

Passed by both Houses



New South Wales

Commission for Children and Young People Amendment Bill 2005

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I certify that this PUBLIC BILL, which originated in the LEGISLATIVE ASSEMBLY, has finally passed the LEGISLATIVE COUNCIL and the LEGISLATIVE ASSEMBLY of NEW SOUTH WALES.

*Clerk of the Legislative Assembly.
Legislative Assembly,
Sydney, , 2005*



New South Wales

Commission for Children and Young People Amendment Bill 2005

Act No , 2005

An Act to amend the *Commission for Children and Young People Act 1998* with respect to child-related employment and the functions of the Commission for Children and Young People; to repeal the *Child Protection (Prohibited Employment) Act 1998*; and for other purposes.

I have examined this Bill, and find it to correspond in all respects with the Bill as finally passed by both Houses.

Chairman of Committees of the Legislative Assembly.

The Legislature of New South Wales enacts:

1 Name of Act

This Act is the *Commission for Children and Young People Amendment Act 2005*.

2 Commencement

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

3 Amendment of Commission for Children and Young People Act 1998 No 146

The *Commission for Children and Young People Act 1998* is amended as set out in Schedule 1.

4 Amendment of other Acts

The Acts specified in Schedule 2 are amended as set out in that Schedule.

5 Repeals

- (1) The *Child Protection (Prohibited Employment) Act 1998* is repealed.
- (2) The *Commission for Children and Young People Regulation 2000* is repealed.

Schedule 1 Amendment of Commission for Children and Young People Act 1998

(Section 3)

[1] Long title

Omit “to provide for employment screening for child-related employment;”.

Insert instead “to provide for safeguards and impose prohibitions relating to child-related employment;”.

[2] Whole Act (other than Schedule 3), except where otherwise amended by this Schedule

Omit “employment screening” wherever occurring.

Insert instead “background checking”.

[3] Section 3 Definitions

Omit the definition of *employment screening* from section 3 (1).

Insert instead in alphabetical order:

background checking—see Division 3 of Part 7.

review application—see Part 7.

[4] Section 5 Commissioner

Omit section 5 (2). Insert instead:

- (2) The employment of the Commissioner is subject to Part 3.1 of the *Public Sector Employment and Management Act 2002*, but is not subject to Chapter 2 of that Act.

[5] Section 5 (3)

Omit “section 42F of the *Public Sector Management Act 1988*”.

Insert instead “section 68 of the *Public Sector Employment and Management Act 2002*”.

[6] Section 5 (4)

Omit “section 42Q of the *Public Sector Management Act 1988*”.

Insert instead “section 77 of the *Public Sector Employment and Management Act 2002*”.

[7] Section 7 Staff of Commission

Omit “Part 2 of the *Public Sector Management Act 1988*” from section 7 (1).
Insert instead “Chapter 2 of the *Public Sector Employment and Management Act 2002*”.

[8] Section 11 Principal functions of Commission

Insert after section 11 (h):

- (h1) to determine or intervene in review applications concerning prohibited persons,

[9] Section 11 (i)

Omit “screening”. Insert instead “background checking”.

[10] Section 11 (i)

Insert “Division 3 of” before “Part 7”.

[11] Section 11 (l) and (m)

Insert after section 11 (k):

- (l) to encourage organisations to develop their capacity to be safe and friendly for children,
- (m) to develop and administer a voluntary accreditation scheme for programs for persons who have committed sexual offences against children.

[12] Section 14A

Omit the section. Insert instead:

14A Powers of Commission for Children and Young People to compel production of information

- (1) The Commission for Children and Young People may, by notice in writing, require any government agency to provide the Commission with information (including documents) relevant to an assessment of whether a person poses a risk to the safety of children.
- (2) A notice under subsection (1) may be given for the purposes of:
 - (a) preparing submissions to the Industrial Relations Commission or Administrative Decisions Tribunal under Subdivision 2 of Division 2 of Part 7 of this Act or section 16 of the *Child Protection (Offenders Registration) Act 2000*, or

- (b) considering a review application made to the Commission.
- (3) A government agency to which any such notice is given is by this section authorised and required to provide the Commission for Children and Young People with the information sought by the notice.
- (4) The Commission for Children and Young People may, by notice in writing, request a person other than a government agency to provide the Commission with a statement setting out information specified by the notice relevant to an assessment of whether a person poses a risk to the safety of children for the purposes of considering a review application made to the Commission.
- (5) A person other than a government agency to whom any such request is given is by this section authorised to provide the Commission for Children and Young People with the information requested.
- (6) A notice under this section may specify a day on or before which the notice is to be complied with.
- (7) If documents are given to the Commission under this section, the Commission:
 - (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 considering an application, 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 Commission.

