

South Australia

# Children's Protection (Implementation of Report Recommendations) Amendment Act 2009

An Act to amend the *Children's Protection Act 1993*; and to make related amendments to the *Health and Community Services Complaints Act 2004*.

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### Part 1—Amendment of *Health and Community Services Complaints Act 2004*

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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 *Children's Protection (Implementation of Report Recommendations) Amendment 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 *Children's Protection Act 1993*

#### 4—Amendment of section 4—Fundamental principles

- (1) Section 4(5)—after "an Aboriginal" insert:  
or Torres Strait Islander
- (2) Section 4(5)—after "the Aboriginal" insert:  
and Torres Strait Islander

#### 5—Amendment of section 6—Interpretation

- (1) Section 6(1)—before the definition of *Aboriginal child* insert:  
*Aboriginal and Torres Strait Islander Child Placement Principle* means the Aboriginal and Torres Strait Islander Child Placement Principle as stated in the regulations;
- (2) Section 6(1), definition of *Aboriginal Child Placement Principle*—delete the definition

- (3) Section 6(1)—after the definition of *family care meeting* insert:

**government organisation** means a government department, agency or instrumentality;

- (4) Section 6(1), after the definition of *medical practitioner* insert:

**non-government organisation** means—

- (a) a business; or
- (b) a service provider; or
- (c) a group organised for some purpose, work or undertaking (such as a society, club, institution or body),

whether incorporated or unincorporated, and includes a local government organisation; but does not include a government organisation;

- (5) Section 6—after subsection (1) insert:

- (1a) For the purposes of this Act, an organisation may consist of a single person.

## **6—Amendment of section 8—General functions of Minister**

Section 8—after subsection (2) insert:

- (3) The Minister must, at least twice in each calendar year, consult groups representing, or comprised of, children or other persons who are, or have been, under the guardianship, or in the custody, of the Minister.
- (4) The purpose of consultation as required under subsection (3) is to ensure that the Minister regularly receives advice from, and is made aware of the experiences of, persons who are, or have been, under the guardianship, or in the custody, of the Minister.

## **7—Amendment of section 8B—Powers and obligations of responsible authority in respect of criminal history**

- (1) Section 8B(1)—delete subsection (1) and substitute:

- (1) The responsible authority for an organisation to which this section applies must ensure that, before a person is appointed to, or engaged to act in, a prescribed position (whether as an employee, volunteer, agent, contractor or subcontractor) in the organisation, an assessment of the person's criminal history is undertaken in accordance with the regulations.

Maximum penalty: \$10 000.

- (2) Section 8B(2)—delete "obtain a report from the Commissioner of Police or some other prescribed source on the criminal history (if any)" and substitute:

cause an assessment of the person's criminal history to be undertaken in accordance with the regulations

- (3) Section 8B(3) and (4)—delete subsections (3) and (4)

- (4) Section 8B(5)(a)—delete "on whose criminal history (if any) the responsible authority is required or authorised to obtain a report" and substitute:

in respect of whom the responsible authority is required or authorised to cause a criminal history assessment to be undertaken in accordance with the regulations

- (5) Section 8B(6)(b)—delete "to which its operation is extended by regulation" and substitute:

that provide health, welfare, education, sporting or recreational, religious or spiritual, child care or residential services wholly or partly for children

- (6) Section 8B(7)—delete subsection (7) and substitute:

- (7) Regulations made for the purposes of this section may (without limitation)—

- (a) prescribe the manner in which an assessment of a person's criminal history may be undertaken; and
- (b) provide for the authorisation of persons or bodies to undertake criminal history assessments for the purposes of this section; and
- (c) make provision in relation to the release of information relating to a person's criminal history to another jurisdiction; and
- (d) make provision in relation to the use of information relating to a person's criminal history received from another jurisdiction; and
- (e) make provision in relation to confidentiality of information relating to a person's criminal history; and
- (f) define classes of information that are to be taken to be included in, or excluded from, a person's criminal history for the purposes of this section; and
- (g) prescribe fees and provide for their waiver or remission; and
- (h) in the case of a regulation of a kind referred to in paragraph (b) or a regulation providing for the waiver or remission of a fee—confer discretionary powers on the Minister, the Chief Executive or another person or body; and
- (i) prescribe penalties, not exceeding \$10 000, for offences against the regulations.

