

House of Assembly—No 102A

As reported with amendments, report agreed to and passed remaining stages,
10 September 2009

South Australia

Statutes Amendment (Recidivist Young Offenders and Youth Parole Board) Bill 2009

A BILL FOR

An Act to amend the *Criminal Law Consolidation Act 1935*, the *Criminal Law
(Sentencing) Act 1988* and the *Young Offenders Act 1993*.

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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 (Recidivist Young Offenders and Youth Parole Board) Act 2009*.

2—Commencement

This Act will come into operation on a day to be fixed by proclamation.

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 *Criminal Law Consolidation Act 1935*

4—Amendment of section 269V—Custody, supervision and care

Section 269V—after subsection (3) insert:

(4) The Minister or the Parole Board (as the case may be) may delegate a power or function under this section—

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- (a) to a person for the time being performing particular duties or holding or acting in a particular position; or
 - (b) to any other person or body that, in the delegator's opinion, is competent to perform or exercise the relevant functions or powers.

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(5) A delegation under subsection (4)—

- (a) must be by instrument in writing; and
- (b) may be absolute or conditional; and
- (c) does not derogate from the ability of the delegator to act in any matter; and
- 25 (d) is revocable at will by the delegator.

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

5—Amendment of heading to Part 2 Division 2A

Part 2, Division 2A, heading—delete "offenders" and substitute:

adult offenders and recidivist young offenders

6—Amendment of section 20A—Interpretation and application

- 30
- (1) Section 20A(1), definition of *serious drug offence*, (a)—after "*Controlled Substances Act 1984*" insert:

or a substantially similar offence against a corresponding previous enactment

(2) Section 20A(1), definition of *serious offence*—after paragraph (a) insert:

(ab) an offence against a law of the Commonwealth dealing with the unlawful importation of drugs into Australia; or

(3) Section 20A(1), definition of *serious offence*, (b)(i)—delete "against the person"

5 (4) Section 20A(1), definition of *serious offence*, (b)(vi)—delete subparagraph (vi) and substitute:

(vi) an offence against a corresponding previous enactment substantially similar to an offence referred to in any of the preceding subparagraphs;

10 (vii) a conspiracy to commit, or an attempt to commit, an offence referred to in any of the preceding subparagraphs; or

(5) Section 20A(1), definition of *serious offence*—after paragraph (c) insert:

or

15 (d) an offence against the law of another State or a Territory that would, if committed in this State, be a serious offence;

(6) Section 20A(1), definition of *serious sexual offence*, (a)—after subparagraph (i) insert:

(ia) an offence against a corresponding previous enactment substantially similar to an offence referred to in subparagraph (i);

20 (7) Section 20A(2)—delete subsection (2) and substitute:

(2) For the purposes of this Division, an offence will not be regarded as a serious offence unless the maximum penalty prescribed for the offence is, or includes, imprisonment for at least 5 years.

25 (3) An offence is one to which this Division applies if the offence is a serious offence and—

(a) a sentence of imprisonment (other than a suspended sentence) has been imposed for the offence; or

30 (b) if a penalty is yet to be imposed—a sentence of imprisonment (other than a suspended sentence) is, in the circumstances, the appropriate penalty.

7—Amendment of section 20B—Declaration that person is serious repeat offender

(1) Section 20B(1)(a)—after "the person" insert:

(whether as an adult or as a youth)

35 (2) Section 20B(1)(a)(i)—delete "section" and substitute:

Division

(3) Section 20B(1)(b)—after "the person" insert:

(whether as an adult or as a youth)

(4) Section 20B(2)—delete subsection (2)

8—Insertion of section 20C

After section 20B insert:

