



New South Wales

Children and Young Persons (Care and Protection) Amendment (Protection from Serious Offenders) Bill 2016

Explanatory note

This explanatory note relates to this Bill as introduced into Parliament.

Overview of Bill

The objects of this Bill are to:

- (a) ensure that, subject to some exceptions, any person found guilty of the murder or manslaughter of a child or young person, or of certain other serious offences in relation to a child or young person, where the offender was the parent or guardian of the victim, will automatically have his or her future children removed from his or her care at birth or will be prevented from residing with, approaching or contacting them, and
- (b) provide for the issue of restraining notices so that any person found guilty of such an offence may be prevented from residing with, approaching or having any contact with a child or young person.

Outline of provisions

Clause 1 sets out the name (also called the short title) of the proposed Act.

Clause 2 provides for the commencement of the proposed Act on the date of assent to the proposed Act.

Schedule 1 **Amendment of Children and Young Persons (Care and Protection) Act 1998 No 157**

Schedule 1 [1] provides for the protection of children and young persons from persons who have been found guilty of certain offences where the victim was a child or young person and the offender was a parent or guardian of that child or young person. The item includes a new Part 3A

(Protection from persons found guilty of certain serious offences) in Chapter 4. The proposed Part contains the following provisions:

- (a) **Proposed section 38H** inserts definitions of terms used in the proposed Part. In particular, *disqualifying offence* is defined to include murder, manslaughter, infanticide, and certain other serious offences, or an attempt to commit such offences, where the victim is a child or young person and the offender a parent or guardian of that child or young person. It does not matter whether the offence was committed before or after the commencement of the proposed Part, and those offences include interstate offences.
- (b) **Proposed section 38I** explains the extended meaning of being *found guilty* in the proposed Part.
- (c) **Proposed section 38J** provides that, for the purposes of the proposed Part, a newborn baby will be taken to reside on the same property as a person if the baby is likely to reside on the same property as the person when the baby is discharged from hospital.
- (d) **Proposed section 38K** requires the Secretary of the Department of Family and Community Services to assume guardianship of a child if the Secretary becomes aware that the child has been born to a parent who has been found guilty of a disqualifying offence.

This is achieved by the Secretary issuing an instrument of guardianship. The child specified in the instrument will, for all purposes, be under the guardianship of the Minister for a period of 60 days, unless a parent of the child makes a successful application to have the instrument of guardianship revoked.

(If the child also resides with a parent who has not been found guilty of a disqualifying offence, the Secretary is not to issue an instrument of guardianship, but must instead issue a restraining notice under proposed section 38Q against the parent found guilty of the disqualifying offence. The Secretary is not required to issue an instrument if he or she is of the opinion that the relevant disqualifying offence occurred where there were significant mitigating circumstances, or arose as a result of any illness or condition from which the offender no longer suffers or from any circumstances that no longer exist.)

- (e) **Proposed section 38L** clarifies the effect of an instrument of guardianship, which is to allocate all aspects of care responsibility for the child to the Minister, authorise the removal of the child from the care of those of his or her parents who have been found guilty of a disqualifying offence, require the child to be kept at a place approved by the Minister and specify the arrangements for the custody, care, protection, health, welfare or education of the child.
- (f) **Proposed section 38M** provides that the Act applies to an instrument of guardianship as if it were a care order.
- (g) **Proposed section 38N** provides that an instrument of guardianship remains in force for 60 days, unless it is earlier revoked, but can be extended.
- (h) **Proposed section 38O** provides that a parent can apply for the revocation of an instrument of guardianship.
- (i) **Proposed section 38P** provides that a woman who has been found guilty of a disqualifying offence and who is expecting a child may, during the term of her pregnancy, apply for an order of the Children's Court to prevent the issuing of an instrument of guardianship in relation to the child.
- (j) **Proposed section 38Q** requires the Secretary, if he or she becomes aware that a child or young person is residing, or is about to reside, on the same property as a person who has been found guilty of a disqualifying offence, to issue a restraining notice to the person. The Secretary is not required to issue a notice if of the opinion that the relevant disqualifying offence occurred where there were significant mitigating circumstances, or arose as a result of any illness or condition from which the offender no longer suffers or from any circumstances that no longer exist.
- (k) **Proposed section 38R** provides that a restraining notice may prohibit the offender from:

