme seeks to achieve that by focussing upon conviction for a specified offence, albeit whether before or after the commencement of the statute. Section 579 has the object of a conviction for an offence, including a sex offence as here, being disregarded for all purposes whatsoever, that is legal and

otherwise, after a period of 15 years on the stated conditions being met. The intent of the measure, clearly I think, is that after the expiration of the stated period, and in relation to what was not a substantial transgression, the person has removed the continuing stigma of a criminal conviction and the benefit of a clean criminal record. May those respective statutory objects, as so identified and having in mind the aim of the legislature in so enacting them, operate or stand together? I consider they can and there is nothing in the statutory scheme of the *Child Protection (Prohibited Employment) Act*, in my view, to make it clearly and indisputably contradictory of s.579. Indeed, I am satisfied that "the fairer and more convenient" construction, to adopt the approach of Mason J in Cooper Brookes (147 CLR at p.321), and one which is consistent with the competing provisions, would only be for them to operate as each subject to and in empathy with the other.

44. My reasons for so construing the legislation may be stated quite shortly. The very basis of the scheme in the *Child Protection (Prohibited Employment) Act* is the status of a person as a "prohibited person" which, in turn, is made to depend upon the person having been convicted of a serious sex offence; if there not be at any relevant time such a conviction, then, it must be the case, the person would not be a prohibited person. In other words, I see no difficulty in the operation of the statute, either as to its terms or in their implementation, in the conviction concerned being one which is only properly recognisable and effective as such. Where a conviction for an offence for some reason, such as s.579 here, is no longer truly effective in any respect then, in my view, it should not, indeed cannot, be sufficiently active or operative to be a relevant conviction for the purposes of s.5 of the *Child Protection (Prohibited Employment) Act*; it has, by statute, to be disregarded and is no longer of any legal force or effect. That view of the interaction between the two provisions seems to me to be consistent with the ordinary meaning of the words used in each and as being consistent with the legislative intent thereby evinced as to both schemes. I see no ambiguity in the provisions as so understood.

45. In the result, I would construe the competing provisions to operate in the following way -

- A prohibited person within the meaning of s.5(1) of the *Child Protection (Prohibited Employment) Act* is a person who has been convicted of a serious sex offence as specified in s.5(3) thereof, whether the conviction occurred before or after the commencement of the statute on 3 July 2000.
- The subject conviction must be one as to which regard may be had in the sense that it is and continues to be properly recognisable and to have legal force and effect; if it were not so, the conviction could have no relevant and effective operation for the purposes of the *Child Protection (Prohibited Employment) Act;* it would be meaningless for that purpose.

46. Section 579 of the *Crimes Act* operates in respect of the conviction (within the extended meaning of that word by s.3 of the *Child Protection (Prohibited Employment) Act)* for a serious sex offence, as defined in s.5(3) of the *Child Protection (Prohibited Employment) Act*, where a recognizance was entered into,

so that on the expiration of a period of 15 years since the recognizance was so entered and the other conditions contained in s.579 are met the conviction ceases to be a relevantly operative and effective conviction for the purpose of characterising a person as a prohibited person under the *Child Protection (Prohibited Employment) Act*.

47. Section 579 operates whether the conviction concerned occurred before or after the commencement on 3 July 2000 of s.5(1) of the *Child Protection (Prohibited Employment) Act*.

48. The view which I have reached, as I have said, was based upon the ordinary meaning of the competing statutory provisions and the legislative intent therefrom perceived. However, and somewhat as confirmation of the conclusion reached, I have relied upon the debate in both the Legislative Assembly and the Legislative Council during the second reading of the bill leading to the enactment of the *Child Protection (Prohibited Employment) Act*: see s.34(1)(a) of the *Interpretation Act*. In that respect, I have noted that the bill was introduced as a response to a key recommendation of the Wood Royal Commission into paedophilia and, although it is apparent that the statute extends well beyond that aspect to cover serious sex offences generally, it is proper nevertheless to read the statute in the context of its origins. Very much related to that approach, I felt confirmed in the ordinary meaning reached as to the provisions by what was said during the debate in the Legislative Council, extracts from which have been cited earlier, when Ms Forsythe spoke of balancing the rights of children with the rights of employees and the vice in enhancing the rights of children to the detriment of the rights of employees. I have to say that I too was concerned to strike a balance in applying the ordinary rules as to statutory construction. Further, the caution expressed by Mr Primrose had relevance to the aspect of a balanced approach. Of course, and of much importance in my view, the comments by the Minister in 1961 during the debate on the enactment of s.579, the relevant part of which has been cited above, only serve to further confirm the conclusion I have reached as to the interaction of the competing provisions.