[13] Section 15A Reports under Children and Young Persons (Care and Protection) Act 1998

Insert “or 27 (Mandatory reporting)” after “harm”.

[14] Section 15A (2)

Insert at the end of section 15A:

- (2) A report referred to in section 29 of the *Children and Young Persons (Care and Protection) Act 1998* may be provided to the Commission in accordance with a requirement under a provision of this Act. Any such report may not be subsequently dealt with by the Commission in a manner that contravenes that section,

except to the extent that it is necessary for the Commission to do so in the exercise of its functions.

[15] Section 15B

Insert after section 15A:

15B Power to compel production of information for monitoring or auditing purposes

- (1) For the purposes of exercising its monitoring or auditing functions under Part 7, the Commission may, by notice in writing, require an officer of a government agency or an employer or employer-related body to do any one or more of the following:
 - (a) to provide to the Commission, on or before a day specified in the notice, a statement setting out such information as is so specified relating to the matters being monitored or audited,
 - (b) to provide to the Commission, on or before a day specified in the notice, such documents as are so specified relating to the matters being monitored or audited.
- (2) A person who:
 - (a) fails, without reasonable excuse, to comply with a requirement of a notice under this section, or
 - (b) provides the Commission with information that the person knows is false or misleading in a material particular,is guilty of an offence.
Maximum penalty: 50 penalty units.
- (3) A notice may specify the manner in which a statement or documents may be given to the Commission.
- (4) If documents are given to the Commission under this section, the Commission:
 - (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 exercising its monitoring or auditing functions, 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 Commission.

(5) In any proceedings for an offence against this section, the onus of proving that a person had a reasonable excuse lies with the defendant.

(6) Words and expressions used in this section have the same meanings as they have in Part 7.

[16] Section 20 Hearings in special inquiries

Omit “prohibiting or restricting the publication or disclosure of evidence or other” from section 20 (8).

[17] Section 20 (9)

Insert after section 20 (8):

(9) If it is shown to the satisfaction of the Commission that any person is substantially and directly interested in the subject-matter of a special inquiry, the Commission may authorise the person to appear and be heard at the hearing or a specified part of the hearing.

[18] Sections 20A and 20B

Insert after section 20:

20A Legal representation

- (1) A person appearing at a hearing of a special inquiry is not entitled to be represented by an Australian legal practitioner unless the Commission authorises such representation.
- (2) The Commission is to give a person a reasonable opportunity to make submissions regarding representation by an Australian legal practitioner.
- (3) The Commission is not to give an authorisation unless satisfied that the authorisation is necessary or desirable in the public interest or for the safety, welfare or well-being of a child.

20B Restriction on publication of evidence at private hearings

- (1) The Commission may direct that:
 - (a) any evidence given before the Commission at a private hearing of a special inquiry, or
 - (b) the contents of any document, or a description of any thing, produced to the Commission at a private hearing, or
 - (c) any information that might enable a person who has given or may be about to give evidence at a private hearing to be identified or located, or

- (d) that fact that any person has given or may be about to give evidence at a private hearing, must not be published except in such manner, and to such persons, as the Commission specifies.
- (2) The Commission is not to give a direction unless satisfied that the direction is necessary or desirable in the public interest or for the safety, welfare or well-being of a child.
- (3) A person must not make a publication in contravention of a direction given under this section.
Maximum penalty: 20 penalty units.

[19] Part 7, heading

Omit “**Employment screening**”.

Insert instead “**Child-related employment**”.

[20] Part 7, Division 1, heading

Insert before section 31:

Division 1 Preliminary

[21] Sections 31 and 32

Omit the sections. Insert instead:

31 Object of Part

The object of this Part is to protect children:

- (a) by prohibiting certain persons from being involved in child-related employment, and
- (b) by means of background checking for child-related employment administered by the Commission and other agencies.

