

[Act 1995 No 23]



New South Wales

# **Criminal Legislation 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:

Bail Act 1978

Crimes Act 1900

Criminal Appeal Act 1912

Criminal Procedure Act 1986

Drug Misuse and Trafficking Act 1985

Traffic Act 1909.

The amendments are explained below in detail 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** gives effect to Schedule 1 which contains amendments to the Acts listed above.

## Schedule 1 Amendment of Acts

### Bail Act 1978

#### Presumption in favour of bail

Section 9 of the *Bail Act 1978* lists various exceptions to the presumption that bail ought generally to be available to a person who is in custody as a consequence of having been charged with an offence. The presumption in favour of the grant of bail is to be removed where the accused is charged with conspiring to murder, attempted murder or sending a document threatening to kill or inflict bodily harm on a person. Accordingly, section 9 of the *Bail Act 1978* is to be amended to exclude the application of the presumption to sections 26–31, inclusive, of the *Crimes Act 1900*. (Schedule 1.1 (1))

#### Review of bail conditions

Section 48A of the *Bail Act 1978* was inserted by the *Bail (Amendment) Act 1989* and commenced on 25 March 1990. The object of the section was to confer a right of review of bail conditions by a court (in addition to the right to a general review of bail) if the accused was in custody because the accused could not satisfy or had breached a bail condition. Applications to review bail were encouraged to reduce the jail remand population. The original decision to set bail at a particular level could be reviewed if the accused was unable to raise bail. The special limited right to the review of a bail condition was to be exercised by the court that imposed the bail condition, principally Local Courts. It was not intended that the special right to review bail conditions would replace or affect the general right to apply for a review of the bail decision. Section 48A (6) sought to make that clear. Because section 45 of the *Bail Act 1978* authorises the Supreme Court to review the bail decisions of any other court and because of the availability of other avenues of review and the minor nature of the limited review of a bail condition, section 48A (5) was inserted to ensure that the Supreme Court was not required to conduct a limited review of bail set by another court.

In two unreported decisions of the Supreme Court, *R v McCullough* (6 July 1993) and *R v Gunton* (15 September 1993), doubt has been expressed as to the relationship between subsections (5) and (6) of section 48A. The amendments are intended to make it clear that the Supreme Court is not required to undertake the review of a bail condition imposed by another court.

The amendments extend to applications and requests made to the Supreme Court but not determined by it before the commencement of the amendments. (Schedule 1.1 (2) and (3))

### **Savings and transitional provisions**

The Schedule of savings and transitional provisions to the *Bail Act 1978* is amended as a consequence of the amendments described above. (Schedule 1.1 (4))

### **Crimes Act 1900**

#### **Act of indecency**

Section 61N of the *Crimes Act 1900* provides that:

Any person who commits an act of indecency with or towards a person under the age of 16 years, or incites a person under that age to an act of indecency with or towards that or another person, is liable to imprisonment for 2 years.

An act of indecency is one that right-minded persons would consider to be contrary to community standards of decency. An example is indecent exposure. The age restriction contained in section 61N prevents the prosecution of a person who acts indecently towards an adult. The section is to be amended to provide that where the act of indecency involves a victim of or above the age of 16 years the offender will be liable to a maximum penalty of 18 months' imprisonment. (Schedule 1.2 (2))

A corresponding amendment is made to section 61O which deals with acts of indecency committed in circumstances of aggravation. The maximum penalty in that case will be imprisonment for 3 years. (Schedule 1.2 (3))

Section 77 of the *Crimes Act 1900* is also to be amended to allow the defence of consent to apply if the victim (in either a section 61N or a section 61O case) is of or above the age of 16 years. (Schedule 1.2 (4) and (5))

Schedule 1.2 (1), (15) and (16) and Schedule 1.4 (3) and (4) make consequential amendments.

### **Extension of circumstances of aggravation for the offence of burglary**

Section 105A of the *Crimes Act 1900* lists circumstances of aggravation in the commission of offences of sacrilege and housebreaking. The penalty for the offence is greater if it is committed in circumstances of aggravation. Those circumstances are extended to include circumstances where the offender knew or was reckless as to whether persons were present in the premises in the commission of the offence. (Schedule 1.2 (6) and (7))

### **Corrupt practices—police officers**

Part 4A of the *Crimes Act 1900* deals with corruptly receiving commissions and other corrupt practices. Section 249A is being amended to avoid doubt that the Part applies to police officers. (Schedule 1.2 (8))

