

[Act 1996 No 6]



New South Wales

# **Criminal Legislation Further Amendment Bill 1995**

## **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:

*Children (Criminal Proceedings) Act 1987*

*Crimes Act 1900*

*Criminal Appeal Act 1962*

*Criminal Procedure Act 1986*

*Justices Act 1902*

*Listening Devices Act 1984*

*Summary Offences Act 1988*

*Supreme Court Act 1970.*

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\* Amended in committee—see table at end of volume.

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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 that the proposed Act will commence on a day or days to be appointed by proclamation.

**Clause 3** is a formal provision that gives effect to Schedule 1 which contains amendments to the Acts listed above.

## Schedule 1 Amendment of Acts

### **Children (Criminal Proceedings) Act 1987** (Schedule 1.1 [1]–[4])

Section 10 of the *Children (Criminal Proceedings) Act 1987* provides for the exclusion of persons from a court while the court is hearing criminal proceedings to which a child is a party. Section 11 prohibits the publication or broadcasting of the name, or any other matter that may lead to the identification, of a child in any way mentioned or involved in any criminal proceedings.

Schedule 1.1 [1] increases the fine for an offence under section 11 from 10 penalty units (currently \$1,000) to 500 penalty units, in the case of a corporation, or 50 penalty units in any other case (currently \$50,000 and \$5,000 respectively). Schedule 1.1 [3] and [4] contain consequential amendments relating to the jurisdiction of courts.

Schedule 1.1 [2] extends the protection for a child involved in criminal proceedings under section 10 or 11 to a child involved in an application for bail.

### **Crimes Act 1900** (Schedule 1.2 [1]–[14])

#### **Misuse of public property by public officials outside New South Wales** (Schedule 1.2 [1], [5] and [14])

Proposed section 3B (Schedule 1.2 [5]) enables the prosecution in New South Wales of certain offences under section 178BA (Obtaining money etc by deception) or 178BB (Obtaining money etc by false or misleading statements) of the *Crimes Act 1900* that are committed by public officials outside New South Wales and that involve the misuse of public money of the State, or other property held by or on behalf of the State.

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Proposed section 3B (6) makes it clear that the proposed section applies only to offences committed after the commencement of the proposed section.

Schedule 1.2 [1] is consequential on the insertion of proposed section 3B.

Schedule 1.2 [14] is a consequential amendment that excludes proposed section 3B from the Second Schedule to the *Crimes Act 1900* (which contains a list of provisions of the *Crimes Act 1900* that extend to all offences and courts).

**Dangerous navigation** (Schedule 1.2 [6])

Proposed sections 52B and 52BA:

- (a) replace the offence of culpable navigation with the following four offences:
  - dangerous navigation occasioning death,
  - aggravated dangerous navigation occasioning death,
  - dangerous navigation occasioning grievous bodily harm,
  - aggravated dangerous navigation occasioning grievous bodily harm, and
- (b) increase the penalties in relation to dangerous navigation offences and provide for higher maximum sentences of imprisonment if aggravating circumstances (such as having the prescribed concentration of alcohol or navigating at an excessive speed) are involved, and
- (c) provide that, for the purposes of the offences, there is a conclusive presumption that a person is under the influence of intoxicating liquor if the person has a blood alcohol concentration of 0.15 grams or more per 100 millilitres of blood.

The proposed sections also provide that any of the offences may be established if the prosecution proves that the person navigating a vessel caused a collision between other vessels or between another vessel and an object or person. Apart from this, the other circumstances that may presently give rise to an offence are retained, though section 52B is in a recast form. The recast form of the section will not affect the elements that the prosecution is required to prove to establish an offence.

The amendment will bring the offences into line with sections 52A and 52AA (dangerous driving) of the *Crimes Act 1900*.