32 Safety and welfare of children to be paramount consideration

The safety and welfare of children and, in particular, protecting them from child abuse, is the paramount consideration in the operation of this Part.

[22] Section 33 Definitions

Omit the definitions of *child-related employment*, *employee*, *employer* and *employment* from section 33 (1).

Insert instead in alphabetical order:

***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 by a person having the capacity to direct the person in the course of the employment:
- (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, movements, societies, institutions or other bodies (including bodies 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.

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 a conviction.

employee means any person who is engaged in employment.

employer includes:

- (a) a person who, in the course of business, arranges for the placement of a person in employment with others, or
- (b) a person who engages a person under a contract to perform work.

employment means (subject to the regulations):

- (a) performance of work under a contract of employment, or
- (b) performance of work as a self-employed person or as a subcontractor, or
- (c) performance of work as a volunteer for an organisation, or
- (d) undertaking practical training as part of an educational or vocational course, or
- (e) performance of work as a minister, priest, rabbi, mufti or other like religious leader or spiritual officer of a religion or other member of a religious organisation, or
- (f) performance of the duties of an authorised carer within the meaning of the *Children and Young Persons (Care and Protection) Act 1998*.

prohibited person—see section 33B.

[23] Section 33 (1), definition of “relevant apprehended violence order”

Omit “subsection (2)”. Insert instead “subsection (6)”.

[24] Section 33 (1), definition of “relevant criminal record”

Omit “subsection (2)”. Insert instead “subsections (7) and (8)”.

[25] Section 33 (1), definition of “relevant employment proceedings”

Omit “(subject to subsection (2))”.

[26] Section 33 (1), definition of “reportable conduct”

Omit “(including a child pornography offence)” from paragraph (a).

[27] Section 33 (1), definition of “reportable conduct”

Insert after paragraph (a):

- (a1) any child pornography offence or misconduct involving child pornography, or
- (a2) any child-related personal violence offence (within the meaning of Division 2), or
- (a3) an offence under section 21G or 21H of the *Summary Offences Act 1988* committed against, with or in the presence of a child, or

[28] Section 33 (2)

Omit the subsection.

[29] Section 33 (6)–(8)

Insert after section 33 (5):

- (6) The following are not relevant apprehended violence orders:
 - (a) an apprehended violence order made by a court before 3 July 1995 under Part 15A of the *Crimes Act 1900*,
 - (b) an external protection order (within the meaning of section 562RA of the *Crimes Act 1900*) made before 3 July 1995,
 - (c) an external protection order (within the meaning of section 562RA of the *Crimes Act 1900*) that is not registered under Division 3 of Part 15A of that Act.
- (7) The following offences are not part of the relevant criminal record of a person:
 - (a) an offence that was a serious sex offence at the time of its commission if the conduct constituting the offence has ceased to be an offence in New South Wales,
 - (b) an offence involving sexual activity or an act of indecency if the conduct constituting the offence occurred in a public place and would not have constituted an offence in New South Wales if the place were not a public place.

- (8) A criminal record is not a relevant criminal record if:
- (a) the record relates to a registrable offence within the meaning of the *Child Protection (Offenders Registration) Act 2000* that was committed elsewhere than in New South Wales, and
 - (b) the Commission, or an employer or employer-related body, is unable to obtain access to the record (whether because the record cannot be released under the law of the jurisdiction in which the offence concerned was committed or for any other reason).

[30] Section 33A

Insert after section 33:

33A Child-related employment to which Part does not apply

- (1) This Part does not apply to the employment of a person in child-related employment if:
- (a) all the children with whom the person is required to have contact in that employment are related to the person, or
 - (b) all the children with whom the person is required to have contact in that employment are related to the employer and the person is related to the employer.
- (2) For the purposes of this section, a person is *related* to another person if:
- (a) the person is a relative of the other person, or
 - (b) the person is the guardian of the other person or a person having the custody of or parental responsibility for the other person (otherwise than as the holder of a public office), or
 - (c) the spouse of the person is related to the other person (as referred to in paragraph (a) or (b)).
- (3) In this section:
- relative* of a person means the spouse, parent, child, grandparent, grandchild, uncle, aunt, brother, sister, niece or nephew of the person, whether the relationship is of the whole or the half-blood and whether the relationship is natural or depends on the adoption of a person.
- spouse* of a person includes any person who is living with that other person as that other person's partner on a bona fide domestic basis.