### **Harm to witnesses and jurors**

It is an offence under Chapter 3 of Part 7 of the *Crimes Act 1900* (Interference with judicial officers, witnesses, jurors etc), sections 320–326, to harm a witness or juror or a potential witness or juror. In a recent incident outside the Downing Centre Local Court, a person was attacked outside the courtroom following the close of a case when no further witnesses could be called. It appeared that the assailant was seeking to punish the person for having been willing to attend as a witness. At the time the attack occurred, the victim had not been a witness and had ceased to be a potential witness. Subsequently, the Court of Criminal Appeal decided on 22 May 1995, in the case of *R v Lansdell*, that a person need not be a witness or be called as a witness in order to come within the provisions. It also recognised that the test as to a person's status might relate solely to the understanding and intention of the accused. Sections 325 and 326 of the *Crimes Act 1900* are to be amended to extend the provisions of Chapter 3 of Part 7 to protect persons who may have been but were not called as witnesses if the accused believed they may have been called as witnesses. (Schedule 1.2 (9), (10))

### **Forensic samples**

Section 353A of the *Crimes Act 1900* sets out the circumstances in which a person in lawful custody upon a charge of committing a crime or offence may be subjected to medical examination.

The section is amended to provide that

- samples of the person's blood, saliva and hair may be taken
- evidence from the samples may only be used in proceedings concerning the crime or offence for which the samples were taken

- the samples must be destroyed as soon as practicable after the conclusion of those proceedings
- the place of custody is not restricted to a police station
- samples may be taken without the consent of the person in lawful custody. (Schedule 1.2 (11))

The amendments extend to a person who is in lawful custody when the amendments commence. (Schedule 1.2 (24), clause 15)

### **Use of depositions by the prosecution**

Section 409 of the *Crimes Act 1900* enables the deposition of a witness given in committal proceedings and certain statements of witnesses given under the *Justices Act 1902* to be read as evidence for the prosecution at the trial of the accused upon proof on oath “that the witness is dead, or so ill as not to be able to travel or to give evidence, or is absent from Australia...”. In *R v Brotherton* (1993) NSWLR 95, the Court of Criminal Appeal held that section 409 did not allow the evidence of a witness to be admitted where the evidence could not be given without a risk of endangering his or her life. That is, the risk faced in giving evidence was not a relevant factor to be taken into consideration. Section 409 is being amended to enable this factor to be taken into account. (Schedule 1.2 (12) and (13))

### **Inspection of red light cameras**

Section 4DA (3) (b) of the *Traffic Act 1909* and section 414A (6) (b) of the *Crimes Act 1900* provide for the acceptance of photographs taken by a red light camera as prima facie evidence of an offence, provided that an inspection of the camera was carried out within 48 hours of the time recorded on the photographs. The effect of the sections is to require inspection of each red light camera every 48 hours. The inspection period is being increased to 84 hours. (Schedule 1.2 (14) and Schedule 1.6)

### **Time for commencing prosecutions relating to unlawful custody of motor vehicles**

Section 527C of the *Crimes Act 1900* makes it an offence to give custody of property to a person who is not entitled to it. Under section 56 of the *Justices Act 1902*, a prosecution for the offence must be commenced within 6 months after the date of disposal of the property. The 6-month period is being extended to 2 years in the case of stolen motor vehicles in order to enable the police adequate time in which to complete their investigations. (Schedule 1.2 (17))

### **Apprehended violence orders—validation of orders**

Part 15A of the *Crimes Act 1900* deals with apprehended violence orders. The Part is to be amended to provide that if an apprehended violence order is mistakenly made against juveniles in the Local Court and if an interstate restraint order is mistakenly registered in the wrong court, the orders will not be rendered invalid on that account. Although the Local Court has no jurisdiction to make an apprehended violence order against a defendant who is under 18 years of age, such an order might be made in the Local Court if the Local Court is under the mistaken belief that a person is 18 years or over. The apprehended violence order would then be void. Furthermore, restraint orders made interstate can be enforced in New South Wales upon registration with the “appropriate court”. The appropriate court is a Local Court if the defendant is 18 years of age or over and the Children’s Court if the defendant is less than 18 years of age. It is conceivable that mistakes could also be made as to age in these circumstances, thus invalidating the registration of the apprehended violence order.

The proposed amendments to section 562G and 562U will ensure that where an apprehended violence order is made or registered in the Local Court upon the assumption that the defendant had or had not reached a particular age, the order will not be rendered invalid for that reason. (Schedule 1.2 (18) and (21))

The amendments are to apply to orders whenever made. (Schedule 1.2 (24), clauses 16 and 18)

### **Assessment of offenders who have contravened an apprehended violence order**

Section 562I of the *Crimes Act 1900* provides for the offence of contravening an apprehended violence order. Subsection (2B) of that section provides for a Local Court to consider a “full psychiatric assessment” before imposing a sentence of imprisonment on persons convicted under section 562I where the act constituting the offence was an act of violence. The subsection is being amended to provide that a “full psychological assessment” may be considered by the court as an alternative to a “full psychiatric assessment”. (Schedule 1.2 (19))