### **Orders for cohabitation and custody and maintenance of children** (Schedule 1.2 [2], [7] and [13])

Section 60 of the *Crimes Act 1900* enables a judge, following conviction of a husband for an assault against his wife, to make a declaration that the wife is no longer bound to cohabit with her husband. Such a declaration is stated in the section to have the effect of a decree of judicial separation on the ground of cruelty. Section 573 provides that where a declaration is made under section 60, a judge may also make orders as to the custody and maintenance of children.

Schedule 1.2 [7] and [[13] repeal sections 60 and 573, respectively. The sections are superfluous. Decrees of judicial separation are no longer available in Australia (see section 8 (2) of the *Family Law Act 1975* of the Commonwealth) and Part 15A of the *Crimes Act 1900* enables courts to make orders in domestic violence matters. A consequential amendment is made by Schedule 1.2 [2].

### **Possession of implements for making false instruments** (Schedule 1.2 [8])

Proposed section 302A creates an offence of making, or having possession of, a device or other material for the purpose of making a false instrument. Under the proposed section it will, for example, be an offence to possess a machine designed to encode cardholder details in the magnetic stripe of credit cards on blank cards for a fraudulent purpose.

### **Harbouring escaped interstate prisoners** (Schedule 1.2 [3] and [9])

Proposed section 358C (Schedule 1.2 [9]) will make it an offence to harbour, maintain or employ in New South Wales a prisoner who has escaped from custody in another State or a Territory.

At present, section 36 of the *Prisons Act 1952* provides for a similar offence. However, that offence is in general terms and does not expressly cover harbouring of such prisoners. Section 36 will continue to apply to the harbouring of prisoners who have escaped from custody within the State.

Schedule 1.2 [3] makes a consequential amendment.

### **intoxication** (Schedule 1.2 [10])

Proposed Part 11A (Schedule 1.2 [10]) will reform the law concerning the effect of intoxication on criminal liability. The proposed Part does not affect the operation of any defence to criminal liability.

Presently, the common law in Australia enables an accused to adduce evidence of intoxication to cast doubt on whether the accused acted voluntarily or with the requisite mental state for the offence. (See *R v O'Connor* (1979–1980) 146 CLR 64.) In England, the common law draws a distinction between offences of specific intent (where evidence of intoxication is relevant) and offences of basic intent (where evidence of intoxication is irrelevant). (See *Reg v Majewski* [1977] AC 443.) An offence of specific intent is essentially an offence requiring a person to intend a result. An offence of basic intent, on the other hand, requires a person simply to intend the prohibited conduct.

The amendments will reform the law to bring it closer to the English common law. Part 11A contains the following provisions:

Proposed section 428A includes definitions of *offence, intoxication* and *self-induced intoxication*.

Proposed section 428B defines *offence of specific intent* and lists examples of such offences. The definition is based on that suggested by Gibbs J in *Viro v The Queen* (1978) 141 CLR 88 at 111 and O'Connor at 91.

Proposed section 428C provides that evidence of intoxication (both self-induced and otherwise) can be taken into account in determining whether a person has formed the requisite intent for an offence of specific intent. However, such evidence cannot be considered if the person became intoxicated to strengthen his or her resolve.

Proposed section 428D provides that evidence of self-intoxication cannot be considered in determining whether a person had the requisite mens rea in relation to offences that are not offences of specific intent. However, evidence of intoxication that was not self-induced may be taken into account in relation to such offences.

Proposed section 428E prevents evidence of self-induced intoxication from being taken into account in determining the mens rea for manslaughter in cases where that evidence has resulted in a person being acquitted of murder. However, evidence of intoxication that was not self-induced can be taken into account.

Proposed section 428F provides that, in applying the reasonable person test in relation to an offence, the test is to be applied by having regard to a reasonable person who is not intoxicated.

Proposed section 428G provides that evidence of self-induced intoxication cannot be considered in determining whether a person voluntarily committed the actus reus of any offence. However, the proposed section also provides that a person is not criminally responsible for conduct constituting an offence if it results from intoxication that was not self-induced.

