

Pre-Trial Diversion of Offenders Act 1985 No 153

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New South Wales

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Pre-Trial Diversion of Offenders Act 1985 No 153



New South Wales

An Act to establish a procedure whereby child sexual assault offenders may be diverted from the criminal process into a treatment program.

Part 1 Preliminary

1 Name of Act

This Act may be cited as the *Pre-Trial Diversion of Offenders Act 1985*.

2 Commencement

- (1) Sections 1 and 2 shall commence on the date of assent to this Act.
- (2) Except as provided by subsection (1), this Act shall commence on such day as may be appointed by the Governor and notified by proclamation published in the Gazette.

2A Purpose of Act

The purpose of this Act is to provide for the protection of children who have been victims of sexual assault by a parent or a parent's spouse or de facto partner. The Act provides for the establishment of a program administered by the Department of Health. In the implementation of the Act, it is intended that the interests of a child victim are to prevail over those of a person pleading guilty to a charge of sexual assault in relation to the child.

Note—

“De facto partner” is defined in section 21C of the *Interpretation Act 1987*.

3 Definitions

- (1) In this Act, except in so far as the context or subject-matter otherwise indicates or requires:

child sexual assault offence means an offence under section 61D, 61E, 63, 65, 66A, 66B, 66C, 66D, 66EA, 67, 68, 71, 72, 73, 74, 76, 76A, 78A, 78B, 78H, 78I, 78K or 78L of the *Crimes Act 1900*.

Director means the person nominated by the Director-General of the Department of Health to be Director of the Program.

Program means the Pre-Trial Diversion of Offenders Program approved in accordance with Part 3A.

regulations mean regulations made under this Act.

- (2) A reference in the definition of **child sexual assault offence** in subsection (1) to an offence under a specified provision of the *Crimes Act 1900* that has been amended or repealed is, or includes, a reference to an offence mentioned in the provision as in force before the amendment or repeal.
- (3) Notes included in this Act do not form part of this Act.

3A Persons to whom Act applies

This Act applies to a person who is charged with a child sexual assault offence committed with or upon the person's child or the child of the person's spouse or de facto partner.

4 Act not to apply to certain persons

- (1) This Act does not apply to a person in relation to a charge for a child sexual assault offence:
 - (a) if the person was charged with that offence before the commencement of this Act, or
 - (b) if the person is required to appear in respect of the charge before the Children's Court.
- (2) For the purposes of subsection (1) (a), a person shall be regarded as having been charged with an offence if a court attendance notice to appear before a Magistrate in respect of the offence has been served on the person.

5 Criminal Procedure Act 1986 to apply

Except as provided by this Act, the *Criminal Procedure Act 1986* shall apply to and in respect of a person charged with a child sexual assault offence.

Part 2 Special procedure before courts

6 Information relating to the Program etc to be given to person charged

A person to whom this Act applies who is charged with a child sexual assault offence shall, as soon as practicable after being charged, be furnished, in a manner approved by the Attorney General, with information regarding the operation of this Act.

7 Person appearing before Magistrate may request that Act not apply

- (1) Where a person who appears before a Magistrate in relation to a charge that the person has committed a child sexual assault offence makes a request to the

Magistrate that this Act cease to apply to the person, this Act shall cease to apply to the person in relation to that charge.

- (2) A request referred to in subsection (1) may be made at any stage of proceedings before a Magistrate relating to a child sexual assault offence.

8 Director of Public Prosecutions to conduct prosecutions

The prosecutor in any proceedings in which this Act applies to a person shall be the Director of Public Prosecutions, or a person authorised for the time being by the Director of Public Prosecutions in relation to the proceedings.

9 Proceedings to be adjourned pending decision by prosecutor

Where a person to whom this Act applies first appears before a Magistrate in relation to a child sexual assault offence, the Magistrate shall adjourn the proceedings for such period, not exceeding the period prescribed for the purposes of this section, as the prosecutor may request to allow for a determination to be made as to whether the person is to be referred for assessment in relation to the person's suitability for participation in the Program.

10 Matters to be considered by prosecutor in deciding whether to refer person for assessment

In determining whether a person charged with a child sexual assault offence is to be referred for assessment in relation to the person's suitability for participation in the Program, the prosecutor must:

- (a) consider the guidelines set out in the regulations, and
- (b) ascertain from the Director or a person to whom the Director delegates the function whether a place in the Program would be available for the person if the person were to give an undertaking to participate in the Program.

11 Prosecutor to notify Magistrate of decision

- (1) Where a person to whom this Act applies appears before a Magistrate following any adjournment of the proceedings under section 9, the prosecutor shall inform the Magistrate as to whether the person is to be referred for assessment in relation to the person's suitability for participation in the Program.
- (2) The prosecutor is to inform the Magistrate that the person is not to be referred for assessment if the prosecutor has ascertained under section 10 that a place in the Program would not be available for the person if the person were to give an undertaking to participate in the Program.