- (i) residing on the same property as the child or young person, or
 - (ii) coming within a specified distance of the child or young person's residence, or
 - (iii) having any physical contact with the child or young person except under supervision, or
 - (iv) having any contact at all with the child or young person.
- (l) **Proposed section 38S** provides that a restraining notice will apply for a period of 60 days, unless it is earlier revoked, but can be extended.
- (m) **Proposed section 38T** provides that an offender can apply for the revocation of a restraining notice.
- (n) **Proposed section 38U** specifies the matters to which the Children's Court is to have regard when determining applications for the revocation of instruments of guardianship or restraining notices or to prevent the issue of instruments of guardianship.
- (o) **Proposed section 38V** requires a court that finds a person guilty of a disqualifying offence to provide the Secretary with certain information relating to the finding of guilt.
- (p) **Proposed section 38W** provides that a document purporting to be an instrument of guardianship or restraining notice is admissible in evidence in any proceedings under the Act and, in the absence of evidence to the contrary, is proof of the instrument or notice and its terms and that it was duly given.

Schedule 1 [2] requires the Secretary to apply to the Children's Court for a care order under Chapter 5 as soon as practicable after the Secretary issues an instrument of guardianship or a restraining notice under the new provisions.

Schedule 1 [3] sets out the grounds for such an application, namely that:

- (a) a parent of the child has been found guilty of a disqualifying offence and the child does not reside on, or is not about to reside on, the same property as any other of his or her parents who has not been found guilty of a disqualifying offence, or
- (b) the child or young person is residing, or is about to reside, on the same property as a person who has been found guilty of a disqualifying offence.

Schedule 1 [4] allows the Children's Court to revoke an instrument of guardianship or restraining notice where:

- (a) an application has been made for revocation by a parent of the child or young person, or
- (b) an application for a care order contemplated by the proposed new provisions has been made by the Secretary.



New South Wales

Children and Young Persons (Care and Protection) Amendment (Protection from Serious Offenders) Bill 2016

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New South Wales

Children and Young Persons (Care and Protection) Amendment (Protection from Serious Offenders) Bill 2016

No. , 2016

A Bill for

An Act to amend the *Children and Young Persons (Care and Protection) Act 1998* to ensure that persons found guilty of serious offences in relation to their children are prevented from having care and responsibility for their children and from having certain contact with other children and young persons.

The Legislature of New South Wales enacts:

1

1 Name of Act

2

This Act is the *Children and Young Persons (Care and Protection) Amendment
(Protection from Serious Offenders) Act 2016*.

3

4

2 Commencement

5

This Act commences on the date of assent to this Act.

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Schedule 1	Amendment of Children and Young Persons (Care and Protection) Act 1998 No 157	1 2
[1] Chapter 4, Part 3A		3
Insert after Part 3:		4
Part 3A	Protection from persons found guilty of certain serious offences	5 6
Division 1	Preliminary	7
38H	Definitions	8
	In this Part:	9
	<i>disqualifying offence</i> means any of the following offences (whether committed before or after the commencement of this Part) where the victim was a child or young person and the offender was a parent or guardian of the child or young person:	10 11 12 13
	(a) murder,	14
	(b) manslaughter,	15
	(c) an offence under any of the following provisions of the <i>Crimes Act 1900</i>):	16 17
	(i) section 22A (Infanticide),	18
	(ii) section 25A (Assault causing death),	19
	(iii) section 27 (Acts done to the person with intent to murder),	20
	(iv) section 29 (Certain other attempts to murder),	21
	(v) section 30 (Attempts to murder by other means),	22
	(vi) section 33 (1) (Wounding or grievous bodily harm with intent),	23
	(vii) section 35 (1) or (2) (Reckless grievous bodily harm),	24
	(viii) section 42 (Injuries to child at time of birth),	25
	(ix) section 45 (Prohibition of female genital mutilation),	26
	(x) section 45A (Removing person from State for female genital mutilation),	27 28
	(d) an offence under section 227 (Child and young person abuse) of this Act,	29 30
	(e) an offence comprised of an attempt to commit an offence referred to in paragraphs (a)–(d),	31 32
	(f) an offence under the law of another jurisdiction that corresponds to an offence referred to in paragraphs (a)–(e).	33 34
	<i>instrument of guardianship</i> means an instrument of guardianship issued under section 38K.	35 36
	<i>parent</i> , of a child or young person, includes the biological parent of a child or young person, whether or not that biological parent has parental responsibility for the child or young person, but does not include a stepmother or stepfather of the child or young person unless she or he has parental responsibility for the child or young person.	37 38 39 40 41
	<i>restraining notice</i> means a restraining notice issued under section 38Q.	42