[31] **Part 7, Division 2, Division 3 heading**

Insert before section 34:

Division 2 Prohibitions on child-related employment

Subdivision 1 Persons prohibited from being employed in child-related employment

33B Prohibited persons

- (1) For the purposes of this Division, a *prohibited person* means:
 - (a) a person convicted of a serious sex offence, the murder of a child or a child-related personal violence offence, whether before or after the commencement of this subsection, or
 - (b) a person who is a registrable person within the meaning of the *Child Protection (Offenders Registration) Act 2000*.
- (2) For the purposes of this Division, a person is not a prohibited person in respect of an offence if an order in force under Subdivision 2 declares that this Division is not to apply to the person in respect of the offence.
- (3) In this Division:

child-related personal violence offence means:

 - (a) an offence committed by an adult involving intentionally wounding or causing grievous bodily harm to a child, or
 - (b) an offence committed by an adult of attempting, or of conspiracy or incitement, to commit an offence referred to in paragraph (a),

but does not include an offence committed by an adult who is not more than 3 years older than the child concerned.

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 section 80D or 80E of the *Crimes Act 1900*, where the person against whom the offence is committed is a child, or
- (d) 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
- (e) an offence under section 91H, 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
- (f) an offence an element of which is an intention to commit an offence referred to in paragraph (a) or (b), or
- (g) an offence of attempting, or of conspiracy or incitement, to commit an offence referred to in the preceding paragraphs, or
- (h) any other offence, whether under the law of New South Wales or elsewhere, prescribed by the regulations.

Note. A conviction for an offence includes a finding that an offence is proven, or that a person is guilty of an offence, even though the court does not proceed to a conviction.

- (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 Division 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 Division 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.
- (6) For the purposes of this Division, section 579 of the *Crimes Act 1900* does not apply to or in respect of a serious sex offence or a child-related personal violence offence.

33C Offences relating to prohibited persons

- (1) A prohibited person must not:
 - (a) apply for child-related employment, or
 - (b) undertake child-related employment, or
 - (c) remain in child-related employment.

Maximum penalty: 100 penalty units, or imprisonment for 2 years, or both.

- (2) A person is not criminally responsible for an offence against this section if the person did not know, at the time of the commission of the offence, that the employment concerned was child-related employment.

33D Employer to ascertain whether employee is prohibited person

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

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

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

Maximum penalty: 100 penalty units, or imprisonment for 12 months, or both.

- (3) This section does not apply to the employment of a person in child-related employment if all the children with whom the person is required to have contact in that employment are related to the employer (whether or not the person is related to the employer).

Note. Under section 37, an employer also has a duty to carry out background checking procedures in relation to a preferred applicant for primary child-related employment before employing the applicant. An employer who fails to do so may be required, by notice, to comply with his or her duty.

33E Employer not to employ prohibited person in child-related employment

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

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

Subdivision 2 Review of prohibition of employment of prohibited persons

33F Definitions

In this Subdivision:

relevant tribunal—see section 33I.

review application means an application under section 33H or 33I.

33G Persons not entitled to make review applications

- (1) A prohibited person who has been convicted of any of the following offences, committed by the person as an adult, is not entitled to make an application under section 33H or 33I:
 - (a) murder of a child,
 - (b) an offence under section 66A, 66B, 66C, 66D or 73 of the *Crimes Act 1900* or a similar offence under that Act or any other law involving sexual intercourse with a child (including a law other than a law of New South Wales),
 - (c) an offence under section 91H (2) of the *Crimes Act 1900*, involving the production of child pornography, or a similar offence under a law other than a law of New South Wales,
 - (d) an offence of attempting, or of conspiracy or incitement, to commit an offence referred to in the preceding paragraphs.
- (2) The Commission or a relevant tribunal may grant leave to a prohibited person to make a review application, despite a conviction for an offence referred to in subsection (1), if the Commission or tribunal is satisfied that:
 - (a) the offence is an offence referred to in subsection (1) (b), or an offence of attempting, or of conspiracy or incitement to commit such an offence, and
 - (b) the prohibited person was not more than 3 years older than the child against whom the offence was committed, and
 - (c) the offence did not involve circumstances of aggravation within the meaning of section 66C of the *Crimes Act 1900*.