49. Even if it be thought the construction I have given to the legislation concerned be too wide in the operation of s.579, but I do no think that it is, the circumstances of the applicant in the present case may properly be seen as free of any real doubt. Here, the applicant obtained the benefits of s.579 nearly 16 years ago on 12 March 1986 in respect of an offence committed nearly 32 years ago in January 1970. Apparently, those benefits so obtained have been since enjoyed without question and, properly and reasonably in my view, the applicant was able to have his earlier conviction for what was not a substantial transgression disregarded for all purposes whatsoever and as being no longer of any legal force or effect. In other words, he achieved very many years ago a benefit in March 1986 by the crystallisation of an accruing right since March 1971 under s.579. It would be extreme, I think, for legislation in the terms of the *Child Protection (Prohibited Employment) Act*, particularly having in mind the generality of s.12(1) thereof relating to inconsistency with other laws, for the applicant's clear and well-settled rights under s.579 to be removed. Of course, it is to be

borne in mind that what the legislature has given that the legislature may take away and it is established also that a later parliament is not bound by what an earlier parliament has enacted: *cf* R v Kidman (1915) 20 CLR 425 at p 451 per Higgins J. However, I do not consider the legislature in enacting the *Child Protection (Prohibited Employment) Act* intended to contradict itself from what was already contained in s.579 of the *Crimes Act* and had been for nearly 40 years.

50. The position of the applicant with the rights accrued to him by s.579 very much involves whether the *Child Protection (Prohibited Employment) Act* was intended to change the law and to remove such accrued rights to permit the full and unfettered operation of the statute in respect of prohibited persons. The common law principle in approaching such a problem was stated long ago by Wright J in In re Athlumney; Ex parte Wilson [1898] 2 QB 547 at pp. 551-552, as follows :

> Perhaps no rule of construction is more firmly established than this - that a retrospective operation is not to be given to a statute so as to impair an existing right or obligation, otherwise than as regards matter of procedure, unless that effect cannot be avoided without doing violence to the language of the enactment. If the enactment is expressed in language which is fairly capable of either interpretation, it ought to be construed as prospective only.

51. In what is often referred to as the leading case on this question, Dixon CJ in Maxwell v Murphy (1957) 96 CLR 261 at p.267 shortly and similarly summarised the position thus :

> The general rule of the common law is that a statute changing the law ought not, unless the intention appears with reasonable certainty, to be understood as applying to facts or events that have already occurred in such a way as to confer or impose or otherwise affect rights or liabilities which the law had defined by reference to the past events. But, given rights and liabilities fixed by reference to past facts, matters or events, the law appointing or regulating the manner in which they are to be enforced or their enjoyment is to be secured by judicial remedy is not within the application of such a presumption.

52. I am satisfied that a review of the provisions of the *Child Protection (Prohibited Employment) Act* discloses nothing to suggest that the legislature intended to derogate from or otherwise affect retrospectively a right already crystallised under s.579. I am firmly of that view even if, which I do not think to be the case, the legislature intended to remove the rights accruing but not yet crystallised under s.579. To so view the matter would not only infringe the general common law principle but also that principle as enshrined in s.30(1)(b), (c) and (4)(b) of the *Interpretation Act* as to the protection of statutory rights and even in a situation where those rights have merely commenced to accrue under the earlier legislation in the sense of being contingent. As Gibbs J, as he then was, observed in Mathieson v Burton (1971) 124 CLR 1 at p.23, in relation to the similar provisions in s.8(b) of the *Interpretation Act* of 1897 - "... does not apply where there is merely a hope or expectation that a right will be created ... but it

does protect anything that may truly be described as a right, 'although the right might fairly be called inchoate or contingent'." In so saying, his Honour referred with approval to the general common law rules of construction as stated in Athlumney and in Maxwell.

53. For the foregoing reasons, I conclude that the applicant is not a "prohibited person" within the meaning of that expression in s.5 of the *Child Protection (Prohibited Employment) Act* and, accordingly, that Act has no application to him in respect of the offence committed by him in January 1970 and for which he was convicted but obtained a recognizance in March 1971. That conclusion is based upon the operation in favour of the applicant of s.579 of the *Crimes Act*. He is entitled to a declaration in the terms sought.

54. I make the following orders -

1. DECLARE that on the true construction of the *Child Protection (Prohibited Employment) Act 1998* "A" is not a "prohibited person" as defined in s.5 thereof and is entitled to engage in child-related employment free from the operation of the said Act with respect to him.

2. ORDER that costs be reserved.

3. DIRECT that the Industrial Registrar serve a sealed copy of these orders on the Commissioner of Police.

Appendix 2

AG v Commission for Children and Young People [2001] NSWADT 163

ORDERS: Declare that Mr AG is not a "prohibited person" as defined in s. 5 of the Child Protection (Prohibited Employment) Act and is entitled to engage in child-related employment free from the operation of that Act with respect to him.

