

Crimes (Appeal and Review) Act 2001 No 120

[2001-120]



New South Wales

Status Information

Currency of version

Historical version for 28 November 2014 to 24 September 2017 (accessed 25 January 2025 at 14:36)

Legislation on this site is usually updated within 3 working days after a change to the legislation.

Provisions in force

The provisions displayed in this version of the legislation have all commenced.

Notes—

- **Previously named**
Crimes (Local Courts Appeal and Review) Act 2001
- **See also**
[Justice Legislation Amendment Bill \(No 2\) 2017](#)

Authorisation

This version of the legislation is compiled and maintained in a database of legislation by the Parliamentary Counsel's Office and published on the NSW legislation website, and is certified as the form of that legislation that is correct under section 45C of the [Interpretation Act 1987](#).

File last modified 14 September 2017

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Crimes (Appeal and Review) Act 2001 No 120



New South Wales

An Act to restate the law with respect to appeals and other forms of review in relation to criminal proceedings; and for other purposes.

Part 1 Preliminary

1 Name of Act

This Act is the *Crimes (Appeal and Review) Act 2001*.

2 Commencement

This Act commences on a day or days to be appointed by proclamation.

3 Definitions

(1) In this Act:

acquittal includes:

- (a) an acquittal in appeal proceedings in respect of an offence, and
- (b) an acquittal at the direction of a court.

appeal court means the court to which an appeal or application for leave to appeal may be made under Part 3, 4 or 5.

appellant, in relation to proceedings on an application for leave to appeal, includes the applicant in those proceedings.

defendant, in relation to proceedings from which an appeal or application for leave to appeal is made, means the person against whom those proceedings have been taken.

environmental offence means an offence for which summary proceedings may be taken before the Land and Environment Court, whether or not summary proceedings for such an offence may also be taken before any other court, and includes any offence arising under the environment protection legislation within the meaning of the *Protection of the Environment Administration Act 1991*.

exercise a function includes perform a duty.

fresh evidence, in relation to appeal proceedings, means evidence in addition to or in substitution for the evidence given in the proceedings from which the appeal proceedings have arisen.

function includes a power, authority or duty.

Local Court includes:

- (a) a Children's Court constituted under the *Children's Court Act 1987*, and
- (b), (c) (Repealed)
- (d) any court that is constituted by a Magistrate and that exercises criminal jurisdiction, and
- (e) any Magistrate or court that exercises any function or jurisdiction under Chapter 3 (Part 3 excepted), Chapter 4 (Part 5 excepted) or Chapter 5 of the *Criminal Procedure Act 1986*.

original Local Court proceedings means the proceedings in the Local Court that involved the making or imposition of a conviction, sentence or order from which the proceedings under this Act arise.

prosecutor, in relation to proceedings from which an appeal or application for leave to appeal is made, means the person responsible for the conduct of the prosecution in those proceedings.

public authority means:

- (a) the Crown, or
- (b) an authority within the meaning of the *Public Finance and Audit Act 1983*, or
- (c) an officer or employee of such an authority acting in the course of his or her employment.

sentence means:

- (a) any order made by the Local Court in respect of a person as a consequence of its having convicted the person of an offence, including:
 - (i) any sentence of imprisonment (including any sentence of imprisonment the subject of an intensive correction order or home detention order), and
 - (ii) any community service order, good behaviour bond or fine, and
 - (iii) any order suspending execution of a sentence of imprisonment under section 12 of the *Crimes (Sentencing Procedure) Act 1999*, and
 - (iiia) any non-association order or place restriction order under section 17A of the

