



**Government  
of South Australia**

**SOUTH AUSTRALIAN GOVERNMENT RESPONSE TO THE *CHILDREN IN  
STATE CARE COMMISSION OF INQUIRY* REPORT**

***Children's Protection (Implementation of Report Recommendations)  
Amendment Bill 2009***

**SUMMARY OF KEY FEATURES**

## INVITATION TO COMMENT

The *Children's Protection (Implementation of Report Recommendations) Amendment Bill 2009* is the South Australian Government's legislative response to the findings of the Mullighan Inquiry. The Minister for Families and Communities introduced the Bill into Parliament on 16 July 2009.

The Bill and proposed regulations are now released for community consultation.

Copies of the Bill, second reading report and supporting material are available at <http://www.sa.gov.au/mullighaninquiry>.

For printed copies or further questions about the Bill, please email [DFCMullighanReforms@dfc.sa.gov.au](mailto:DFCMullighanReforms@dfc.sa.gov.au) or phone 8463 6468.

Community members and organisations are invited to provide written comments on the Bill. Comments should not contain confidential information, because confidentiality cannot be absolutely guaranteed.

Comments should be addressed to:

Executive Officer

Inter-departmental Working Group, SA Government response to Commission of Inquiry (*Children in State Care*) report

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## BACKGROUND

In November 2004 the Honourable Edward Mullighan QC, former justice of the Supreme Court, commenced an Inquiry into Children in State Care. A second Inquiry was subsequently established into Children on APY Lands. The Commissions of Inquiry (“the Mullighan Inquiry”) made wide-reaching recommendations to further strengthen South Australia’s child protection system and to promote the safety and well-being of South Australia’s children and young people.

The majority of recommendations made by the Mullighan Inquiry were accepted by the South Australian Government. In response to these recommendations, the Government committed to specific actions towards implementation, including the introduction of a “package of legislation” to Parliament.

The *Children’s Protection (Implementation of Report Recommendations) Amendment Bill 2009* is a key component of the Government’s legislative response to the Mullighan Inquiry recommendations. It will provide much stronger protections for children and young people accessing services in South Australia and promote broad community awareness of the responsibility to help keep children safe from harm.

The principal amendments include (but are not limited to):

- Enhanced provisions to promote child safe environments, including requiring a broader range of organisations to have criminal history checks for personnel working with children;
- Additional protection for mandatory notifiers;
- Provisions to ensure appropriate mechanisms are available to respond when a young person makes a disclosure of sexual abuse;

- Provisions to clarify and strengthen the role and powers of the Guardian for Children and Young People and the Health and Community Services Complaints Commissioner; and
- Mechanisms to promote the participation of children and young people in government decision-making.

The following discussion provides a summary of the key features of the *Children's Protection (Implementation of Report Recommendations) Amendment Bill 2009* and proposed regulations.

## AMENDMENTS TO THE *CHILDRENS PROTECTION ACT 1993*

### **Child Safe Environments – Criminal History Assessments**

#### ***What happens now?***

Section 8B (1) of the *Children’s Protection Act 1993* requires all Government organisations and non-government schools to obtain a criminal history report on any personnel working with children (section 8B (1)).

Criminal history reports must be obtained for all employees, volunteers, agents, contractors and sub-contractors of government organisations and non-government schools.

#### ***What is being changed?***

As recommended by Commissioner Mullighan, the Bill extends the obligation to obtain criminal history reports on personnel working with children to organisations defined in section 8C of the *Children’s Protection Act 1993*. The requirement will apply to any local government or non-government organisation that provides health, welfare, education, sporting or recreational, religious or spiritual, child-care or residential services wholly or partly for children. A maximum penalty of \$10,000 may be imposed for non-compliance with this requirement.

The Act currently requires organisations obtain a criminal history report “*from the Commissioner of Police or some other prescribed source.*” The Bill amends this obligation and instead requires an organisation to “*cause an assessment of the person’s criminal history to be undertaken in accordance with the Regulations.*” This amendment will have no immediate impact on an organisation’s obligation to obtain a criminal history for personnel working with children but it will accommodate any future requirements arising from the work being undertaken at a national level to establish a framework for improved

inter-jurisdictional exchange of criminal history information for screening of people working with children.