20C—Declaration that youth is recidivist young offender

- 5 (1) A youth is liable to be declared a recidivist young offender if the following conditions apply:
- (a) the youth—
- 10 (i) has committed on at least 3 separate occasions an offence to which this Division applies (whether or not the same offence on each occasion); and
- (ii) has been convicted of those offences; or
- (b) the youth—
- 15 (i) has committed on at least 2 separate occasions a serious sexual offence against a person or persons under the age of 14 years (whether or not the same offence on each occasion); and
- (ii) has been convicted of those offences.
- (2) If a court convicts a youth of a serious offence, and the youth is liable, or becomes liable as a result of the conviction, to a declaration that he or she is a recidivist young offender, the court—
- 20 (a) must consider whether to make such a declaration; and
- (b) if of the opinion that the youth's history of offending warrants a particularly severe sentence in order to protect the community—should make such a declaration.
- (3) If a court convicts a youth of a serious offence, and the youth is declared (or has previously been declared) to be a recidivist young offender—
- 25 (a) the court is not bound to ensure that the sentence it imposes for the offence is proportional to the offence (but, in the case of the Youth Court, the limitations relating to a sentence of detention under section 23 of the *Young Offenders Act 1993* apply to the sentence that may be imposed by the Youth Court on the recidivist young offender); and
- 30 (b) any non-parole period fixed in relation to the sentence must be at least four-fifths the length of the sentence.

9—Amendment of section 23—Offenders incapable of controlling, or unwilling to control, sexual instincts

Section 23(1), definition of *relevant offence*—after paragraph (b) insert:

- 40 (ba) an offence against a corresponding previous enactment substantially similar to an offence referred to in either of the preceding paragraphs;

10—Amendment of section 32—Duty of court to fix or extend non-parole periods

Section 32(5a)—delete subsection (5a) and substitute:

(5a) If—

(a) a court sentences a person under section 18A to the 1 penalty for a number of offences; and

(b) a mandatory minimum non-parole period is prescribed (*mandatory period*) in respect of any of those offences,

any non-parole period to be fixed by the court under that section—

(c) must be a period not less than the mandatory period prescribed in respect of the relevant offence; and

(d) if there is more than 1 such offence in respect of which a mandatory period is prescribed—must be a period not less than the greater of any such mandatory period; and

(e) must be commenced or be taken to have commenced on the date specified by the court (which may be the day on which the person was first taken into custody or a later date specified by the court that occurs after the day on which the defendant was taken into custody but before the day on which the person is sentenced).

Note—

See *PNJ v The Queen* [2009] HCA 6

11—Amendment of section 33—Interpretation

(1) Section 33(1), definition of *serious sexual offence*, (a)—after subparagraph (i) insert:

(ia) an offence against a corresponding previous enactment substantially similar to an offence referred to in subparagraph (i);

(2) Section 33(1), definition of *serious sexual offence*, (a)(ii)—delete "those offences" and substitute:

the offences referred to in either of the preceding subparagraphs

Part 4—Amendment of *Young Offenders Act 1993*

12—Amendment of section 4—Interpretation

(1) Section 4—after the definition of *Department* insert:

domestic partner means a person who is a domestic partner within the meaning of the *Family Relationships Act 1975*, whether declared as such under that Act or not;

(2) Section 4—after the definition of *homicide* insert:

immediate family of a victim means—

(a) a spouse or domestic partner;

- (b) a parent;
- (c) a grandparent;
- (d) a child (including an adult child);
- (e) a grandchild (including an adult grandchild);
- (f) a brother or sister;

injury means physical or mental injury, and includes pregnancy, mental shock and nervous shock;

- (3) Section 4, definition of *police officer*—delete the definition and substitute:

recidivist young offender means a youth who is declared under Part 2 Division 2A of the *Criminal Law (Sentencing) Act 1988* to be a recidivist young offender;

registered victim includes a member of a victim's immediate family whose name is entered in the Victims Register;

- (4) Section 4—after the definition of *Registrar* insert:

spouse—a person is the spouse of another if they are legally married;

- (5) Section 4—after the definition of *Training Centre Review Board* insert:

victim of an offence means a person who suffers injury as a result of the offence;

Victims Register—see section 5A;

- (6) Section 4—after the definition of *Youth Justice Co-ordinator* insert:

Youth Parole Board means the Training Centre Review Board as constituted from time to time under Part 5 Division 3 to review the progress and circumstances of a recidivist young offender, or hear and determine any other matter relating to a recidivist young offender assigned to the Board under this Act.