Crimes (Sentencing Procedure) Act 1999, and

- (iv) any direction for compensation under section 94 (Directions for compensation for injury) or 97 (Directions for compensation for loss) of the *Victims Rights and Support Act 2013*, and
 - (iva) any child protection registration order under section 3D of the *Child Protection (Offenders Registration) Act 2000*, and
 - (v) any order or direction with respect to restitution, compensation, forfeiture, destruction, disqualification or loss or suspension of a licence or privilege, or
- (b) any order made by the Local Court in respect of a person under section 10 or 11 of the *Crimes (Sentencing Procedure) Act 1999* on finding the person guilty of an offence, or
- (ba) any order made by the Local Court revoking a good behaviour bond and any order made as a consequence of the revocation of the good behaviour bond, or
- (c) any order for restitution made by the Local Court in respect of a person under section 43 of the *Criminal Procedure Act 1986*, or
- (d) any order for costs made by a Magistrate against a person in connection with committal proceedings taken against the person, or
- (e) any order for costs made by the Local Court against a person in connection with summary proceedings taken against the person, or
- (f) (Repealed)
- (2) In the case of an application or appeal in relation to a decision of the Children's Court under Part 3 of the *Children (Criminal Proceedings) Act 1987*:
- (a) a reference in this Act to a **conviction** includes a reference to a finding of guilt under that Act, and
 - (b) a reference in this Act to a **sentence** includes a reference to an order made on the finding of guilt under that Act.
- (3) In this Act, a reference to **varying a sentence** includes:
- (a) a reference to varying the severity of the sentence, and
 - (b) a reference to setting aside the sentence and imposing some other sentence of a more or less severe nature.
- (3A) Without limiting subsection (3), a power conferred on an appeal court under this Act to vary a sentence includes the power to make an order under section 10 of the *Crimes (Sentencing Procedure) Act 1999* and, for that purpose, to set aside a

conviction made by the original Local Court (without setting aside the finding of guilt on which the conviction is based) to enable the order to be made.

(4) Notes included in the text of this Act do not form part of this Act.

Part 2 Local Court review of Local Court decisions

4 Applications to Local Court

(1) An application for annulment of a conviction or sentence made or imposed by the Local Court may be made to the Local Court sitting at the place at which the original Local Court proceedings were held.

(1A) An application may be made by the defendant or by the prosecutor. However, an application by the defendant may be made only if:

- (a) in the case of an application for an annulment of a conviction—the defendant was not in appearance before the Local Court when the conviction was made, or
- (b) in the case of an application for an annulment of a sentence—the defendant was not in appearance before the Local Court when the sentence was imposed.

(1B) A defendant may not make an application for annulment of a conviction or sentence under this section if the defendant had lodged a notice in writing under section 182 of the *Criminal Procedure Act 1986* in respect of the offence for which the defendant was convicted or the sentence was imposed.

(2) An application under this section must be made:

- (a) within 2 years after the relevant conviction or sentence is made or imposed, or
- (b) if an application has been made to the Minister under section 5 within that 2-year period, within 2 years after the application under section 5 has been disposed of under this Part.

(3) Except by leave of the Local Court, a person may not make more than one application under this section in relation to the same matter.

(4) An application must be in writing, and must be lodged with a registrar of the Local Court.

(5) (Repealed)

5 Applications to Minister

(1) An application for annulment of a conviction or sentence made or imposed by the Local Court may be made to the Minister by any person.

(1A) An application under this section may be made at any time after the relevant

conviction or sentence is made or imposed.

(2) If satisfied that a question or doubt exists:

(a) as to the defendant's guilt, or

(b) as to the defendant's liability for a penalty,

the Minister may refer the application to the Local Court sitting at the place at which the original Local Court proceedings were held.

6 Notice of applications

(1) As soon as practicable after an application for annulment is received by the Local Court, the relevant registrar of the Local Court must notify the applicant and other interested parties of the date, time and place fixed for dealing with the application.

(2) The Local Court may deal with an application for annulment, despite any omission or error in the notice or despite the notice having not been served on an interested party, if it is satisfied that the party:

(a) is aware of the date, time and place fixed for dealing with the application and has not been prejudiced as a consequence of the notice having not been served, or

(b) is avoiding service of the notice or cannot, after reasonable search and inquiry, be found.

7 Procedure for dealing with applications

(1) The Local Court may deal with an application for annulment in the presence or absence of the parties and in open court or in private.

(2) When dealing with an application for annulment, the Local Court may stay the execution of the sentence concerned subject to such terms and conditions as it thinks fit.

(3) The rules of court made under the [Local Court Act 2007](#) may make provision for or with respect to procedure and evidence for the purposes of the hearing of applications for annulment.

8 Circumstances in which applications to be granted

(1) The Local Court must grant an application for annulment made by the prosecutor if it is satisfied that, having regard to the circumstances of the case, there is just cause for doing so.