- (7) Section 8B(8), definition of **employment**—delete "and **employer** includes an organisation or person for whom the functions are performed;"

- (8) Section 8B(8), definition of **government organisation**—delete the definition

- (9) Section 8B(8), definition of **non-government organisation**—delete the definition

- (10) Section 8B(8), definition of **prescribed functions**, (a)—after "regular basis" insert:

, unless the contact or work is directly supervised at all times

- (11) Section 8B(8), definition of *prescribed functions*, (c)—after "records" insert:  
of a kind prescribed by regulation
- (12) Section 8B(8), definition of *relevant employment*—delete the definition
- (13) Section 8B(8), definition of *responsible authority*, (b)—delete "to which this section applies"

## **8—Amendment of section 8C—Obligations of certain organisations**

- (1) Section 8C(1)—delete "An organisation to which this section applies must, as soon as practicable following the formation of the organisation, or, in the case of an organisation in existence when this section comes into operation, as soon as possible following the prescribed date, establish" and substitute:  
Subject to subsection (1a), an organisation to which this section applies must have in place
- (2) Section 8C—after subsection (1) insert:  
(1a) An organisation formed after the commencement of this subsection must have policies and procedures in place as required under subsection (1) as soon as practicable following the formation of the organisation.
- (3) Section 8C(2)(b)—delete paragraph (b) and substitute:  
(b) must comply with any requirements prescribed in the regulations.
- (4) Section 8C(3)—delete subsection (3) and substitute:  
(3) An organisation to which this section applies must—  
(a) within 10 days after putting in place policies and procedures as required under subsection (1), lodge with the Chief Executive a statement setting out the policies and procedures; and  
(b) respond, as soon as reasonably practicable (and in any case within 10 business days), to any written request by the Chief Executive for information relating to the organisation's compliance with the requirements of this section.  
Maximum penalty: \$5 000.
- (4) This section applies to government and non-government organisations that provide health, welfare, education, sporting or recreational, religious or spiritual, child care or residential services wholly or partly for children.

## **9—Insertion of section 8D**

After section 8C insert:

### **8D—Exemptions etc**

- (1) The regulations may exempt organisations, persons and positions, or particular classes of organisations, persons and positions, from the application of this Division or from specified provisions of this Division.

- (2) The regulations may, for transitional purposes—
  - (a) provide that this Division, or specified provisions of this Division, will not apply in relation to an organisation, person or position, or a class of organisation, person or position, until a specified day; or
  - (b) modify the application of this Division, or provisions of this Division, in relation to an organisation, person or position, or a class of organisation, person or position, until a specified day.
- (3) Subsection (2) is in addition to, and does not derogate from, subsection (1).

### **10—Amendment of section 11—Notification of abuse or neglect**

- (1) Section 11(2)(j)—delete "a Government department, agency or instrumentality, or a local government or non-government organisation," and substitute:

a government or non-government organisation

- (2) Section 11—after subsection (5) insert:

- (6) A person must not threaten or intimidate, or cause damage, loss or disadvantage to, a person to whom this section applies because the person has discharged, or proposes to discharge, his or her duty under subsection (1).

Maximum penalty: \$10 000.

### **11—Amendment of section 16—Power to remove children from dangerous situations**

Section 16—after subsection (5) insert:

- (6) The power to remove a child under this section is in addition to, and does not derogate from, the powers of an authorised police officer under section 51(4).

