

Courts and Crimes Legislation Further Amendment Act 2010 No 135

[2010-135]



New South Wales

Status Information

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Provisions in force

Some, but not all, of the provisions displayed in this version of the legislation have commenced.

Notes—

- **Note**

Amending Acts and amending provisions are subject to automatic repeal pursuant to sec 30C of the [Interpretation Act 1987 No 15](#) once the amendments have taken effect.

Authorisation

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Courts and Crimes Legislation Further Amendment Act 2010 No 135



New South Wales

An Act to amend various Acts with respect to courts, crimes, evidence, criminal and civil procedure, victims compensation and other matters.

1 Name of Act

This Act is the *Courts and Crimes Legislation Further Amendment Act 2010*.

2 Commencement

- (1) This Act commences on the date of assent to this Act, except as provided by subsection (2).
- (2) The following provisions commence on the dates indicated:
 - (a) Schedule 4—25 February 2011 or such earlier day as may be appointed by proclamation,
 - (b) Schedules 6.1, 6.2, 6.4, 14 [1] and 18—a day or days to be appointed by proclamation,
 - (c) Schedule 12.2 [2]—14 January 2011,
 - (d) Schedule 14 [2]—the date of assent to this Act, or the date of commencement of Schedule 1 [2] to the *Industrial Relations Further Amendment (Jurisdiction of Industrial Relations Commission) Act 2009*, whichever is the later.

Schedules 1-5 (Repealed)

Schedule 6 Amendment of **Civil Procedure Act 2005 No 28**

6.1

(Repealed)

6.2 Amendment of **Civil Procedure Act 2005 No 28** relating to dispute

resolution

[1] Section 3 Definitions

Insert in section 3 (1) in alphabetical order:

civil dispute has the same meaning as it has in Part 2A.

[2] Part 2A

Insert after Part 2:

Part 2A Steps to be taken before the commencement of proceedings

Division 1 Preliminary

18A Interpretation

(1) In this Part:

alternative dispute resolution means processes (other than a judicial determination) in which an impartial person assists persons in dispute to resolve or narrow the issues in dispute, including (but not limited to) the following:

- (a) mediation (whether or not by a referral under this Act),
- (b) expert determination,
- (c) early neutral evaluation,
- (d) conciliation,
- (e) arbitration (whether or not by a referral under this Act).

civil dispute means a dispute that may result in the commencement of civil proceedings.

costs, in relation to compliance with the pre-litigation requirements, means costs payable in or in relation to complying with the requirements, and includes fees, disbursements, expenses and remuneration.

dispute resolution statement means a statement filed under Division 3.

mediation means a structured negotiation process in which the mediator, as a neutral and independent party, assists the parties to a dispute to achieve their own resolution of the dispute.

pre-litigation protocol—see section 18C.

pre-litigation requirements means the requirements set out in section 18E.

- (2) In the event of an inconsistency between a provision of regulations made under this Part and a provision of any rules of court made under this Part, the provision in the regulations prevails to the extent of the inconsistency.
- (3) Any provision of this Part that enables or provides for rules of court to be made in relation to a matter operates, in relation to a particular court, to confer power on the rule committee for the court to make local rules in relation to the matter under the Act that constitutes the court.
- (4) Nothing in subsection (3) limits the operation of section 11 (Relationship between uniform rules and local rules).
- (5) If costs of compliance with the pre-litigation requirements are awarded or taken into account in civil proceedings in accordance with a provision of this Part, those costs are to be treated as if they formed part of the costs of the proceedings and the amount of costs payable may be assessed accordingly.

