



New South Wales

Child Protection (Working with Children) and Other Child Protection Legislation Amendment Act 2016 No 56

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Child Protection (Working with Children) and Other Child Protection Legislation Amendment Act 2016 No 56

Act No 56, 2016

An Act to amend the *Child Protection (Working with Children) Act 2012* and the *Children and Young Persons (Care and Protection) Act 1998* and other Acts with respect to working with children clearance checks and the employment of children; and for other purposes. [Assented to 25 October 2016]

The Legislature of New South Wales enacts:

1 Name of Act

This Act is the *Child Protection (Working with Children) and Other Child Protection Legislation Amendment Act 2016*.

2 Commencement

This Act commences on the date of assent to this Act.

Schedule 1 Amendment of Child Protection (Working with Children) Act 2012 No 51

[1] Section 5 Definitions

Insert in alphabetical order in section 5 (1):

key position, in an organisation, means each of the following:

- (a) the chief executive of the organisation,
- (b) the principal officer—if the organisation is a designated agency, a registered agency or an accredited adoption service provider,
- (c) any other position in the organisation that is of a kind prescribed by the regulations.

[2] Section 9B Governing body to ensure persons appointed to key positions hold clearance

Omit section 9B (1).

[3] Section 15 Assessment of applicants and holders

Insert after section 15 (4) (j):

- (j1) any relevant information in relation to the person that was obtained in accordance with section 36A,

[4] Section 16 Request for further information

Omit section 16 (2) and (3). Insert instead:

- (2) The Children's Guardian may terminate an application for a clearance or cancel a clearance if the applicant or holder fails, without reasonable excuse, to provide further information within 3 months of the request being made and the Children's Guardian has not withdrawn the request.
- (3) The Children's Guardian must:
 - (a) as soon as practicable after terminating an application, give written notice of that termination to the applicant and to each person that the Children's Guardian reasonably believes to be a notifiable person in relation to the applicant, or
 - (b) as soon as practicable after cancelling a clearance, give written notice of that cancellation to the holder of the clearance and to each person that the Children's Guardian reasonably believes to be a notifiable person in relation to the holder of the clearance.

[5] Section 24

Omit the section. Insert instead:

24 Surrender of clearances

- (1) The holder of a working with children check clearance may, with the consent of the Children's Guardian, surrender the clearance at any time.
- (2) The Children's Guardian must not consent to the surrender of a clearance if the Children's Guardian is of the opinion that it is likely that there is a risk to the safety of children if the holder were to engage in child-related work.
- (3) The Children's Guardian must, as soon as practicable after consenting to the surrender of a clearance, cancel the clearance and give written notice of that

cancellation to each person that the Children's Guardian reasonably believes to be a notifiable person in relation to the holder of the clearance.

[6] Section 26 Persons not entitled to apply for review or enabling order

Insert “, or whose working with children check clearance has been cancelled,” after “refused” in section 26 (1) (c).

[7] Section 26 (2) (b)

Insert “(including any equivalent orders made by a court of a jurisdiction other than this State (including jurisdictions outside Australia))” after “the following orders”.

[8] Section 26 (2) (c)

Insert “(or a corresponding prohibition order under section 19 of that Act)” after “2004”.

[9] Section 27 Applications to Civil and Administrative Tribunal for administrative reviews of clearance decisions

Insert “under section 23” after “Children's Guardian” in section 27 (2).

[10] Section 28 Orders relating to disqualified and ineligible persons

Insert “under section 23” after “cancelled” in section 28 (3) (b).

[11] Section 30 Determination of applications and other matters

Insert after section 30 (1) (j):

- (j1) any relevant information in relation to the person that was obtained in accordance with section 36A,

[12] Section 35 Notification by reporting bodies of conduct constituting assessment requirement trigger

Omit section 35 (2). Insert instead:

- (2) Notification under this section does not extend to findings made by the reporting body before 3 July 1995 unless:
 - (a) the reporting body is otherwise directed in writing by the Children's Guardian in respect of a finding made by the reporting body, or
 - (b) a person holding a key position in the organisation has knowledge of a finding made by the reporting body.
- (2A) A direction of the Children's Guardian may specify a particular finding or may specify findings of a particular class (such as findings against a specified person or findings during a specified period).
- (2B) Nothing in this section:
 - (a) prevents a reporting body from notifying the Children's Guardian about a finding made before 3 July 1995, or
 - (b) requires a reporting body or a person holding a key position to review or to seek out records created before 3 July 1995, otherwise than in accordance with a direction given under this section.

