



New South Wales

Crimes (Appeal and Review) Amendment (DNA Review Panel) Act 2006 No 70

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New South Wales

Crimes (Appeal and Review) Amendment (DNA Review Panel) Act 2006 No 70

Act No 70, 2006

An Act to amend the *Crimes (Local Courts Appeal and Review) Act 2001* to establish a DNA Review Panel in connection with reviews of existing convictions; to transfer and consequentially amend related provisions of the *Crimes Act 1900*; and for other purposes. [Assented to 19 October 2006]

The Legislature of New South Wales enacts:

1 Name of Act

This Act is the *Crimes (Appeal and Review) Amendment (DNA Review Panel) Act 2006*.

2 Commencement

This Act commences on a day or days to be appointed by proclamation.

3 Amendment of Crimes (Local Courts Appeal and Review) Act 2001 No 120

The *Crimes (Local Courts Appeal and Review) Act 2001* is amended as set out in Schedule 1.

4 Consequential amendment of other Acts

Each Act listed in Schedule 2 is amended as set out in that Schedule.

5 Repeal of Act

- (1) This Act is repealed on the day following the day on which all of the provisions of this Act have commenced.
- (2) The repeal of this Act does not, because of the operation of section 30 of the *Interpretation Act 1987*, affect any amendment made by this Act.

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(Section 3)

[1] Part 7

Insert after Part 6:

Part 7 Review of convictions and sentences

Division 1 Preliminary

74 Definitions

(1) In this Part:

biological material means human blood, semen, hair, saliva, skin tissue or other biological material from which DNA information may be obtained, whether the material separately identified or present in other material.

conviction includes:

- (a) a verdict of the kind referred to in section 22 (1) (c) or (d) of the *Mental Health (Criminal Procedure) Act 1990*, being a verdict that the accused person committed the offence charged or an offence available as an alternative to the offence charged, or
- (b) an acquittal on the ground of mental illness, where the mental illness was not set up as a defence by the person acquitted.

DNA Review Panel or **Panel** means the DNA Review Panel constituted by section 90.

judicial officer means a judicial officer (or former judicial officer) within the meaning of the *Judicial Officers Act 1986*.

previous review provisions means the provisions of:

- (a) Part 13A of the *Crimes Act 1900* as in force before the repeal and transfer of those provisions to this Part by the

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Crimes (Appeal and Review) Amendment (DNA Review Panel) Act 2006, or

- (b) section 475 of the *Crimes Act 1900*, or section 26 of the *Criminal Appeal Act 1912*, as in force before the repeal of those sections by the *Crimes Legislation (Review of Convictions) Amendment Act 1993*.

sentence includes a sentence or order imposed or made by any court following a conviction.

- (2) In this Part, a reference to a review of, or an inquiry into, a conviction or sentence includes a reference to a review of, or an inquiry into, any aspect of the proceedings giving rise to the conviction or sentence.

75 Exercise of Supreme Court's jurisdiction

- (1) The jurisdiction of the Supreme Court under this Part is to be exercised by the Chief Justice or by a Judge of the Supreme Court who is authorised by the Chief Justice to exercise that jurisdiction.
- (2) References in this Part to the Supreme Court are to be construed accordingly.

Note. Divisions 2, 3, 4 and 5 of this Part are inserted by Schedule 2.1 and are transferred from Part 13A of the *Crimes Act 1900*.

Division 6 Applications to DNA Review Panel

89 Previously convicted persons eligible to apply for review of conviction under this Division

- (1) For the purposes of this Part, an **eligible convicted person** is a convicted person who is eligible in accordance with this section to make an application under this Division to the DNA Review Panel.
- (2) A convicted person is eligible to make an application to the Panel if, and only if, the person's claim of innocence may be affected by DNA information obtained from biological material specified in the application.
- (3) A convicted person is not eligible to make an application to the Panel unless the person was convicted before 19 September

2006 and the conviction was for a relevant offence. A relevant offence is:

- (a) an offence that is punishable by imprisonment for life or for a period of 20 years or more, or
 - (b) any other offence punishable by imprisonment in respect of which the Panel considers that there are special circumstances that warrant the application.
- (4) In determining whether there are special circumstances that warrant an application under subsection (3) (b), the Panel is to have regard to the following matters and any other relevant matter:
- (a) the nature and seriousness of the offence concerned,
 - (b) the length of any sentence currently being served by the applicant,
 - (c) whether the applicant has exhausted all avenues of appeal,
 - (d) the current workload of the Panel,
 - (e) the interests of justice.
- (5) A convicted person is not eligible to make an application to the Panel unless the person:
- (a) continues to be subject to the sentence imposed on conviction (whether the person is in custody or has been released on parole), or
 - (b) is subject to supervision or detention under the *Crimes (Serious Sex Offenders) Act 2006* in connection with the offence for which the person was convicted.