Reasons for Decision

1. The applicant in this matter is a 70 year old man employed by a specialist school for children suffering from disabilities (the school). In 1951 he was convicted of two counts of indecent assault on a male person. The *Child Protection (Prohibited Employment) Act 1998* (*Child Protection Act*) makes it an offence for a person to apply for, undertake or remain in child-related employment if he or she is a "prohibited person" defined in the *Child Protection Act* to mean a person who has committed a "serious sex offence."

2. On 24 August 2001 the applicant lodged an application with the Tribunal seeking a declaration that the Act not apply to him in respect of the above mentioned offences and at the same time made application for a stay pending the determination of the substantive application.

3. Section 126(1) of the *Administrative Decisions Tribunal Act 1997* (the *Tribunal Act)* makes it an offence in respect of proceedings in the Community Services Division of the Tribunal, to publish or broadcast except with the consent of the Tribunal, the name of any person mentioned in such procceedings. Although s.126(2) contains an exception in relation to the publication of an official report of the proceedings, because of the sensitivity of this matter I have decided in this decsion not to publish the applicant's name or that of any other person mentioned in these proceedings and not to include in this judgement any other information which could lead to the applicant's identification. Accordingly I refer in this decsion to the applicant as "Mr AG". The official copy of the orders provided to the parties will include the name of the applicant.

Procedural matters

4. The applicant attended these proceedings by telephone and was self-represented. The respondent was legally represented.

5. The stay application first came before me for hearing on 29 August 2001. At that hearing I deferred determining that application not being satisfied that all relevant material necessary to determine a stay was before me. Because of the age of the applicant's convictions the respondent experienced considerable delay in obtaining relevant historical records. The matter was therefore stood over on a number of occasions until such material became available.

Relationship between s.579 of the Crimes Act and the Child Protection Act

6. On 10 September 2001 I made orders granting a conditional stay reserving reasons for that decision. At the time of making these orders I had not had the opportunity of properly considering the implications of the decision of the Industrial Relations Commission of NSW, A v Commission for Children and Young People and Anor [2001] NSWIRComm 194 which had been handed down the day prior to this matter coming before me. The Industrial Relations Commission of NSW (IRC) shares jurisdiction with the Administrative Decisions Tribunal (ADT) in respect of the *Child Protection Act*. A v Commission for Children and Young People and Anor concerned an application to the IRC by a person who had committed a "serious sex offence" as defined by s.5 of the Act. The issue for determination was the operation and interaction between s.579 of the *Crimes Act* and the relevant provisions of the *Child Protection Act*. In that decision Hungerford J determined that the applicant was not a "prohibited person" as defined in s.5 of the Act by reason of the operation of s.579 of the *Crimes Act* and accordingly the *Child Protection Act* did not prohibit his employment in child-related areas.

7. It is convenient at this point to set out the relevant statutory provisions. Section 6(1) of the *Child Protection Act* makes it an offence for a prohibited person to apply for, undertake or remain in child-related employment. A prohibited person is defined by s.5(1) to mean a person convicted of a serious sex offence.

8. Section 5(3) defines a serious sex offence to mean (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

(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

(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

(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

(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.

9. Section 579 of the *Crimes Act 1900* provides that a conviction for an offence is to be "disregarded for all purposes whatsoever", "be inadmissible in any criminal, civil or other legal proceedings as being no longer of any legal force or effect" and any question "may be answered as if the conviction or finding had never taken place or the recognizance had never been entered into" providing certain conditions are met. In summary these conditions are that the person entered into a recognizance; at least fifteen years have elapsed since that recognizance was entered into; the conditions of the recognizance were observed; and, during the relevant period the person was not convicted of an offence, or a finding made that a charge had been proved against him or her.

10. Hungerford J rejected the respondent's argument that s.579 of the *Crimes Act* and the relevant provisions of the *Child Protection Act* were inconsistent and as such the earlier enacted *Crimes Act* must yield to the later enacted *Child Protection Act*. Nor did Hungerford J accept the respondent's submission that s.12(1) of the *Child Protection Act* which provides that that statute "prevails to the extent of any inconsistency between it and any other any

other Act or law" was a complete answer to the relationship between the two (apparently) competing statutes.