33H Commission may make declarations concerning prohibited persons

- (1) On the application of a prohibited person, the Commission may make an order declaring that this Division is not to apply to the person in respect of a specified offence.

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- (2) An application must be made in a form approved by the Commission. An applicant must fully disclose to the Commission any matters relevant to the application.
 - (3) Orders under this section may be made subject to conditions.
 - (4) The Commission is not to make an order that is subject to conditions without the consent in writing of the applicant to the conditions.
 - (5) If the Commission proposes to make an order that is subject to conditions, it is to notify the applicant in writing that:
 - (a) it proposes to make the order subject to the conditions specified in the notification, and
 - (b) the applicant may consent in writing to the making of the order subject to those specified conditions or request the Commission to take no further action, and
 - (c) the Commission will take no further action in relation to the application unless the applicant has consented in writing to the making of the proposed order subject to the specified conditions, and
 - (d) if the applicant does not consent to the making of the order subject to the specified conditions, the applicant may apply under section 33I to the Industrial Relations Commission or the Administrative Decisions Tribunal for an order declaring that this Division is not to apply to the person in respect of a specified offence.
 - (6) If the Commission makes an order, it is to notify the applicant in writing that the Commission has made the order and (if applicable) that the order is subject to the conditions specified in the notification.
 - (7) If the Commission considers that an applicant under this section poses a risk to the safety of children or, for whatever reason, cannot make a decision as to whether the applicant poses such a risk, the Commission is to notify the applicant in writing that:
 - (a) the Commission cannot make an order under this section, and
 - (b) the Commission will take no further action in relation to the application, and
 - (c) the applicant may apply under section 33I to the Industrial Relations Commission or the Administrative Decisions Tribunal for an order declaring that this Division is not to apply to the person in respect of a specified offence.

33I 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 Division 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 Commission for Children and Young People is to be a party to any proceedings for an order under this section. The Commission may make submissions in opposition to or support of the making of the order.
- (4) An applicant must fully disclose to the relevant tribunal any matters relevant to the application.
- (5) 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 or section 33H 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.
- (6) Orders under this section may be made subject to conditions.
- (7) 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.

33J Matters to be considered in determining review applications

- (1) The Commission or a relevant tribunal is not to make an order on a review application unless it is satisfied that the person the subject of the application does not pose a risk to the safety of children.
- (2) In any proceedings for a review application, it is to be presumed, unless the applicant proves to the contrary, that the applicant poses a risk to the safety of children.
- (3) In deciding whether or not to make an order in relation to a person, the Commission or 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 period of time since those offences were committed,
- (c) the age of the person at the time those offences were committed,
- (d) the age of each victim of the offences at the time they were committed,
- (e) the difference in age between the prohibited person and each such victim,
- (f) whether the person knew, or could reasonably have known, that the victim was a child,
- (g) the prohibited person's present age,
- (h) the seriousness of the prohibited person's total criminal record,
- (i) such other matters as the Commission or tribunal considers relevant.

33K Stay pending determination of review application

On a review application, the Commission or a relevant tribunal may, by order, stay the operation of a prohibition under this Division pending the determination of the matter.

33L Multiple applications not permitted

A person may not make a review application under section 33H or 33I if the person has another application pending under either of those sections.

33M Further review of persons who obtain orders

- (1) The Commission may apply to a relevant tribunal to revoke or vary an order made under this Subdivision by the Commission or the tribunal.
- (2) The relevant tribunal may:
 - (a) revoke an order, if it is satisfied, on the basis of fresh evidence provided by the Commission, that the person the subject of the proposed order poses a risk to the safety of children, or
 - (b) vary an order, if it is satisfied, on the basis of fresh evidence provided by the Commission, that the person is likely to pose such a risk if the order is not varied.
- (3) A relevant tribunal may consider fresh evidence provided by the Commission.
- (4) Orders under this section may be made subject to conditions.

- (5) 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.

