

PRE-TRIAL DIVERSION OF OFFENDERS ACT 1985 No. 153

NEW SOUTH WALES.



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PRE-TRIAL DIVERSION OF OFFENDERS ACT 1985 No. 153

New South Wales



ANNO TRICESIMO QUARTO

ELIZABETHÆ II REGINÆ

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Act No. 153, 1985

An Act to establish a procedure whereby child sexual assault offenders may be diverted from the criminal process into a treatment programme.
[Assented to, 28th November, 1985.]

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BE it enacted by the Queen's Most Excellent Majesty, by and with the advice and consent of the Legislative Council and Legislative Assembly of New South Wales in Parliament assembled, and by the authority of the same, as follows:

PART I
PRELIMINARY

Short title

1. This Act may be cited as the "Pre-Trial Diversion of Offenders Act 1985".

Commencement

2. (1) Sections 1 and 2 shall commence on the date of assent to this Act.

(2) Except as provided by subsection (1), this Act shall commence on such day as may be appointed by the Governor and notified by proclamation published in the Gazette.

Interpretation

3. In this Act, except in so far as the context or subject-matter otherwise indicates or requires—

"child sexual assault offence" means—

- (a) an offence under section 61D, 61E, 66A, 66B, 66C or 66D of the Crimes Act 1900 or an offence of attempting to commit an offence under section 61D or 61E of that Act;
- (b) an offence under section 67, 68, 71, 72, 73, 74, 78A or 78B of that Act, as in force before the commencement of Schedule 2 to the Crimes (Child Assault) Amendment Act 1985; or
- (c) an offence under section 63, 65, 76 or 76A of that Act, as in force before the commencement of Schedule 1 to the Crimes (Sexual Assault) Amendment Act 1981,

being in any case an offence committed with or upon a person under the age of 16 years;

"Director" means the Director of special programmes, being the person holding, or acting in, a prescribed office;

"Justice" means a Justice of the Peace;

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“regulations” means regulations made under this Act;

“special programme” means a programme, approved for the time being by the Minister for Health after consultation with the Attorney General and the Minister for Youth and Community Services, for the treatment of persons who have committed child sexual assault offences.

Act not to apply to certain persons

4. (1) This Act does not apply to a person in relation to a charge for a child sexual assault offence—

- (a) if the person was charged with that offence before the commencement of this Act; or
- (b) if the person is required to appear in respect of the charge before a Justice exercising the jurisdiction of a children’s court.

(2) For the purposes of subsection (1) (a), a person shall be regarded as having been charged with an offence if a summons to appear before a Justice in respect of the offence has been served on the person.

Justices Act 1902 to apply

5. Except as provided by this Act, the Justices Act 1902 shall apply to and in respect of a person charged with a child sexual assault offence.

PART II**SPECIAL PROCEDURE BEFORE COURTS****Information relating to special programme, etc., to be given to person charged**

6. A person who is charged with a child sexual assault offence shall, as soon as practicable after being charged, be furnished, in a manner approved by the Attorney General, with information regarding the operation of this Act.

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Person appearing before Justice may request that Act not apply

7. (1) Where a person who appears before a Justice in relation to a charge that the person has committed a child sexual assault offence makes a request to the Justice that this Act cease to apply to the person, this Act shall cease to apply to the person in relation to that charge.

(2) A request referred to in subsection (1) may be made at any stage of proceedings before a Justice relating to a child sexual assault offence.

Solicitor for Public Prosecutions to conduct prosecutions

8. The prosecutor in any proceedings in which this Act applies to a person shall be the Solicitor for Public Prosecutions, or a person authorised for the time being by the Solicitor for Public Prosecutions in relation to the proceedings.

Proceedings to be adjourned pending decision by prosecutor

9. Where a person to whom this Act applies first appears before a Justice in relation to a child sexual assault offence, the Justice shall adjourn the proceedings for such period, not exceeding the period prescribed for the purposes of this section, as the prosecutor may request to allow for a determination to be made as to whether the person is to be referred for assessment in relation to the person's suitability for participation in a special programme.