38I	Extended meaning of “found guilty”	1
	For the purposes of this Part, a reference to a person being <i>found guilty</i> of an offence will be taken to include a reference to a person having been charged with a disqualifying offence and there being:	2
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	(a) a special verdict that the accused person was not guilty by reason of mental illness under section 38 of the <i>Mental Health (Forensic Provisions) Act 1990</i> , or	5
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	(b) a verdict of the kind referred to in section 22 (1) (c) or (d) of that Act, being a verdict that the accused person committed the offence charged or an offence available as an alternative to the offence charged, or	8
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	(c) an acquittal on the ground of mental illness, where the mental illness was not set up as a defence by the person acquitted, or	11
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	(d) any finding of a court of another jurisdiction that corresponds to a finding referred to in paragraphs (a)–(c).	13
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38J	Newborn child taken to reside at likely residence	15
	For the purposes of this Part, a newborn child who has not yet been discharged from hospital will be taken to be residing on the same property as a person if the child is likely to reside on the same property as the person on being discharged.	16
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Division 2	Temporary guardianship of children of certain offenders	20
		21
38K	Secretary must issue instrument of guardianship for children of certain offenders	22
		23
	(1) The Secretary must issue an instrument under this section (an <i>instrument of guardianship</i>) in respect of any child who:	24
		25
	(a) is born, after the commencement of this section, to a parent who has been found guilty of a disqualifying offence (the <i>offender</i>), and	26
		27
	(b) does not reside on, or is not about to reside on, the same property as any other of his or her parents who have not been found guilty of a disqualifying offence, and	28
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	(c) is not subject to a guardianship order under this or any other Act.	31
	(2) However, the Secretary is not required to issue an instrument of guardianship if the Secretary is of the opinion that the relevant disqualifying offence:	32
		33
	(a) occurred where there were significant mitigating circumstances, or	34
		35
	(b) arose as a result of any illness or condition from which the offender no longer suffers or from any circumstances that no longer exist.	36
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	(3) An instrument of guardianship:	37
		38
	(a) must be served on the offender as soon as practicable after it has been issued, and	39
		40
	(b) must be lodged with the Children’s Court in accordance with any requirements prescribed by the regulations (and may be so lodged whether or not it has been served in accordance with paragraph (a)).	41
		42

38L	Contents and effect of instrument of guardianship	1
(1)	The instrument of guardianship is to:	2
(a)	allocate all aspects of care responsibility for the child to the Minister, and	3 4
(b)	authorise the removal of the child from the care of those of his or her parents who have been found guilty of a disqualifying offence, and	5 6
(c)	require the child to be kept at a place approved by the Minister for the purposes of this section, and	7 8
(d)	specify the arrangements for the custody, care, protection, health, welfare or education of the child.	9 10
(2)	If the Secretary issues an instrument of guardianship, the child specified in the instrument will, for all purposes, be under the guardianship of the Minister during the guardianship period (subject to a care order of the Children's Court on an application under section 61AA).	11 12 13 14
38M	Act applies to instrument of guardianship as if it were care order	15
(1)	This Act will be taken to apply to an instrument of guardianship while it remains in force as if it were a care order of the Children's Court under Part 2 of Chapter 5:	16 17 18
(a)	the parties to which were:	19
(i)	the parents of the child to whom the instrument relates, and	20
(ii)	the child to whom the instrument relates, and	21
(iii)	a person who would, but for the instrument, have had custody or guardianship of the child to whom the instrument relates, and	22 23
(iv)	the Secretary, and	24
(b)	that specified the same arrangements for the custody, care, protection, health, welfare or education of the child as those specified in the instrument of guardianship.	25 26 27
(2)	However, until the Secretary makes an application to the Children's Court under section 61AA in relation to an instrument of guardianship, any application to the Children's Court under section 90 in relation to the instrument may only seek to vary the arrangements for the custody, care, protection, health, welfare or education of the child specified in the instrument.	28 29 30 31 32 33
38N	Duration of instrument of guardianship	34
(1)	An instrument of guardianship remains in force for the period beginning at the time the instrument is lodged with the Children's Court and ending 60 days later (or such longer period as may be allowed by the Children's Court), unless sooner revoked by the Children's Court.	35 36 37 38
(2)	The Children's Court may, on application by the Secretary, extend the duration of the instrument of guardianship if satisfied that it is appropriate to do so.	39 40 41
38O	Parent may apply for revocation of instrument of guardianship	42
	The Children's Court may, on application by a parent of the child concerned, revoke an instrument of guardianship if satisfied that it is appropriate to do so.	43 44
	Note. Section 38U sets out the matters to which the Children's Court is to have regard in determining an application under this section.	45 46