18B Application of Part

- (1) This Part applies in relation to civil disputes and civil proceedings other than excluded disputes or excluded proceedings.
- (2) Each of the following is an ***excluded dispute***:
 - (a) any civil dispute where a person is in dispute with another person who is the subject of a vexatious proceedings order under the [Vexatious Proceedings Act 2008](#),
 - (b) any civil dispute (other than a civil dispute referred to in paragraph (a) or (c)) that involves claims that may result in the commencement of excluded proceedings if the issues in dispute are not resolved or narrowed,
 - (c) such other civil disputes (or civil disputes belonging to a class of civil disputes) that are declared under subsection (4) (a) or (5) to be excluded disputes.
- (3) Each of the following are ***excluded proceedings***:
 - (a) any civil proceedings that result from a civil dispute referred to in subsection (2) (a) or (c),
 - (b) any civil proceedings in the Dust Diseases Tribunal,
 - (c) any civil proceedings in the Industrial Relations Commission, including the

Commission in Court Session (the Industrial Court),

- (d) any civil proceedings in relation to the payment of workers compensation,
 - (e) any civil proceedings in relation to the enforcement of a farm mortgage to which the *Farm Debt Mediation Act 1994* applies,
 - (f) any civil proceedings in relation to a claim to which the *Motor Accidents Act 1988* or the *Motor Accidents Compensation Act 1999* applies,
 - (g) any civil proceedings in relation to a claim made under the *Motor Accidents (Lifetime Care and Support) Act 2006*,
 - (h) any civil proceedings in which a civil penalty under a civil penalty provision (however described) of or under an Act (including a Commonwealth Act) is sought,
 - (i) any ex parte civil proceedings,
 - (j) any appeal in civil proceedings,
 - (k) such other civil proceedings (or civil proceedings belonging to a class of civil proceedings) that are declared under subsection (4) (a) or (5) to be excluded proceedings.
- (4) The Governor may make regulations declaring that:
- (a) specified civil disputes or civil proceedings (or classes of civil disputes or civil proceedings) are excluded disputes or excluded proceedings for the purposes of this Part, or
 - (b) specified civil disputes or civil proceedings (or classes of civil disputes or civil proceedings) that have been excluded by rules of court under subsection (5) are not to be treated as excluded disputes or excluded proceedings for the purposes of this Part.

Note—

See section 18A (2) in relation to the resolution of inconsistencies between regulations made by the Governor and rules of court.

- (5) Rules of court (including the uniform rules) may declare that specified civil disputes or civil proceedings (or classes of civil disputes or civil proceedings) are excluded disputes or excluded proceedings for the purposes of this Part.

18C Pre-litigation protocols

- (1) A ***pre-litigation protocol*** is a set of provisions setting out steps that will constitute reasonable steps for the purposes of the pre-litigation requirements in

their application to a specified class of civil disputes to which this Part applies.

- (2) Without limiting subsection (1), a pre-litigation protocol for a class of civil disputes may provide for any of the following matters:
 - (a) appropriate notification and communication steps,
 - (b) appropriate responses to notifications and communication steps,
 - (c) appropriate correspondence, information and documents for exchange between the persons involved in the dispute,
 - (d) appropriate negotiation and alternative dispute resolution options,
 - (e) appropriate procedures to be followed in relation to the gathering of evidence (including expert evidence).
- (3) The Governor may make regulations setting out a pre-litigation protocol for a specified class of civil disputes to which this Part applies.
- (4) Rules of court (including the uniform rules) may also set out a pre-litigation protocol for a specified class of civil disputes to which this Part applies.

Division 2 Pre-litigation requirements

18D Compliance with pre-litigation requirements prior to commencement of civil proceedings

Each person involved in a civil dispute to which this Part applies is to comply with the pre-litigation requirements before the commencement of any civil proceedings in a court in relation to that dispute.

18E Pre-litigation requirements

- (1) Each person involved in a civil dispute to which this Part applies is to take reasonable steps having regard to the person's situation, the nature of the dispute (including the value of any claim and complexity of the issues) and any applicable pre-litigation protocol:
 - (a) to resolve the dispute by agreement, or
 - (b) to clarify and narrow the issues in dispute in the event that civil proceedings are commenced.
- (2) For the purposes of this section, reasonable steps include (but are not limited to) the following:
 - (a) notifying the other person of the issues that are, or may be, in dispute, and offering to discuss them, with a view to resolving the dispute,

