

[Act 2001 No 117]



New South Wales

Criminal Legislation Amendment Bill 2001

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 amend the *Crimes Act 1900* to create a new offence concerning bomb and other hoaxes that will make it an offence punishable by 5 years imprisonment to leave or send by any means an article or substance that is likely to make a person fear for the safety of a person or property, or both,
 - (b) to amend the *Crimes Act 1900* to modernise the offence of conveying false information that a person or property is in danger to include modern forms of communication such as the electronic transmission of a message,
 - (c) to amend the *Crimes Act 1900*:
 - (i) to set the period for bringing proceedings for certain offences relating to child pornography and to clarify one of the defences to a charge of possession of such material, and
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- (ii) to rationalise and reform offences relating to abduction and kidnapping, and
- (iii) to extend the duration of telephone interim apprehended violence orders in certain circumstances from 14 to 28 days,
- (d) to amend the *Crimes (Administration of Sentences) Act 1999* to require the Parole Board to consider the potential trauma to victims if a violent offender were to be released on the anniversary of his or her offence,
- (e) to amend the *Crimes (Sentencing Procedure) Act 1999* to confirm that the Court of Criminal Appeal has power and jurisdiction to give guideline judgments, to validate any judgments given previously and to make other minor amendments,
- (f) to amend the *Children (Community Service Orders) Act 1987* to bring certain aspects of the scheme relating to children's community service orders into line with the adult scheme,
- (g) to amend the *Children (Criminal Proceedings) Act 1987* to clarify and expand the offence of prohibiting the publication of the name of a child in relation to criminal proceedings,
- (h) to amend the *Criminal Appeal Act 1912*:
 - (i) to allow the Court of Criminal Appeal to quash or vary all sentences passed at a trial, not just the sentence being appealed against, and
 - (ii) to provide for a notice of intention to appeal, or a notice of intention to apply for leave to appeal, to be given to the Court of Criminal Appeal within 28 days of the conviction or sentence being appealed against (instead of notice of appeal or of application for leave to appeal),
- (i) to amend the *Criminal Procedure Act 1986*:
 - (i) to make available the full range of sentencing options to a Local Court when dealing with the offence of knowingly harbouring an escapee, and
 - (ii) to provide for back up and related offences to be dealt with in the court in which the person has been committed for trial unless it would not be in the interests of justice to do so,
- (j) to amend the *Drug Misuse and Trafficking Act 1985* to permit regulations to be made with respect to the cash sale of precursors and to remove a related provision from the *Poisons and Therapeutic Goods Regulation 1994*,

- (k) to amend the *Evidence (Children) Act 1987* to permit a child who is 16 or more years of age, but under 18 years of age:
 - (i) to give evidence of a recording of a previous representation if this was made at an interview when the child was under 16 years of age, and
 - (ii) to give evidence in certain proceedings by means of closed-circuit television facilities if the person was under 16 years of age when the charge to which the proceedings relate was laid,
- (l) to amend the *Summary Offences Act 1988* to permit a correctional officer to exercise the powers of arrest of a police officer in relation to an offence of possession of an offensive weapon or instrument in a place of detention,
- (m) to amend the *Young Offenders Act 1997* to permit an offence for possession of a small amount of cannabis to be dealt with under the Act in certain circumstances.

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.

Clause 3 is a formal provision giving effect to the amendments to the *Children (Community Service Orders) Act 1987*, the *Children (Criminal Proceedings) Act 1987*, the *Crimes Act 1900*, the *Crimes (Administration of Sentences) Act 1999*, the *Crimes (Sentencing Procedure) Act 1999*, the *Criminal Appeal Act 1912*, the *Criminal Procedure Act 1986*, the *Drug Misuse and Trafficking Act 1985*, the *Evidence (Children) Act 1997*, the *Occupational Health and Safety Act 2000*, the *Poisons and Therapeutic Goods Regulation 1994*, the *Summary Offences Act 1988*, and the *Young Offenders Act 1997* set out in Schedules 1–13.