90 Establishment of DNA Review Panel

- (1) There is established by this section a DNA Review Panel.
- (2) The Panel consists of 6 members appointed by the Governor.
- (3) Of the members of the Panel:
 - (a) one is to be a former judicial officer appointed as Chairperson of the Panel, and
 - (b) one is to be a person nominated by the Premier to represent the victims of crime, and

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- (c) one is to be the Director-General of the Attorney General's Department or an officer nominated by the Director-General, and
 - (d) one is to be the Senior Public Defender or an officer nominated by the Senior Public Defender, and
 - (e) one is to be the Director of Public Prosecutions or an officer nominated by the Director, and
 - (f) one is to be a former police officer nominated by the Commissioner of Police.
- (4) Schedule 2 has effect with respect to the members and procedure of the Panel.

Note. Clause 4 of Schedule 2 enables the appointment of deputies of members.

91 Functions and powers of DNA Review Panel

- (1) The functions of the DNA Review Panel are as follows:
- (a) to consider any application under this Division from an eligible convicted person and to assess whether the person's claim of innocence will be affected by DNA information obtained from biological material specified in the application,
 - (b) to arrange, if appropriate, searches for that biological material and the DNA testing of that biological material,
 - (c) to refer, if appropriate, a case to the Court of Criminal Appeal under this Division for review of a conviction following the receipt of DNA test results,
 - (d) to make reports and recommendations to the Minister on systems, policies and strategies for using DNA technology to assist in the assessment of claims of innocence (including an annual report of its work and activities, and of statistical information relating to the applications it received).
- (2) In exercising its functions, the Panel is to have regard to the following:
- (a) the interests of and the consequences for any registered victim of the offence to which the application to the Panel relates,

- (b) the need to maintain public confidence in the administration of criminal justice in the State,
 - (c) the public interest,
 - (d) any other relevant matter.
- (3) For the purpose of exercising its functions, the Panel may engage persons to provide expert assistance to the Panel.
- (4) The Panel may require the Commissioner of Police or other public authority:
 - (a) to provide information about biological material specified in an application under this Division (including information about whether the material exists or can be found), and
 - (b) to provide any such biological material in their possession to the Panel.
- (5) The Commissioner of Police or a public authority:
 - (a) is authorised and required to provide biological material or information about any such material that the Commissioner or authority is required to provide under subsection (4), and
 - (b) is authorised to provide any other specified information that the Panel requests in order to determine an application under this Division.
- (6) The Panel has such other functions as are conferred on it by or under this or any other Act.

92 Applications to DNA Review Panel

- (1) An application under this Division may be made to the DNA Review Panel in writing by an eligible convicted person or by any other person on the convicted person's behalf.
- (2) The application is to specify the biological material from which DNA information may be obtained to support the convicted person's claim of innocence.
- (3) If the Panel is satisfied that the application is made by or on behalf of an eligible convicted person, it may (subject to this Division):

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- (a) arrange searches for biological material specified in the application and the DNA testing of that biological material, and
- (b) prepare a report of its findings with respect to the application.

93 Refusal or deferral of consideration

- (1) The DNA Review Panel may refuse to consider or otherwise deal with an application under this Division.
- (2) Without limiting subsection (1), the Panel is to refuse to consider or otherwise deal with an application if:
 - (a) it appears that the matter:
 - (i) has been fully dealt with in the proceedings giving rise to the conviction (or in any proceedings on appeal from the conviction), or
 - (ii) has previously been dealt with under this Division, or
 - (iii) has previously been dealt with under Division 2 or 3 (or the corresponding provisions of the previous review provisions), and
 - (b) the Panel is not satisfied that there are any special facts or special circumstances to justify the taking of further action under this Division.
- (3) Without limiting subsection (1), the Panel is to refuse to consider or otherwise deal with an application if it appears that the biological material specified in the application does not exist or cannot be found.
- (4) The Panel may defer consideration of an application if:
 - (a) the time within which an appeal may be made against the conviction (without leave to appeal out of time) is yet to expire, or
 - (b) the conviction is the subject of appeal proceedings (including proceedings on an application for leave to appeal) that are yet to be finally determined, or
 - (c) the matter is being dealt with under Division 2 or 3, or
 - (d) the application fails to disclose sufficient information to enable the matter to be properly considered.