- (b) responding appropriately to any such notification by communicating about what issues are, or may be, in dispute, and offering to discuss them, with a view to resolving the dispute,
 - (c) exchanging appropriate pre-litigation correspondence, information and documents critical to the resolution of the dispute,
 - (d) considering, and where appropriate proposing, options for resolving the dispute without the need for civil proceedings in a court, including (but not limited to) resolution through genuine and reasonable negotiations and alternative dispute resolution processes,
 - (e) taking part in alternative dispute resolution processes.
- (3) Each person involved in a civil dispute to which this Part applies is not to unreasonably refuse to participate in genuine and reasonable negotiations or alternative dispute resolution processes.
- (4) Nothing in this section requires a person to provide any correspondence, information or document that might tend to incriminate the person.

18F Protection and use of information and documents disclosed under pre-litigation requirements

- (1) A person involved in a civil dispute to which this Part applies who receives any information or documents provided by another person involved in a civil dispute in accordance with the pre-litigation requirements (and not otherwise available to the recipient) is subject to an obligation not to use the information or documents, or permit the information or documents to be used, for a purpose other than in connection with:
- (a) the resolution of the civil dispute between the persons involved in the civil dispute, or
 - (b) any civil proceedings arising out of the civil dispute.
- (2) Despite subsection (1), a person involved in a civil dispute or a party to civil proceedings to which this Part applies may:
- (a) agree in writing to the use of information or documents otherwise protected under subsection (1), or
 - (b) be released from the obligation imposed under subsection (1) by leave of the court.
- (3) A court may treat a failure to comply with the obligation under subsection (1) as a contempt of court if the court is satisfied that there was no lawful or reasonable excuse for the failure.

- (4) If documents exchanged in accordance with the pre-litigation requirements are permitted by this section to be used in civil proceedings arising from the dispute to which the requirements applied, those documents are to be obtained and admitted into evidence in accordance with the usual rules and procedures applicable in the court in relation to the obtaining and admission of documentary evidence.
- (5) Nothing in this section:
 - (a) limits any other undertaking to a court (implied or specific) whether at common law or otherwise, in relation to information or documents disclosed or discovered in civil proceedings, or
 - (b) limits the operation of section 180 in relation to a mediation to which that section applies.

Division 3 Filing of dispute resolution statements by parties to civil proceedings

18G Dispute resolution statement to be filed by plaintiff

- (1) A plaintiff who commences civil proceedings to which this Part applies is to file a dispute resolution statement at the time the originating process for the proceedings is filed.
- (2) A dispute resolution statement filed under subsection (1) is to specify:
 - (a) the steps that have been taken to try to resolve or narrow the issues in dispute between the plaintiff and the defendant in the proceedings, or
 - (b) the reasons why no such steps were taken, which may relate to (but are not limited to) the following:
 - (i) the urgency of the proceedings (including that the limitation period for the commencement of the proceedings is about to expire),
 - (ii) whether, and the extent to which, the safety or security of any person or property would have been compromised by taking such steps.

18H Dispute resolution statement to be filed by defendant

- (1) A defendant in civil proceedings to which this Part applies who has been served with a copy of a dispute resolution statement filed by the plaintiff is to file a dispute resolution statement at the time the defendant files a defence in the proceedings.
- (2) A dispute resolution statement filed under subsection (1) is to:

- (a) state that the defendant agrees with the dispute resolution statement filed by the plaintiff, or
- (b) if the defendant disagrees in whole or part with the dispute resolution statement filed by the plaintiff—specify the respect in which, and reasons why, the defendant disagrees and specify other reasonable steps that the defendant believes could usefully be undertaken to resolve the dispute.

18I Dispute resolution statement to comply with uniform rules

A dispute resolution statement filed under this Division is to comply with such additional requirements as may be specified in rules of court (including the uniform rules).

Note—

See also section 17, which enables the Uniform Rules Committee to approve forms for documents to be used in connection with civil proceedings.