The “prescribed functions” definition in section 8B (8) of the *Children’s Protection Act 1993* sets out who is “working with children.” In order to achieve a better balance between protection and practicality, the definition is amended to:

- exclude situations where a person is under direct supervision and observation at all times by appropriate personnel (for example, a specialist sports coach who is at all times supervised by a PE teacher with an appropriate criminal history check)
- limit the types of records that require a person to undergo a criminal history assessment.

Limiting the definition of “access to records” was considered necessary because definition of a record is enormously wide in scope. It encompasses commonly held records such as name, address and date of birth, or indeed a photograph. These types of common records may be handled by a large range of personnel in an organisation. A better balance between protection and practicality is achieved by requiring organisations to only obtain a criminal history report for personnel accessing the more sensitive type of personal records (such as those relating to child protection, juvenile justice, health services, education services, disability services and court orders and proceedings).

***What are the changes for?***

A strong and effective child protection system requires commitment and participation from the whole-of-government, as well as organisations, employers and the community.

The Bill establishes a minimum state-wide standard to help government and non-government organisations keep children safe from harm. The Bill provides organisations with an additional mechanism to promote the safety of children and young people who access their services and helps organisations to make informed decisions about who is suitable to work with children in their organisation. The changes will also deter unsuitable people from trying to obtain work with children and will contribute to a broader understanding of child protection being a whole-of-community responsibility.

The Government recognises that most organisations are already committed to ensuring that their organisation is a safe place for children and young people and have implemented strategies and initiatives to promote child safety and wellbeing. A number of organisations not legally obliged to undertake criminal history checks on personnel working with children already do so as part of their commitment to making children safe and as a part of good organisational practice. Many organisations have implemented a range of additional strategies and initiatives to make their organisation a safer place for children. These include developing and implementing child safe environment policies and procedures, undertaking comprehensive recruitment practices and ensuring staff are appropriately trained and supervised.

The amendments will also bring South Australia further in line with working with children schemes established in other Australian States and Territories.

However, it is important to recognise that criminal history assessments alone will not guarantee a person's suitability to work with children and should not be a substitute for comprehensive recruitment practices and other strategies that help ensure that organisations are safe places for children.

***Proposed Exemption Criteria (to be established via regulation pursuant to section 8D)***

As announced in the Government response of June 2008, the Bill makes provision for an exemption scheme to be established via regulation. An

exemption scheme is considered necessary to ensure that a sensible and balanced approach is reached, where the best child protection mechanisms are achieved without placing unnecessarily onerous obligations on organisations and positions that are assessed as posing a low risk to children. In low risk situations, the risk to children may be appropriately managed through the establishment of appropriate child safe environment standards and policies along with comprehensive recruitment processes and appropriate supervision, training and management of staff.

The scheme will exempt organisations, positions or functions from the obligation to undertake a criminal history assessment in certain circumstances. However, no exemptions will be available for positions involving “high risk” activities (ie: positions involving the provision of commercial child care; family day care; juvenile justice; child protection; disability services; or residential care and other overnight accommodation (unless the overnight accommodation is provided by a visiting interstate worker who does not ordinarily live or perform work in South Australia)).

The scheme will also not override the prohibition preventing registrable offenders from engaging in child related work set out in section 65 of the *Child Sex Offenders Registration Act 2006*.

**The following organisations, positions and functions will be exempt:**

***(1) Parents volunteering in services or activities in which their children ordinarily participate***

Volunteer parents will be exempt from the requirement to undergo a criminal history assessment in most circumstances. Parents play a vital role in the learning and development of their children and many organisations, such as sport and recreation and schools, rely on parental involvement in order to continue providing a high level of service. In order to ensure that parents are not unreasonably prevented from participating in their children’s learning and development, it is considered appropriate to

exempt parents from this requirement. A similar exemption for parents is in place in Queensland, Victoria and Western Australia.

This exemption recognises that the vast majority of parents who volunteer do so to assist and support the children involved and are motivated by the desire to protect those children and their child in particular. In addition, most situations where a parent volunteers also generally involve appropriately screened personnel.

*Example: Jennifer coaches her daughter's hockey team. As a parent volunteering in her own child's activity, Jennifer is exempt from the requirement to undergo a criminal history assessment, even if her daughter is not present on a particular day due to illness or some other reason.*

**(2) People who are engaged in an event or activity that is for no more than 10 consecutive days in a calendar year or for no more than 1 day in any month.**

This exemption is designed to accommodate unforeseen circumstances that may arise, such as where a regular employee or volunteer is unwell and another person temporarily acts in their position. The exemption will also cover once-off events, such as the Royal Adelaide Show, or where there are visiting interstate workers, such as a weekend sporting carnival.