[13] Section 36A

Insert after section 36:

36A Exchange of information to bodies in other jurisdictions

- (1) In this section:
working with children check information means information relevant to determining whether to grant or cancel a working with children check clearance (or its equivalent in another jurisdiction) to a person and may include any information about the person.
- (2) The object of this section is to provide for the exchange of working with children check information between the Children's Guardian and bodies that administer working with children check clearances in other jurisdictions.
- (3) The Minister may, by order published in the Gazette, make protocols setting out the circumstances under which working with children check information may be exchanged under this section.
- (4) The protocols may contain recommended privacy standards for bodies in other jurisdictions and may prohibit the disclosure of information under this section that do not adopt those standards.
- (5) The Minister is to consult with the Privacy Commissioner in the preparation of the protocols.
- (6) The Children's Guardian may exchange working with children check information with bodies that administer working with children check clearances in other jurisdictions, but only if the exchange is in accordance with the protocols.
- (7) If a person, acting in good faith, exchanges working with children check information in accordance with this section, that person is not liable to any civil or criminal action, or any disciplinary action, for exchanging the information.
- (8) Nothing in this section limits an exchange of working with children check information that is otherwise permitted under any Act or law.

[14] Section 45 Unauthorised disclosure or dishonest collection of information

Insert after section 45 (2):

- (3) For the avoidance of doubt, if a worker has consented to the disclosure to an agency prescribed by the regulations of information indicating that a criminal record check did not disclose any criminal record in relation to the worker, the Children's Guardian may, at the time of the verification of the worker under section 9A, disclose that information to the Secretary of the agency.

[15] Section 45A

Insert after section 45:

45A False or misleading statements

A person must not, in any application under this Act or the regulations, or in connection with an inquiry made by the Children's Guardian in relation to any such application, make a statement or furnish information that the person knows to be false or misleading in a material particular.

Maximum penalty: 5 penalty units.

[16] Schedule 3 Savings, transitional and other provisions

Omit clause 16. Insert instead:

16 Matters for consideration

- (1) Sections 15 and 30, as amended by the amending Act, do not apply to an application for a clearance or an application for an administrative review of a decision to refuse an application for a clearance.
- (2) In this clause:
application for a clearance means an application for a working with children check clearance made by a person before 2 November 2015.

[17] Schedule 3, Part 5

Insert after Part 4:

Part 5 Provisions consequent on enactment of Child Protection (Working with Children) and Other Child Protection Legislation Amendment Act 2016

23 Definition

In this Part:

amending Act means the *Child Protection (Working with Children) and Other Child Protection Legislation Amendment Act 2016*.

24 Cancellation of clearance where information has not been provided

Section 16, as amended by the amending Act, extends to a request for further information made before that amendment. However, in such a case the Children's Guardian must not cancel a clearance until at least 3 months after that amendment.

25 Reviews and appeals

An amendment made to a provision of Part 4 of this Act by the amending Act does not apply to or in respect of a review (or an appeal arising from a review) if the review commenced before that amendment and that provision, as in force immediately before that amendment, continues to apply to and in respect of any such review or appeal.

26 False and misleading information and statements

Section 45A, as inserted by the amending Act, does not extend to a statement made or information furnished before the commencement of that section.

Schedule 2 Amendment of Children and Young Persons (Care and Protection) Act 1998 No 157

[1] Sections 226A and 226B

Insert after section 226:

226A Enforcement of undertakings

- (1) The Children's Guardian may accept a written undertaking given by a person for the purposes of this section in connection with a matter in relation to which the Children's Guardian has a function under this Act.
- (2) Without limiting subsection (1), an undertaking that the Children's Guardian may accept includes an undertaking to carry out a restorative justice activity.
- (3) The person may withdraw or vary the undertaking at any time, but only with the consent in writing of the Children's Guardian. The consent of the Children's Guardian is required even if the undertaking purports to authorise withdrawal or variation of the undertaking without that consent.
- (4) The Children's Guardian may apply to the Supreme Court for an order under subsection (5) if the Children's Guardian considers that the person who gave the undertaking has breached any of its terms.
- (5) The Court may make all or any of the following orders if it is satisfied that the person has breached a term of the undertaking:
 - (a) an order directing the person to comply with that term of the undertaking,
 - (b) an order directing the person to pay to the State an amount not exceeding the amount of any financial benefit that the person has obtained directly or indirectly and that is reasonably attributable to the breach,
 - (c) any order that the Court thinks appropriate directing the person to compensate any other person who has suffered loss or damage as a result of the breach,
 - (d) an order suspending or revoking any employer's authority,
 - (e) any other order the Court considers appropriate.