### **12—Substitution of heading to Part 7A**

Heading to Part 7A—delete the heading and substitute:

## **Part 7A—The Guardian, the Youth Advisory Committee and the Charter**

### **Division 1—The Guardian**

### **13—Amendment of section 52A—The Guardian**

- (1) Section 52A(4)—after paragraph (d) insert:
  - (da) becomes bankrupt or applies as a debtor to take the benefit of the laws relating to bankruptcy; or
  - (db) becomes, in the opinion of the Governor, mentally or physically incapable of carrying out satisfactorily the duties of office; or

- (dc) becomes a member of the Parliament of this State or any other State of the Commonwealth or of the Commonwealth or becomes a member of a Legislative Assembly of a Territory of the Commonwealth; or
- (2) Section 52A(5) to (8)—delete subsections (5) to (8) (inclusive) and substitute:
- (5) The Governor may remove the Guardian from office on the presentation of an address from both Houses of Parliament seeking the Guardian's removal.
- (6) The Governor may suspend the Guardian from office on the ground of incompetence or misbehaviour and, in that event—
- (a) a full statement of the reason for the suspension must be laid before both Houses of Parliament within 3 sitting days of the suspension; and
- (b) if, at the expiration of 1 month from the date on which the statement was laid before Parliament, an address from both Houses of Parliament seeking the Guardian's removal has not been presented to the Governor, the Guardian must be restored to office.
- (7) Except as provided by this section, the Guardian may not be removed or suspended from office, nor will the office of the Guardian become vacant.

#### **14—Insertion of section 52AB**

After section 52A insert:

##### **52AB—Independence**

- (1) In performing and exercising his or her functions and powers under this Act, the Guardian must act independently, impartially and in the public interest.
- (2) The Minister cannot control how the Guardian is to exercise the Guardian's statutory functions and powers and cannot give any direction with respect to the content of any report prepared by the Guardian.

**Note—**

This provision does not derogate from any express power of the Minister under this Act.

#### **15—Amendment of section 52C—The Guardian's functions and powers**

- (1) Section 52C(1)(b)—after "the Minister" insert:
- and, in particular, for any such child who has suffered, or is alleged to have suffered, sexual abuse
- (2) Section 52C(4)—delete subsection (4)

## 16—Insertion of section 52CA

After section 52C insert:

### 52CA—Use and obtaining of information

- (1) A government or non-government organisation that is involved in the provision of services to children must, at the Guardian's request, provide the Guardian with information relevant to the performance of the Guardian's functions.
- (2) If the Guardian has reason to believe that a person is capable of providing information or producing a document that may be relevant to the performance of the Guardian's functions, the Guardian may, by notice in writing provided to the person, require the person to do 1 or more of the following:
  - (a) to provide that information to the Guardian in writing signed by that person or, in the case of a body corporate, by an officer of the body corporate;
  - (b) to produce that document to the Guardian;
  - (c) to attend before a person specified in the notice and answer relevant questions or produce relevant documents.
- (3) A notice under subsection (2) is to specify the period within which, or the time, day and place at which, the person is required to provide the information or document, or to attend.
- (4) A notice under subsection (2) must provide a period of time for compliance with a requirement under that subsection that has been determined by the Guardian to be reasonable in the circumstances.
- (5) A person must comply with a requirement under subsection (2).  
Maximum penalty: \$5 000.
- (6) If a document is produced in accordance with a requirement under this section, the Guardian may take possession of, make copies of, or take extracts from, the document.

## 17—Insertion of section 52DA

After section 52D insert:

### 52DA—Other reports

- (1) The Guardian may, at any time, prepare a report to the Minister on any matter arising out of the exercise of the Guardian's functions under this Act.
- (2) The Minister must—
  - (a) if Parliament is sitting—have copies of a report received under this section laid before both Houses of Parliament within 6 sitting days; or



- (b) if Parliament is not sitting—deliver copies of the report to the President of the Legislative Council and the Speaker of the House of Assembly so that they may—
  - (i) immediately cause the report to be published; and
  - (ii) lay the report before their respective Houses at the earliest opportunity.
- (3) A report will, when published under subsection (2)(b)(i), be taken for the purposes of any other Act or law to be a report of the Parliament published under the authority of the Legislative Council and the House of Assembly.