This exemption recognises that organisational arrangements, such as supervision and policing, in conjunction with the organisations' child safe environment policies and procedures are generally in place to protect against "opportunistic" criminal behaviours. In these short-term situations, it is considered unreasonable and impractical to require personnel to undergo a criminal history assessment.

*Example: Carol lives in Victoria and coaches a netball team that is competing in a weekend event in Adelaide. Carol is not required to undergo a criminal history assessment to attend this event because she is participating in a short-term activity of less than 10 days duration.*

**(3) A position in which all work involving children takes place in the presence of the child's parents or guardian's and in which there is ordinarily no physical contact.**

A service or activity that takes place when the child's parent or guardian remains present at all times and does not ordinarily involve physical contact will be exempt. In assessing the situation, account has been taken of the fact that in these situations the provider remains largely under the parent's direction.

The extended requirement to undertake criminal history assessments is intended to be an additional tool for protecting children from harm. It is not intended to replace parents being vigilant about managing risks to their child's safety.

*Example: Kevin tutors primary school-aged children on a part-time basis. In all cases, a parent of the child remains physically present at all times and the tuition involves no physical contact. Kevin is exempt from the requirement to undergo a criminal history assessment.*

**(4) A person who undertakes, or a position that only involves, work that is primarily provided to adults or the general community and is not provided to any child on an individual basis.**

This exemption will apply to organisations, positions and functions that are involved in the provision of services to groups made up of the general community, but where a child may sometimes participate on an equal basis to adults present. This may include a group yoga class, or a senior sporting team that may have a team member less than 18 years of age. This exemption will also apply to services that require incidental or occasional contact with children or involve customers who are children, such as retail outlets and cinemas.

As described elsewhere in this paper, the intent of the recommendations is to strike a balance that ensures that the best child protection mechanisms

are applied and a sensible working approach is taken to the application of these new obligations. With this in mind, it was not considered reasonable to extend the requirement to organisations providing services to the general community that may involve occasional participation by children on an equal basis with adults present.

*Example: Jason coaches a senior soccer team that has one team member who has not yet attained 18 years of age. Jason is exempt from the requirement to undergo a criminal history assessment.*

**(5) An organisation that provides equipment, food or a venue for children's parties or events but does not provide any other service.**

This exemption applies to organisations that provide food, equipment or a venue for children's parties or events but no other service (for example, organisations that provide catering or equipment for children's birthday parties or food and beverage vendors at children's events). The proposed exemption would also apply to an organisation that offers a hall or other venue for hire (such as a local council). However, it would not apply to an organisation offering hosted birthday parties for children.

In assessing this situation it was determined that, where an organisation only provides food, equipment or a venue for children's parties or events, personnel would usually be under the direction of another person (e.g. a parent at a children's birthday party). This may be contrasted with an organisation offering hosted children's parties or events, which involve a greater degree of interaction and responsibility.

*Example: Sally works for a catering organisation that often caters for children's parties. In some cases, children are present when Sally makes her delivery. As Sally is providing food and no other service, she is exempt from the requirement to undergo a criminal history assessment.*

**(6) A person who is a volunteer and is less than 18 years of age.**

There are numerous difficulties associated with extending the requirement for a criminal history assessment to children who are volunteers, such as defining situations where a child is “working with children” rather than participating on an equal basis with children (an example of this is the ‘buddy system’ that operates in many school where an older student is teamed up with a younger student to provide support and guidance).

In assessing this situation it was recognised that many children in South Australia volunteer in a range of organisations. For example, many thousands of children each year in South Australia participate in “work experience” activities (which are usually volunteer activities) and the Government does not wish to impose additional barriers on this important activity. Whilst it is acknowledged that instances of abuse by one child of another do occur, it is also the case that very few children have a ‘criminal history’ that can be assessed.

As with all exempting criteria, this exemption will not apply to child volunteers working in positions defined as “high risk” (ie: positions involving the provision of commercial child care; family day care; juvenile justice; child protection; disability services; or residential care and other overnight accommodation (unless the overnight accommodation is provided by a visiting interstate worker who does not ordinarily live or perform work in South Australia)).