11. Hungerford J took the view [at 43] that "there is nothing in the statutory scheme of the *Child Protection (Prohibited Employment) Act*, …to make it clearly and indisputably contradictory of s.579. Indeed, I am satisfied that "the fairer and more convenient" construction, to adopt the approach of Mason J in Cooper Brookes (Wollongong) Pty Ltd v Commissioner of Taxation (147 CLR 297 at p.321), and one which is consistent with the competing provisions, would only be for them to operate as each subject to and in empathy with the other." He explained [at 44]:

> "The very basis of the scheme in the *Child Protection (Prohibited Employment) Act* is the status of a person as a "prohibited person" which, in turn, is made to depend upon the person having been convicted of a serious sex offence; if there not be at any relevant time such a conviction, then, it must be the case, the person would not be a prohibited person. In other words, I see no difficulty in the operation of the statute, either as to its terms or in their implementation, in the conviction concerned being one which is only properly recognisable and effective as such. Where a conviction for an offence for some reason, such as s.579 here, is no longer truly effective in any respect then, in my view, it should not, indeed cannot, be sufficiently active or operative to be a relevant conviction for the purposes of s.5 of the *Child Protection (Prohibited Employment) Act*; it has, by statute, to be disregarded and is no longer of any legal force or effect. That view of the interaction between the two provisions seems to me to be consistent with the ordinary meaning of the words used in each and as being consistent with the legislative intent thereby evinced as to both schemes. I see no ambiguity in the provisions as so understood."

12. In dismissing the respondent's contention that in enacting the *Child Protection Act* the legislature intended to override s.579, His Honour concluded [at 52]:

> " I am satisfied that a review of the provisions of the *Child Protection Act* discloses nothing to suggest that the legislature intended to derogate from or otherwise affect retrospectively a right already crystallised under s.579. I am firmly of that view even if, which I do not think to be the case, the legislature intended to remove the rights accruing but not yet crystallised under s.579. To so view the matter would not only infringe the general common law principle but also that principle as enshrined in s.30(1)(b), (c) and (4)(b) of the *Interpretation Act* as to the protection of statutory rights and even in a situation where those rights have merely commenced to accrue under the earlier legislation in the sense of being contingent. As Gibbs J, as he then was, observed in Mathieson v Burton (1971) 124 CLR 1 at p.23, in relation to the similar provisions in s 8 (b) of the *Interpretation Act* of 1897 – "... does not apply where there is merely a hope or expectation that a right will be created ... but it does protect anything that may truly be described as a right, 'although the right might fairly be called inchoate or contingent'." In so saying, his Honour referred with approval to the general common law rules of construction as stated in Athlumney and in Maxwell."

13. The issue before Hungerford J is on all fours with the issue raised by Mr AG's application. Here the offences, for which Mr AG was convicted in 1950, absent any consideration of s.579, constitute "serious sex offences" as that term is defined by the *Child Protection Act.* It is not in issue that s.579 applies to Mr AG and these convictions, all relevant conditions set out in that provision having been met. These 1950 offences are the sole matters which trigger Mr AG's status as a "prohibited person."

14. At the conclusion of proceedings the respondent filed written submissions in relation to the application of s.579. It was argued for the respondent that Hungerford J had erred in determining that a conviction to which s.579 applied must be disregarded and therefore was not a relevant conviction for the purpose of s.5 of the *Child Protection Act*. In essence these written submissions represented a reventilation of the respondent's case put in A v Commission for Children and Young People and Anor.

15. As correctly pointed out for the respondent, a decision of the Industrial Relations Commission in Court Session is not binding upon the ADT. In the absence of authority of a superior court members of this Tribunal are entitled to reach their own conclusion as to the proper interpretation of the *Child Protection Act*. The Tribunal is not bound by the doctrine of precedence in respect of decisions of the IRC. Consequently A v Commission for Children and Young People and Anor has persuasive force only. However, in my view the principles of Tribunal comity demand that caution should be exercised before departing from an approach adopted by another court or tribunal where jurisdiction is shared. It goes without saying that principles of Tribunal comity do not require members of the ADT to apply decisions that are patently incorrect in law.

16. I note that the matter now before me has been fully argued before the IRC. Mr Justice Hungerford had the benefit of lengthy and detailed submissions from three counsel. The decision relies on a number of well-known principles of statutory interpretation. There is no obvious error of law. Having had the benefit of considering Hungerford Js' detailed judgement I intend in this decision to adopt that approach in respect to the relationship between the two statutory provisions.

Order

17. As a consequence of this approach, Mr AG cannot be lawfully regarded as a "prohibited person" and therefore the jurisdiction of this Tribunal to make an order under s.9 of the *Child Protection Act* cannot be invoked. Accordingly the application before me is otiose. This means, in short, that it is not an offence for Mr AG to remain in child-related employment. Nor is it an offence for his employer to continue to employ him. Accordingly to clarify the position of Mr AG I make the following revised orders:

> Declare that Mr AG is not a "prohibited person" as defined in s.5 of the *Child Protection (Prohibited Employment) Act* and is entitled to

engage in child-related employment free from the operation of that Act with respect to him.