Schedule 1 Amendment of Children (Community Service Orders) Act 1987

Schedule 1 [5] omits Part 5 of the Act, which makes it an offence to breach a children's community service order.

Schedule 1 [3] substitutes section 20 of the Act to allow the Director-General to increase the number of hours of community service work under a children's community service order if a person fails without reasonable excuse to comply with the order, and the breach is of a trivial nature or there are good reasons why the failure to comply should be dealt with by increasing the person's required number

of hours. The Director-General is able to increase the hours to a maximum of 10 hours more than the required number of hours specified in the order. The person has a right to apply to the court that made the order for a review of any decision to increase the hours. Proposed section 20A deals with revocation of orders. It is based on the current provisions, but it enables the extension of an order even if the relevant maximum period of the order has expired.

Schedule 1 [4] substitutes section 21 of the Act to permit an application to be made by the assigned officer to revoke a children's community service order on the ground that the person who is the subject of the order has failed without reasonable excuse to comply with the order (including a failure to work the required number of hours within the relevant period). Currently, an application may only be made by the person in respect of whom the order was made or by the assigned officer on the grounds that it would (having regard to circumstances that have arisen since the relevant community service order was made) be in the interests of justice to revoke the order. An application cannot be made later than 1 month after the expiry of the relevant maximum period. Proposed section 21A provides that a court that revokes an order can deal with the person for the offence for which the order was originally made. A person whose order has been revoked and who is re-sentenced has the same rights of appeal as if the penalty had been imposed when the person was convicted of the offence. For the purposes only of determining an application for revocation of a children's community service order, the order is taken to be in force even if the relevant maximum period has expired.

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

Schedule 1 [6] enables regulations to be made of a savings or transitional nature.

Schedule 2 Amendment of Children (Criminal Proceedings) Act 1987

Schedule 2 [1] amends section 11 of the Act to clarify the existing prohibition on the publication or broadcast of the names of children connected with criminal proceedings. The amendment makes it clear that the prohibition covers the publication or broadcast of the name of a person who was a witness in criminal proceedings or to whom the proceedings relate, where the person was a child at the time of the offence to which the proceedings relate. The prohibition on publishing and broadcasting also extends to a person who is mentioned in criminal proceedings in relation to something that occurred when the person was a child and also to a person who was otherwise involved in criminal proceedings as a child.

The prohibition applies both before and after the proceedings have been disposed of and even if the person is no longer a child. The existing exceptions to the prohibition remain, namely, where the person consents or where the court orders the name of an offender to be published in relation to a serious children's indictable offence.

Schedule 2 [2]–[6] make consequential amendments.

Schedule 3 Amendment of Crimes Act 1900

Revision of abduction offences

The *Crimes Amendment (Gang and Vehicle Related Offences) Act 2001* inserted new section 85A into the *Crimes Act 1900*. The new section updated and modernised the offence of kidnapping. The proposed amendments complete the process of revising abduction offences.

Schedule 3 [3] repeals the current offences of abduction relating to the abduction of heiresses for marriage or other carnal purposes and of girls under the age of 16 years.

Schedule 3 [3] also inserts proposed section 87, which replaces the current section 91 relating to taking a child. The proposed section makes it an offence, without the consent of a person having parental responsibility for a child, to take or detain the child with the intention of removing or keeping the child from the lawful control of any person having parental responsibility for the child. The proposed section also makes it an offence to take or detain a child with the intention of stealing from the child. The proposed section will apply in respect of children under the age of 12 years. The maximum penalty for each offence is to be 10 years imprisonment (the same maximum penalty as may be imposed for the existing offence).

Schedule 3 [1], [2] and [4] make consequential amendments that renumber provisions and insert new Division headings.

