

[Act 1997 No 85]



New South Wales

Crimes Legislation Amendment Bill 1997

Explanatory note

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

Overview of Bill

The object of this Bill is to make miscellaneous amendments to the following Acts relating to criminal law and procedure:

Bail Act 1978

Crimes Act 1900

Criminal Appeal Act 1912

Criminal Procedure Act 1986

Justices Act 1902

Listening Devices Act 1984

The amendments are explained in detail below in relation to each Act amended.

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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 a day or days to be appointed by proclamation.

Clause 3 is a formal provision giving effect to the Schedule which contains amendments to the Acts listed above.

Schedule 1 Amendment of Acts

Bail Act 1978

Section 6 of the *Bail Act 1978* enables bail to be granted under the Act in respect of the periods set out in the section. The proposed amendment (Schedule 1.1 [2]) will enable bail to be granted to a person during the following periods:

- (a) the period between the making and hearing of an application to annul a conviction under section 100A of the *Justices Act 1902*,
- (b) the period between the referral of a conviction under section 100B of the *Justices Act 1902* and the hearing of the matter referred,
- (c) the period between the annulment of a conviction under section 100A or 100B of the *Justices Act 1902* and the rehearing of the information in respect of which the conviction was made,
- (d) the period between an application for review under section 45 of the *Children (Criminal Proceedings) Act 1987* of a decision in respect of an offence and the determination of the application,
- (e) the period between the determination of an application for review under section 45 of the *Children (Criminal Proceedings) Act 1987* of a decision in respect of an offence and any further proceedings on the information laid or complaint made in relation to the offence.

Schedule 1.1 [1] contains a consequential amendment.

Schedule 1.1 [3] contains a transitional provision.

Crimes Act 1900

Offenders who are minors

Section 61S of the *Crimes Act 1900* currently provides that, for the purposes of sections 61H-61U of that Act, a person is not, by reason only of age, to be presumed incapable of having sexual intercourse, or intent to have sexual intercourse, with another person. The provision has the effect of abolishing the common law presumption that a boy under 14 years of age is incapable of sexual intercourse in relation to the sexual assault offences referred to in sections 61H-61U (offences in the nature of rape and other offences relating to sexual assault). The proposed amendment will extend the application of section 61S to other offences where the presumption might otherwise apply (for example, offences under sections 66A-66D of having sexual intercourse with children under 10, or between 10 and 16, years of age (Schedule 1.2 [1])).

Time for commencing prosecutions relating to unlawful access to data in a computer

Section 309 (1) of the *Crimes Act 1900* makes it an offence for a person, without authority or lawful excuse, to intentionally obtain access to a program or data stored in a computer. As the offence is a summary offence, section 56 of the *Justices Act 1902* requires any prosecution for the offence to be commenced within 6 months after the date the program or data is accessed. The proposed amendment will extend the 6-month period to 2 years in order to enable adequate time for the detection of such offences (Schedule 1.2 [2]).

Prosecutions for concealing a serious offence

Section 316(1) of the *Crimes Act 1900* makes it an offence for a person who knows or believes that a serious offence has been committed and that he or she has information that might be of material assistance in securing the apprehension of the offender or the prosecution or conviction of the offender to fail, without reasonable excuse, to bring the information to the attention of the police or another appropriate authority. Proposed section 316 (4) will require the approval of the Attorney General to be obtained before a prosecution for an offence against the subsection is commenced against a person who has formed the knowledge or belief that an offence has been committed or obtained the information referred to in the subsection in the

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course of practising or following a profession, calling or vocation prescribed by the regulations. A regulation could be made to cover, for example, lawyers, doctors, nurses or social workers. Proposed section 3 16 (5) enables the making of the regulation (Schedule 1.2 [3]).

Orders for taking of photographs, finger-prints and other particulars

Section 353A (4) of the *Crimes Act 1900* enables a court that finds an offence specified by section 353A (7) proven against a person to order the person to submit to the taking of any particulars necessary for the identification of the person, including the person's photograph or finger-prints. At present the specified offences include certain driving offences under the *Traffic Act 1909* but do not include the offence of negligently driving a motor vehicle on a public street occasioning death or grievous bodily harm. The proposed amendment will enable an order to be made when such an offence is proven (Schedule 1.2 [4]).

Autrefois convict and autrefois acquit

The special pleas of autrefois convict and autrefois acquit assert that the accused person has already been convicted or acquitted of the offence with which he or she is charged. Currently the issue is determined by a jury. The proposed amendment provides for such pleas, which almost always involve complex matters of law, to be determined by a judge and not a jury (Schedule 1.2 [5]).

Savings and transitional provisions

Schedule 1.2 [6] contains savings and transitional provisions relating to the amendments to the *Crimes Act 1900* described above.