### **Apprehended violence orders—expiry of arrest warrants**

Section 562K of the *Crimes Act 1900* allows an authorised justice to issue a warrant for the arrest of the defendant where a complaint is made for an apprehended violence order. As first instance warrants remain current for several years, a defendant may be arrested despite the earlier resolution of

the domestic situation. To avoid the unnecessary deprivation of the defendant's liberty and the waste of police and court time in such a situation, first instance warrants are to automatically expire after 12 months. A fresh complaint for an apprehended violence order may be made if necessary. (Schedule 1.2 (20))

The amendments are to apply to warrants whenever issued. (Schedule 1.2 (24), clause 17)

### **Disclosure of addresses and telephone numbers of witnesses**

The *Crimes Act 1900* is to be amended by the insertion of proposed section 577A to provide that a witness in criminal proceedings is not required to disclose his or her address or telephone number unless it is a materially relevant part of the evidence or the court makes an order requiring the disclosure. Such an order can only be made if the court is satisfied that the disclosure is not likely to present a reasonably ascertainable risk to the welfare or protection of any person or that the interests of justice outweigh any such risk. (Schedule 1.2 (22))

### **Abolition of common law offences of eavesdropping and being a common scold**

The common law is the unwritten law as distinct from the written or statute law. Included among common law offences are the offences of eavesdropping and being a common scold. "Eavesdropping" involves the act of listening through walls or under windows (within the eaves' drop) to private conversations for the purpose of spreading scandals. A "common scold" is a troublesome woman who, by brawling and wrangling with her neighbours, breaks the public peace, increases discord and becomes a public nuisance to the neighbourhood. These offences have become obsolete. There is no record of them having been prosecuted in New South Wales this century.

Proposed section 580B abolishes these offences but not so as to affect any offences that may have been committed before the commencement of the proposed section. (Schedule 1.2 (23) and (24), clause 19)

### **Criminal Appeal Act 1912**

Decisions of the Court of Criminal Appeal in *R v Puena* (15 August 1992) and *R v Hallocoglu* (1 September 1992) have drawn attention to the difficulty of sentencing respondents to Crown appeals in their absence. The *Criminal Appeal Act 1912* is to be amended by the insertion of proposed section 14A to enable the Court of Criminal Appeal to deal with Crown appeals in the absence of the respondent as long as the Court is satisfied that

the respondent has been given notice of the appeal and that it would not be unjust to deal with the appeal in the absence of the respondent. (Schedule 1.3)

### **Criminal Procedure Act 1986**

Section 32 of the *Criminal Procedure Act 1986* permits an accused person in criminal proceedings in the Supreme Court or District Court to dispense with a jury and elect instead to be tried by a judge alone. An election may only be made with the consent of the prosecutor. As administrative problems have been encountered in contacting the particular prosecutor in order to obtain his or her consent, section 32 is to be amended to enable the Director of Public Prosecutions (or the Director's delegate) to consent to the election. (Schedule 1.4 (1))

The amendment made to section 33J of the *Criminal Procedure Act 1986* is consequential on the insertion of section 33AA into the *Drug Misuse and Trafficking Act 1985*. (Schedule 1.4 (2))

The amendments made to section 33K and Table 2 to Part 9A of the *Criminal Procedure Act 1986* are Consequential on the amendments to the *Crimes Act 1900* concerning acts of indecency. (Schedule 1.4 (3) and (4))

### **Drug Misuse and Trafficking Act 1985**

#### **Equipment for use in administration of a prohibited drug**

Section 11 of the *Drug Misuse and Trafficking Act 1985* makes it an offence to have possession of an item of equipment for use in the administration of a prohibited drug. In order that no one, including a health worker, is exposed to the risk of prosecution, the section does not apply to hypodermic syringes or hypodermic needles. The section is being amended to provide that it will not apply to "any item of equipment that is required to minimise health risks associated with the intravenous administration of a prohibited drug" such as alcohol swabs, spoons and infusion sets if the equipment is in the possession of persons identified in regulations to be made under the Act. It is proposed that the regulations will identify only health workers. (Schedule 1.5 (1))

A consequential amendment to the *Criminal Procedure Act 1986* is made by Schedule 1.4 (2).

#### **Penalties for offences involving supply to persons under 16 years**

Section 25 of the *Drug Misuse and Trafficking Act 1985* is being amended to make it an offence for a person who is 18 years of age or older to supply prohibited drugs (other than cannabis leaf) to a person who is under 16 years

of age. This amendment is made so as to enable an increased penalty to be applied for these offences. The increased penalty is provided for in proposed section 33AA. The increased penalty, whether imprisonment or a fine, is generally one-fifth higher than the penalty that would otherwise apply. (Schedule 1.5 (2), (3) and (6))

Schedule 1.5 (4) and (5) make consequential amendments.

### **Traffic Act 1909**

The same amendment is being made to section 4DA of the *Traffic Act 1909* as that made to section 414A of the *Crimes Act 1900* to enable the inspection of red light cameras to be carried out within 84 hours instead of 48 hours. (Schedule 1.6)