

[Act 1999 No 39]



New South Wales

# Courts Legislation Amendment Bill 1999

## Explanatory note

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

## Overview of Bill

The objects of this Bill are as follows:

- (a) to allow statements of children in relation to criminal proceedings to be provided in the form of a transcript of any recording made by an investigating official of an interview with the child (pursuant to the *Evidence (Children) Act 1997*),
  - (b) to allow the Crown to appeal to the Supreme Court against an order by a Magistrate that has the effect of staying summary proceedings for the prosecution of an offence,
  - (c) to clarify the matters that may be appealed to the Supreme Court under the *Justices Act 1902*, particularly in relation to committal proceedings and interlocutory orders,
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Explanatory note

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- (d) to give the Land and Environment Court, in relation to environmental offences, similar appellate jurisdiction to that of the Supreme Court under the *Justices Act 1902* and to require appeals in relation to environmental offences to generally be heard by the Land and Environment Court, rather than the Supreme Court,
- (e) to enable an appeal hearing commenced before 3 or more Judges of the Court of Appeal to be continued, with the consent of the parties, if one of the Judges dies, resigns or is unable to continue,
- (f) to enable certain appeals and references under the *Aboriginal Land Rights Act 1983* to be heard by the Land and Environment Court in its Class 3 jurisdiction, so that the Court may, in hearing the proceedings, be assisted by 2 Commissioners of the Court (with suitable qualifications),
- (g) to restrict the availability of remedies in the nature of certiorari in relation to proceedings in the District Court,
- (h) to provide for peremptory challenges to jurors in civil proceedings,
- (i) to increase the penalties for failure to attend for jury service,
- (j) to allow the sheriff to excuse potential jurors from jury service at any time,
- (k) to remove the requirement that every potential juror complete and return to the sheriff a questionnaire relating to proposed jury service,
- (l) to make a minor change to the rules relating to disqualification of persons for jury service,
- (m) to allow an appeal to the District Court against an apprehended violence order made with the consent of the defendant to be made only with the leave of the District Court,
- (n) to provide that appeals against sentence in the District Court are to be by way of rehearing (including by the admission of new evidence), rather than by rehearing on transcript evidence,
- (o) to require the registrars of the District Court and the Land and Environment Court to supply to the parties to an appeal transcripts of evidence given by witnesses in the original proceedings,
- (p) to prevent a person who is the subject of a conviction, order or sentence made by a Magistrate from seeking review by both a Local Court and the Industrial Relations Commission in Court Session,
- (q) to clarify the powers of appellate courts to stay a sentence, order or conviction on appeal,
- (r) to increase the general limit on the civil jurisdiction of the Small Claims Division of a Local Court,

- (s) to extend the initial review period for awards under the *Industrial Relations Act 1996*,
- (t) to remove the requirement that video link facilities in the Supreme Court be “of television standard”,
- (u) to make other minor amendments.

## 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 amendments to the *Criminal Appeal Act 1912*, the *Industrial Relations Act 1996*, the *Jury Act 1977*, the *Justices Act 1902*, the *Land and Environment Court Act 1979*, the *Local Courts (Civil Claims) Act 1970*, the *Supreme Court Act 1970* and the *Wills, Probate and Administration Act 1898* set out in Schedules 1–8.

### **Schedule 1 Amendments to Criminal Appeal Act 1912**

Section 5F of the *Criminal Appeal Act 1912* allows appeals to be made to the Court of Criminal Appeal against certain interlocutory judgments and orders, including orders made in committal proceedings. The amendment provides that such an appeal cannot be made if the person has already instituted an appeal to the Supreme Court under Part 5 of the *Justices Act 1902*. The amendment relates to the amendments to be made to Part 5 of the *Justices Act 1902* by Schedule 4 (those amendments make it clear that orders made by Magistrates in relation to committal proceedings can be appealed to the Supreme Court on a question of law).

### **Schedule 2 Amendments to Industrial Relations Act 1996**

At present, the Industrial Relations Commission is required to review each award at least once every 3 years (the deadline for the first review period being 2 September 1999). The amendment extends the first review period for 2 years, while retaining the requirement for subsequent reviews at least once every 3 years.

