

Legislative Council—No 143

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South Australia

**Statutes Amendment (Children's Protection)
Bill 2009**

A BILL FOR

An Act to amend the *Children's Protection Act 1993*, the *Criminal Law (Sentencing) Act 1988* and the *Summary Procedure Act 1921*.

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The Parliament of South Australia enacts as follows:

Part 1—Preliminary

1—Short title

This Act may be cited as the *Statutes Amendment (Children's Protection) Act 2009*.

2—Commencement

- 5 (1) This Act will come into operation on a day to be fixed by proclamation.
- (2) Section 7(5) of the *Acts Interpretation Act 1915* does not apply to this Act.

3—Amendment provisions

In this Act, a provision under a heading referring to the amendment of a specified Act amends the Act so specified.

Part 2—Amendment of *Children's Protection Act 1993*

5 4—Amendment of section 16—Power to remove children from dangerous situations

Section 16—after subsection (1) insert:

(1a) If—

- 10 (a) a restraining order has been made under section 99AAC of the *Summary Procedure Act 1921* preventing a person from residing with a child; and
- (b) the child is residing, during the operation of the order, with the person,

15 the child will be taken, for the purposes of this section, to be in a situation of serious danger from which an officer is authorised to remove him or her under subsection (1).

5—Insertion of heading to Part 7 Division 1

Before section 51 insert:

Division 1—Powers of Minister

20 6—Insertion of Part 7 Division 2

After section 52 insert:

Division 2—Offences relating to children under Minister's care and protection

52AA—Definition

25 In this Division—

child means a child who is under the guardianship, or in the custody, of the Minister.

52AAB—Direction not to harbour, conceal or communicate with child

- 30 (1) The Chief Executive may, by written notice, direct a person not to communicate, or attempt to communicate, with a specified child (in any way or in a way specified in the notice) during a specified period.
- 35 (2) The Chief Executive may, by written notice, direct a person not to harbour or conceal, or attempt to harbour or conceal, or assist another person to harbour or conceal, a specified child during a specified period.

(3) The Chief Executive must not issue a notice under subsection (1) or (2) unless he or she believes that the issuing of the notice is reasonably necessary—

(a) to avert a risk that the child specified in the notice will—

(i) be abused or neglected, or be exposed to the abuse or neglect of another child; or

(ii) engage in, or be exposed to, conduct that is an offence against Part 5 of the *Controlled Substances Act 1984*; or

(b) to otherwise prevent harm to the child.

(4) A person who, without reasonable excuse, contravenes or fails to comply with a direction under subsection (1) is guilty of an offence. Maximum penalty: \$4 000 or imprisonment for 1 year.

(5) A person who, without reasonable excuse, contravenes or fails to comply with a direction under subsection (2) is guilty of an offence. Maximum penalty: \$15 000 or imprisonment for 4 years.

(6) A notice under this section must be served personally on the person to whom the notice is directed.

(7) However, if personal service cannot be effected promptly, it will be sufficient service for the notice—

(a) to be left for the person with someone apparently over the age of 18 years; or

(b) to be posted in an envelope addressed to the person, at the person's address.

52AAC—Offence of harbouring or concealing a child etc

(1) A person must not—

(a) harbour or conceal, or assist another person to harbour or conceal, a child; or

(b) prevent, or assist another person to prevent, the return of a child to a State care placement,

if the person knows that the child is absent from a State care placement without lawful authority.

Maximum penalty: \$12 000 or imprisonment for 1 year.

(2) In this section—

State care placement, in relation to a child, means placement of the child in the care of a person, or in a place, by the Minister pursuant to section 51(1).

Part 3—Amendment of *Criminal Law (Sentencing) Act 1988*

7—Amendment of section 19A—Restraining orders may be issued on finding of guilt or sentencing

Section 19A—after subsection (1a) insert:

5 (1b) If a court, in accordance with this section, determines to exercise the powers of the Magistrates Court to issue a restraining order under section 99AAC of the *Summary Procedure Act 1921*, section 99KA of that Act applies to proceedings relating to the restraining order as if—

- 10 (a) the court were the Magistrates Court; and
(b) the proceedings were child protection restraining order proceedings within the meaning of that section.

Part 4—Amendment of *Summary Procedure Act 1921*

8—Amendment of section 4—Interpretation

15 Section 4(1), definition of *restraining order*—delete the definition and substitute:
restraining order means an order made under Division 7 of Part 4;

9—Amendment of section 99—Restraining orders

(1) Section 99—before subsection (1) insert:

(a1) A complaint may be made under this section by—

- 20 (a) a police officer; or
(b) a person against whom, or against whose property, the behaviour that forms the subject matter of the complaint has been, or may be, directed.

(2) Section 99(1)—delete "under this Division"

10—Amendment of section 99AA—Paedophile restraining orders

(1) Section 99AA—before subsection (1) insert:

(a1) A complaint may be made under this section by a police officer.