12 Act ceases to apply to person not referred for assessment

Where, under section 11, the prosecutor informs the Magistrate that a person charged

with a child sexual assault offence is not to be referred for assessment in relation to the person's suitability for participation in the Program, this Act shall cease to apply to the person in relation to that charge.

13 Proceedings to be further adjourned pending assessment

- (1) Where a Magistrate before whom a person charged with a child sexual assault offence appears is informed by the prosecutor that the person is to be referred for assessment in relation to the person's suitability for participation in the Program, the Magistrate shall adjourn the proceedings for such period, not exceeding the period prescribed for the purposes of this section, as the prosecutor may request to allow for that assessment to be made.
- (2) Proceedings may be adjourned more than once under this section but the periods for which the proceedings are adjourned shall not, in total, exceed the period prescribed for the purposes of this section.

14 Assessment

- (1) A person who is to be referred for assessment in relation to the person's suitability for participation in the Program must be referred for assessment, and be assessed, in accordance with the regulations.
- (2) The Director, or a person to whom the Director delegates the duty, is to assess a person's suitability for the purposes of subsection (1) and in doing so may take into account any or all of the following matters which appear to be relevant and any other matter which he or she considers to be relevant:
 - (a) any statement made to a police officer in relation to the alleged offence (including statements of the person charged with the offence, the child concerned, a parent of the child or any other person with relevant information),
 - (b) relevant information held by other government agencies which are or have been involved in the treatment of the person charged with the offence or of a member of that person's family or household,
 - (c) interviews conducted by the Director or officer making the assessment with the person, the person's spouse or de facto partner and the child concerned,
 - (d) whether the person accepts responsibility for the sexual assault of the child,
 - (e) whether the person demonstrates some understanding of the impact of the offence on the child and on other members of the child's family or household,
 - (f) whether the person's spouse or de facto partner is prepared to participate in the Program as required by the Director,
 - (g) whether the person and the person's spouse or de facto partner have sufficient

interactive skills to be able to participate in any group therapy aspects of the Program,

- (h) whether the person and the person's spouse or de facto partner agree to participate in all aspects of the Program,
- (i) whether participation in the Program by the person, the person's spouse or de facto partner and the child concerned is in the best interests of the child.

- (3) The prosecutor is, in accordance with the regulations, to be notified as to the result of the assessment and to be provided with written reasons if the assessment made is that the person is not suitable for participation in the Program.

15 Prosecutor to notify Magistrate as to person's suitability

Where a person to whom this Act applies appears before a Magistrate following any adjournment of the proceedings under section 13, the prosecutor shall inform the Magistrate as to whether the person has been assessed as being suitable for participation in the Program.

16 Act ceases to apply to person not suitable for participation in the Program

Where, under section 15, the prosecutor informs the Magistrate that a person charged with a child sexual assault offence has been assessed as not being suitable for participation in the Program, this Act shall cease to apply to the person in relation to that charge.

17 Act ceases to apply if person does not plead guilty before Magistrate

(1) Where:

- (a) a person to whom this Act applies appears before a Magistrate following any adjournment of the proceedings under section 13 and is charged with a child sexual assault offence (whether or not that offence is the offence originally charged), and
- (b) the prosecutor informs the Magistrate that the person has been assessed as being suitable for participation in the Program,

the person shall, before any evidence is given in those proceedings, be asked to plead to the charge.

(2) Where, upon being asked to plead to a charge as referred to in subsection (1), a person pleads guilty, the Magistrate shall, before accepting or rejecting the plea, consider:

- (a) whether the person has received such advice (including legal advice) as the Magistrate thinks proper in the circumstances, and

(b) whether the person understands the purpose of the Program and the effect of giving undertakings under this Act,

and may adjourn the proceedings for a period, not exceeding the period prescribed for the purposes of this section, to allow that advice and information to be given to the person.

- (3) Except as provided by subsection (4), where, upon being asked to plead to a charge as referred to in subsection (1), a person pleads not guilty or refuses to plead, this Act shall cease to apply to the person in relation to that charge.
- (4) Where, upon being asked to plead to a charge as referred to in subsection (1), a person does not plead guilty to that charge but, instead, pleads guilty to another child sexual assault offence and the plea in respect of the other offence is accepted by the Magistrate:
- (a) this Act shall not cease to apply to the person by reason only of the person's failure to plead guilty to the original charge, and
- (b) subject to any other provision of this Act, this Act shall continue to apply to the person in respect of the offence to which the plea of guilty was made as if that offence had been the offence originally charged.