## **Schedule 3 Amendments to Jury Act 1977**

### **Questionnaire relating to jury service**

At present, the sheriff sends to each person who is proposed to be included on the jury roll a notice advising the person of that proposal and requiring the person to return a completed questionnaire to the sheriff. This requirement is removed. The questionnaire will be required to be returned only if the person is disqualified or ineligible for jury service, or claims an exemption, or if the person's particulars have changed or if the person is otherwise required by the sheriff to return the questionnaire. (Schedule 3 [1] and [7])

The amendments also increase the maximum penalty payable on penalty notice for failure to respond to the questionnaire from 2.5 penalty units (\$275) to 5 penalty units (\$550). (Schedule 3 [13])

### **Power of sheriff to excuse persons from attending for jury service**

The amendments allow the sheriff to excuse a person whose name appears on a jury roll from attending for jury service during the period, or any part of the period, in which the person may be required by summons to attend for jury service. At present a person may be excused from jury service only after the person has actually been summoned to attend for jury service. (Schedule 3 [2])

### **Peremptory challenges to jurors in civil proceedings**

The amendments provide that both parties in any civil proceedings have a right of peremptory challenge of a juror. The number of peremptory challenges available to each party equals half the number of jurors required to constitute the jury. (See Schedule 3 [3] and consequential amendments in Schedule 3 [4], [5] and [6].)

### **Failure to attend for jury service**

The penalties for a failure to attend for jury service are increased. At present, if a person fails to attend for jury service the sheriff is to serve on the person a notice requiring the person to pay a penalty not exceeding 2 penalty units (\$220) or to show cause why a penalty should not be imposed. If the person fails to pay the penalty or show cause, a penalty notice may be served on the person requiring the person, if he or she does not wish the matter to be dealt with by a court, to pay a prescribed penalty not exceeding 2.5 penalty units (\$275). If the matter is dealt with by a court, the court may impose a penalty not exceeding 5 penalty units (\$550) for the failure to attend for jury service. These amounts are increased to 10 penalty units (\$1100), 15 penalty units (\$1650) and 20 penalty units (\$2200) respectively,

and the requirement that the appropriate penalties be prescribed by regulation is removed. (Schedule 3 [8], [10], [11], [12], [13], [14] and [15])

The amendments also provide that it is a defence to a prosecution for an offence of failure to attend for jury service (if the matter is dealt with by a court) if the person prosecuted proves that he or she had a reasonable excuse for that failure. (Schedule 3 [9])

### **Persons who are disqualified as jurors because of juvenile offences**

At present, a person who at any time within the last 5 years has been found guilty of an offence and detained in a detention centre or other institution for juvenile offenders (not being detention merely for failure to pay a fine) is disqualified from being a juror. The relevant crime-free period for juvenile offences is reduced from 5 years to 3 years. (Schedule 3 [16])

### **Savings and transitional provisions**

Amendments for savings and transitional purposes are also made. (Schedule 3 [17] and [18])

## **Schedule 4 Amendments to Justices Act 1902**

### **Recording of interviews with children**

The *Evidence (Children) Act 1997* allows children to give evidence of a previous representation wholly or partly in the form of a recording made by an investigating official of an interview with the child where the child was questioned regarding the alleged commission of an alleged offence.

Subdivision 7A of Division 1 of Part 4 of the *Justices Act 1902* provides for “paper” committal proceedings. The prosecution must give its evidence by tendering written statements of witnesses as to the evidence that they would be prepared to give in court. Such statements are admissible in the same way as oral evidence. Those provisions are amended to provide that a transcript of any recording of an interview with a child will satisfy the requirements of a written statement. Such a transcript, when certified by the investigating official concerned, will serve as a written statement by the child concerned. It is also made clear that the prosecution is not required to provide the defendant with a copy of the recording, but the defendant must be given a reasonable opportunity to listen to it or view it before the committal proceedings. (Schedule 4 [1] and [2])

Subdivision 6A of Division 2 of Part 4 of the *Justices Act 1902* requires a prosecuting authority to serve a brief of evidence on a defendant who pleads not

guilty to an offence. The brief of evidence consists of the documents regarding the evidence that the prosecution intends to adduce in order to prove the commission of the offence. The amendments to those provisions allow the prosecution to provide, as part of the brief of evidence, a transcript of a recording made by an investigating official of an interview with a child, during which the child was questioned about the alleged offence. The prosecution will not be required to also include in the brief of evidence a written statement from the child. In addition, it is made clear that the prosecution is not required to give the defence a copy of the actual recording made of the child. The amendments will not affect the requirements of the *Evidence (Children) Act 1997* that the defence be given a reasonable opportunity to listen to or view the recording prior to the admission of the recording into evidence. (Schedule 4 [3])