Matters to be considered by prosecutor in deciding whether to refer person for assessment

10. In determining whether a person charged with a child sexual assault offence is to be referred for assessment in relation to the person's suitability for participation in a special programme, the prosecutor shall consider the guidelines set out in the regulations.

Prosecutor to notify Justice of decision

11. Where a person to whom this Act applies appears before a Justice following any adjournment of the proceedings under section 9, the prosecutor shall inform the Justice as to whether the person is to be referred for assessment in relation to the person's suitability for participation in a special programme.

Act ceases to apply to person not referred for assessment

12. Where, under section 11, the prosecutor informs the Justice that a person charged with a child sexual assault offence is not to be referred for

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assessment in relation to the person's suitability for participation in a special programme, this Act shall cease to apply to the person in relation to that charge.

Proceedings to be further adjourned pending assessment

13. (1) Where a Justice before whom a person charged with a child sexual assault offence appears is informed by the prosecutor that the person is to be referred for assessment in relation to the person's suitability for participation in a special programme, the Justice shall adjourn the proceedings for such period, not exceeding the period prescribed for the purposes of this section, as the prosecutor may request to allow for that assessment to be made.

(2) Proceedings may be adjourned more than once under this section but the periods for which the proceedings are adjourned shall not, in total, exceed the period prescribed for the purposes of this section.

Assessment

14. (1) A person to whom this Act applies shall, in accordance with the regulations, be referred for assessment, and be assessed, for suitability for participation in a special programme.

(2) The prosecutor shall, in accordance with the regulations, be notified as to the result of the assessment.

Prosecutor to notify Justice as to person's suitability

15. Where a person to whom this Act applies appears before a Justice following any adjournment of the proceedings under section 13, the prosecutor shall inform the Justice as to whether the person has been assessed as being suitable for participation in a special programme.

Act ceases to apply to person not suitable for participation in programme

16. Where, under section 15, the prosecutor informs the Justice that a person charged with a child sexual assault offence has been assessed as not being suitable for participation in a special programme, this Act shall cease to apply to the person in relation to that charge.

Act ceases to apply if person does not plead guilty before Justice

17. (1) Where—

- (a) a person to whom this Act applies appears before a Justice following any adjournment of the proceedings under section 13

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and is charged with a child sexual assault offence (whether or not that offence is the offence originally charged); and

- (b) the prosecutor informs the Justice that the person has been assessed as being suitable for participation in a special programme.

the person shall, before any evidence is given in those proceedings, be asked to plead to the charge.

(2) Where, upon being asked to plead to a charge as referred to in subsection (1), a person pleads guilty, the Justice shall, before accepting or rejecting the plea, consider—

- (a) whether the person has received such advice (including legal advice) as the Justice thinks proper in the circumstances; and
- (b) whether the person understands the purpose of the special programme and the effect of giving undertakings under this Act.

and may adjourn the proceedings for a period, not exceeding the period prescribed for the purposes of this section, to allow that advice and information to be given to the person.

(3) Except as provided by subsection (4), where, upon being asked to plead to a charge as referred to in subsection (1), a person pleads not guilty or refuses to plead, this Act shall cease to apply to the person in relation to that charge.

(4) Where, upon being asked to plead to a charge as referred to in subsection (1), a person does not plead guilty to that charge but, instead, pleads guilty to another child sexual assault offence and the plea in respect of the other offence is accepted by the Justice—

- (a) this Act shall not cease to apply to the person by reason only of the person's failure to plead guilty to the original charge; and
- (b) subject to any other provision of this Act, this Act shall continue to apply to the person in respect of the offence to which the plea of guilty was made as if that offence had been the offence originally charged.

Act ceases to apply if plea of guilty rejected

18. (1) Where, upon being asked to plead to a charge as referred to in section 17 (1), a person pleads guilty, the Justice may accept or reject the

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plea under section 51A of the Justices Act 1902 on such grounds as the Justice would have power to do so if this Act did not apply to the person.