18. Before leaving this issue it is a matter of some concern that the respondent's legal representatives failed in these proceedings to appraise the Tribunal of the decision in A v Commission for Children and Young People and Anor which came before the IRC for hearing in March this year. As previously noted that decision was handed down the day prior to the commencement of proceedings in respect of Mr AG's stay application. Written submissions on the application of s.579 were only provided to the Tribunal when at the close of these proceedings the applicant raised the so-called s.579 defence. I am especially troubled by this situation given that the applicant was without the benefit of legal representation. Legal representatives have a clear duty to place all relevant material before a court or tribunal irrespective of whether such material will assist their case.

19 The issues raised by the interaction of s.579 of the *Crimes Act* and the *Child Protection Act* remain live issues. The respondent advises the Tribunal that an appeal in respect of A v Commission for Children and Young People and Anor is being considered. If it transpires that Hungerford J was in error (and consequently my conclusion in respect of Mr AG's application is wrong) and, as the stay application was fully argued before me, I set out my reasons for granting a conditional stay.

Reasons

Relevant legislative provisions

20. Section 9(1) of the Act allows the Tribunal, on the application of a prohibited person, to declare that the Act does not apply to that person in respect of a specified offence.

21. Section 9(4) and 9(5) set out the tests to be applied by the Tribunal when making an order under this section. These provisions state:

> (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:
>
> (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,

(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,

(e) the seriousness of the prohibited person's total criminal record,

(f) such other matters as the tribunal considers relevant.

22. Pursuant to s.9(9), an order may be made subject to conditions.

23. Section 9 (6) allows the Tribunal on application to stay the operation of a prohibition under the Act : "… the relevant tribunal may stay the operation of a prohibition under this Act pending the determination of the matter."

Principles to apply in determination of stay application

24. The Act does not expressly state what matters are to be taken into account in the determination of an application for a stay made under s. 9(6) of the Act. This raises the question whether the Tribunal in determining a stay is to have regard to the matters raised in s.9(5) and s.9(6) as it must when determining an application for a final order under s.9(1) of the Act. In my view the matters set out in s.9(4) and s.9(5) are relevant to the determination of a stay application. Section 9(4) provides that the Tribunal is *not to make an order under this section* [my emphasis] unless it considers that the person the subject of the proposed order does not pose a risk to children. Section 9(5) sets out a non-exhaustive list of factors to be taken into account in deciding whether or *not to make an order under this section*. A stay order is an order made under s.9 of the Act therefore it follows that the reference to "an order under this section" embraces both stay and final orders. This approach is consistent with that taken by Barr J in Commissioner for Children and Young People v "G" & Anor [2001] NSWSC 534 (21 June 2001).

25. What additional issues, if any, are to apply when determining a stay application? Section 60 of the *Tribunal Act* lists factors to be taken account where a party seeks a stay (or some other order) in respect of a reviewable decision. That section relevantly provides:

(3) The Tribunal may make an order under this section only if it considers that it is desirable to do so after taking into account:

(a) the interests of any persons who may be affected by the determination of the application, and

(b) any submission made by or on behalf of the administrator who made the decision to which the application relates, and

(c) the public interest.

26. While, as is self evident, an application made under s.9(6) is not an application for a stay of a reviewable decision but an application for a stay of the operation of Part 2 of the *Child Protection Act,* in my view s.60 of the *Tribunal Act* provides useful guidance on the range of matters to be taken into account. (See for example the comments of Deputy President Hennessy in G v Commissioner, NSW Commission for Children and Young People [2000] NSWADT 180 [at 15-16])

Evidence

27. The documents before me in this matter include the applicant's criminal history; a copy of police statements taken at the time of the offence and various court documents; a record of a telephone conversation between the solicitor representing the respondent, and the principal of the school at which the applicant is employed; various character testimonials and references tendered by the applicant; a report issued by the NSW Department of Community Services (DoCS). The respondent advised that it had been unable to locate a transcript of the court proceedings relating to the offences.

28. On the first day of hearing the applicant gave evidence about the offences of sexual assault for which he was convicted in 1951. He said he had only a vague recollection of these events as they occurred so long ago. He said the offence involved a young boy who used to visit him at his place of work. According to him the offence involved taking the boy to an isolated area at the back of his work premises where he touched the boy "on his private parts." He could not recall whether he removed the boy's clothing. He said he thought the incident happened on only one occasion but could not be sure. He claimed not to have had, or attempted to have, sexual intercourse with the boy. He said he knew what he did was wrong and was deeply ashamed.

29. The police statements of both the victim and the applicant given at the time of the offence were tendered in evidence. The victim in his statement estimated that on about thirteen occasions the applicant took him "out back" and masturbated him; the applicant told him not to talk to anybody.

30. The applicant's statement to the police was broadly consistent with that given by the boy. He stated that the incidents occurred over a period of about six months.