38P	Pregnant woman may apply to prevent issue of instrument of guardianship	1
(1)	A woman who has been found guilty of a disqualifying offence and who is expecting a child may, during the term of her pregnancy, apply for an order of the Children's Court to prevent the issuing of an instrument of guardianship in relation to the child.	2 3 4 5
(2)	If an application to prevent the issuing of an instrument of guardianship is made:	6 7
(a)	the Secretary is not to issue an instrument of guardianship in relation to the relevant child while the application is being determined, and	8 9
(b)	the application must be determined no later than 28 days after it is made, and	10 11
(c)	the Children's Court may prevent the Secretary from issuing an instrument of guardianship in relation to the child if satisfied that it is appropriate to do so.	12 13 14
	Note. Section 38U sets out the matters to which the Children's Court is to have regard in determining an application under this section.	15 16
Division 3	Restraining notices against certain offenders	17
38Q	Secretary must issue restraining notice if child or young person residing with certain offenders	18 19
(1)	The Secretary must issue a notice under this section (a <i>restraining notice</i>) in respect of any child or young person:	20 21
(a)	who is born after the commencement of this section, and	22
(b)	who the Secretary becomes aware is residing, or is about to reside, on the same property as a parent of the child or young person, or any other person, who has been found guilty of a disqualifying offence (the <i>offender</i>), and	23 24 25 26
(c)	who is not subject to an instrument of guardianship or to a guardianship order under this or any other Act.	27 28
(2)	However, the Secretary is not required to issue a restraining notice if the Secretary is of the opinion:	29 30
(a)	that the relevant disqualifying offence occurred where there were significant mitigating circumstances, or	31 32
(b)	that the relevant disqualifying offence arose as a result of any illness or condition from which the offender no longer suffers or from any circumstances that no longer exist, or	33 34 35
(c)	that it is otherwise inappropriate to do so in the circumstances.	36
(3)	A restraining notice issued in relation to an offender:	37
(a)	must be served on the offender as soon as practicable after it has been issued, and	38 39
(b)	must be lodged with the Children's Court in accordance with any requirements prescribed by the regulations (and may be so lodged whether or not it has been served in accordance with paragraph (a)).	40 41 42
38R	Contents and effect of restraining notice	43
(1)	A restraining notice may prohibit the offender from:	44
(a)	residing on the same property as the child or young person, or	45

(b)	coming within a specified distance of the child or young person's residence, or	1 2
(c)	having any physical contact with the child or young person (except in the presence of a specified person or person of a specified class of person), or	3 4 5
(d)	having any contact at all with the child or young person (including any contact through the internet).	6 7
(2)	A person who contravenes or fails to comply with a restraining notice knowing that the relevant act or omission constituted a contravention of, or failure to comply with, the notice, or being reckless as to the fact, is guilty of an offence. Maximum penalty: 100 penalty units.	8 9 10 11
38S	Duration of restraining notice	12
(1)	A restraining notice remains in force for the period commencing at the time at which the restraining notice is served on the offender and ending 60 days later (or such longer period as may be allowed by the Children's Court) unless sooner revoked by the Children's Court.	13 14 15 16
(2)	The Children's Court may, on application by the Secretary, extend the duration of a restraining notice if satisfied that it is appropriate to do so.	17 18
38T	Offender may apply for revocation of restraining notice	19
	The Children's Court may, on application by the offender concerned, revoke a restraining order if satisfied that it is appropriate to do so.	20 21
	Note. Section 38U sets out the matters to which the Children's Court is to have regard in determining an application under this section.	22 23
Division 4	Miscellaneous	24
38U	Matters to which Children's Court is to have regard in considering certain applications	25 26
(1)	This section applies to the Children's Court's consideration of the following applications:	27 28
(a)	an application for revocation of an instrument of guardianship under section 38O,	29 30
(b)	an application to prevent the issue of an instrument of guardianship under section 38P,	31 32
(c)	an application for revocation of a restraining notice under section 38T.	33
(2)	Without limiting the matters to which the Children's Court may have regard in determining an application, the Court is to have regard to the following:	34 35
(a)	the age of the victim of the relevant disqualifying offence when it was committed,	36 37
(b)	the seriousness of the relevant disqualifying offence and of the penalty imposed,	38 39
(c)	whether or not the disqualifying offence involved any aggravating factors,	40 41
(d)	whether or not the disqualifying offence occurred where there were significant mitigating circumstances,	42 43
(e)	whether or not the disqualifying offence arose as a result of any illness or condition from which the offender no longer suffers or from any circumstances that no longer exist,	44 45 46