Bomb and other hoaxes

Schedule 3 [5] inserts into the *Crimes Act 1900* a new Part 3D relating to bomb and other hoaxes. The Part is made up of an offence of conveying false information that a person or property is in danger (proposed section 93IH) that was previously found in section 203 of the Act and a new offence of leaving or sending an article with intent to cause alarm (proposed section 93II). The offence previously found in section 203 has been updated to recognise modern forms of communication. While

previously the offence dealt only with making a statement or sending a document, it now addresses any means of conveying false information (including transmitting an electronic message) that is likely to make a person fear for the safety of a person or of property, or both. A person is guilty of the new offence of leaving or sending an article with intent to cause alarm if that person leaves in any place or sends by any means a substance or article with the intention of inducing a false belief that the substance or article is likely to be a danger to the safety of a person or of property, or both. Each offence has a maximum penalty of imprisonment for 5 years.

Schedule 3 [6] makes a consequential amendment.

Schedule 7 [10] amends Table 1 of Schedule 1 to the *Criminal Procedure Act 1986* to permit the offences in Part 3D to be tried summarily.

Telephone interim orders

Schedule 3 [7] amends section 562H of the Act to permit a telephone interim apprehended violence order to be made for 28 days rather than 14 days, but only if the authorised justice making the order is satisfied that the Local Court closest to the place at which the application for the order is made is not sitting within the fourteen-day period following the making of the order, and the defendant (if present at the time the order is made) does not object to the making of the order for the extended period. The defendant, if present, is to be notified of his or her right to object to the making of the order for an extended period, and is to be notified at the time the order is served of the right to seek to have the period reduced or the terms of the order varied. The extended period may be reduced, or the conditions of the order varied, on application by the defendant to an authorised justice or a Local Court. The order is not to be reduced or varied unless notice of the application has been served on the Commissioner of Police. Notice of any such reduction or variation is to be served on the defendant, the protected person and the Commissioner of Police.

Schedule 3 [8] amends section 562H to remove a redundant definition.

Child pornography

Schedule 3 [9] amends section 578B of the Act to increase the amount of time for commencing a prosecution for possession of child pornography to 2 years from the date of the alleged offence. Currently proceedings must be commenced within 6 months after the date of the alleged offence.

Schedule 3 [10] amends the defence to a charge of possession of child pornography found in section 578B (5) of the Act to prevent claims that a lack of knowledge of the meaning of RC classification is enough to gain the benefit of the defence. The amended defence requires that a person did not know, or could not reasonably be expected to have known, that the film, publication or computer game concerned is or contains pornographic material involving a child under 16.

Schedule 3 [11] amends section 578C of the Act to require that proceedings for publishing child pornography be commenced within 2 years from the date of the alleged offence.

Schedule 4 Amendment of Crimes (Administration of Sentences) Act 1999

Schedule 4 amends the Act to require the Parole Board, when determining a day on which to release a violent offender, to take into account the potential trauma to a victim and the victim's family if the offender is released on the anniversary of the commission of the offence against the victim. *Violent offender* is defined to mean an offender who is serving a sentence for an offence that involved violence against a person, including a sexual assault within the meaning of clause 6 of Schedule 1 to the *Victims Support and Rehabilitation Act 1996*. In the case of a non-serious offender that is to be released on parole, the Parole Board must release the offender within 7 days after the day on which the offender becomes eligible for parole (the *earliest parole date*) or if the order is made after the earliest parole date, within 7 days after the order is made. For a serious offender that is to be released on parole, the Parole Board must release the offender between 7 and 14 days after the order is made unless this would result in the offender being released before the earliest parole date, in which case the offender is to be released within 7 days after the order is made.

Schedule 5 Amendment of Crimes (Sentencing Procedure) Act 1999

Guideline judgements

In *R v Jurisic* [1998] NSWSC 423 the Court of Criminal Appeal adopted the practice of the English Court of Appeal of giving a guideline judgment in the context of a particular case and a number of such judgments have subsequently been given (the *Jurisic guideline judgments*). A guideline judgment sets out the

guidelines for the sentencing of offenders. Such guidelines are intended to be indicative only and are not intended to be applied in every case as if they were rules binding on judges. However, guidelines help ensure consistency in sentencing decisions.