(2) The Local Court must grant an application for annulment made by the defendant if it is satisfied:

(a) that the defendant was not aware of the original Local Court proceedings until

after the proceedings were completed, or

(b) that the defendant was otherwise hindered by accident, illness, misadventure or other cause from taking action in relation to the original Local Court proceedings, or

(c) that, having regard to the circumstances of the case, it is in the interests of justice to do so.

9 Procedure after decision on application

- (1) The Local Court must notify each of the interested parties of its decision as to an application for annulment.
- (2) If its decision is to annul the relevant conviction or sentence, the Local Court:
 - (a) must deal with the original matter afresh (either immediately or at a later date), and
 - (b) unless it does so immediately, must notify each of the interested parties of the date, time and place fixed for dealing with the original matter.
- (3) The Local Court is to deal with the original matter as if no conviction or sentence had been previously made or imposed.
- (4) The original matter need not be dealt with by the Magistrate who ordered the annulment of the conviction or sentence, but may be dealt with by any Magistrate, including the Magistrate by whom the matter was dealt with in the original Local Court proceedings.
- (5) In this section, **original matter**, in relation to a conviction or sentence that has been annulled, means the matter the subject of the proceedings from which the conviction or sentence arose.

10 Effect of annulment of conviction or sentence

- (1) On being annulled, a conviction or sentence ceases to have effect and any enforcement action previously taken is to be reversed.
- (2) The annulment of a conviction for an offence that has been heard together with another offence for which a conviction has been made does not prejudice the conviction for the other offence.
- (3) If a fine is annulled, any amount paid towards the fine is repayable to the person by whom it was paid.
- (4) The Consolidated Fund is appropriated to the extent necessary to give effect to subsection (3).

10A Part applies to findings of guilt

- (1) An application for annulment under this Part may be made in relation to a finding of guilt made by the Local Court, whether or not the Court proceeds to conviction, and this Part applies in respect of any such application accordingly.
- (2) For that purpose:
 - (a) a reference in this Part to a **conviction** includes a reference to a finding of guilt, and
 - (b) a reference in this Part to a **sentence** includes any order made under section 10 or 11 of the *Crimes (Sentencing Procedure) Act 1999* on finding a person guilty of an offence.

Part 3 Appeals from Local Court to District Court

Division 1 Appeals by defendants

Subdivision 1 Making of appeals

11 Appeals as of right

- (1) Any person who has been convicted or sentenced by the Local Court may appeal to the District Court against the conviction or sentence (or both).
- (1A) Subsection (1) does not apply in respect of a conviction if the person was convicted in the person's absence or following the person's plea of guilty.
- (1B) Any person whose application under section 4 for annulment of a sentence has been refused by the Local Court may appeal to the District Court against the sentence.
- (2) An appeal must be made:
 - (a) within 28 days after sentence is imposed, or
 - (b) if an application for annulment of the conviction or sentence has been made under Part 2 within that 28-day period, within 28 days after the Part 2 application is disposed of under that Part,but (in the case of an appeal against a conviction) may not be made before sentence is imposed.

11A Appeals as of right against Local Court's refusal of application for annulment of conviction

- (1) Any defendant whose application under section 4 for annulment of a conviction has been refused by the Local Court may appeal to the District Court against the refusal.

- (2) An appeal under this section must be made within 28 days after the Local Court notifies the defendant of its refusal of the application.
- (3) Not more than one appeal may be made under this section in respect of any particular conviction.

12 Appeals requiring leave

- (1) Any person who has been convicted by the Local Court in the person's absence or following the person's plea of guilty may appeal to the District Court against the conviction, but only by leave of the District Court.
- (2) An application for leave to appeal may not be made in relation to a conviction in respect of which the defendant:
 - (a) is entitled to make an application under section 4 but has not done so, or
 - (b) has made an application under section 4 but the application has not been disposed of under Part 2.
- (3) An application for leave to appeal must be made:
 - (a) within 28 days after (but not before) the sentence imposed after the relevant conviction is made, or
 - (b) if an application for annulment of the conviction has been made under Part 2 within that 28-day period, within 28 days after the Part 2 application is disposed of under that Part.

13 Late applications for leave to appeal

- (1) An appeal to the District Court may be made:
 - (a) by any person by whom an appeal could be made under section 11, but for section 11 (2), and
 - (a1) by any defendant by whom an appeal could be made under section 11A, but for section 11A (2), and
 - (b) by any person by whom an application for leave to appeal could be made under section 12, but for section 12 (3),but only by leave of the District Court.
- (2) An application for leave to appeal must be made within 3 months after the relevant conviction or sentence is made or imposed, or the relevant application under section 4 is refused, as the case may require.