(f)	whether or not the offender has a record of previous findings of guilt (particularly if the offender has been found guilty of several disqualifying offences or has a record of previous findings of guilt for serious personal violence offences that are not disqualifying offence).	1 2 3 4
(3)	In this section: aggravating factors , in relation to a disqualifying offence, mean any of the following:	5 6 7
(a)	the victim was vulnerable, for example, because the victim was very young,	8 9
(b)	the offence involved gratuitous cruelty,	10
(c)	the injury, emotional harm, loss or damage caused by the offence was substantial,	11 12
(d)	the offence was committed in the home of the victim,	13
(e)	the offence involved the offender causing the victim to take, inhale or be affected by a narcotic drug, alcohol or any other intoxicating substance,	14 15 16
(f)	the offence was committed without regard for public safety,	17
(g)	the offence involved a grave risk of death to another person or persons,	18
(h)	the offence involved multiple victims or a series of criminal acts,	19
(i)	the offence was committed in company or was part of a planned or organised criminal activity,	20 21
(j)	the offence was committed for financial gain,	22
(k)	any other factor that the Children’s Court considers aggravated the nature of the disqualifying offence.	23 24
	serious personal violence offence means a personal violence offence (within the meaning of the <i>Crimes (Domestic and Personal Violence) Act 2007</i>) that is punishable by imprisonment for life or for a term of 5 years or more.	25 26 27
38V	Information to be provided to Secretary by courts	28
	A court that finds a person guilty of a disqualifying offence must ensure that the following information relating to the finding of guilt is provided to the Secretary as soon as practicable after the person is found guilty:	29 30 31
(a)	the name and date of birth of the offender,	32
(b)	the disqualifying offence,	33
(c)	the nature of the finding of guilt (having regard to section 38I),	34
(d)	any other information prescribed by the regulations.	35
38W	Admissibility of instruments and notices	36
	A document purporting to be an instrument of guardianship or restraining notice is admissible in evidence in any proceedings under this Act and, in the absence of evidence to the contrary, is proof of the instrument or notice and its terms and that it was duly given.	37 38 39 40

[2] Sections 61AA and 61AB	1
Insert after section 61:	2
61AA Application if instrument of guardianship issued	3
(1) If an instrument of guardianship has been issued under section 38K, the Secretary must, as soon as practicable after the issue of the instrument (and in any case within the period during which the instrument applies) apply to the Children’s Court for a care order.	4 5 6 7
(2) In such a case, the grounds of the application will be taken to be that the instrument of guardianship was properly issued under section 38K.	8 9
61AB Application if restraining notice issued	10
(1) If a restraining notice has been issued under section 38Q, the Secretary must, as soon as practicable after the issue of the notice (and in any case within the period during which the notice applies) apply to the Children’s Court for a care order.	11 12 13 14
(2) In such a case, the grounds of the application will be taken to be that the restraining notice was properly issued under section 38Q.	15 16
[3] Section 71 Grounds for care orders	17
Insert after section 71 (1) (h):	18
(i) in the case of a child born after the commencement of Part 3A of Chapter 4—a parent of the child has been found guilty of a disqualifying offence (within the meaning of that Part) and the child does not reside on, or is not about to reside on, the same property as any other of his or her parents who have not been found guilty of a disqualifying offence,	19 20 21 22 23
(j) in the case of a child or young person born after the commencement of Part 3A of Chapter 4—the child or young person is residing, or is about to reside, on the same property as a person who has been found guilty of a disqualifying offence (within the meaning of that Part).	24 25 26 27
[4] Sections 77A and 77B	28
Insert after section 77:	29
77A Children’s Court may revoke instrument of guardianship	30
If an instrument of guardianship has been issued under section 38K and is in force, and an application has been made under section 38O or 61AA, the Children’s Court may revoke the instrument.	31 32 33
77B Children’s Court may revoke restraining notice	34
If a restraining notice has been issued under section 38Q and is in force, and an application has been made under section 38T or 61AB, the Children’s Court may revoke the notice.	35 36 37