## **18—Insertion of Part 7A Divisions 2 to 4**

After section 52E insert:

### **Division 2—Youth Advisory Committee**

#### **52EA—Youth Advisory Committee**

- (1) The Guardian must establish and maintain a Youth Advisory Committee.
- (2) Subject to subsection (3), membership of the Committee is to be determined by the Guardian.
- (3) The Committee is to include children who are, or have been, under the guardianship, or in the custody, of the Minister.
- (4) The Committee's primary function is to assist the Guardian in the performance of the Guardian's functions by ensuring that the Guardian is aware of the experiences of, and receives advice from, children who are, or have been, under the guardianship, or in the custody, of the Minister.
- (5) The Committee has such other functions as are assigned to the Committee by the Guardian.
- (6) The Guardian may consult the committee, or members of the committee, as the Guardian thinks fit.
- (7) The Committee will, subject to direction by the Guardian as to the procedures it is to adopt, determine its own procedures.

### **Division 3—Charter of Rights for Children and Young People in Care**

#### **52EB—Development of Charter**

- (1) The Guardian must develop a draft *Charter of Rights for Children and Young People in Care*.

- (2) The Guardian must, in developing the draft Charter, have regard to the fact that the State Government is responsible for the care and wellbeing of children who are under the guardianship, or in the custody, of the Minister.
- (3) The draft must be presented to the Minister within 12 months following the commencement of this Division or within such longer period as the Minister may allow.

#### **52EC—Review of Charter**

The Guardian—

- (a) may review the Charter at any time; and
- (b) must review the Charter at least every 5 years.

#### **52ED—Consultation**

In developing or reviewing the Charter, the Guardian must invite submissions from, and consult with, to such extent as may be reasonable, interested persons (including persons who are, or have been, under the guardianship, or in the custody, of the Minister) with a view to obtaining a wide range of views in relation to the matters under consideration.

#### **52EE—Approval of Charter**

- (1) The Minister may, on the receipt of a draft Charter or a variation of the Charter from the Guardian—
  - (a) approve the Charter or the variation; or
  - (b) require an alteration to the Charter or the variation, after consultation with the Guardian, and then approve the Charter or variation as altered.
- (2) The Minister must then cause a copy of the Charter or variation (as the case may be) to be laid before both Houses of Parliament.

#### **52EF—Obligations of persons involved with children in care**

- (1) A person exercising functions or powers under a relevant law must, in any dealings with, or in relation to, a child who is under the guardianship, or in the custody, of the Minister, have regard to, and seek to implement to the fullest extent possible, the terms of the Charter.
- (2) However, the Charter cannot create legally enforceable rights or entitlements.
- (3) In this section—

*relevant law* means—

  - (a) this Act; or
  - (b) the *Family and Community Services Act 1972*; or

- (c) any law relating to the detention of a youth in a training centre.

## **Division 4—Offences**

### **52EG—Offence relating to intimidation**

A person must not persuade or attempt to persuade by threat or intimidation another person—

- (a) to fail to cooperate with the Guardian in the performance or exercise of the Guardian's powers or functions under this Act; or
- (b) to fail to provide information or a document to the Guardian as authorised or required under this Act; or
- (c) to provide information or a document that is false or misleading in a material particular, or to provide information or a document in a manner that will make the information or document false or misleading in a material particular, to the Guardian under this Act.

Maximum penalty: \$10 000.

### **52EH—Offence relating to reprisals**

- (1) A person must not treat another person unfavourably on the ground that a person—
  - (a) has cooperated with the Guardian in the performance or exercise of powers or functions under this Act; or
  - (b) has provided information or documents to the Guardian as authorised or required under this Act,

or on the ground that he or she knows that a person intends to do either of these things, or suspects that a person has done, or intends to do, either of these things.