*Example: Peter is 14 years old and a member of his local Youth Advisory Council. As a volunteer under 18 years of age, Peter is exempt from the requirement to undergo a criminal history assessment.*

**(7) A person who has contact with children as part of an employment relationship.**

It is not the intent of this proposal to regulate contact that occurs in the normal course of duties between an employer and an employee (including

employees less than 18 years) or between employees of the same employer, who are not otherwise engaged in child-related work.

The conduct of employers of young people and employees working alongside young people in general employment situations is governed by industrial relations legislation and policy. In assessing this situation, it was concluded that South Australian employment-related legislation is the appropriate mechanism to regulate the conduct and functions of employers of young people and employees working alongside young people in lawful employment.

*Example: Kara is 17 and is employed in the central office of a community organisation. Kara's supervisor and colleagues are not required to undergo a criminal history assessment in order to work with her, unless they are also otherwise engaged in child-related work.*

#### **(8) Where the person is a police officer or registered teacher.**

Teachers and police officers are already subject to criminal history assessments and "fit and proper person" inquiries as part of their appointment and registration procedures. As these categories of employment must reach a higher threshold of suitability than provided by a criminal history assessment, it is not considered necessary to conduct additional assessments in these situations.

*Example: Melanie is a police officer and regularly attends schools to present information to children. As Melanie is a sworn police officer, she is not required to undergo a criminal history assessment to carry out this activity.*

#### **When will this requirement commence?**

In order to provide time for organisations to become familiar with the new requirements to obtain a criminal history assessment, the implementation of the amendments to section 8B will be delayed by one year following proclamation. The new requirements will then be phased in over a three year

period. (A draft schedule for the phasing-in of these amendments is annexed as appendix 1.)

These amendments will establish a statewide minimum standard for all relevant government, local government and non government organisations that employ personnel to work in positions of trust with children.

### **Child Safe Environments – Obligations of certain organisations**

The Bill introduces a new requirement for organisations to lodge a statement setting out details of their child safe environment policies and procedures with the Chief Executive of the Department for Families and Communities as evidence that the organisation is engaged in making their organisation a safer place for children. This will assist the Department for Families and Communities to monitor progress towards the establishment of child safe environments as required under section 8A (i) of the *Children's Protection Act 1993*.

To ensure that the Department for Families and Communities has sufficient power and authority to undertake this role, the Bill makes provision for the Chief Executive to seek further information from organisations relating to their compliance with the child safe environment requirements. It is intended that this power will be used in situations where experience is showing that there is a particular risk of child abuse occurring or where the nature of reports to the child abuse report line suggest that more stringent efforts need to be made by a particular class or group of organisations to protect children from possible abuse.

Further information about child safe environments can be accessed at [www.familiesandcommunities.sa.gov.au](http://www.familiesandcommunities.sa.gov.au).

## **Notification of Abuse and Neglect**

As recommended by Commissioner Mullighan, the Bill will create a new offence of preventing a person from discharging the obligation of mandatory reporting through threat, intimidation or unfavourable treatment.

This clause will provide additional protection to people subject to mandatory notification requirements under the Act and ensure that they are confident to provide Families SA with the necessary information to make an appropriate response in cases of suspected abuse or neglect without fear of threat, intimidation or unfavourable treatment.

## **Guardian for Children and Young Persons**

The Mullighan Inquiry endorsed the establishment of the office of the Guardian for Children and Young Persons, noting that the office of the Guardian, like the Inquiry, “is focused on children and young people in State care, rather than children generally.”

As recommended by Commissioner Mullighan, the Bill makes a number of amendments to the Act to strengthen the powers and functions of the Guardian for Children and Young Persons. In many cases, the amendments operate to formalise what is already occurring in practice and ensure that there is no doubt regarding the Guardian’s role as an independent and impartial advocate for children and young people in care.

Broadly, the amendments to the powers and functions of the Guardian for Children and Young Persons will:

- Expressly recognise that the Guardian must act independently, impartially and in the public interest in performing and exercising his or her functions under the Act;
- Include an additional function of acting as an advocate for a child or young person in State care who has made a disclosure of sexual abuse;

- Require that the Guardian establish a Youth Advisory Council;
- Empower the Guardian to prepare a report to the Minister on any matter arising from the exercise of the Guardian's functions under the Act;
- Empower the Guardian to request and obtain information from any person in relation to the Guardian's functions under the Act;
- Require that the Guardian develop a *Charter of Rights for Children and Young People*;
- Protect persons from fear of intimidation or reprisal when lawfully complying with a request from the Guardian; and
- Create an offence of obstructing the Guardian in the lawful exercise of the Guardian's powers.