14 Lodgment of appeals and applications for leave to appeal

- (1) An appeal under section 11 or 11A is to be made by lodging a written notice of appeal with:
 - (a) a registrar of the Local Court, or
 - (b) the person in charge of the place where the appellant is in custody.
- (2) A notice of appeal must state the general grounds of appeal.
- (3) An application for leave to appeal under section 12 or 13 is to be made by lodging a written application for leave to appeal, together with a written notice of appeal, with:
 - (a) a registrar of the Local Court, or
 - (b) the person in charge of the place where the appellant is in custody.
- (4) An application for leave to appeal must state the general grounds of the application and, in the case of an application under section 13, must state the reasons why an appeal or application for leave to appeal was not made within the time allowed by section 11, 11A or 12, as the case may be.
- (5) On the granting of leave to appeal, an appeal is taken to have been made in accordance with the written notice of appeal referred to in subsection (3).

15 Documents to be forwarded to prosecutor and relevant court registrars

- (1) The person with whom a notice of appeal or application for leave to appeal is lodged must immediately forward a copy of it to:
 - (a) the prosecutor in the original Local Court proceedings, and
 - (b) the relevant registrar of the Local Court, if the person is not that registrar, and
 - (c) the Director of Public Prosecutions.
- (2) As soon as practicable after receiving a notice of appeal or application for leave to appeal, the relevant registrar of the Local Court must send the relevant papers (including a copy of any relevant order or conviction made by the Local Court) to a registrar of the District Court.

Subdivision 2 Determination of appeals

16 Determination of applications for leave to appeal

- (1) The District Court may determine an application for leave to appeal by dismissing the application or by granting leave to appeal.
- (2) Leave to appeal must not be granted in relation to an application under section 13

unless the District Court is satisfied that it is in the interests of justice that leave be granted.

- (3) If the District Court dismisses an application for leave to appeal, it may make such order as to the costs to be paid by the appellant as it thinks just.
- (4) If the District Court grants leave to appeal, it may proceed to hear the appeal immediately or it may adjourn the appeal proceedings.

16A Determination of appeals against Local Court's refusal of application for annulment of conviction

- (1) The District Court may determine an application under section 11A by dismissing the application or by granting it.
- (2) Pending the determination of the application, the District Court may stay the execution of any sentence relating to the conviction concerned subject to such terms and conditions as it thinks fit.
- (3) If the District Court grants the application, the District Court must remit the matter to the Local Court.
- (4) The Local Court is to deal under section 9 with any matter remitted to it under this section as if the application under section 4 in respect of the matter had been granted by the Local Court.

17 Appeals against sentence to be by way of rehearing of evidence

An appeal against sentence is to be by way of a rehearing of the evidence given in the original Local Court proceedings, although fresh evidence may be given in the appeal proceedings.

18 Appeals against conviction to be by way of rehearing on the evidence

- (1) An appeal against conviction is to be by way of rehearing on the basis of evidence given in the original Local Court proceedings, except as provided by section 19.
- (2) Fresh evidence may be given, but only by leave of the District Court which may be granted only if the Court is satisfied that it is in the interests of justice that the fresh evidence be given.
- (3) The parties to an appeal are each entitled to be provided with one free copy of the transcripts of evidence relevant to the appeal and, if fresh evidence is given, one free copy of the transcript of the fresh evidence.

19 Circumstances in which evidence to be given in person

- (1) The District Court may direct a person to attend and give evidence in proceedings on an appeal against conviction if it is satisfied:

- (a) in the case of an appeal that relates to an offence involving violence against that person, that there are special reasons why, in the interests of justice, the person should attend and give evidence, or
 - (b) in any other case, that there are substantial reasons why, in the interests of justice, the person should attend and give evidence.
- (2) An application for such a direction may be made by a party to the proceedings in relation to a particular person only if notice of the party's intention to make such an application has been served on each other party to the proceedings within such period as the District Court may direct.
 - (3) If an application for such a direction is refused, the District Court must give reasons for the refusal.
 - (4) A direction may be withdrawn only on the application, or with the consent, of the appellant.
 - (5) The regulations may make provision for or with respect to the determination of special or substantial reasons for the purposes of subsection (1).
 - (6) Without limiting subsection (5), in determining whether special or substantial reasons exist, the District Court must have regard to whether or not the appellant was legally represented for the whole or any part of the original Local Court proceedings.