31. The applicant is currently employed to escort a young boy to and from school on a twelve-seater bus operated by the school. Mr AG estimates the boy to be about 12 years of age. His charge suffers from epilepsy and is unable to communicate through language. About six other students take the bus.

32. According to the principal of the school the driver of the bus is very experienced and has worked for the school for some years. He has can see the whole of the interior of the bus from his rear vision mirror and has a high level of awareness of what is happening on the bus. If one of the children were to become disruptive he would stop the bus.

33. According to the applicant other adults sometimes travel on the bus to act as escorts for individual children with special needs. The principal states that the boy for which Mr AG is responsible sits on the bus next to another child and Mr AG sits directly behind the two.

34. The applicant gave evidence that he had held his current position for about a month. He last worked during the Olympics and had found it hard to get work since then. In his current position he earns about $54 a day. He claims he would be “battling without this money”. Both he and his wife receive a pension, his a part pension. He has a 32 year old son who suffers from autism and lives at home. According to the applicant he was unsure what financial contribution, if any, his son made to the family, he left that to his wife.

35. He says he enjoys his position and feels that because of his experience of caring for a child with a disability he is well placed to assist other children who suffer from disabilities. He has been happily married for 38 years.

Applicant's submissions

36. The applicant submits that a stay should be granted because first, the income generated was important to his family; second the offences for which he has been convicted were one-off incidents for which he is now deeply ashamed; third he has not re-offended or done anything which could be said to pose a risk to children.

Respondent's submissions

37. The respondent opposed the granting of the stay and proposed a number of conditions in the event the Tribunal proceeded to grant the application. In support of this submission the respondent argued first, that a number of material inconsistencies emerged between the applicant’s evidence and the historical documentary evidence concerning the offence; second, the offences for which Mr AG was charged involved a young child and as such must be regarded as being at the serious end of the scale; third, the children in the applicant’s care suffer from intellectual disabilities and as such are especially vulnerable; fourth, there is no direct adult supervision of Mr AG. In short the respondent contends that the Tribunal cannot be satisfied that the applicant does not pose a risk to children.

Onus of Proof

38. In determining whether the applicant does pose a relevant risk to children I have applied the civil standard of proof. However I have taken into account the gravity of the matter to be determined: see the remarks of Dixon J in Briginshaw -v- Briginshaw (1938) 60 CLR at 361-362.

Findings and Conclusions

39. As was revealed by the production of the contemporaneous court and police records relating to the applicant's offences, there are significant inconsistencies between those records and the applicant's account of the assaults given in these proceedings. Relevantly in his evidence before this Tribunal the applicant understated both the seriousness and frequency of the assaults.

40. The truthfulness of an applicant's account of his/her criminal history in my view is of critical importance in proceedings in respect of a stay application made under the *Child Protection Act*. As a general rule a stay application must be determined as soon as possible after being lodged with the Tribunal as to do otherwise would render the application of little utility. However in practice this can mean that the Tribunal does not have the benefit of certain relevant material that may later become available when the matter proceeds to final hearing. In that environment the veracity of an applicant's often unsupported oral evidence given in the course of the stay hearing, takes on great importance.

41. Candor in the context of proceedings under the *Child Protection Act* is also important as it may indicate whether the applicant has gained some insight into the conduct which gave rise to his/ her conviction for a "serious sex offence" which in turn may assist the Tribunal in determining whether the applicant continues to represent a risk to the safety of children. Importantly candor allows the Tribunal to accept with some comfort the claim typically made by applicants in these proceedings that they are genuinely contrite for the offence/s for which they were convicted and have not and will not re-offend.

42. Half a century has now passed since the applicant who is now seventy-years of age was convicted for the offences of indecent assault. In giving evidence Mr AG did not have the benefit of contemporaneous records to assist with his recollection of events. While I am troubled by aspects of Mr AG's account of the assaults which downplayed their severity and incidence, in the circumstances of this case I am not prepared to find that of itself Mr AG's faulty recollection indicates that he does not appreciate the gravity of his conduct or that his evidence taken as a whole is unreliable. In all other respects the applicant impressed me as a forthright witness. It is to be expected that with the passage of some fifty years a witness' recollection of events will be something less than accurate.

43 I turn now to consider the specific matters set out in s.9(5) required to be taken into account in determining whether the applicant poses a risk to children.

44 *Seriousness of the offences* The conduct for which the applicant was convicted was serious both in terms of the nature of the offence and its frequency. It cannot readily be dismissed as a one-off aberration but the conduct was repeated over a six month period. While in my view the sexual assault of a nine year old child in whatever form that assault may take must be seen as being at the serious end of the scale I note that here no violence was involved and intercourse not attempted.

45. *Ages and age difference* At the time of the offence the applicant was ten years older than his victim, he being nineteen, and the victim nine years of age. The offence the sexual assault of a child, the very conduct the concern of the *Child Protection Act*. The inescapable conclusion from the age difference of the parties is that the applicant abused his position of power and breached his relationship of trust with the boy.