Criminal Appeal Act 1912

Crown appeal against sentence where related summary offences are dealt with under Part 10 of the Criminal Procedure Act 1986

Sections 5AA and 5AD of the *Criminal Appeal Act 1912* provide a right of appeal against conviction and sentence to a person convicted by the Supreme Court or District Court in the exercise of its jurisdiction to deal with related summary offences under Part 10 of the *Criminal Procedure Act 1986*

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(described in more detail below in relation to the amendments to that Act contained in Schedule 1.4 [4]-[7]). However, the Crown currently has no right of appeal against an inadequate sentence imposed by the Supreme Court or District Court in the exercise of that jurisdiction.

Proposed section 5DB will confer such a right of appeal. The powers conferred on the Court of Criminal Appeal in respect of such an appeal are broadly similar to those conferred by section 131AB of the *Justices Act 1902* (Schedule 1.3 [1]).

Schedule 1.3 [2]-[4] makes consequential amendments.

The proposed amendments will not apply to any appeal from a decision made in proceedings in respect of an offence committed before the commencement of the amendments (Schedule 1.3 [6]).

Powers of judge sitting alone

Section 22 of the *Criminal Appeal Act 1912* sets out the powers that a judge of the Court of Criminal Appeal sitting alone may exercise in the same manner as they may be exercised by the Court, and subject to the same provisions. The proposed amendment adds to the powers already listed the power to dismiss an appeal as incompetent (Schedule 1.3 [5]).

Criminal Procedure Act 1986

Procedure for dealing with related summary matters

Accused persons who are charged with indictable offences may also be charged with summary offences relating to the same matter (“related summary offences”). Such charges are commonly called “back up charges” and may be proceeded with after the indictable offence has been dealt with.

A related summary offence is defined in Part 10 of the *Criminal Procedure Act 1986* as a summary offence that is capable of being dealt with by a Local Court that arises from substantially the same circumstances as those from which the indictable offence arose.

Part 10 currently gives the Supreme Court and District Court a discretion, at the end of the trial for the indictable offence, to dispose of related summary offences without the jury (but only if both the prosecuting authority and the accused person consent). The Supreme Court or District Court deals with the related summary offence as if it were a Local Court. If the Courts do not exercise the discretion the matter will be heard by a Local Court.

Part 10 provides no mechanism to assist a Court to decide which related summary offences might be dealt with under Part 10 or to distinguish the charges for related summary offences that cannot lead to a conviction if the person is convicted of the indictable offence concerned because of the overlap in the elements of the indictable and summary offences.

The proposed amendments insert a definition of the latter category of offences (“back up summary offences”) and distinguishes these from related summary offences as currently defined.

The proposed amendments will require the prosecuting authority to specify all the back up summary offences and related summary offences with which a person charged with an indictable offence has been charged. The amendments will require the Supreme Court and District Court (unless the court considers it inappropriate to do so) to dismiss any charges for back up summary offences while retaining the existing discretion to deal with related summary offences under Part 10 in the case of the other specified summary offences (Schedule 1.4 [4]-[13]).

Schedule 1.4 [1] and [14] inserts a Schedule containing provisions of a savings or transitional nature. The proposed Schedule will also enable regulations of a savings or transitional nature to be made to supplement the other provisions of the Schedule.

Procedure for dealing with offences relating to false instruments

At present offences under sections 300–302 of the *Crimes Act 1900* are listed in Table 1 to Part 9A of the *Criminal Procedure Act 1986* and so are required to be dealt with summarily unless the prosecuting authority or the person charged with the offence elects to have them dealt with on indictment. The proposed amendments provide for the offences to continue to be dealt with in this way where the value of the property, or amount of remuneration, greater remuneration or financial advantage in respect of which the offence is charged exceeds \$5,000 (or is not specified) (Schedule 1.4 [2]) but provides for offences where the value or amount does not exceed \$5,000 to be listed in Table 2 to Part 9A (Schedule 1.4 [3]). The effect of this will be that in those cases the offences are required to be dealt with summarily unless the prosecuting authority elects to have them dealt with on indictment.

Justices Act 1902

The proposed amendment is consequential on the proposed amendments to the *Criminal Procedure Act 1986* relating to the procedure for dealing with related summary matters (Schedule 1.4 [4]–[7]) described above.

Listening Devices Act 1984

Sections 13 and 14 of the *Listening Devices Act 1984* make evidence of private conversations that have been unlawfully obtained or obtained inadvertently pursuant to a warrant inadmissible in criminal proceedings except in specified circumstances. The proposed amendments make it clear that the reference to criminal proceedings extends to proceedings in connection with bail.