20 Determination of appeals

- (1) The District Court may determine an appeal against conviction:
 - (a) by setting aside the conviction, or
 - (b) by dismissing the appeal, or
 - (c) in the case of an appeal made with leave under section 12 (1)—by setting aside the conviction and remitting the matter to the original Local Court for redetermination in accordance with any directions of the District Court.
- (2) The District Court may determine an appeal against sentence:
 - (a) by setting aside the sentence, or
 - (b) by varying the sentence, or
 - (c) by dismissing the appeal.

21 Notice of dismissal of appeal or application for leave to appeal

- (1) If an appeal or application for leave to appeal is dismissed because of the appellant's failure to appear, the registrar of the District Court for the proclaimed place (within the

meaning of the *District Court Act 1973*) at which the appeal or application is dismissed must cause notice of that fact to be served on the appellant.

- (2) Such a notice must state the following:
 - (a) that the District Court has dismissed the appeal or application,
 - (b) that the appellant is entitled to apply for the setting aside of the order by which the order dismissing the appeal or application was made,
 - (c) that any such application must be made within 12 months after the date on which the order dismissing the appeal or application was made.

22 Revocation of orders dismissing appeals and applications for leave to appeal

- (1) An application may be made to the District Court for the setting aside of an order under section 21 that has dismissed an appeal or application for leave to appeal because of the appellant's failure to appear (a ***dismissal order***).
- (2) An application under this section must be made within 12 months after the date on which the dismissal order is made.
- (3) After hearing such an application, the District Court may set aside the dismissal order, either unconditionally or subject to conditions, if it is satisfied:
 - (a) that the appellant has shown sufficient cause for the failure to appear, and
 - (b) that it is in the interests of justice that the appeal or application be heard.
- (4) Section 60 applies to any sentence in respect of which a dismissal order is set aside.
- (5) No action lies against any person for anything done or omitted to be done by the person in good faith, and without notice of the setting aside of a dismissal order, for the purpose of enforcing the conviction or sentence the subject of the appeal to which the order relates.

Division 2 Appeals by prosecutors

Subdivision 1 Making of appeals

23 Appeals as of right

- (1) The Director of Public Prosecutions may appeal to the District Court against a sentence imposed on a person by the Local Court in any of the following proceedings:
 - (a) proceedings for any indictable offence that has been dealt with summarily,
 - (b) proceedings for any prescribed summary offence (within the meaning of the *Director of Public Prosecutions Act 1986*),

- (c) proceedings for any summary offence that has been prosecuted by or on behalf of the Director of Public Prosecutions.
- (2) The prosecutor may appeal to the District Court against:
 - (a) any order for costs made by a Magistrate against the prosecutor in respect of committal proceedings taken by the prosecutor, or
 - (b) any order for costs made by the Local Court against the prosecutor in respect of summary proceedings taken by the prosecutor.
- (3) An appeal against a sentence or an order for costs must be made within 28 days after the relevant sentence is imposed or the order for costs is made.
- (4) Despite subsection (3), an appeal may be lodged more than 28 days after the relevant sentence is imposed if:
 - (a) the sentence has been reduced on the defendant's undertaking to assist law enforcement authorities (as referred to in section 23 of the *Crimes (Sentencing Procedure) Act 1999*), and
 - (b) the defendant has failed, whether wholly or partly, to fulfil the undertaking.

24 Lodgment of appeals

- (1) An appeal under section 23 is to be made by lodging a written notice of appeal with a registrar of the Local Court.
- (2) A notice of appeal must state the general grounds of appeal.

25 Documents to be forwarded to defendant and relevant court registrars

- (1) The person with whom a notice of appeal is lodged must immediately forward a copy of it to:
 - (a) the defendant in the original Local Court proceedings, and
 - (b) the relevant registrar of the Local Court, if the person is not that registrar.
- (2) As soon as practicable after receiving a notice of appeal, the relevant registrar of the Local Court must send the relevant papers (including a copy of any relevant order or conviction made by the Local Court) to a registrar of the District Court.