The Court of Criminal Appeal considered that it had power and jurisdiction to give guideline judgments under sections 5D and 12 of the *Criminal Appeal Act 1912* but, in a recent joint judgment of the High Court, Gaudron, Gummow and Hayne JJ expressly held that those provisions did not authorise the giving of guideline judgments (*Wong v The Queen* [2001] HCA 64 at para [84]).

Division 3 of Part 4 of the *Crimes (Sentencing Procedure) Act 1999* currently contains provisions enabling the Attorney General to apply to the Court at any time (rather than in the context of a particular case) to ask it to exercise its power and jurisdiction to give a guideline judgment in respect of a specified offence or category of offences). The proposed amendments to that Division:

- (a) statutorily confirm that the Court also has power and jurisdiction to give Jurisic guideline judgments (**Schedule 5 [5]**, proposed section 37A), and
- (b) validate any previously given Jurisic guideline judgments that could have been given if proposed section 37A had been in force when they were given and preserves the effect of those judgments (**Schedule 5 [14]**, proposed clause 41 of Schedule 2).

Consequential amendments are made to ensure that guideline judgments (whether given on application of the Attorney General or on the Court's own motion) may be reviewed, varied or revoked in any subsequent guideline judgment of the Court (**Schedule 5 [5]**, proposed section 37B) and provision is made concerning the relationship of guidelines and other sentencing matters (**Schedule 5 [8]**, proposed section 42A).

Schedule 5 [2] also amends the definition of *guideline proceedings* in section 36 of the Act. This will have the effect of enabling the Senior Public Defender and Director of Public Prosecutions to intervene not only, as at present under sections 38 and 39 of the Act, in proceedings on an application for a guideline judgment but also where the Court proposes to give a guideline judgment on its own motion.

Schedule 5 [6] (proposed section 39A) will enable the Attorney General to intervene in such proceedings.

Parole supervision

Schedule 5 [9] amends section 51 of the Act to prevent a court placing a supervision condition on a parole order that is related to a sentence that is to be served by way of periodic detention. If such a condition is included on a parole order and the sentence is subsequently served by way of periodic detention, the condition ceases to have effect.

Schedule 5 [15] applies the amendment to existing parole orders.

Escape from lawful custody

Schedule 5 [10] and **[11]** amend sections 55 and 57 of the Act to clarify that for the purposes of assessing whether a sentence should be served concurrently or consecutively, any escape by an offender while an inmate of a correctional centre, whether or not the escape itself is from a correctional centre, is to be considered an escape from lawful custody.

Change of address

Schedule 5 [12] amends section 95 of the Act to remove the need for a person on a good behaviour bond to inform the registrar or clerk of the court of any change in the person's residential address.

Savings and transitional

Schedule 5 [13] enables regulations to be made of a savings or transitional nature.

Schedule 6 Amendment of Criminal Appeal Act 1912

Schedule 6 [1] enables the Court of Criminal Appeal, when it quashes or varies a sentence on appeal, to also quash or vary other sentences passed on the offender in respect of other offences dealt with at the trial even though those other sentences were not the subject of an appeal. As a result, when the Court of Appeal quashes or varies a sentence imposed on an offender sentenced for multiple offences (for example, because the sentence appealed against was manifestly inadequate or excessive), the Court will be able to adjust the other sentences imposed on the offender to ensure that the totality of the sentences adequately reflects the criminality of the offender's conduct.

The Court of Criminal Appeal indicated the desirability of such a provision in its decision in *R v Itamua* [2000] NSWCCA 502.

Schedule 6 [3] revises the procedure by which an appeal, or an application for leave to appeal, against a person's conviction or sentence is made. Proposed section 10 requires notice of intention to appeal, or notice of intention to apply for leave to appeal, to be given to the Court of Criminal Appeal within 28 days after the conviction or sentence appealed against. The Court may extend the time within which the notice is required to be given. The subsequent appeal, or application for leave to appeal, is to be made in accordance with the rules of the Court. At present section 10 requires an appeal or an application for leave to appeal to be lodged within 28 days of the conviction or sentence. **Schedule 6 [2]** and **[5]–[8]** make consequential amendments.