Division 4 Duties of legal practitioners

18J Duty of legal practitioners to provide certain information

- (1) A legal practitioner who is engaged to represent a person involved in a civil dispute to which this Part applies is to:
 - (a) inform the person about the applicability of the pre-litigation requirements to the dispute (including of the need to file a dispute resolution statement in relation to those requirements if civil proceedings are commenced), and
 - (b) advise the person about the alternatives to the commencement of civil proceedings (including alternative dispute resolution processes) that are reasonably available to the person in the circumstances in order to resolve or narrow the issues in dispute.
- (2) In determining whether a costs order should be made against a legal practitioner under section 99, a court may take into account a failure by the legal practitioner to comply with subsection (1).

Division 5 Consequences of non-compliance with this Part

18K Failure to comply does not prevent commencement or affect validity of proceedings

- (1) Non-compliance with the pre-litigation requirements:
 - (a) does not (unless the court otherwise orders or the uniform rules otherwise provide) prevent or preclude a person from commencing civil proceedings in a court, or

(b) does not invalidate civil proceedings that have otherwise been duly commenced.

(2) A failure to file a dispute resolution statement in civil proceedings to which this Part applies does not invalidate the originating process commencing the proceedings, a response to such a process or the proceedings if they have otherwise been duly filed or commenced.

18L Persons generally to bear own costs of compliance with pre-litigation requirements

Subject to this Division, each person involved in a civil dispute (or each party to civil proceedings) to which this Part applies is to bear that person's or party's own costs of compliance with the pre-litigation requirements, unless rules of court (including the uniform rules) otherwise provide.

18M Court may make orders as to costs of compliance with pre-litigation requirements

(1) Despite section 18L, a court may:

- (a) order that a party to civil proceedings to which this Part applies pay all or a specific part of another party's costs of compliance with the pre-litigation requirements if satisfied that it is reasonable to do so, having regard to the overriding purpose of this Act, and
- (b) make a costs order under section 99 against a legal practitioner and, in determining whether such an order should be made, the court may take into account any conduct by the legal practitioner that causes a party to civil proceedings to which this Part applies not to comply with the pre-litigation requirements.

(2) A court may make an order under subsection (1) (a) of its own motion or on the application of a party to the civil proceedings.

18N Court may take failure to comply with pre-litigation requirements into account

(1) If a court is satisfied that a party to civil proceedings to which this Part applies has failed to comply with the pre-litigation requirements, the court may take into account that failure:

- (a) in determining costs in the proceeding generally, and
- (b) in making any order about the procedural obligations of parties to proceedings, and
- (c) in making any other order it considers appropriate.

- (2) In determining whether to take into account a failure to comply with the pre-litigation requirements, the court may have regard to any of the following matters:
 - (a) whether or not the persons in dispute were legally represented,
 - (b) whether or not compliance might have resulted in self-incrimination by a person in dispute,
 - (c) any reasons that have been provided for the failure by the persons in dispute,
 - (d) any other matter that the court considers relevant.
- (3) A court may make an order under subsection (1) of its own motion or on the application of a party to the civil proceedings.

Division 6 Miscellaneous

180 Disclosure and publication of information concerning mediation undertaken for the purposes of this Part

- (1) In this section:

mediation means a meeting arranged for the mediation of a civil dispute to which this Part applies, and includes any steps taken in the course of making arrangements for the meeting or in the course of the follow-up of a meeting.

- (2) The following provisions apply in relation to a mediation:
 - (a) evidence of anything said or of any admission made in the mediation is not admissible in any proceedings before any court or other body,
 - (b) a document prepared for the purposes of, or in the course of, or as a result of, the mediation, or any copy of such a document, is not admissible in evidence in any proceedings before any court or other body.
- (3) Subsection (2) does not apply with respect to any evidence or document if:
 - (a) the persons in attendance at, or identified during, the mediation and, in the case of a document, all persons specified in the document, consent to the admission of the evidence or document, or
 - (b) the evidence is called to prove that an agreement or other arrangement has been reached as a result of a mediation and the substance of the agreement or arrangement.
- (4) The same privilege with respect to defamation as exists with respect to judicial proceedings and a document produced in judicial proceedings exists with

respect to:

(a) a mediation, or

(b) a document or other material sent to or produced to a mediator for the purpose of enabling a mediation to be arranged.