13—Insertion of section 5A

After section 5 insert:

5A—Victims Register

- (1) The Chief Executive must keep a Victims Register for the purposes of this Act.
- (2) The victim of an offence for which a youth is sentenced to detention or imprisonment or, if the victim is dead or under an incapacity or in prescribed circumstances, a member of the victim's immediate family, may apply in writing to the Chief Executive to have the following information entered in the Victims Register:
 - (a) the applicant's name;
 - (b) the applicant's contact address and (if supplied) telephone number or the name, contact address and (if supplied) telephone number of a person nominated by the applicant to receive information under this Act on his or her behalf;

(c) any information (including the name of the youth) in the applicant's possession that may assist the Chief Executive to identify the youth.

5 (3) The Chief Executive is entitled to assume the accuracy of information supplied under subsection (2) without further inquiry.

(4) The Victims Register must also contain any other information prescribed by the regulations.

10 (5) The Chief Executive must, when requested to do so by the Training Centre Review Board, provide the Board with information derived from the Victims Register.

15 (6) If the Victims Register includes particulars of a person nominated by a registered victim to receive information under this Act on his or her behalf, any information or notification required or authorised by this Act to be given to the registered victim must, instead, be given to the person so nominated (and where such information or notification is to be given at the request of the registered victim, the person so nominated is entitled to make such a request as if he or she were the registered victim).

20 (7) A person must not divulge information derived from the Victims Register, being information obtained (whether by the person or some other person) in the administration or enforcement of this Act, except—

(a) as required or authorised by this Act or any other Act or law; or

25 (b) as reasonably required in connection with the administration or enforcement of this Act or any other prescribed Act; or

(c) for the purposes of legal proceedings arising out of the administration or enforcement of this Act; or

30 (d) with the consent of the registered victim to whom the information relates.

14—Amendment of section 6—Informal cautions

Section 6(3)—delete subsection (3) and substitute:

35 (3) A record (whether made before or after the commencement of this subsection) of an informal caution given to a youth does not constitute a criminal record of the youth and may not be referred to—

(a) for the purposes of a criminal record check; or

(b) without the youth's consent—in any judicial proceedings.

40 (4) A record of an informal caution made and kept before the commencement of this subsection will be taken to have been legally made and kept.

15—Amendment of section 23—Limitation on power to impose custodial sentence

Section 23(4)—delete subsection (4) and substitute:

- (4) A sentence of detention must not be imposed for an offence unless—
- 5 (a) the offender is a recidivist young offender; or
 - (b) in any other case—the Court is satisfied that a sentence of a non-custodial nature would be inadequate—
 - 10 (i) because of the gravity or circumstances of the offence; or
 - (ii) because the offence is part of a pattern of repeated offending.

16—Amendment of section 37—Release on licence of youths convicted of murder

(1) Section 37—after subsection (1) insert:

- 15 (1a) When determining an application under subsection (1)—
- (a) if the application is made by a recidivist young offender—despite any other provision of this Act, the paramount consideration of the Supreme Court should be the safety of the community;
 - 20 (b) if the application is made by any other youth—the Supreme Court should have regard to the balance to be achieved between—
 - (i) the protection of the community; and
 - (ii) the need to rehabilitate the youth;
 - 25 (c) in all cases—the Supreme Court should also take the following matters into consideration:
 - (i) any relevant remarks made by the court in passing sentence;
 - 30 (ii) if, in relation to an offence for which a youth was sentenced to imprisonment for life, there is a registered victim—the impact that the release of the youth on licence is likely to have on the registered victim and the registered victim's family;
 - (iii) the behaviour of the youth while in detention;
 - 35 (iv) any reports provided to the Court as required by the Court;
 - (v) the probable circumstances of the youth after release from detention;
 - (vi) any other matters that the Court thinks are relevant.

(2) Section 37—after subsection (5) insert:

(5a) If, in relation to an offence for which a youth was sentenced to imprisonment for life, there is a registered victim and the release of the youth on licence under this section is subject to a condition that relates to the victim or the victim's family, the Training Centre Review Board must notify the victim of the terms of the condition.