94 Referral of matter to Court of Criminal Appeal

- (1) The DNA Review Panel may refer a matter (together with a copy of its report under section 92 (3) (b)) to the Court of Criminal Appeal for consideration of the question of whether the conviction should be set aside if the Panel is of the opinion that there is a reasonable doubt as to the guilt of the convicted person.
- (2) The Panel cannot refer a matter to the Court of Criminal Appeal unless the quorum present at the meeting of the Panel when the decision is made includes the Chairperson and the following members:
 - (a) the Senior Public Defender or the officer nominated by the Senior Public Defender,
 - (b) the Director of Public Prosecutions or the officer nominated by the Director.
- (3) On receiving a reference under this section, the Court of Criminal Appeal is to deal with the case so referred in the same way as if the convicted person had appealed against the conviction under the *Criminal Appeal Act 1912*.
- (4) In any proceedings on a reference under this section:
 - (a) the Crown has the right of appearance, and
 - (b) the Court of Criminal Appeal is to consider:
 - (i) the report prepared by the Panel under section 92 (3) (b), and
 - (ii) any submissions on any such report that are made by the Crown or by the applicant to whom the proceedings relate, and
 - (c) no other evidence is to be admitted or considered, except by leave of the Court of Criminal Appeal, and
 - (d) if leave to admit evidence is granted, the rules governing the admissibility of evidence do not apply to the proceedings.
- (5) The convicted person is entitled to receive a copy of the report of the Panel under section 92 (3) (b) for the purpose of enabling the convicted person to make submissions on the report as referred to in subsection (4) (b).

95 Notification and secrecy provisions

- (1) If an application is made under this Division by an eligible convicted person, the DNA Review Panel is to notify:
- (a) the applicant and the registered victims of the offence concerned of any decision by the Panel to arrange searches for and DNA testing of biological material with respect to the application, and
 - (b) the applicant and those registered victims of the determination of the Panel with respect to the application.

The Panel may give such a notification by giving it to an Australian legal practitioner who is representing the applicant or registered victim.

- (2) The Panel may also provide information about an application under this Division:
- (a) to the Commissioner of Police, the Police Integrity Commission, the Independent Commission Against Corruption, the Commissioner of Corrective Services or the Director-General of the Department of Juvenile Justice, or
 - (b) to the Minister or Chief Justice, or
 - (c) to any other person or body prescribed by the regulations.
- (3) A person must not disclose any information that was acquired by the person as a member of the Panel (or as a person engaged to assist the Panel) unless the disclosure is made for the purpose of the exercise of functions under this Division or in the circumstances authorised by this Division.

Maximum penalty: 100 penalty units or imprisonment for 2 years, or both.

- (4) In this section, **registered victim** means a victim whose name is recorded on the Register of Victims under the *Crimes (Administration of Sentences) Act 1999*.

96 Duty of police and other State officers to retain biological material evidence relating to eligible convicted persons

- (1) This section applies to physical evidence comprising or containing biological material:
 - (a) that was obtained by any member of NSW Police in connection with the investigation or prosecution of the offence for which an eligible convicted person was convicted (but only if the person was convicted of an offence punishable by imprisonment for life or for 20 years or more), and
 - (b) that is in the possession or control of any member of NSW Police on the commencement of this section,
referred to in this section as *relevant biological material*.
- (2) It is the duty of members of NSW Police (or members of any other authority of the State) to retain relevant biological material in their possession or control.
- (3) However, that duty does not apply to relevant biological material if:
 - (a) the material is required, by the order of any court, to be returned to the person to whom the material belongs, or
 - (b) the owner of the material is the victim of the offence concerned and the material is required to be returned promptly to minimise inconvenience to the victim, or
 - (c) the material is of such size or nature as to render its retention impracticable (but only if steps have been taken to retain a portion of the material sufficient for DNA testing), or
 - (d) the material has already been subject to DNA testing and the testing indicates that it relates only to the eligible convicted person concerned, or
 - (e) the eligible convicted person concerned ceases to be an eligible convicted person, or
 - (f) the material is required by or under any Act to be given to another person or destroyed.

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- (4) An authority of the State is not under a duty to retain biological material if the material is given to a court or another authority of the State and has not been returned.
- (5) A person who, knowing that relevant biological material is required to be retained under this section, destroys or tampers with the material with the intention of preventing the material being subjected to DNA testing is guilty of an offence.