46. *Criminal record* Mr AG's criminal record reveals that the only offences for which he has been convicted are those that gave rise to his application before the Tribunal.

47. While s.9(5) commands the Tribunal to have regard to the offences which caused the applicant to become a "prohibited person", it does not follow that because a person has committed a "serious sex offence" the Tribunal must find that the applicant represents a risk to children. If this were the case then the Tribunal's discretion to declare that the Act is not to apply to a person convicted of a "serious sex offence" would be at best illusory. In my view the Act makes clear that while the nature and seriousness of the offence are highly relevant factors, the conduct which gave rise to the conviction is relevant but not determinative.

48. In my view the applicant's unblemished criminal record after the 1951 convictions carries great weight. The DoCS' report filed by the respondent reveals that no adverse notifications have been made in respect of the applicant. I have before me a number of testimonials, which, while not acknowledging the offences for which the applicant was convicted, indicate that he commands respect within the community and is held in high regard by his employers. In short there is no evidence before me to suggest that the applicant has been involved in any improper conduct involving children since 1951. The passage of half century since the offence occurred without any report or conviction for improper conduct involving children provides a strong basis for finding that the applicant is reformed and no longer poses a relevant risk to children.

49. I have given close consideration to the submissions made by the respondent who opposes the stay. The respondent's argument that the children with whom the applicant works are especially vulnerable because of their intellectual disability and limited verbal skills holds considerable weight. It is for

this reason that I deferred making any decision until the DoCS' report became available.

50. I do not accept however the respondent's argument that the applicant has not demonstrated any need for a stay as he has only held his current position for a few weeks; was unemployed for a significant period before that; and in any event receives a government pension and possibly some supplementary income from his disabled son. The concept of "need" in stay proceedings is highly subjective. Here while the applicant may not be reduced to penury if the stay is not granted I note that he is seventy years of age, his wife does not work, he lives in Sydney, does not his own home and without the income generated from his current position finds it extremely difficult to make ends meet. The evidence before me makes clear that the applicant's current employer is unable to hold the position open indefinitely and that unless a stay is granted the applicant will lose his position. I am satisfied that the applicant has demonstrated that his interests would be seriously and adversely effected unless a stay is granted.

51. In reaching a determination in this matter the interests of the applicant must be seen as a relevant, but secondary, consideration. Unless I am comfortably satisfied that the applicant does not represent a risk to children a stay cannot be granted irrespective of any adverse consequences that may flow to the applicant. However having taken into account all relevant factors I am comfortably satisfied that the applicant does not pose a risk to the children and accordingly pursuant to s.9(6) I grant a stay, subject to the conditions outlined below.

Conditions

52. The respondent submits that if the Tribunal intends to grant a stay it should be granted subject to conditions. A Minute of Proposed Conditions for Stay was filed by the respondent on 7 September 2001 and set out four proposed conditions. In the interests of caution I broadly accept the respondent's submissions that conditions should be imposed although it would appear to me in light of my findings in respect of the applicant that these conditions may be unnecessary. This matter however can be more fully explored prior to making final orders.

53. I have given close consideration to the respondent's proposal that a condition be imposed that "Another adult be present (other than the bus driver) whilst the applicant is engaged [in his current position]." I decline to impose that condition as first, in my view the absence of a second adult does not mean the applicant represents a risk to children; second in any event I note that the driver of the bus while not supervising the applicant is in his company at all relevant times, is very experienced and enjoys the confidence of his employer; and third, from the evidence before me it would appear that if such condition were

imposed there is a strong likelihood that Mr AG would not be permitted to return to his current position.

Orders made on 10 September 2001

54. The operation of a prohibition under the *Child Protection (Prohibited Employment) Act 1998* in relation to the offences of "Indecent assault on Male person (2 charges)" of which the applicant was convicted on 31 January 1951 and 23 July 1951 respectively, is stayed pending the determination of this matter subject to the following conditions:

> (1) That the applicant not engage in any paid or voluntary child related employment as defined in the *Child Protection (Prohibited Employment) Act 1998*, apart from his current employment as an escort for a disabled child with the School 'X';
>
> (2) The applicant to inform School 'X' in writing within forty eight hours of the date of these orders of the nature of his convictions and provide a copy of that correspondence to the Commission and the Tribunal; and
>
> (3) A copy of this order to be served on the Principal and bus driver of the School 'X' and the Commissioner of Police, New South Wales Police Service.