(5b) However, the Training Centre Review Board is not required to notify the registered victim if—

(a) the victim has indicated to the Board that he or she does not wish to be so notified; or

(b) the Board is satisfied that, in the circumstances of the case, it is not appropriate to so notify the victim.

(5c) A decision of the Training Centre Review Board to notify or not notify a victim of the terms of any such condition is final and is not reviewable by a court.

(3) Section 37(7)(b)—delete "a justice" and substitute:

the Youth Court

(4) Section 37(8)(b)—delete "a justice" and substitute:

the Youth Court

(5) Section 37(9)—delete "a justice" and substitute:

the Youth Court

(6) Section 37(9a)—delete "A justice" and substitute:

The Youth Court

17—Insertion of heading to Part 5 Division 3 Subdivision 1

Before section 38 insert:

Subdivision 1—Training Centre Review Board

18—Amendment of section 38—Establishment of Training Centre Review Board

(1) Section 38(2)—after paragraph (c) insert:

(ca) 2 persons with appropriate skills and experience in matters related to the impact of crime on victims and the needs of victims of crime in relation to the criminal justice system, appointed by the Governor on the recommendation of the Attorney-General; and

(2) Section 38(2)(d)—delete paragraph (d) and substitute:

(d) 2 persons (who must be police officers or former police officers) with appropriate skills and experience, appointed by the Governor on the recommendation of the Minister responsible for the administration of the *Police Act 1998*; and

- (3) Section 38(2)(e)—delete "appointed by the Governor on the nomination of the Minister for Aboriginal Affairs" and substitute:

, appointed by the Governor on the nomination of the Minister responsible for the administration of the *Aboriginal Heritage Act 1988*

- 5 (4) Section 38(9) and (10)—delete subsections (9) and (10)

19—Substitution of section 39

Section 39—delete the section and substitute:

39—Reviews, etc and proceedings of Training Centre Review Board

- 10 (1) The Training Centre Review Board has the following functions in respect of a youth who has been sentenced to detention in a training centre:
- (a) to conduct a review of the progress and circumstances of the youth while in the training centre—
 - 15 (i) at intervals of not more than 6 months; and
 - (ii) at any other time on the request of the Chief Executive;
 - (b) to hear and determine any other matter relating to the youth assigned to the Board under this Act.
- 20 (2) The following provisions apply in proceedings before the Training Review Board under this Act in respect of a youth:
- (a) if the youth is not a recidivist young offender—the Training Centre Review Board must be constituted of—
 - 25 (i) a Judge (who will preside at the sitting); and
 - (ii) 4 of the appointed members (of whom at least 1 must be a member appointed under section 38(2)(e) if the youth is an Aboriginal youth);
 - (b) if the youth is a recidivist young offender—the Training Centre Review Board will sit as the Youth Parole Board and be constituted of—
 - 30 (i) a Judge (who will preside at the sitting); and
 - (ii) 4 of the appointed members, of whom—
 - 35 (A) at least 1 must be a member appointed under section 38(2)(ca); and
 - (B) at least 1 must be a member appointed under section 38(2)(d); and
 - (C) if the recidivist young offender is an Aboriginal youth—at least 1 must be a member appointed under section 38(2)(e).
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- (3) The Training Centre Review Board must notify the following persons of the day and time fixed by the Board for proceedings before the Board:
- (a) the youth to whom the proceedings relate;
 - (b) a guardian of the youth;
 - (c) the Chief Executive;
 - (d) if, in relation to an offence for which the youth was detained, there is a registered victim—the registered victim.
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- (4) However, the Training Centre Review Board is not required to notify the registered victim if the victim has indicated to the Board that he or she does not wish to be so notified.
- (5) In any proceedings before the Training Centre Review Board relating to a youth (whether or not a recidivist young offender)—
- (a) the legal representative, and a guardian, of the youth must be given the opportunity to make submissions to the Board; and
 - (b) the registered victim may make such submissions to the Board as he or she thinks fit in writing or, by prior arrangement with the Board, in person.
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- (6) If a period of detention to which a youth has been sentenced will extend past the youth's 18th birthday, the Training Centre Review Board must, at the last periodical review before that birthday, consider whether the youth should be transferred to complete the period of detention in a prison (and, if the Board does so determine, the youth will be transferred to prison on or after his or her birthday in accordance with the Board's determination).
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20—Insertion of heading to Part 5 Division 3 Subdivision 2