#### **Review of decisions by Local Courts**

Part 4A of the *Justices Act 1902* allows a person to apply to a Local Court for a review of a conviction or order made by a Magistrate in respect of the person, or a sentence imposed on the person by a Magistrate, in certain circumstances. Those provisions are amended so that an application for review cannot be made if the decision has been appealed to the Industrial Relations Commission in Court Session under the *Industrial Relations Act 1996*. For instance, a conviction for an offence against that Act can be appealed to the Commission under that Act. (Schedule 4 [4])

#### **Appeals to Supreme Court**

The amendments clarify the power of the Supreme Court to hear appeals in respect of committal proceedings and interlocutory orders made in summary proceedings. At present, the *Justices Act 1902* provides that such appeals may be made, but only with leave of the Court. The amendments provide that such appeals may be made by a defendant or an informant and provide that they may be made on a ground that involves a question of law alone. (See Schedule 4 [9] and consequential amendments in Schedule 4 [6], [7], [11] and [15].) A person will not be able to appeal to the Supreme Court if the person has instituted an appeal to the Court of Criminal Appeal under section 5F of the *Criminal Appeal Act 1912*. (See Schedule 4 [14] and Schedule 1.)

The amendments also make it clear that appeals under the *Local Courts (Civil Claims) Act 1970* can be made to the Supreme Court, as provided for by section 69 of that Act. (Schedule 4 [9])

In addition, the Supreme Court is given power to hear appeals by an informant in any summary proceedings against an order made by a Magistrate that has the effect of staying the prosecution of an offence. (Schedule 4 [8])

### **Appeals to Land and Environment Court**

At present the Supreme Court has power to hear certain appeals against decisions made by Magistrates in summary proceedings. These appeals, sometimes called “case stated” appeals, may generally be made only on a question of law. They include some types of appeals that cannot be made to either the District Court or the Land and Environment Court under the *Justices Act 1902*, such as appeals against orders made in committal proceedings and interlocutory orders made by Magistrates.

The amendments confer on the Land and Environment Court the same jurisdiction as the Supreme Court has under the *Justices Act 1902* to hear and dispose of appeals relating to environmental offences. As a result of the amendments it will be possible for a person to appeal to the Land and Environment Court against any conviction, order or sentence of a Magistrate that can currently be appealed to the Supreme Court, such as orders in relation to committal proceedings and interlocutory orders. (See Schedule 4 [29] and consequential amendments in Schedule 4 [23], [24] and [27].)

In addition, the amendments will prevent appeals in relation to environmental offences from being heard by the Supreme Court, except with the leave of the Supreme Court. The Supreme Court is to give leave to appeal only if it is of the view that the appeal is likely to require the resolution of a matter relating to constitutional law or a matter of general application. Otherwise, the appeal is to be heard and disposed of by the Land and Environment Court. (See Schedule 4 [10] and consequential amendments in Schedule 4 [5], [13] and [30].)

The *Land and Environment Court Act 1979* is also amended, so as to create a new class of jurisdiction of the Court for the hearing of the types of appeals currently disposed of by the Supreme Court and to give the Judges of the Court a power to make rules concerning those appeals. (See Schedule 5 [5] and [9] and consequential amendments in Schedule 5 [1], [4], [6], [7] and [8].)

### **Stay of execution of conviction, order or sentence pending appeal**

The *Justices Act 1902* (sections 107, 127 and 133AH) provides that the execution of a sentence imposed as a consequence of a conviction, or of any other order, is stayed when a notice of appeal is given. In the case of an appellant who is in custody, the stay does not take effect unless and until the appellant enters into a bail undertaking in accordance with the *Bail Act 1978*, or bail is dispensed with. The amendments to those sections make it clear that this also applies to an appellant who is the subject of an order for periodic detention or a home detention order ie the stay does not have effect in respect of such an appellant unless and until a bail undertaking is given or bail is dispensed with. (Schedule 4 [12], [17] and [25])

### **Appeals against apprehended violence orders**

The *Justices Act 1902* provides that appeals may be made to the District Court as of right in respect of certain decisions. The amendment to section 123 provides that an appeal against an apprehended violence order that was made under the *Crimes Act 1900* with the consent of the person against whom the order was made can be made only with the leave of the District Court. (Schedule 4 [16])

### **Hearing of appeals in the District Court**

Sections 132 and 133 of the *Justices Act 1902* provide that appeals to the District Court from the decision of a Magistrate are to be by way of rehearing on the transcripts of the evidence heard before the Magistrate who made the conviction or order or imposed the sentence appealed against. In special circumstances, the District Court may direct that a person attend to give evidence in person in the appeal proceedings.