Subdivision 2 Determination of appeals

26 Appeals against sentence to be by way of rehearing of evidence

- (1) An appeal against sentence is to be by way of a rehearing of the evidence given in the original Local Court proceedings, although fresh evidence may be given in the appeal proceedings, but only by leave of the District Court.

- (2) Leave to give fresh evidence may be granted to the Director of Public Prosecutions only in exceptional circumstances.

27 Determination of appeals

- (1) The District Court may determine an appeal against sentence:
 - (a) by setting aside the sentence, or
 - (b) by varying the sentence, or
 - (c) by dismissing the appeal.
- (2) The District Court may determine an appeal against an order referred to in section 23 (2):
 - (a) by setting aside the order and making such other order as it thinks just, or
 - (b) by dismissing the appeal.

Division 3 Miscellaneous

28 Miscellaneous powers

- (1) Without limiting its other powers, the District Court may do any one or more of the following:
 - (a) it may specify the proclaimed place (within the meaning of the *District Court Act 1973*) at which the hearing of an appeal or application for leave to appeal is to be heard or continued,
 - (b) it may specify the sitting at which the hearing of an appeal or application for leave to appeal is to be heard or continued,
 - (c) it may adjourn the hearing of an appeal or application for leave to appeal.
- (2) In determining an appeal, the District Court may exercise any function that the Local Court could have exercised in the original Local Court proceedings.
- (3) Subject to section 70, the District Court may make such order as to the costs to be paid by either party (including the Crown) as it thinks just.

29 Limits on appeals

- (1) No appeal may be made to the District Court under this Part against a decision of the Local Court:
 - (a) in relation to an environmental offence against which an appeal may be made under Part 4, or

- (b) that is or has previously been the subject of an appeal or application for leave to appeal to the District Court under this Part, or
 - (c) that is or has previously been the subject of an appeal or application for leave to appeal to the Supreme Court under Part 5.
- (2) Subsection (1) (c) does not prevent a person who has made an appeal or application for leave to appeal to the Supreme Court under Part 5 from making an appeal or application for leave to appeal to the District Court under this Part if:
- (a) the Supreme Court has remitted the matter on appeal to the Local Court for redetermination, and the Local Court has redetermined the matter, or
 - (b) the Supreme Court has refused leave to appeal in relation to an appeal made on a ground of mixed law and fact.
- (3) No application to set aside or vary any conviction or sentence of the Local Court that could be the subject of an appeal under this Part may be made to the District Court (whether in its civil or criminal jurisdiction) except by way of an appeal under this Part.

30 Rules of court

Rules of court may be made under the [District Court Act 1973](#) with respect to the jurisdiction conferred by this Part on the District Court.

Part 4 Appeals from Local Court to Land and Environment Court

Division 1 Appeals by defendants

Subdivision 1 Making of appeals

31 Appeals as of right

- (1) Any person who has been convicted or sentenced by the Local Court with respect to an environmental offence may appeal to the Land and Environment Court against the conviction or sentence.
- (1A) Subsection (1) does not apply in respect of a conviction if the person was convicted in the person's absence or following the person's plea of guilty.
- (2) An appeal must be made:
- (a) within 28 days after sentence is imposed, or
 - (b) if an application for annulment of the conviction or sentence has been made under Part 2 within that 28-day period, within 28 days after the Part 2 application is disposed of under that Part,
- but (in the case of an appeal against conviction) may not be made before sentence is

imposed.

32 Appeals requiring leave

- (1) Any person who has been convicted by the Local Court, in the person's absence or following the person's plea of guilty, with respect to an environmental offence may appeal to the Land and Environment Court against the conviction, but only on a ground that involves a question of law alone, and only by leave of the Land and Environment Court.
- (2) Any person against whom:
 - (a) an order has been made by a Magistrate in relation to the person in any committal proceedings with respect to an environmental offence, or
 - (b) an interlocutory order has been made by the Local Court in relation to the person in summary proceedings with respect to an environmental offence,may appeal to the Land and Environment Court against the order, but only on a ground that involves a question of law alone, and only by leave of the Land and Environment Court.
- (3) An application for leave to appeal under subsection (1) may not be made in relation to a conviction in respect of which the defendant:
 - (a) is entitled to make an application under section 4 but has not done so, or
 - (b) has made an application under section 4 but the application has not been disposed of under Part 2.
- (4) An application for leave to appeal must be made:
 - (a) in the case of a conviction referred to in subsection (1):
 - (i) within 28 days after sentence is imposed, or
 - (ii) if an application for annulment of the conviction has been made under Part 2 within that 28-day period, within 28 days after the Part 2 application is disposed of under that Part,but may not be made before sentence is imposed, or
 - (b) in the case of an order referred to in subsection (2), within 28 days after the relevant order is made.