(2) Section 99AA(1)—delete "under this Division"

11—Amendment of section 99AAB—Power to conduct routine inspection of computer etc

30 Section 99AAB(2), penalty provision—delete the penalty provision and substitute:
Maximum penalty: Imprisonment for 2 years.

12—Insertion of section 99AAC

After section 99AAB insert:

99AAC—Child protection restraining orders

- (1) A complaint may be made under this section by—
 - (a) a police officer; or
 - (b) a child, or the guardian of a child, for the protection of whom a restraining order under this section is sought.
- (2) On a complaint, the Court may make a restraining order against the defendant if—
 - (a) the defendant is an adult who is, or has been, residing with a child under the age of 17 years of whom the defendant is not a guardian; and
 - (b) the defendant and the child are, or have been, residing at premises other than premises in which a guardian of the child resides; and
 - (c) —
 - (i) the defendant or another person who resides at, or frequents, premises at which the defendant and the child reside or have resided—
 - (A) has, within the preceding 10 years, been convicted of a prescribed offence; or
 - (B) is, or has at any time been, subject to a restraining order under this section; or
 - (ii) the Court is satisfied that, as a consequence of the child's contact or residence with the defendant, the child is at risk of—
 - (A) sexual abuse; or
 - (B) engaging in, or being exposed to, conduct that is an offence under Part 5 of the *Controlled Substances Act 1984*; and
 - (d) the Court is satisfied that the making of the order is appropriate in the circumstances.
- (3) In considering whether or not to make a restraining order under this section and in considering the terms of the restraining order, the Court's primary consideration must be the best interests of the child, and in determining the best interests of the child the Court must have regard to the following matters:
 - (a) the degree of control or influence exerted by the defendant over the child;
 - (b) the prior criminal record (if any) of the defendant;

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- (c) any apparent pattern in the defendant's behaviour towards the child or other children and any apparent justification for that behaviour;
 - (d) the views of the child and any guardian of the child (to the extent that they are made known to the Court);
 - (e) any other matter that the Court considers relevant.
- (4) The Court may—
- (a) require that a copy of the complaint be served on the child, or a guardian of the child, personally; and
 - 10 (b) issue any orders it thinks fit to ensure that the child, or a guardian of the child, is given an opportunity to be heard in relation to the complaint.
- (5) A restraining order under this section—
- 15 (a) may impose such restraints on the defendant as are necessary or desirable to protect the child from any apprehended risk; and
 - (b) may, subject to any current proceedings before, or orders of, the Family Court of Australia or the Youth Court, provide for the temporary placement of the child (pending, if
20 necessary, proceedings before either of those courts)—
 - (i) into the custody of a guardian of the child or such other person as the Court directs; or
 - (ii) into the custody of the Minister and the care of such
25 person as the Chief Executive, or the Chief Executive's nominee, directs; and
 - (c) may include any consequential or ancillary orders that the Court thinks fit; and
 - (d) will expire when the child reaches the age of 17 years or, if an earlier time is specified in the order, at that earlier time.
- 30 (6) If the complainant is not a police officer, and the complaint is not made by telephone by a person introduced by a police officer, the following provisions apply despite any other provisions of this Act:
- 35 (a) the Court must not issue a summons for the appearance of the defendant and must dismiss the complaint unless it is supported by oral evidence;
 - (b) in addition to the discretion whether to make an order under section 99C(2), the Court has, subject to this subsection, a discretion to refuse to issue a summons for the appearance of the defendant and to dismiss the complaint;

5 (c) without limiting the circumstances in which the Court may exercise the discretion, the Court may exercise the discretion under paragraph (b) to dismiss the complaint if satisfied that the complaint is frivolous, vexatious, without substance or has no reasonable prospect of success;

(d) there is a presumption against exercising the discretion under paragraph (b) to dismiss the complaint if the complaint discloses allegations of—

10 (i) sexual abuse; or

(ii) conduct that is an offence under Part 5 of the *Controlled Substances Act 1984*;

(e) if the Court exercises the discretion under paragraph (b) to dismiss the complaint, it must record the reasons for doing so in writing.

15 (7) In this section—

Chief Executive means the person for the time being holding, or acting in, the position of Chief Executive of the administrative unit of the Public Service charged with the administration of the *Children's Protection Act 1993*;

20 **child sexual offence** means any of the following offences committed against or in relation to a child under 16 years of age (including a substantially similar offence against a corresponding previous enactment or the law of another place):

25 (a) rape;

(b) indecent assault;

(c) incest;

(d) an offence involving unlawful sexual intercourse;

(e) an offence involving an act of gross indecency;

(f) an offence involving child prostitution;

30 (g) an offence involving indecency or sexual misbehaviour including an offence against Part 3 Division 11A of the *Criminal Law Consolidation Act 1935* or against section 23 or 33 of the *Summary Offences Act 1953*;

35 (h) an attempt to commit, or assault with intent to commit, any of the offences referred to in the above paragraphs;