Before section 40 insert:

Subdivision 2—Leave of absence

21—Substitution of section 41

30 Section 41—delete the section and substitute:

Subdivision 3—Conditional release from detention

41—Application and interpretation of Subdivision

- 35
- (1) This Subdivision does not apply to a youth—
- (a) who has been dealt with as an adult and is serving a sentence or part of a sentence of imprisonment in a training centre; or
 - (b) to whom Division 2 applies; or
 - (c) who is serving a sentence of detention of less than 2 months.

(2) In this Subdivision, if a reference to the *Training Centre Review Board*, or the *Board*, is made in relation to a youth who is a recidivist young offender—

(a) the reference will be taken to be a reference to the *Youth Parole Board*; and

(b) in carrying out any function assigned to the Training Centre Review Board under this Subdivision, the Board must be constituted as the Youth Parole Board in accordance with section 39(2)(b).

41A—Conditional release from detention

(1) A youth who is serving a period of detention in a training centre may be released from detention by the Training Centre Review Board in accordance with this Subdivision.

(2) The provisions set out below apply to the release from detention of a youth other than a recidivist young offender:

(a) the youth must have completed at least two-thirds of the period of detention in a training centre to which he or she has been sentenced;

(b) in determining whether the youth should be released from detention, the Training Centre Review Board—

(i) must be satisfied that—

(A) the behaviour of the youth during the period of detention has been satisfactory; and

(B) there is no undue risk that the youth would, if released under this Subdivision, re-offend;

(ii) if, in relation to an offence for which the youth was detained, there is a registered victim—must take into consideration the impact that the release of the youth is likely to have on the registered victim and the registered victim's family;

(c) the release of the youth must be subject to the following conditions:

(i) a condition that he or she not commit any offence;

(ii) a condition that he or she be under the supervision of an officer of the Department and that the youth obey the directions of that officer;

(iii) any other condition that the Board thinks fit;

(d) a decision of the majority of the Board is a decision of the Board.

(3) The provisions set out below apply to the release from detention of a youth who is a recidivist young offender:

(a) the recidivist young offender must have completed at least four-fifths of the period of detention in a training centre to which he or she has been sentenced;

(b) in determining whether the recidivist young offender should be released from detention—

(i) despite any other provision of this Act, the paramount consideration of the Youth Parole Board must be the safety of the community; and

(ii) the Youth Parole Board must also take the following matters into consideration:

(A) the likelihood of the recidivist young offender re-offending if released from detention;

(B) the likelihood of the recidivist young offender complying with the conditions of release;

(C) if, in relation to an offence for which the recidivist young offender was sentenced to a period of detention in a training centre, there is a registered victim—the impact that the release of the recidivist young offender is likely to have on the registered victim and the registered victim's family;

(D) the behaviour of the recidivist young offender while in detention;

(E) the behaviour of the recidivist young offender during any previous release from detention;

(F) any reports provided to the Board as required by the Board;

(G) the probable circumstances of the recidivist young offender after release from detention;

(H) any other matters that the Board thinks are relevant;

(c) the release of the recidivist young offender must be subject to the following conditions:

(i) a condition that he or she not commit any offence;

(ii) a condition that he or she be under the supervision of an officer of the Department and that he or she obey the directions of that officer;

- (iii) any other condition that the Board thinks fit;
- (d) a decision of the majority of the Board is a decision of the Board.
- 5 (4) A condition of release of a youth under this section may, for any proper reason, be varied or revoked at any time as follows:
- (a) in the case of a condition under subsection (2)(c)—by the Training Centre Review Board;
- (b) in the case of a condition under subsection (3)(c)—by the Youth Parole Board.
- 10 (5) If, in relation to an offence for which a youth was detained, there is a registered victim and the release of the youth under this section is subject to a condition that relates to the victim or the victim's family, the Training Centre Review Board must notify the victim of the terms of the condition.
- 15 (6) However, the Training Centre Review Board is not required to notify the registered victim if—
- (a) the victim has indicated to the Board that he or she does not wish to be so notified; or
- (b) the Board is satisfied that, in the circumstances of the case, it is not appropriate to so notify the victim.
- 20 (7) A decision of the Training Centre Review Board to notify or not notify a victim of the terms of any such condition is final and is not reviewable by a court.
- 25 (8) Subject to this Subdivision, the conditions on which a youth is released from a training centre under this Subdivision are binding on the youth for the unexpired period of the detention order.