Maximum penalty: \$10 000.

- (2) It is sufficient for a contravention of subsection (1) if the ground specified in subsection (1) is a significant factor in inducing the person to take the particular action against the other person.
- (3) Unfavourable treatment on the ground that a person—
  - (a) has made a false allegation; or
  - (b) has not acted in good faith,

does not constitute a contravention of subsection (1).

**52EI—Offence relating to obstruction etc**

A person must not, without reasonable excuse, obstruct, hinder, resist or improperly influence, or attempt to obstruct, hinder, resist or improperly influence, the Guardian in the performance or exercise of a function or power under this Act.

Maximum penalty: \$10 000.

**52EJ—Offence relating to the provision of information**

A person must not—

- (a) provide to the Guardian information that the person knows is false or misleading in a material particular; or
- (b) refuse or fail to include in information provided to the Guardian other information without which the information provided is, to the knowledge of the person, false or misleading in a material particular.

Maximum penalty: \$10 000.

**19—Amendment of section 63—Regulations**

Section 63—after subsection (2) insert:

- (3) Regulations under this Act may—
  - (a) be of general or limited application; and
  - (b) make different provision according to the matters or circumstances to which they are expressed to apply; and
  - (c) provide that a matter or thing in respect of which regulations may be made is to be determined according to the discretion of the Chief Executive (or a delegate of the Chief Executive); and
  - (d) refer to or incorporate, wholly or partially and with or without modification, a code, standard or other document prepared or published by a prescribed person or body, either as in force at the time the regulations are made or as in force from time to time.

## 20—Insertion of Schedule 1

After section 63 insert:

### **Schedule 1—Transitional provisions**

#### **1—Responsible authority to obtain criminal history**

- (1) If an organisation to which section 8B of this Act applies immediately after the commencement of section 7 of the *Children's Protection (Implementation of Report Recommendations) Amendment Act 2009* was not an organisation to which section 8B applied immediately before that commencement, the responsible authority for the organisation must ensure that, during the period prescribed by regulation in relation to the organisation or organisations of that class, an assessment of the criminal history of each person occupying or acting in a prescribed position (whether as an employee, volunteer, agent, contractor or subcontractor) in the organisation is undertaken in accordance with regulations made for the purposes of section 8B.

Maximum penalty: \$10 000.

- (2) The regulations may exempt organisations, persons and positions, or particular classes of organisations, persons and positions, from the application of this clause.
- (3) In this clause, terms used have meanings consistent with the meanings they have in section 8B.

### **Schedule 1—Related amendments**

#### **Part 1—Amendment of *Health and Community Services Complaints Act 2004***

##### **1—Amendment of section 24—Who may complain**

Section 24(b) and (c)—delete paragraphs (b) and (c) and substitute:

- (b) if the health or community service user is a child—
  - (i) the child; or
  - (ii) if the child has attained the age of 16 years—a person appointed by the child to make the complaint on the child's behalf; or
  - (iii) if the child has not attained the age of 16 years—a parent or guardian of the child; or

**2—Amendment of section 27—Time within which a complaint may be made**

Section 27(2)—delete subsection (2) and substitute:

- (2) The Commissioner may extend the period under subsection (1) in a particular case—
  - (a) if satisfied that it is appropriate to do so after taking into account—
    - (i) whether a proper investigation of the complaint should still be possible; and
    - (ii) whether the complaint should still be amenable to resolution under the provisions of this Act; and
    - (iii) whether it would be in the public interest to entertain the complaint; and
    - (iv) any other matter considered relevant by the Commissioner; or
  - (b) if—
    - (i) the complaint relates to the provision of a health or community service to a child; and
    - (ii) the complainant first had notice of the circumstances giving rise to the complaint after May 2004.