Extracts of the Minutes of the Committee on Children and Young People

Relevant extracts of the Minutes of the Committee on Children and Young People are included:

Meeting No. 17 Friday 15 March 2002

Meeting No. 18 Friday 22 March 2002

No. 17

COMMITTEE ON CHILDREN AND YOUNG PEOPLE

PROCEEDINGS

10:00 A.M., FRIDAY 15 MARCH 2002
AT PARLIAMENT HOUSE, SYDNEY

MEMBERS PRESENT

Legislative Council
Ms Burnswoods
Mr Primrose
Mr Harwin

Legislative Assembly
Mr Campbell
Ms Andrews
Mr Cull
Mr Smith
Mrs Hopwood

The Chair, Mr Campbell, presiding.

Also in attendance: Mr Faulks, Committee Manager, Ms Callinan, Project Officer, Ms Dart, Committee Officer, and Ms Tanzer, Assistant Committee Officer.

1. Apologies

Apologies were received from Mr Corbett, Mr Tsang and Ms Beamer.

….

6. Public hearing into proposed legislative amendments concerning employment screening of persons in child-related work

The Chair indicated that he had ordered a public hearing into matters associated with proposed legislative amendments regarding employment screening of persons in child-related work. The public hearing would adopt a roundtable format, with all witnesses sworn and examined together. The Chair noted that a briefing paper detailing the proposed legislative amendments had been distributed previously.

The Chair noted that the matters to be examined involved particular issues at law.

On the motion of Mr Primrose, seconded Ms Andrews:

> That Ms Callinan, Project Officer, be permitted to clarify specific legal issues raised in testimony by witnesses during the roundtable discussion.

Passed unanimously.

The public were admitted.

> Ms Gillian Calvert, Commissioner for Children and Young People
> Ms Judith Walker, Law Society
> Ms Catherine Escobar, Law Society
> Ms Sharryn Ryan, Law Society
> Ms Kathrina Lo, Attorney General's Department
> Mr Piccolo Willoughby, Attorney General's Department

were called and sworn.

The witnesses acknowledged receipt of a summons issued by the Chair under the Parliamentary Evidence Act 1901.

The witnesses were examined by the Chair and Members of the Committee.

In evidence, Ms Calvert requested a particular matter be held as confidential.

On the motion of Ms Burnswoods, seconded Mr Primrose:

> The transcript of evidence at page 9 (line 46) to page 10 (line 29), page 11 (line 3 and line 5), and Exhibit 1 to the hearing, be in camera evidence.

Passed unanimously.

Evidence completed, the witnesses withdrew.

7. General business

There being no further business, the Committee adjourned at 11:40 a.m.

No. 19

COMMITTEE ON CHILDREN AND YOUNG PEOPLE

PROCEEDINGS

7:00 P.M.,TUESDAY 9 APRIL 2002 AT PARLIAMENT HOUSE, SYDNEY

MEMBERS PRESENT

Legislative Council	*Legislative Assembly*
Mr Harwin	Mr Campbell
Mr Primrose	Ms Andrews
Ms Burnswoods	Mr Cull
Mr Corbett	Mr Smith
Mr Tsang	Mrs Hopwood

The Chair, Mr Campbell, presiding.

Also in attendance: Mr Faulks, Committee Manager, Ms Dart, Committee Officer, and Ms Tanzer, Assistant Committee Officer.

1. Apologies

Apologies were received from Ms Beamer.

….

4. Consideration of the Chair's draft report: "Amendments to the *Child Protection (Prohibited Employment) Act 1998* regarding convictions for serious sexual offences, and other matters"

The draft report: "Amendments to the *Child Protection (Prohibited Employment) Act 1998* regarding convictions for serious sexual offences, and other matters" (Report 7/52), having previously been distributed to Members, was accepted as being read.

The Committee proceeded to deliberate on the draft report in globo:

Recommendation 1: read and agreed to

Recommendation 2: read and agreed to

Recommendation 3:	read and agreed to
Chapter 1:	read and agreed to
Chapter 2:	read, amended and agreed to
Chapter 3:	read and agreed to
Chapter 4:	read and agreed to
Appendix 1:	read and agreed to
Appendix 2:	read and agreed to

On the motion of Ms Andrews, seconded Mr Harwin:

> That the draft report: "Amendments to the *Child Protection (Prohibited Employment) Act 1998* regarding convictions for serious sexual offences, and other matters", be read and agreed to.

Passed unanimously.

On the motion of Ms Andrews, seconded Mr Harwin:

> That the draft report: "Amendments to the *Child Protection (Prohibited Employment) Act 1998* regarding convictions for serious sexual offences, and other matters" be accepted as a report of the Committee on Children and Young People, and that it be signed by the Chair and presented to the House.

Passed unanimously.

On the motion of Ms Andrews, seconded Mr Harwin:

> That the Chair and Manager be permitted to correct any stylistic, typographical and grammatical errors in the report.

Passed unanimously.

….

6. General business

There being no further business, the Committee adjourned at 7:20 p.m.