Proposed section 428H abolishes the common law relating to the effect of intoxication on criminal responsibility.

Proposed section 428I provides that the proposed Part applies to offences (whether under the Act or otherwise) committed after the commencement of the proposed Part.

### **Offence of watching or besetting** (Schedule 1.2 [11] and [12])

Section 545B of the *Crimes Act 1900* provides (among other things) that a person who “watches or besets” another person with a view to compelling the person to do or to abstain from doing any lawful thing is guilty of an offence.

Persons watch or beset another person by attending at or near any place in such numbers or in such a manner as to intimidate any person, or obstruct entry or exit or lead to a breach of the peace. The offence covers picketing and other behaviour that is associated with peaceful industrial disputes. The proposed amendment will repeal those provisions of section 545B relating to watching or besetting while retaining other elements of the section relating to violence or intimidation, following a person from place to place or hiding, or hindering use of, a person’s tools.

### **Criminal Appeal Act 1912** (Schedule 1.3)

Proposed section 14A specifies the circumstances in which the Court of Appeal may sentence (or resentence) a respondent to a Crown appeal in his or her absence. The Court may do so if notice of the date of appeal has been given to the respondent (or notice of appeal has been given but not the date because the respondent’s whereabouts are unknown) and it would not be unjust to pass sentence in the absence of the respondent.

### **Criminal Procedure Act 1986** (Schedule 1.4 [1]–[9])

Under Part 9A of the *Criminal Procedure Act 1986* indictable offences are required to be dealt with summarily:

- (a) if the offence is listed in Table 1 to Part 9A—unless the prosecuting authority or other person charged with the offence elects to have the offence dealt with on indictment, or
- (b) if the offence is listed in Table 2 to Part 9A—unless the prosecuting authority elects to have the offence dealt with on indictment.

Schedule 1.4 [4] and [9] removes the offence contained in section 114 (1) (b) of the *Crimes Act 1900* (possession of implement of housebreaking or any implement capable of being used to enter or drive a conveyance) from Table 1 and inserts it in Table 2.

The offence under section 562AB (Stalking) of the *Crimes Act 1900* is included in Table 2. The proposed amendment to section 33K of the *Criminal Procedure Act 1986* (Schedule 1.4 [1]) provides a maximum penalty (imprisonment for 2 years, or a fine of 50 penalty units (currently \$5,000), or both) that may be imposed if the stalking offence is dealt with summarily.

Schedule 1.4 [3], [5] and [6] amend Table 1 to list offences to be created by proposed section 3B (Misuse of public property by public officials outside the State) (Schedule 1.2 [6]), 302A (Making or possession of implements for making false instruments) (Schedule 1.2 [9]) and 358C (Harbouring escapee from another State or Territory) (Schedule 1.2 [10]), respectively, in the Table.

Schedule 1.4 [8] amends Table 2 to list the offence created by proposed section 3B (Schedule 1.2 [6]) in the Table.

Schedule 1.4 [7] contains an amendment by way of statute law revision to more accurately describe the offences of larceny and other property offences listed in clause 3 of Part 2 of Table 2.

The proposed amendment to section 33L (Schedule 1.4 [2]) extends the jurisdiction of a Local Court under section 33F (Time for making election) and 33H (Information to be given to person charged (Table 1 offences)) of the *Criminal Procedure Act 1986* to the Clerks of the Court or Justices of the Peace employed in the Local Court Administration of the Attorney General's Department. This will enable such persons to attend to purely procedural matters.

### **Justices Act 1902** (Schedule 1.5 [1]–[3])

Under section 442B of the *Crimes Act 1900*, a Magistrate (whether exercising jurisdiction in respect of an indictable offence or a summary offence) may reduce the sentence the Magistrate would otherwise impose on a person convicted of the offence by having regard to the degree to which the person has assisted, or undertaken to assist, law enforcement authorities in the prevention, detection or investigation of, or in proceedings relating to, the offence or other offences.