(2) In determining whether to accept or reject a plea as referred to in subsection (1), a Justice may consider any papers or statements tendered to the Justice but shall not require any oral evidence to be given.

(3) Where the Justice does not accept a plea of guilty made by a person to a charge in respect of a child sexual assault offence, this Act shall cease to apply to the person in relation to that charge.

Justice may not dispose of certain child sexual assault cases summarily

19. Where this Act applies to a person charged with a child sexual assault offence, a Justice may not dispose of the case summarily under section 476 of the Crimes Act 1900.

Person pleading guilty before Justice to comply with certain directions pending appearance before higher court

20. A person to whom this Act applies who has pleaded guilty before a Justice to a child sexual assault offence shall, until requested by the Supreme Court or District Court to give an undertaking under this Act, comply with all reasonable directions given by the Director to the person in relation to—

- (a) the behaviour of the person (including access by the person to any other person or premises or place, whether or not the person has a legal or equitable interest in the premises or place);
- (b) the commencement by the person of participation in a special programme;
- (c) any matter prescribed by the regulations; and
- (d) any other matter which the Director thinks necessary or appropriate in the circumstances.

Act ceases to apply if person does not comply with directions pending further appearance

21. Where a person to whom this Act applies who is charged with a child sexual assault offence appears before the Supreme Court or the District Court, the court may, if it is satisfied that the person has failed to comply with a reasonable direction given by the Director to the person under section 20, determine that this Act shall cease to apply to the person in relation to that charge, and that determination shall have effect accordingly.

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Act ceases to apply if person does not plead guilty before Supreme Court or District Court, etc.

22. (1) Except as provided by subsection (2), where a person to whom this Act applies who is charged with a child sexual assault offence appears before the Supreme Court or the District Court and—

- (a) does not plead guilty to the charge; or
- (b) refuses to give an undertaking to the court under section 23,

this Act shall cease to apply to the person in relation to that charge.

(2) Where a person appearing before the Supreme Court or the District Court as referred to in subsection (1) in relation to a charge does not plead guilty to that charge but, instead, pleads guilty before trial to another child sexual assault offence and the plea in respect of the other offence is accepted by the prosecution—

- (a) this Act shall not cease to apply to the person by reason only of the person's failure to plead guilty to the original charge; and
- (b) subject to any other provision of this Act, this Act shall continue to apply to the person in respect of the offence to which the plea of guilty was made as if that offence had been the offence originally charged.

PART III

UNDERTAKING TO ATTEND PROGRAMME, ETC.

Undertaking to attend programme to be given to Court

23. Where a person to whom this Act applies who is charged with a child sexual assault offence appears before the Supreme Court or the District Court and pleads guilty before trial to the charge, the court shall request the person to give to the court an undertaking—

- (a) to participate (or continue to participate) in a special programme for such period not exceeding, in total, 2 years, as the Director may require;
- (b) during that participation and, where applicable, pending the commencement of that participation, to comply with all

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reasonable directions given by the Director to the person in relation to—

- (i) the behaviour of the person (including access by the person to any other person or premises or place, whether or not the person has a legal or equitable interest in the premises or place);
 - (ii) any matter prescribed by the regulations; and
 - (iii) any other matter which the Director thinks necessary or appropriate in the circumstances; and
- (c) to appear before the court in relation to the matter when required by the court to do so.

Person giving undertaking not to be convicted or sentenced, etc.

24. (1) Subject to sections 25 and 28, where a person gives an undertaking to a court under section 23, the court shall not—

- (a) convict the person of the offence in respect of which the undertaking was given; or
- (b) sentence or otherwise deal with the person in respect of that offence.

(2) Where a person gives an undertaking to a court under section 23, the undertaking shall, for the purpose of the exercise of any power conferred by section 437 of the Crimes Act 1900, have the same effect as a conviction.

Person may be released from undertaking

25. (1) The court to which a person has given an undertaking under this Act may at any time, on the application of the person, release the person from that undertaking.

(2) Where a court releases a person from an undertaking given under this Act in respect of a child sexual assault offence, it may convict and sentence or otherwise deal with the person for the offence as if the undertaking had not been given.