18 Act ceases to apply if plea of guilty rejected

- (1) Where, upon being asked to plead to a charge as referred to in section 17 (1), a person pleads guilty, the Magistrate may accept or reject the plea under section 100 of the *Criminal Procedure Act 1986* on such grounds as the Magistrate would have power to do so if this Act did not apply to the person.
- (2) In determining whether to accept or reject a plea as referred to in subsection (1), a Magistrate may consider any papers or statements tendered to the Magistrate but shall not require any oral evidence to be given.
- (3) Where the Magistrate does not accept a plea of guilty made by a person to a charge in respect of a child sexual assault offence, this Act shall cease to apply to the person in relation to that charge.

19 Certain child sexual assault cases may not be disposed of summarily

If this Act applies to a person charged with a child sexual assault offence, the offence must not be dealt with summarily under Chapter 5 of the *Criminal Procedure Act 1986* (which relates to the summary disposal of certain indictable offences unless an election is made to proceed on indictment).

20 Person pleading guilty before Magistrate to comply with certain directions pending

appearance before higher court

A person to whom this Act applies who has pleaded guilty before a Magistrate to a child sexual assault offence shall, until requested by the Supreme Court or District Court to give an undertaking under this Act, comply with all reasonable directions given by the Director to the person in relation to:

- (a) the behaviour of the person (including access by the person to any other person or premises or place, whether or not the person has a legal or equitable interest in the premises or place),
- (b) the commencement by the person of participation in the Program,
- (c) any matter prescribed by the regulations, and
- (d) any other matter which the Director thinks necessary or appropriate in the circumstances.

21 Act ceases to apply if person does not comply with directions pending further appearance

Where a person to whom this Act applies who is charged with a child sexual assault offence appears before the Supreme Court or the District Court, the court may, if it is satisfied that the person has failed to comply with a reasonable direction given by the Director to the person under section 20, determine that this Act shall cease to apply to the person in relation to that charge, and that determination shall have effect accordingly.

22 Act ceases to apply if person does not plead guilty before Supreme Court or District Court etc

(1) Except as provided by subsection (2), where a person to whom this Act applies who is charged with a child sexual assault offence appears before the Supreme Court or the District Court and:

- (a) does not plead guilty to the charge, or
- (b) refuses to give an undertaking to the court under section 23,

this Act shall cease to apply to the person in relation to that charge.

(2) Where a person appearing before the Supreme Court or the District Court as referred to in subsection (1) in relation to a charge does not plead guilty to that charge but, instead, pleads guilty before trial to another child sexual assault offence and the plea in respect of the other offence is accepted by the prosecution:

- (a) this Act shall not cease to apply to the person by reason only of the person's failure to plead guilty to the original charge, and
- (b) subject to any other provision of this Act, this Act shall continue to apply to the

person in respect of the offence to which the plea of guilty was made as if that offence had been the offence originally charged.

Part 3 Undertaking to attend Program etc

23 Undertaking to attend the Program to be given to court

Where a person to whom this Act applies who is charged with a child sexual assault offence appears before the Supreme Court or the District Court and pleads guilty before trial to the charge, the court shall request the person to give to the court an undertaking:

- (a) to participate (or continue to participate) in the Program for such a period not exceeding, in total, 2 years, as the Director may require,
- (b) during that participation and, where applicable, pending the commencement of that participation, to comply with all reasonable directions given by the Director to the person in relation to:
 - (i) the behaviour of the person (including access by the person to any other person or premises or place, whether or not the person has a legal or equitable interest in the premises or place),
 - (ii) any matter prescribed by the regulations, and
 - (iii) any other matter which the Director thinks necessary or appropriate in the circumstances, and
- (c) to appear before the court in relation to the matter when required by the court to do so.

24 Procedure following giving of undertaking

If a person gives an undertaking at the request of a court under section 23, the court is (subject to sections 25 and 28) to proceed to conviction of the person for the offence concerned but is not to sentence or otherwise deal with the person in respect of the offence.

25 Person may be released from undertaking

- (1) The court to which a person has given an undertaking under this Act may at any time, on the application of the person, release the person from that undertaking.
- (2) Where a court releases a person from an undertaking given under this Act in respect of a child sexual assault offence, it may sentence or otherwise deal with the person for the offence as if the undertaking had not been given.

26 Breach of undertaking etc

- (1) A person who has given an undertaking under this Act shall, unless the person has

been released from the undertaking, comply with the undertaking and the requirements made by or under this Act or the regulations.

- (2) Where the court to which a person has given an undertaking under this Act is notified by the Director, or a person to whom the Director delegates the duty, of any failure by the person to comply with the undertaking or the requirements made by or under this Act or the regulations, the court shall determine whether the person concerned should appear before the court in relation to the matter.