Maximum penalty: Imprisonment for 10 years.

97 Sunset provision

- (1) The DNA Review Panel is abolished and ceases to have any functions under this Division (and the duty imposed under section 96 ceases) on:
 - (a) the seventh anniversary of the establishment of the Panel, except as provided by paragraph (b), or
 - (b) a later date (being not later than the tenth anniversary of the establishment of the Panel) appointed by proclamation before that seventh anniversary and after the review of this Division under subsection (2).
- (2) The Minister is to review this Division to determine whether the DNA Review Panel should continue to operate beyond the seventh anniversary of its establishment. The review is to be undertaken as soon as practicable after the fifth anniversary of its establishment and the report of the outcome of that review is to be tabled in each House of Parliament within 12 months after that anniversary.

[2] Section 117A

Insert after section 78 (renumbered as section 117):

117A Proceedings for offences

Proceedings for an offence under this Act or the regulations (other than under section 96) may be dealt with summarily before a Local Court.

[3] Schedule 1 Savings, transitional and other provisions

Insert at the end of clause 1 (1):

*Crimes (Appeal and Review) Amendment (DNA Review Panel)
Act 2006*

[4] Schedule 1

Insert at the end of the Schedule (with appropriate Part and clause numbers):

**Part Provisions consequent on enactment of
Crimes (Appeal and Review) Amendment
(DNA Review Panel) Act 2006**

Definition

In this Part:

amending Act means the *Crimes (Appeal and Review)
Amendment (DNA Review Panel) Act 2006*.

Review of previous convictions and sentences

Part 7 of this Act, as inserted by the amending Act, extends to convictions and sentences entered or imposed before the commencement of that Part.

Pending applications under Part 13A of Crimes Act for review of convictions and sentences

- (1) A petition or application that was made under Part 13A of the *Crimes Act 1900* before the repeal and transfer of that Part by the amending Act and that had not been finally determined under that Part immediately before its repeal is taken to be a petition or application under the corresponding provision of Part 7 of this Act.
- (2) Any referral or report with respect to such a petition or application that was made under Part 13A of the *Crimes Act 1900* is taken to have been made under the corresponding provision of Part 7 of this Act.

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Pending applications to set aside conviction following free pardon

An application to the Court of Criminal Appeal that was made under Part 13A of the *Crimes Act 1900* before the repeal and transfer of that Part by the amending Act for the purpose of setting aside a conviction for an offence for which a free pardon has been granted and that had not been finally determined under that Part immediately before its repeal is taken to be an application under section 84 of this Act.

[5] Schedule 2

Insert after Schedule 1:

Schedule 2 Members and procedure of DNA Review Panel

(Section 90)

1 Definitions

In this Schedule:

Chairperson means the Chairperson of the Panel.

member means any member of the Panel.

Panel means the DNA Review Panel constituted by section 90.

2 Terms of office of members

Subject to this Schedule, a member holds office for such period (not exceeding 3 years) as is specified in the member's instrument of appointment, but is eligible (if otherwise qualified) for re-appointment.

3 Remuneration

A member is entitled to be paid such remuneration (including travelling and subsistence allowances) as the Minister may from time to time determine in respect of the member.

4 Deputies

- (1) The Minister may, from time to time, appoint a person to be the deputy of a member, and the Minister may revoke any such appointment.
- (2) A person is not eligible to be appointed as the deputy of a member unless the person has the same qualification that was required for appointment as that member.
- (3) In the absence of a member, the member's deputy may, if available, act in the place of the member.
- (4) While acting in the place of a member, a person:
 - (a) has all the functions of the member and is taken to be a member, and
 - (b) is entitled to be paid such remuneration (including travelling and subsistence allowances) as the Minister may from time to time determine in respect of the person.
- (5) For the purposes of this clause, a vacancy in the office of a member is taken to be an absence of the member.

5 Vacancy in office of member

- (1) The office of a member becomes vacant if the member:
 - (a) dies, or
 - (b) completes a term of office and is not re-appointed, or
 - (c) resigns the office by instrument in writing addressed to the Minister, or
 - (d) is removed from office by the Governor under this clause, or
 - (e) is absent from 4 consecutive meetings of the Panel of which reasonable notice has been given to the member personally or by post, except on leave granted by the Minister or unless the member is excused by the Minister for having been absent from those meetings, or
 - (f) becomes bankrupt, applies to take the benefit of any law for the relief of bankrupt or insolvent debtors, compounds with his or her creditors or makes an

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assignment of his or her remuneration for their benefit,
or

- (g) becomes a mentally incapacitated person, or
- (h) is convicted in New South Wales of an offence that is punishable by imprisonment for 12 months or more or is convicted elsewhere than in New South Wales of an offence that, if committed in New South Wales, would be an offence so punishable.