226B Power to compel production of information

- (1) The Children's Guardian may, by notice in writing, request that a person provide the Children's Guardian with information (including documents) relevant to the exercise of its functions relating to the employment of children.
- (2) A notice under subsection (1) may be given for the purposes of:
 - (a) preparing submissions to the Supreme Court under this Act, or
 - (b) investigating a complaint relating to the employment of children.
- (3) A person to whom any such request is given is by this section authorised to provide the Children's Guardian with the information requested.
- (4) A notice under this section may specify a day on or before which the notice is to be complied with.

- (5) If documents are given to the Children's Guardian under this section, the Children's Guardian:
 - (a) may take possession of, and make copies of or take extracts from, the documents, and
 - (b) may keep possession of the documents for such period as is necessary for the purposes of preparing the submission or investigating the complaint, and
 - (c) during that period must permit them to be inspected at all reasonable times by the persons who would be entitled to inspect them if they were not in the possession of the Children's Guardian.

[2] Section 236A

Insert after section 236:

236A Entry without warrant into premises—suspected employment of children

- (1) This section applies to any premises that the Children's Guardian reasonably suspects is a place at which a person is employing a child in contravention of Chapter 13.
- (2) The Children's Guardian may, at any time, enter and inspect any premises to which this section applies without the need for any authority other than that conferred by this section for the purpose of ensuring that the provisions of Chapter 13 with respect to the premises are being complied with.
- (3) Nothing in this section authorises the entry of a dwelling.

[3] Section 259A Penalty notices

Insert at the end of section 259A (10) (b):

- , or
- (c) an employee of the Office of the Children's Guardian authorised in writing by the Children's Guardian as an authorised officer for the purposes of this section.

Schedule 3 Amendment of Teaching Service Act 1980 No 23

[1] **Section 93L Suspension of officers from duty pending certain decisions or on lapsing of working with children check clearance**

Insert after section 93L (2) (a):

- (a1) is a charged person within the meaning of Part 4B, or

[2] **Section 93R Definitions**

Insert in alphabetical order in section 93R (1):

charged person means a person whose working with children check clearance is cancelled pending determination of proceedings against the person for an offence specified in Schedule 2 to the *Child Protection (Working with Children) Act 2012*.

[3] **Section 93R (1), definition of “unauthorised person”**

Omit paragraph (a). Insert instead:

- (a) a person whose working with children check clearance is cancelled under section 23 of the *Child Protection (Working with Children) Act 2012*, other than a charged person, or
- (a1) a charged person on the person being convicted (within the meaning of the *Child Protection (Working with Children) Act 2012*) of an offence specified in Schedule 2 to that Act, or

Note. A conviction includes a finding that the charge for an offence is proven, or that a person is guilty of an offence, even though the court does not proceed to conviction (see the definition of **conviction** in the *Child Protection (Working with Children) Act 2012*).

[4] **Section 93W Effect of person obtaining working with children check clearance**

Omit section 93W (2) and (3). Insert instead:

- (2) If the person is granted a clearance and a period of not more than 12 months has elapsed since the date on which the person’s employment was terminated under section 93T, the person is entitled to be reinstated to, or re-employed in, a position in the Teaching Service that is similar to the position that the person held when his or her employment was terminated.

[5] **Schedule 3 Savings and transitional provisions**

Insert after Part 5:

Part 6 Provisions consequent on enactment of Child Protection (Working with Children) and Other Child Protection Legislation Amendment Act 2016

22 **Secretary may reinstate or re-employ certain persons dismissed under section 93T**

- (1) In this clause:

amending Act means the *Child Protection (Working with Children) and Other Child Protection Legislation Amendment Act 2016*.

dismissed person means an officer or temporary employee who, before the commencement of the amending Act, was dismissed under section 93T because the person’s working with children check clearance was cancelled as

a consequence of the commencement of proceedings against the person in relation to an offence.