41B—Release on condition of home detention

- 30 (1) The Training Centre Review Board may release a youth on condition that the youth remain at a residence specified by the Board for the remainder of the unexpired balance of the term of detention or such shorter period as the Board may specify and, if a youth is released on such a condition, the provisions of Division 2A (except for subsections (4), (5) and (6) of section 37C and section 37D(1)) apply as if—
- 35 (a) the order of the Board were a sentence of home detention imposed by the Court; and
- (b) a reference to the Court were a reference to the Board.
- (2) The Training Centre Review Board—
- 40 (a) must not release a youth on home detention unless it is satisfied that accommodation is available at the residence it proposes to specify; and

(9) The Training Centre Review Board may order that a youth who has been brought before the Board under this section be returned to detention under the original order if satisfied that the youth has contravened a condition.

5 (10) If a youth is returned to detention under the original order—

(a) he or she is liable to serve the balance of the sentence unexpired as at the date on which the breach of condition occurred; and

10 (b) the youth will be taken to have been serving that balance of sentence during any period spent in custody pending determination of the proceedings for breach of condition.

15 (11) However, instead of exercising its powers under subsection (9), the Training Centre Review Board may impose a further condition on the youth's release requiring the youth to perform a specified number of hours of community service, if the Board is of the opinion that the breach of condition was not so serious as to warrant returning the youth to detention.

22—Insertion of heading to Part 5 Division 3 Subdivision 4

Before section 42 insert:

20 Subdivision 4—Absolute release from detention by Court

23—Amendment of section 64—Information about youth may be given in certain circumstances

Section 64—after its present contents (now to be designated as subsection (1)) insert:

25 (2) If a youth is sentenced to detention or imprisonment for an offence, an eligible person may apply in writing to the Chief Executive for the release to him or her of any of the following information relating to the youth:

(a) the name and address of the place in which the youth is for the time being held in custody;

30 (b) details of any transfer of the youth from 1 place in which the youth is being held in custody to another;

(c) details of the sentence or sentences that the youth is liable to serve;

35 (d) the date on which and circumstances under which the youth was, is to be, or is likely to be, released from custody for any reason;

(e) details of any escape from custody by the youth.

(3) The Chief Executive has an absolute discretion to grant or refuse an application for release of information to an eligible person.

40 (4) A decision of the Chief Executive as to whether a person is an eligible person or to grant or refuse an application under this section is final and is not reviewable by a court.

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- (5) The Chief Executive must not release information relating to a youth's conditional release from detention by the Training Centre Review Board without the consent of the Board (but the Board may waive this requirement in such circumstances as it thinks fit).
- (6) For the purposes of this section, a person is an *eligible person* in relation to a youth who is sentenced to detention or imprisonment for an offence if he or she is—
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- (a) a registered victim in relation to the offence; or
- (b) a member of the youth's family or a close associate of the youth; or
- (c) a legal practitioner who represents the youth; or
- (d) any other person who the Chief Executive thinks has a proper interest in the release of such information.

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Part 5—Review of *Statutes Amendment (Recidivist Young Offenders and Youth Parole Board) Act 2009*

24—Review of Act

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- (1) The Attorney-General must, within 3 years after the commencement of the *Statutes Amendment (Recidivist Young Offenders and Youth Parole Board) Act 2009*, in consultation with the Commissioner for Social Inclusion, cause a review of the Act to be undertaken.
- (2) The outcome of the review must be incorporated into a report and the Attorney-General must ensure that a copy of the report is laid before each House of Parliament.