40 (i) any other offence (such as homicide or abduction), if there are reasonable grounds to believe that any of the offences referred to in the above paragraphs was also committed by the same person against or in relation to the child in the course of, or as part of events surrounding, the commission of the offence;

conviction—a person is taken to have been **convicted** of an offence if—

- (a) the person was convicted of the offence; or
- (b) the person was charged with, and found guilty of, the offence but was discharged without conviction; or
- (c) a court, with the consent of the person, took the offence, of which the person had not been found guilty, into account in passing sentence on the person for another offence; or
- (d) a court has, under Part 8A Division 2 of the *Criminal Law Consolidation Act 1935* recorded findings that—
 - (i) the person was mentally incompetent to commit the offence; and
 - (ii) the objective elements of the offence were established; or
- (e) a court has, under Part 8A Division 3 of the *Criminal Law Consolidation Act 1935*, recorded findings that—
 - (i) the person was mentally unfit to stand trial on a charge of the offence; and
 - (ii) the objective elements of the offence were established;

guardian, of a child, means a parent of the child, a person who is the legal guardian of the child or has the legal custody of the child or any other person who stands *in loco parentis* to the child and has done so for a significant length of time;

Minister means the Minister to whom the administration of the *Children's Protection Act 1993* is committed;

prescribed offence means—

- (a) a child sexual offence; or
- (b) an offence under Part 5 of the *Controlled Substances Act 1984*;

sexual abuse—a child is sexually abused if—

- (a) a child sexual offence is committed against or in relation to the child; or
- (b) the child is exposed to the commission of a child sexual offence against or in relation to another child.

13—Repeal of section 99A

Section 99A—delete the section

14—Amendment of section 99C—Issue of restraining order in absence of defendant

Section 99C(3a)—delete subsection (3a)

15—Amendment of section 99F—Variation or revocation of restraining order

Section 99F(1)(a) to (c)—delete paragraphs (a) to (c) (inclusive) and substitute:

- (a) in the case of a restraining order made under section 99AAC—by a parent or guardian of the child for the protection of whom the order was made; and
- (b) in any case—
 - (i) by a police officer; or
 - (ii) by the person for whose benefit the order was made; or
 - (iii) by the defendant.

16—Amendment of section 99I—Offence to contravene or fail to comply with restraining order

(1) Section 99I(1), penalty provision—delete the penalty provision and substitute:

Maximum penalty: Imprisonment for 2 years.

(2) Section 99I—after subsection (5) insert:

- (6) If a restraining order is made under section 99AAC for the protection of a child, the child cannot be convicted of an offence of aiding, abetting, counselling or procuring the commission of an offence against subsection (1) relating to a contravention of, or failure to comply with, the restraining order.

17—Insertion of section 99KA

After section 99K insert:

99KA—Special restrictions relating to child protection restraining order proceedings

- (1) A person must not publish, by radio, television, newspaper or in any other way, a report of child protection restraining order proceedings if—
 - (a) the Court prohibits publication of any report of the proceedings; or
 - (b) the report—
 - (i) identifies the child or contains information tending to identify the child for the protection of whom a restraining order is sought or has been made; or
 - (ii) reveals the name, address or school, or includes any particulars, picture or film that may lead to the identification, of any child who is concerned in those proceedings.
- (2) The Court may, on such conditions as it thinks fit, permit the publication of particulars, pictures or films that would otherwise be suppressed from publication under subsection (1)(b).

- (3) A person who contravenes subsection (1), or a condition imposed under subsection (2), is guilty of an offence.

Maximum penalty: \$10 000.

- (4) No person may be present in the Court during child protection restraining order proceedings except the following:

- (a) officers of the Court;
- (b) officers of the administrative unit of the Public Service charged with the administration of the *Children's Protection Act 1993*;
- (c) parties to the proceedings and their legal representatives;
- (d) witnesses while giving evidence or permitted by the Court to remain in the Court;
- (e) any guardian of the child for the protection of whom the restraining order is sought;
- (f) any other persons authorised by the Court to be present.

- (5) The Court may, however, exclude any of those persons from the Court if the Court considers it necessary to do so in the interests of the proper administration of justice.

- (6) In this section—

child protection restraining order proceedings means—

- (a) proceedings under section 99AAC; or
- (b) proceedings under section 99F relating to an application to vary or revoke a restraining order made under section 99AAC.

18—Amendment of section 104—Preliminary examination of charges of indictable offences

Section 104(6), penalty provision—delete the penalty provision and substitute:

Maximum penalty: Imprisonment for 2 years.

19—Further amendments

- (1) Act—delete "member of the police force" wherever occurring and substitute in each case:

police officer

- (2) Act—delete "member" wherever occurring and substitute in each case:

officer

- (3) Section 57A(11), definition of *public officer*, (a)—delete "any member of the Police Force of the State or the Commonwealth" and substitute:

any police officer, any member of the Australian Federal Police