(5) The privilege conferred by subsection (4) extends only to a publication made:

(a) at a mediation, or

(b) in a document or other material sent to or produced to a mediator for the purpose of enabling a mediation to be arranged.

[3] Section 56 Overriding purpose

Omit “civil proceedings” and “the proceedings” from section 56 (1).

Insert instead “a civil dispute or civil proceedings” and “the dispute or proceedings”, respectively.

[4] Section 56 (3A)

Insert after section 56 (3):

(3A) A party to a civil dispute or civil proceedings is under a duty to take reasonable steps to resolve or narrow the issues in dispute in accordance with the provisions of Part 2A (if any) that are applicable to the dispute or proceedings in a way that is consistent with the overriding purpose.

[5] Section 56 (4)

Omit the subsection. Insert instead:

(4) Each of the following persons must not, by their conduct, cause a party to a civil dispute or civil proceedings to be put in breach of a duty identified in subsection (3) or (3A):

(a) any solicitor or barrister representing the party in the dispute or proceedings,

(b) any person with a relevant interest in the proceedings commenced by the party.

[6] Section 56 (5)

Insert “, (3A)” after “(3)”.

[7] Section 56 (6) and (7)

Insert after section 56 (5):

- (6) For the purposes of this section, a person has a **relevant interest** in civil proceedings if the person:
- (a) provides financial assistance or other assistance to any party to the proceedings, and
 - (b) exercises any direct or indirect control, or any influence, over the conduct of the proceedings or the conduct of a party in respect of the proceedings.

Note—

Examples of persons who may have a relevant interest are insurers and persons who fund litigation.

- (7) In this section:

party to a civil dispute means a person who is involved in the dispute.

[8] Schedule 3 Rule-making powers

Insert after clause 34:

- 35 The pre-litigation requirements under Part 2A (including the practice and procedure relating to the pre-litigation requirements).
- 36 Pre-litigation requirements other than those under Part 2A (including specific protocols for civil proceedings or classes of civil proceedings).

[9] Schedule 6

Insert at the end of the Schedule (with appropriate Part and clause numbering):

**Part Provisions consequent on enactment of Schedule 6.2
to Courts and Crimes Legislation Further Amendment Act
2010**

Application of Part 2A

- (1) Part 2A (as inserted by the *Courts and Crimes Legislation Further Amendment Act 2010*) extends to civil proceedings commenced on or after the commencement of that Part in relation to civil disputes arising before that commencement, but only if the proceedings are commenced after the expiry of the transitional period.
- (2) In this clause:
transitional period means the period:

- (a) commencing on the day on which Part 2A commences, and
- (b) ending at the end of the day that is 6 months after the day on which Part 2A commences.

6.3, 6.4

(Repealed)

Schedules 7-13 (Repealed)

Schedule 14 Amendment of [Industrial Relations Act 1996 No 17](#)

[1] Section 162C

Insert after section 162B:

162C Exercise of certain functions under federal Act by Commissioner

- (1) A Commissioner who is an Australian lawyer may exercise any function of the Commission in Court Session in respect of small claims proceedings.
- (2) If the Commissioner gives a direction, makes an order or does any other thing in relation to small claims proceedings, the Commission in Court Session may, on application by a party to the proceedings:
 - (a) review the direction, order or action, and
 - (b) by order confirm, vary or discharge the direction or order or take such other action as it thinks fit.
- (3) In this section:

small claims proceedings means proceedings dealt with as small claims proceedings under section 548 of the [Fair Work Act 2009](#) of the Commonwealth.

[2] Section 364 Definitions (as amended by [Industrial Relations Further Amendment \(Jurisdiction of Industrial Relations Commission\) Act 2009](#))

Insert “the Commission constituted by” before “a Commissioner who is an Australian lawyer” in paragraph (a1) in the definition of ***industrial court*** in section 364 (1).

Schedules 15-19 (Repealed)