- (2) The Secretary may reinstate a dismissed person to, or re-employ a dismissed person in, a position in the Teaching Service that is similar to the position that the person held when his or her employment was terminated.
- (3) The Secretary must not reinstate or re-employ a dismissed person under subclause (2) if the person is or becomes an unauthorised person (within the meaning of Part 4B, as amended by the amending Act).
- (4) A dismissed person, on being reinstated or re-employed under this clause, is taken for the purposes of this Act or any other Act or law:
 - (a) to have never been dismissed from the Teaching Service, and
 - (b) to have been on leave without pay during the period between dismissal and reinstatement or re-employment.
- (5) However, the Secretary may, after reinstating or re-employing a dismissed person under this clause, suspend the dismissed person under section 93L (2) (a1), pending the outcome of the relevant proceedings.
- (6) Nothing in this clause entitles the dismissed person to the payment of damages or compensation (on any ground) for any termination of employment or other related matter done or omitted in accordance with Part 4B.

Schedule 4 Amendment of Education (School Administrative and Support Staff) Act 1987 No 240

[1] Section 32D Suspension of employees from duty pending certain decisions or on lapsing of working with children check clearance

Insert after section 32D (2) (a):

- (a1) is a charged person within the meaning of Part 6A, or

[2] Section 32I Definitions

Insert in alphabetical order in section 32I (1):

charged person means a person whose working with children check clearance is cancelled pending determination of proceedings against the person for an offence specified in Schedule 2 to the *Child Protection (Working with Children) Act 2012*.

[3] Section 32I (1), definition of “unauthorised person”

Omit paragraph (a). Insert instead:

- (a) a person whose working with children check clearance is cancelled under section 23 of the *Child Protection (Working with Children) Act 2012*, other than a charged person, or
- (a1) a charged person on the person being convicted (within the meaning of the *Child Protection (Working with Children) Act 2012*) of an offence specified in Schedule 2 to that Act, or

Note. A conviction includes a finding that the charge for an offence is proven, or that a person is guilty of an offence, even though the court does not proceed to conviction (see the definition of **conviction** in the *Child Protection (Working with Children) Act 2012*).

[4] Section 32N Effect of person obtaining working with children check clearance

Omit section 32N (2) and (3). Insert instead:

- (2) If the person is granted a clearance and a period of not more than 12 months has elapsed since the date on which the person’s employment was terminated under section 32K, the person is entitled to be reinstated to, or re-employed in, a position that is similar to the position that the person held when his or her employment was terminated.

[5] Schedule 1 Savings, transitional and other provisions

Insert after Part 2:

Part 3 Provisions consequent on enactment of Child Protection (Working with Children) and Other Child Protection Legislation Amendment Act 2016

6 Secretary may reinstate or re-employ certain persons dismissed under section 32K

- (1) In this clause:

amending Act means the *Child Protection (Working with Children) and Other Child Protection Legislation Amendment Act 2016*.

dismissed person means a permanent employee who, before the commencement of the amending Act, was dismissed under section 32K

because the person's working with children check clearance was cancelled as a consequence of the commencement of proceedings against the person in relation to an offence.

- (2) The Secretary may reinstate a dismissed person to, or re-employ a dismissed person in, a position that is similar to the position that the person held when his or her employment was terminated.
- (3) The Secretary must not reinstate or re-employ a dismissed person under subclause (2) if the person is or becomes an unauthorised person (within the meaning of Part 6A, as amended by the amending Act).
- (4) A dismissed person, on being reinstated or re-employed under this clause, is taken for the purposes of this Act or any other Act or law:
 - (a) to have never been dismissed, and
 - (b) to have been on leave without pay during the period between dismissal and reinstatement or re-employment.
- (5) However, the Secretary may, after reinstating or re-employing a dismissed person under this clause, suspend the dismissed person under section 32D (2) (a1), pending the outcome of the relevant proceedings.
- (6) Nothing in this clause entitles the dismissed person to the payment of damages or compensation (on any ground) for any termination of employment or other related matter done or omitted in accordance with Part 6A.

[Second reading speech made in—
Legislative Assembly on 12 October 2016
Legislative Council on 19 October 2016]