Proposed section 131ACA (Schedule 1.5 [3]) enables the Director of Public Prosecutions to appeal against a sentence that was reduced because an offender undertook to assist law enforcement authorities if the person fails wholly or partly to fulfil the undertaking. Such an appeal will be able to be lodged outside the normal 28 day period for appeals against sentence.

Schedule 15 [1] and [2] make consequential amendments.

### **Listening Devices Act 1984** (Schedule 1.6 [1]–[13])

The proposed definition of *prescribed offence* (Schedule 1.6 [2]) makes it clear that a listening device warrant can authorise the use of a listening device for the investigation of offences under the laws of the Commonwealth and of other States and Territories (and not just under the laws of New South Wales).

Proposed section 17 (3) (Schedule 1.6 [5]) allows the notice of particulars of warrants sought under section 16 that is required to be served on the Attorney General or a prescribed officer to be served by facsimile. Schedule 1.6 [4] makes a consequential amendment.

Proposed section 20A (Schedule 1.6 [11]) allows the use of assumed names or code-names in a listening device warrant and associated documents if it is necessary to do so to protect the safety of the persons who are participants in conversations at which the warrant is directed.

Proposed amendments to sections 16 and 18 (Schedule 1.6 [3] and [6]) change the nomenclature for referring to the process for seeking warrants authorising the use of listening devices from “complaint” to “application”. Schedule 1.6 [1], [7]–[10] and [12] make consequential amendments to references to complaints in other provisions.

Schedule 1.6 [[13] contains a savings provision consequential on the change of nomenclature.

## **Summary Offences Act 1988** (Schedule 1.7 [1] and [2])

### **Unauthorised entry of vehicle or boat** (Schedule 1.9 [1])

Proposed section 6A creates an offence of entering a vehicle or boat in a public place (without reasonable excuse) without the consent of the owner or lawful occupier of the vehicle or vessel. The penalty for the offence is to be 4 penalty units (currently \$400).

### **Penalty for custody of offensive implement** (Schedule 1.7 [2])

The proposed amendment to section 10 (Schedule 1.7 [2]) increases the maximum penalty for having an offensive implement in custody (without reasonable excuse) in a public place from 10 penalty units (currently \$1,000) or imprisonment for 6 months to 20 penalty units (\$2,000) or imprisonment for 12 months.

## **Supreme Court Act 1970** (Schedule 1.8)

### **Sentences of convicted persons seeking judicial review**

Proposed section 69A enables the Supreme Court, in proceedings for judicial review of a conviction or sentence for an offence, to commence or recommence an original sentence from a fresh date. This addresses concerns expressed by the Court of Appeal in cases such as *Parker v Director of Public Prosecutions* (1992) 28 NSWLR 282 at 298–299 and *Blazevski v Judges of the District Court of New South Wales* (1992–93) 29 ALD 197 at 202–203.

The proposed section also includes provisions similar to section 18 of the *Criminal Appeal Act 1912* (as to be amended by the *Courts Legislation Further Amendment Bill 1995*) to enable the time a person has spent on bail or in special custody awaiting a determination in such proceedings to be reflected in the sentence to be served.

### **Deferential upholding on judicial review of decisions in relation to conviction or sentence**

Proposed section 69B seeks to overcome procedural difficulties encountered by the Court of Appeal in granting relief when reviewing orders of the District Court in appeals under section 125 of the *Justices Act 1902* from convictions and sentences determined by Magistrates. See *Anderson v Judges*

*of the District Court of New South Wales* (1992) 27 NSWLR 701 and *Parker v Director of Public Prosecutions* (1992) 28 NSWLR 282. At present, the Court must either uphold or quash both the conviction and sentence ordered by the District Court in order to grant relief in respect of an erroneous decision of the District Court concerning sentence alone. The proposed section will enable the Court to grant differential relief in such cases.