27 Requirement to appear or issue of warrant on breach

If it appears to the court to which a person has given an undertaking under this Act that the person has failed to comply with the undertaking or the requirements made by or under this Act or the regulations, the court may require the person to appear before the court in accordance with the undertaking or may issue a warrant for the arrest of the person and directing that the person be brought before the court as soon as possible after arrest.

28 Powers of court on breach

Where the court to which a person has given an undertaking under this Act is satisfied that the person has failed to comply with the undertaking or the requirements made by or under this Act or the regulations and that the failure is not of such a minor nature that no action is warranted, the court may, whether or not the undertaking is current:

- (a) sentence or otherwise deal with the person as if the undertaking had not been given, or
- (b) direct that the undertaking to participate in the Program be extended for such further period, not exceeding 12 months, as the Director may require in addition to the original period for which the person was required to participate in the Program.

29 Court may be constituted by another judge

The powers, authorities, duties and functions which are required or permitted to be exercised or performed by the court to which a person has given an undertaking under this Act may be exercised or performed by that court, whether or not it is constituted by the same judge as that to whom the undertaking was given.

30 Person who has complied with undertaking not to be further prosecuted etc

- (1) Where a person who has given an undertaking under this Act in respect of a child sexual assault offence has complied with the undertaking and the requirements made by or under this Act or the regulations, no further proceedings shall be taken against the person in respect of the offence.
- (2) For the purposes of subsection (1), a person who has given an undertaking under this Act in respect of a child sexual assault offence shall be regarded as having complied

with the undertaking and the requirements made by or under this Act or the regulations at the expiration of the period (including any extension of the original period under section 28) for which the person was, in accordance with the undertaking, required to participate in the Program in relation to the offence unless, at the expiration of that period, any failure by the person has been notified to the court to which the undertaking was given but has not been determined.

- (3) Where at the expiration of the period for which a person was required to participate in the Program a failure by the person has been notified to the court but has not been determined, the person shall be regarded as having complied with an undertaking given under this Act if the court determines, in relation to that failure, that the person need not appear before the court or that no action is warranted.

Part 3A Pre-Trial Diversion of Offenders Program

30A The Program

- (1) The Pre-Trial Diversion of Offenders Program is a program for the treatment of a person who commits a child sexual assault offence with or upon the person's child or the child of the person's spouse or de facto partner.
- (2) The Program is one which is approved for the time being by the Minister for Health after consultation with the Attorney General and the Minister for Community Services.

30B Administration of the Program

- (1) The Department of Health is to administer the Program.
- (2) The Director-General of that Department is to prepare an annual report on the operation and effectiveness of the Program being administered by the Department and is to forward the report to the Attorney General, the Minister for Health and the Minister for Community Services.

Part 4 Miscellaneous

31 (Repealed)

32 Certain defects not to invalidate proceedings

A failure to comply with section 6 or 8 shall not invalidate any proceedings.

33 Evaluation of administration of Act

The Attorney General and the Minister for Health, in consultation with the Minister for Youth and Community Services, shall make arrangements for the administration of this Act to be monitored and for reports giving an evaluation of that administration to be given to those Ministers.

34 Regulations

- (1) The Governor may make regulations, not inconsistent with this Act, for or with respect to any matter that by this Act is required or permitted to be prescribed or that is necessary or convenient to be prescribed for carrying out or giving effect to this Act and, in particular, for or with respect to:
 - (a) the undertakings to be given by persons in accordance with this Act,
 - (b) requirements to be complied with by persons who have given undertakings in accordance with this Act,
 - (c) the content and conduct of, and any other matter relating to, the Program,
 - (d) attendance at the Program by persons who have given undertakings under this Act, and
 - (e) the notification of a failure by a person to comply with any undertaking given under this Act or the requirements made by or under this Act or the regulations in relation to the person.
- (2) A provision of a regulation may:
 - (a) apply generally or be limited in its application by reference to specified exceptions or factors,
 - (b) apply differently according to different factors of a specified kind, or
 - (c) authorise any matter or thing to be from time to time determined, applied or regulated by any specified person or body,or may do any combination of those things.

35 Savings and transitional provisions

Schedule 1 has effect.

Schedule 1 Savings and transitional provisions

(Section 35)

1 Application of amendments made by [Pre-Trial Diversion of Offenders \(Amendment\) Act 1993](#)

- (1) Section 3A does not apply to proceedings pending at the commencement of that section if the person charged with the offence concerned was assessed under section 14 before that commencement.
- (2) Section 24 (as substituted by the [Pre-Trial Diversion of Offenders \(Amendment\) Act 1993](#)) does not apply to proceedings pending at the commencement of Schedule 1

(10) to that Act in which the person charged with the offence concerned pleaded guilty or not guilty before that commencement.