33N Commissioner of Police to be notified

The Commission or a relevant tribunal must notify the Commissioner of Police of the terms of any order made under this Subdivision by the Commission or tribunal.

33O Jurisdiction of Industrial Relations Commission

The Industrial Relations Commission may not make an order under this Subdivision 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, or
- (b) the person was such an employee who was dismissed from that employment under this Act.

Subdivision 3 Miscellaneous

33P Self-employed persons

- (1) This section applies to self-employed persons engaged in child-related employment.
- (2) The regulations may make provision for or with respect to the following matters:
 - (a) additional persons who are not self-employed who may be treated as self-employed persons for the purposes of this section and any regulations made under this section,
 - (b) requirements for obtaining, displaying and producing certificates that a person is not a prohibited person,
 - (c) the issue of such certificates,
 - (d) regulating or prohibiting the engagement of self-employed persons in child-related employment if certificate requirements are not complied with,
 - (e) prohibiting the use of certificates by persons other than self-employed persons,
 - (f) matters ancillary to matters referred to in paragraphs (a)–(e).

33Q Prohibited person may be transferred to other employment

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

33R Commission may advise on status

The Commission may, on the application of a person, advise the person as to whether the person is a prohibited person or is eligible to make a review application.

33S Monitoring and auditing functions

- (1) The Commission may monitor and audit compliance with requirements and procedures relating to prohibited persons.
- (2) The Minister may give the Commission a written direction on the exercise of its functions under this section, and the Commission is to comply with any such direction. The Commission is to include any such direction in the Commission's annual report.

Division 3 Background checking

[32] Section 34 Nature of background checking

Omit "Part, *employment screening*".

Insert instead "Division, *background checking*".

[33] Section 34 (c)

Omit the paragraph. Insert instead:

- (c) an estimate of the risk to children involved in that child-related employment arising from anything disclosed by such a check, having regard to all the circumstances of the case, including any risk arising from the particular workplace,

[34] Section 34 (d)

Omit "risk assessment". Insert instead "estimate of risk".

[35] Section 35 Guidelines relating to procedures and standards for background checking

Omit section 35 (4).

- [36] Sections 35 (5), 37 (4B), 38 (1) and (2), 39 (4), 40 (3) and 44 (1)–(3) and (4) (where firstly occurring)**
Omit “Part” wherever occurring. Insert instead “Division”.
- [37] Section 35 (6) and (7)**
Insert after section 35 (5):
- (6) The Minister may, from time to time, amend or revoke guidelines published under this section.
 - (7) Guidelines made under this section, or amendments to guidelines, are to be published in the Gazette and take effect from the date of publication or such later date as is specified in the guidelines or amendments.
- [38] Section 36 Functions of Commission in respect of background checking**
Insert “(including updating and correcting)” after “maintaining” in section 36 (1) (a).
- [39] Section 36 (1) (c)**
Omit “such screening”. Insert instead “such checking”.
- [40] Section 37 Background checking mandatory for preferred applicants for certain child-related employment**
Insert “and section 37A” after “this section” in section 37 (6).
- [41] Section 37 (6)**
Omit paragraphs (a) and (b) of the definition of *primary child-related employment*.
Insert instead:
- (a) paid child-related employment, or
 - (b) child-related employment of a minister, priest, rabbi, mufti or other like religious leader or spiritual official of a religion, or
- [42] Section 37A**
Insert after section 37:
- 37A Background checking for certain short-term employees**
- (1) This section applies to any decision by an employer to employ a person in primary child-related employment for a period of less than 6 months or such other period as may be prescribed by the regulations.

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- (2) The employer is taken to have complied with section 37 if:
- (a) background checking procedures have been carried out in accordance with that section in relation to the person within the period of 12 months immediately preceding the employment of the person by the employer, and
 - (b) the background checking procedures were carried out in respect of a decision by the same employer to employ the person in the same kind of primary child-related employment.
- (3) The employer is taken to have complied with section 37 if:
- (a) background checking procedures have been carried out in accordance with that section in relation to the person by an employer-related body approved by the Minister within the period of 12 months immediately preceding the employment of the person by the employer, and
 - (b) the background checking procedures were carried out in respect of a decision by the same or another employer to employ the person in the same kind of primary child-related employment.