(2) The Governor may at any time remove a member from office.

6 Filling of vacancy in office of member

If the office of any member becomes vacant, a person is, subject to this Act, to be appointed to fill the vacancy.

7 Effect of certain other Acts

- (1) Chapter 1A of the *Public Sector Employment and Management Act 2002* does not apply to or in respect of the appointment of a member.
- (2) If by or under any Act provision is made:
 - (a) requiring a person who is the holder of a specified office to devote the whole of his or her time to the duties of that office, or
 - (b) prohibiting the person from engaging in employment outside the duties of that office,

the provision does not operate to disqualify the person from holding that office and also the office of a member or from accepting and retaining any remuneration payable to the person under this Act as a member.

8 General procedure

The procedure for the calling of meetings of the Panel and for the conduct of business at those meetings is, subject to this Act and the regulations, to be as determined by the Chairperson.

9 Quorum

The quorum for a meeting of the Panel is 4 members, of whom one must be the Chairperson.

10 Presiding member

- (1) The Chairperson is to preside at a meeting of the Panel.
- (2) The presiding member has a deliberative vote and, in the event of an equality of votes, has a second or casting vote.

11 Voting

- (1) A decision supported by a majority of the votes cast at a meeting of the Panel at which a quorum is present is the decision of the Panel.
- (2) This clause is subject to section 94 (Referral of matter to Court of Criminal Appeal).

12 Transaction of business outside meetings or by telephone

- (1) The Panel may, if it thinks fit, transact any of its business by the circulation of papers among all the members of the Panel for the time being, and a resolution in writing approved in writing by a majority of those members is taken to be a decision of the Panel.
- (2) The Panel may, if it thinks fit, transact any of its business at a meeting at which members (or some members) participate by telephone, closed-circuit television or other means, but only if any member who speaks on a matter before the meeting can be heard by the other members.
- (3) For the purposes of:
 - (a) the approval of a resolution under subclause (1), or
 - (b) a meeting held in accordance with subclause (2),the Chairperson and each member have the same voting rights as they have at an ordinary meeting of the Panel.
- (4) A resolution approved under subclause (1) is, subject to the regulations, to be recorded in the minutes of the meetings of the Panel.
- (5) Papers may be circulated among the members for the purposes of subclause (1) by facsimile or other transmission of the information in the papers concerned.

Schedule 2 Amendment of other Acts

(Section 4)

2.1 Crimes Act 1900 No 40

[1] Part 13A Review of convictions and sentences

Omit the Part.

Transfer Divisions 2, 3, 4 and 5 of that Part to the *Crimes (Local Courts Appeal and Review) Act 2001* with the following amendments, as Divisions 2, 3, 4 and 5 of Part 7 of that Act (as inserted by this Act), with sections numbered consecutively starting from section 76 and with cross-references to sections of that Part in those transferred provisions renumbered accordingly.

[2] Part 13A, Divisions 2–5

Omit “prescribed person” and “prescribed person’s” wherever occurring. Insert instead “judicial officer” and “judicial officer’s” respectively.

[3] Sections 474C (3) (a) (ii) and 474E (3) (a) (ii)

Omit “the repealed provisions” wherever occurring. Insert instead “the previous review provisions”.

[4] Section 474J (4)

Insert “(or so dealt with under the corresponding previous review provisions)” after “section 474H (2)”.

[5] Second Schedule

Omit “, 12 and 13A”. Insert instead “and 12”.

Crimes (Appeal and Review) Amendment (DNA Review Panel) Act 2006
No 70

Amendment of other Acts

Schedule 2

2.2 Crimes (Forensic Procedures) Act 2000 No 59

[1] Section 92 Use of information on DNA database system

Omit “Part 13A of the *Crimes Act 1900*” from section 92 (2) (f).
Insert instead “Part 7 of the *Crimes (Appeal and Review) Act 2001*”.

[2] Section 109 Disclosure of information

Omit “Part 13A of the *Crimes Act 1900*” from section 109 (2) (e).
Insert instead “Part 7 of the *Crimes (Appeal and Review) Act 2001*”.

[Second reading speech made in—
Legislative Assembly on 19 September 2006
Legislative Council on 17 October 2006]

BY AUTHORITY