### **Other Amendments**

The Bill also makes a number of additional minor amendments to the Act, which include:

- Amending the Aboriginal Child Placement Principle so that reference is also made to Torres Strait Islander Children;
- Requiring that the Minister for Families and Communities consult with groups representing or comprised of children and other persons who are or have been under the Guardianship, or in the custody, of the Minister; and
- Amending section 16 – the power to remove children from dangerous situations – to make clear that this power is in addition to, and does not derogate from, the powers set out in section 51 (4).<sup>1</sup>

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<sup>1</sup> Section 51 (4) provides that an authorised police officer may for the purposes of enforcing any order of the Youth Court, without warrant, remove from any place a child who is under the Guardianship of the Minister or of whom the Minister has custody, using such force (including breaking into premises) as is reasonable necessary for that purpose.

**AMENDMENTS TO THE *HEALTH AND COMMUNITY SERVICES  
COMPLAINTS ACT 2004***

**Amendments to Part 4 - Complaints**

As recommended by the Mullighan Inquiry, this Bill also amends the *Health and Community Service Complaints Act 2004* to expressly state the right of children and young people to complain directly to the Commissioner. This will ensure that there is no actual or perceived impediment for children or young people who wish to make a complaint to the Commissioner themselves.

The Act is also amended to provide that a relevant consideration for extending the two-year limit on the child protection jurisdiction is that the complaint arises from circumstances since the launch of the *Keeping Them Safe* reform agenda in May 2004. This amendment will provide greater clarity for children and young people who may wish to make a complaint to the Commissioner outside the two-year time limit currently specified in the Act.

*Phasing-in of amendments to section 8B (1) of the Children’s Protection Act 1993*

The extended requirement for organisations to conduct criminal history assessments will be phased in over a period of three years. This incremental approach will provide sufficient time for organisations to become familiar with the new requirements and ensure that the system is not overloaded.

In developing the proposed phasing in arrangements, consideration has been given to the relative risk of harm to children and the extent to which criminal history assessments are already in place within various sectors.

Organisations must ensure that people working in prescribed positions within their organisations obtain a criminal history check within the appropriate time period. The requirements apply to both new and existing employees within the organisation.

<b>January – June 2011</b>	<b>July - December 2011</b>
<p>Paid employees and volunteers working in prescribed positions in organisations providing the following services wholly or partly to children:</p> <ul style="list-style-type: none"> <li>• Child-care services (including commercial child care centres, family day care and out of hours school care).</li> <li>• Residential care (including overnight accommodation for</li> </ul>	<p>Paid employees and volunteers working in prescribed positions in organisations providing the following services wholly or partly to children:</p> <ul style="list-style-type: none"> <li>• Welfare</li> <li>• Health services.</li> </ul>

<p>children ad refuges)</p> <ul style="list-style-type: none"> <li>• Education (other than education programs outside schools).</li> </ul>	
<b>January – June 2012</b>	<b>July - December 2012</b>
<p>Paid employees working in prescribed positions in organisations providing the following services wholly or partly to children:</p> <ul style="list-style-type: none"> <li>• Sport and recreation</li> <li>• Health services</li> <li>• Religious or spiritual</li> <li>• Education programs outside schools.</li> </ul>	<p>Volunteers working in prescribed positions with children aged 0 – 7 years in organisations providing the following services wholly or partly to children:</p> <ul style="list-style-type: none"> <li>• Sport and recreation</li> <li>• Health services</li> <li>• Religious or spiritual</li> <li>• Education programs outside schools.</li> </ul>
<b>January – June 2013</b>	<b>July - December 2013</b>
<p>Volunteers working in prescribed positions with children aged 8–12 years in providing the following services wholly or partly to children:</p> <ul style="list-style-type: none"> <li>• Sport and recreation</li> <li>• Health services</li> <li>• Religious or spiritual</li> <li>• Education programs outside schools.</li> </ul>	<p>Volunteers working in prescribed positions with children aged 13– 17 years in providing the following services wholly or partly to children:</p> <ul style="list-style-type: none"> <li>• Sport and recreation</li> <li>• Health services</li> <li>• Religious or spiritual</li> <li>• Education programs outside schools.</li> </ul>