Schedule 6 [4] omits a provision requiring the registrar of the Court of Criminal Appeal to obtain documents, exhibits and other things necessary for the appeal and provides instead for the matter to be dealt with by the rules of the Court.

Schedule 6 [9] provides for matters of a transitional nature.

Schedule 7 Amendment of Criminal Procedure Act 1986

Sentencing options for knowingly harbouring an escapee

Schedule 7 [1] amends section 27 of the Act to remove the limitation on sentencing options available to a Local Court when dealing with the offence of knowingly harbouring an escapee under section 310G of the *Crimes Act 1900*.

Back up and related offences

Schedule 7 [2] and **[3]** amend section 36 of the Act to require that all charges for back up offences and related offences be transferred to the court to which the person has been committed for trial along with the certificate specifying each back up offence and related offence.

Schedule 7 [4]–[8] amend section 37 of the Act to require the court that is hearing an indictable offence to deal with all back up offences and related offences unless to do so would not be in the interests of justice.

Schedule 7 [9] substitutes section 39 of the Act to require that all back up offences and related offences that are not dealt with by the court that is hearing the indictable offence to be remitted back to a Local Court.

Schedule 7 [11] enables regulations to be made of a savings or transitional nature.

Schedule 8 Amendment of Drug Misuse and Trafficking Act 1985

Schedule 8 amends section 24A of the Act to permit regulations to be made with respect to the cash sale of precursors. This is currently addressed by the *Poisons and Therapeutic Goods Regulation 1994* (see **Schedule 11**).

Schedule 9 Amendment of Evidence (Children) Act 1987

Schedule 9 [1] amends section 11 of the Act to permit a child of 16 or more, but less than 18, years of age to give evidence in chief in the form of a recording of certain previous representations made in the course of an interview when under the age of 16.

Schedule 9 [2] amends section 18 of the Act to permit a child witness of 16 or more, but less than 18, years of age to give evidence by closed-circuit television or other similar prescribed technology in relation to certain proceedings involving personal assault or apprehended violence orders if the child was under 16 when the charge for the personal assault was laid.

Schedule 9 [3] enables regulations to be made of a savings or transitional nature.

Schedule 10 Amendment of Occupational Health and Safety Act 2000

Schedule 10 makes an amendment to the Act consequential on the amendments to the *Crimes (Sentencing Procedure) Act 1999* relating to guideline judgments (see **Schedule 5**).

Schedule 11 Amendment of Poisons and Therapeutic Goods Regulation 1994

Schedule 11 omits clause 131A of the Regulation that relates to the cash sale of drug precursors. This matter is to be dealt with in regulations under the *Drug Misuse and Trafficking Act 1985* (see **Schedule 8**).

Schedule 12 Amendment of Summary Offences Act 1988

Schedule 12 amends section 27D of the Act to permit a correctional officer to exercise the powers of arrest of a police officer in relation to an offence of possession of an offensive weapon or instrument in a place of detention.

Schedule 13 Amendment of Young Offenders Act 1997

Schedule 13 [1] and **[2]** amend section 8 of the Act to allow an offence under section 23 (1) (a) or (c) of the *Drug Misuse and Trafficking Act 1985* to be dealt with under the *Young Offenders Act 1997* if the offence involves not more than half the prescribed small quantity of the prohibited plant. An offence involving more than half but not more than the total small quantity of the prohibited plant may also be dealt with under the *Young Offenders Act 1997* if the investigating official or prosecuting authority believes it would be in the interests of rehabilitation and appropriate in all the circumstances to do so. The amendments provide that an offence under section 27 or 28 of the *Drug Misuse and Trafficking Act 1985* of aiding or abetting the commission of such an offence may be similarly dealt with.

Schedule 13 [3] enables regulations to be made of a savings or transitional nature.