[43] Section 38 Notification of information relating to relevant criminal records or other orders

Omit “on their behalf” from section 38 (2).

[44] Section 38 (5)

Insert after section 38 (4):

- (5) Information may be disclosed under subsections (1) and (2) to and by an employer (or employer-related body) situated outside New South Wales and approved by the Minister.

[45] Section 39 Duties of employers with respect to relevant employment proceedings

Omit section 39 (1). Insert instead:

- (1) It is the duty of an employer to notify the Commission of the name and other identifying particulars of any employee against whom relevant employment proceedings have been completed by the employer, other than proceedings:
 - (a) in which a finding is made that the alleged reportable conduct, or the alleged commission of an act of violence, did not occur, or

(b) in which a finding is made that the allegations in respect of which the proceedings were brought were vexatious or misconceived.

(1A) For the purposes of subsection (1), employment proceedings are taken to be completed by an employer if the employer has determined the proceedings, whether or not any right of appeal or review has been exercised or exhausted.

[46] Section 40 Duties of employers to notify Commission of rejected applicant in connection with background checking

Omit “a risk assessment” from section 40 (1).

Insert instead “an estimate of risk”.

[47] Section 41

Omit sections 41 and 42. Insert instead:

41 Enforcement notices

- (1) The Commission may, by notice in writing served on an employer, require the employer to comply with obligations of the employer under section 37, 39 or 40 within the period specified in the notice.
- (2) The Commission may serve a notice on an employer under this section if it is of the opinion that the employer has failed to comply with any provision of section 37, 39 or 40.
- (3) The notice must set out the reasons for the notice being given.
- (4) The period specified in a notice is to be not less than 28 days.
- (5) The Commission may revoke a notice at any time.
- (6) A person who fails, without reasonable excuse, to comply with a notice in force under this section is guilty of an offence.
Maximum penalty: 50 penalty units, or imprisonment for 6 months, or both.
- (7) In any proceedings for an offence against this section, the onus of proving that a person had a reasonable excuse lies with the defendant.

[48] Section 43A

Insert after section 43:

43A Rectification or withdrawals of notifications

- (1) An employer may amend or withdraw a notification to the Commission under section 39 or 40 if the employer determines that the notification was incorrect or wrongly made.
- (2) An amendment or withdrawal of a notification is to be in the form directed by the Commission.

[49] Section 44 Effect of Division on other rights and procedures

Omit "Employment screening" from section 44 (1).

Insert instead "Background checking".

[50] Section 45 Staged implementation of duties under Part

Omit the section.

[51] Sections 48A and 48B

Insert after section 48:

48A Protection of persons relating to child-related employment

- (1) Anything done by a person in good faith and with reasonable care:
 - (a) for the purpose of background checking, or
 - (b) for the purpose of exercising a function under Part 7,does not subject the person to any action, liability, claim or demand.
- (2) Without limiting subsection (1):
 - (a) a person has qualified privilege in proceedings for defamation in respect of anything done by the person for the purposes of background checking or exercising a function under Part 7, and
 - (b) damages or compensation (whether for breach of contract or otherwise) are not payable in respect of a decision not to employ a person as a result of an estimate of risk carried out in good faith and with reasonable care for the purposes of background checking or an application for an order under Subdivision 2 of Division 2 of Part 7.
- (3) This section does not limit or affect any other right, privilege or immunity that a person has as a defendant in any proceedings.

48B Unauthorised disclosure or dishonest collection of information

- (1) A person who discloses any information obtained by the person in connection with background checking or the exercise of functions under Part 7 is guilty of an offence unless the disclosure:
 - (a) is made in good faith for the purposes of background checking or the exercise of a function under Part 7, or
 - (b) is made with the consent of the person to whom the information relates, or
 - (c) is ordered by a court, or any other body or person exercising judicial functions, for the purposes of the hearing or determination by the court, body or person of any matter, or
 - (d) is made with other lawful excuse.
- (2) A person who dishonestly obtains confidential information relating to background checking or the exercise of functions under Part 7 is guilty of an offence.
Maximum penalty: 50 penalty units or imprisonment for 6 months, or both.

[52] Section 49 Proceedings for offences

Insert at the end of section 49:

- (2) Despite any other law, proceedings for an offence under this Act must be commenced not later than 2 years from when the offence was alleged to have been committed.