Breach of undertaking, etc.

26. (1) A person who has given an undertaking under this Act shall, unless the person has been released from the undertaking, comply with the

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undertaking and the requirements made by or under this Act or the regulations.

(2) Where the court to which a person has given an undertaking under this Act is notified of any failure by the person to comply with the undertaking or the requirements made by or under this Act or the regulations, the court shall determine whether the person concerned should appear before the court in relation to the matter.

Requirement to appear or issue of warrant on breach

27. If it appears to the court to which a person has given an undertaking under this Act that the person has failed to comply with the undertaking or the requirements made by or under this Act or the regulations, the court may require the person to appear before the court in accordance with the undertaking or may issue a warrant for the arrest of the person and directing that the person be brought before the court as soon as possible after arrest.

Powers of court on breach

28. Where the court to which a person has given an undertaking under this Act is satisfied that the person has failed to comply with the undertaking or the requirements made by or under this Act or the regulations and that the failure is not of such a minor nature that no action is warranted, the court may, whether or not the undertaking is current—

- (a) convict and sentence or otherwise deal with the person as if the undertaking had not been given; or
- (b) direct that the undertaking to participate in a special programme be extended for such further period, not exceeding 12 months, as the Director may require in addition to the original period for which the person was required to participate in a special programme.

Court may be constituted by another judge

29. The powers, authorities, duties and functions which are required or permitted to be exercised or performed by the court to which a person has given an undertaking under this Act may be exercised or performed by that court, whether or not it is constituted by the same judge as that to whom the undertaking was given.

Person who has complied with undertaking not to be further prosecuted, etc.

30. (1) Where a person who has given an undertaking under this Act in respect of a child sexual assault offence has complied with the undertaking

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and the requirements made by or under this Act or the regulations, no further proceedings shall be taken against the person in respect of the offence.

(2) For the purposes of subsection (1), a person who has given an undertaking under this Act in respect of a child sexual assault offence shall be regarded as having complied with the undertaking and the requirements made by or under this Act or the regulations at the expiration of the period (including any extension of the original period under section 28) for which the person was, in accordance with the undertaking, required to participate in a special programme in relation to the offence unless, at the expiration of that period, any failure by the person has been notified to the court to which the undertaking was given but has not been determined.

(3) Where at the expiration of the period for which a person was required to participate in a special programme a failure by the person has been notified to the court but has not been determined, the person shall be regarded as having complied with an undertaking given under this Act if the court determines, in relation to that failure, that the person need not appear before the court or that no action is warranted.

PART IV
MISCELLANEOUS

Police record to be kept

31. The Commissioner of Police shall maintain a record of persons who have pleaded guilty to a child sexual assault offence and have given an undertaking under this Act.

Certain defects not to invalidate proceedings

32. A failure to comply with section 6 or 8 shall not invalidate any proceedings.

Evaluation of administration of Act

33. The Attorney General and the Minister for Health, in consultation with the Minister for Youth and Community Services, shall make arrangements for the administration of this Act to be monitored and for

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reports giving an evaluation of that administration to be given to those Ministers.

Regulations

34. (1) The Governor may make regulations, not inconsistent with this Act, for or with respect to any matter that by this Act is required or permitted to be prescribed or that is necessary or convenient to be prescribed for carrying out or giving effect to this Act and, in particular, for or with respect to—

- (a) the undertakings to be given by persons in accordance with this Act;
- (b) requirements to be complied with by persons who have given undertakings in accordance with this Act;
- (c) the content and conduct of, and any other matter relating to, a special programme;
- (d) attendance at a special programme by persons who have given undertakings under this Act; and
- (e) the notification of a failure by a person to comply with any undertaking given under this Act or the requirements made by or under this Act or the regulations in relation to the person.

(2) A provision of a regulation may—

- (a) apply generally or be limited in its application by reference to specified exceptions or factors;
- (b) apply differently according to different factors of a specified kind; or
- (c) authorise any matter or thing to be from time to time determined, applied or regulated by any specified person or body,

or may do any combination of those things.