These provisions are amended so that they do not apply in respect of appeals against sentence by the person against whom the sentence was imposed. An appeal against sentence is to be by way of a new hearing, and new evidence may be given. (Schedule 4 [18], [19], [20] and [22])

Amendments to section 132 also require a registrar of the District Court to provide one copy of a transcript of evidence of any witness to an appellant or respondent on request (if a copy of the transcript has been provided to the registrar by a clerk of the Local Court). A similar amendment is made to section 133AM, which deals with appeals to the Land and Environment Court. (Schedule 4 [21] and [26])

### **No remedies in the nature of certiorari in respect of District Court adjudications**

Section 146 of the *Justices Act 1902*, before its repeal by the *Justices Legislation Amendment (Appeals) Act 1998*, provided that no conviction or order of a Justice or Justices, or adjudication on appeal of the District Court, could be removed by any order into the Supreme Court. The amendments restore section 146 insofar as it applied to adjudications of the District Court. The purpose of the provision is to restrict the availability of relief in the nature of certiorari in relation to adjudications of the District Court on appeal. (Schedule 4 [31])

### **Other amendments**

A cross reference is corrected. (Schedule 4 [28])

Amendments for savings and transitional purposes are also made. (Schedule 4 [32])



## **Schedule 5 Amendments to Land and Environment Court Act 1979**

Schedule 5 amends the *Land and Environment Court Act 1979* (*the Act*) to provide that appeals under section 49F of the *Aboriginal Land Rights Act 1983* (Rectification of register), and references under section 49G of that Act (Reference by Registrar to Land and Environment Court), fall within the Class 3 jurisdiction of the Land and Environment Court instead of its Class 4 jurisdiction. (Schedule 5 [2], [3] and [10])

As a consequence of the transfer of jurisdiction, section 37 of the Act (Commissioners sitting with a Judge) applies in relation to the hearing by the Land and Environment Court of proceedings arising under section 49F or 49G of the *Aboriginal Land Rights Act 1983*. Accordingly, the Court may, in hearing the proceedings (or any part of the proceedings), be assisted by 2 Commissioners of the Court (or by one Commissioner if the Chief Judge of the Court so directs). Any such Commissioner must, in accordance with section 30 (2A) of the Act, be a person who has suitable knowledge of matters concerning land rights for Aborigines and qualifications and experience suitable for the determination of disputes involving Aborigines.

Schedule 5 also makes amendments that are related to the powers to be conferred on the Land and Environment Court by Schedule 4 to hear appeals under the *Justices Act 1902* that are currently heard by the Supreme Court. (See Schedule 5 [1] and [5] and consequential amendments in Schedule 5 [4], [6], [7], [8] and [9].)

## **Schedule 6 Amendments to Local Courts (Civil Claims) Act 1970**

The amendments increase to \$10,000 the general limit on the civil jurisdiction of the Small Claims Division of a Local Court (currently the limit is \$3,000).

## **Schedule 7 Amendments to Supreme Court Act 1970**

The amendments to the *Supreme Court Act 1970* enable the hearing of an appeal commenced before 3 or more Judges of the Court of Appeal to be continued to be heard and determined despite one or more of the Judges being unable to continue, so long as at least 2 Judges remain and the parties consent. This replaces another provision of the *Supreme Court Act 1970* that applied only if one of the Judges died before the decision was given. (Schedule 7 [1], [2] and [6])

The amendments also remove the requirement that video link facilities in the Supreme Court be of television standard, and provide that the rules of the Supreme Court may make provision in relation to those facilities. (Schedule 7 [3] and [4])  
Schedule 7 [5] provides for additional offices of registrars of the Supreme Court.

### **Schedule 8 Amendments to Wills, Probate and Administration Act 1898**

The amendment replaces an obsolete reference to the Registrar of the Probate Division of the Supreme Court (that Division will soon become part of the Equity Division).