[53] Section 52

Insert after section 51:

52 Relationship with other Acts and laws

- (1) A prohibition on employment under 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.

[54] Section 53 Review of Act

Omit section 53 (2). Insert instead:

- (2) The review is to be undertaken as soon as possible after the period of 5 years from the date of assent to the *Commission for Children and Young People Amendment Act 2005*.

[55] Schedule 3 Savings, transitional and other provisions

Insert at the end of clause 1 (1):

Commission for Children and Young People Amendment Act 2005

[56] Schedule 3, Part 5

Insert after Part 4:

**Part 5 Provisions consequent on enactment of
Commission for Children and Young
People Amendment Act 2005**

7 Definitions

- (1) In this Part:
amending Act means the *Commission for Children and Young People Amendment Act 2005*.
repealed Act means the *Child Protection (Prohibited Employment) Act 1998*.
- (2) Words and expressions used in this Part have the same meanings as they have in Part 7 of this Act, as amended by the amending Act.

8 Persons convicted of child-related personal violence offences

- (1) A person who was, immediately before the commencement of this clause, employed in child-related employment and who had previously been convicted of a child-related personal violence offence does not commit an offence under Part 7 of this Act by remaining in that employment.
- (2) An employer who continues to employ a person referred to in subclause (1) is not guilty of an offence under Part 7 of this Act.

- (3) However, a person referred to in subclause (1) is a prohibited person in relation to the conviction for the child-related personal violence offence for the purposes of any child-related employment (subject to Subdivision 2 of Division 2 of Part 7) commencing after the commencement of this clause.

9 Existing declarations

- (1) An order made under the repealed Act, and in force immediately before the repeal of that Act, continues in force and is taken to have been made under Division 2 of Part 7.
- (2) Subclause (1) has effect whether or not the prohibited person the subject of the order is a person in respect of whom an order may be made under that Division.

10 Review of existing orders

Section 33M, as inserted by the amending Act, applies in respect of orders made under the repealed Act and in force immediately before the commencement of that section.

11 General savings

- (1) Anything of a kind required or permitted to be done by or under a provision of Division 2 of Part 7 of this Act, as inserted by the amending Act, that was required or permitted to be done under a corresponding provision of the repealed Act and that still had effect immediately before its repeal continues in effect on or after that repeal as if:
- (a) Division 2 of Part 7 of this Act had been in force when it was done, and
 - (b) it had been done by or under the corresponding provision of Division 2 of Part 7 of this Act.
- (2) The repeal of the repealed Act does not affect the operation of the repealed Act to the extent that it provided that a person was not liable for an offence under that Act.

Schedule 2 Amendment of other Acts

(Section 4)

2.1 Administrative Decisions Tribunal Act 1997 No 76

Schedule 2 Composition and functions of Divisions

Omit “*Child Protection (Prohibited Employment) Act 1998*” from clause 2 of Division 2 of Part 1.

Insert instead “*Commission for Children and Young People Act 1998*”.

2.2 Child Protection (Offenders Registration) Act 2000 No 42

Section 9 Relevant personal information to be reported

Omit “*Child Protection (Prohibited Employment) Act 1998*” from section 9 (3).

Insert instead “*Commission for Children and Young People Act 1998*”.

2.3 Education Act 1990 No 8

Section 47 Registration requirements for non-government schools

Omit “the *Child Protection (Prohibited Employment) Act 1998*” from section 47 (g) (ii).

Insert instead “Division 2 of Part 7 of the *Commission for Children and Young People Act 1998*”.

2.4 Industrial Relations Act 1996 No 17

Section 164A Powers of Commission as to disclosure of matters before the Commission

Omit “the *Child Protection (Prohibited Employment) Act 1998*” from section 164A (3) (a).

Insert instead “Subdivision 2 of Division 2 of Part 7 of the *Commission for Children and Young People Act 1998*”.

2.5 Institute of Teachers Act 2004 No 65

Section 24 General grounds for revocation of accreditation

Omit “the *Child Protection (Prohibited Employment) Act 1998*” from section 24 (b) (ii).

Insert instead “Division 2 of Part 7 of the *Commission for Children and Young People Act 1998*”.