33 Late applications for leave to appeal

- (1) An appeal to the Land and Environment Court may be made:
 - (a) by any person by whom an appeal could be made under section 31, but for

section 31 (2), and

(b) by any person by whom an application for leave to appeal could be made under section 32, but for section 32 (4),

but only by leave of the Land and Environment Court.

(2) An application for leave to appeal must be made within 3 months after the relevant conviction, sentence or order is made or imposed.

34 Lodgment of appeals and applications for leave to appeal

(1) An appeal under section 31 is to be made by lodging a written notice of appeal with:

(a) the Registrar of the Land and Environment Court, or

(b) the person in charge of the place where the appellant is in custody.

(2) A notice of appeal must state the general grounds of appeal.

(3) An application for leave to appeal under section 32 or 33 is to be made by lodging a written application for leave to appeal, together with a written notice of appeal, with:

(a) the Registrar of the Land and Environment Court, or

(b) the person in charge of the place where the appellant is in custody.

(4) An application for leave to appeal must state the general grounds of the application and, in the case of an application under section 33, must state the reasons why an appeal or an application for leave to appeal was not made within the time allowed by section 31 or 32, as the case may be.

(5) On the granting of leave to appeal, an appeal is taken to have been made in accordance with the written notice of appeal referred to in subsection (3).

35 Documents to be forwarded to prosecutor and relevant court registrars

(1) The person with whom a notice of appeal or application for leave to appeal is lodged must immediately forward a copy of it to:

(a) the prosecutor in the original Local Court proceedings, and

(b) the relevant registrar of the Local Court, if the person is not that registrar, and

(c) the Director of Public Prosecutions.

(2) As soon as practicable after receiving a notice of appeal or application for leave to appeal, the relevant registrar of the Local Court must send the relevant papers (including a copy of any relevant order or conviction made by the Local Court) to the registrar of the Land and Environment Court.

Subdivision 2 Determination of appeals

36 Determination of applications for leave to appeal

- (1) The Land and Environment Court may determine an application for leave to appeal by dismissing the application or by granting leave to appeal.
- (2) Leave to appeal must not be granted in relation to an application under section 33 unless the Land and Environment Court is satisfied that it is in the interests of justice that leave be granted.
- (3) If the Land and Environment Court dismisses an application for leave to appeal, it may make such order as to the costs to be paid by the appellant as it thinks just.
- (4) If the Land and Environment Court grants leave to appeal, it may proceed to hear the appeal immediately or it may adjourn the appeal proceedings.

37 Appeals to be by way of rehearing on the evidence

- (1) An appeal against conviction is to be by way of rehearing on the basis of evidence given in the original Local Court proceedings, except as provided by section 38.
- (2) Fresh evidence may be given, but only by leave of the Land and Environment Court which may be granted only if the Court is satisfied that it is in the interests of justice that the fresh evidence be given.
- (3) The parties to an appeal are each entitled to be provided with one free copy of the transcripts of evidence relevant to the appeal and, if fresh evidence is given, one free copy of the transcript of the fresh evidence.

38 Circumstances in which evidence to be given in person

- (1) The Land and Environment Court may direct a person to attend and give evidence in proceedings on an appeal against conviction if it is satisfied that there are substantial reasons why, in the interests of justice, the person should attend and give evidence.
- (2) An application for such a direction may be made by a party to the proceedings in relation to a particular person only if notice of the party's intention to make such an application has been served on each other party to the proceedings within such period as the Land and Environment Court may direct.
- (3) If an application for such a direction is refused, the Land and Environment Court must give reasons for the refusal.
- (4) A direction may be withdrawn only on the application, or with the consent, of the appellant.
- (5) The regulations may make provision for or with respect to the determination of

substantial reasons under subsection (1).

- (6) Without limiting subsection (5), in determining whether substantial reasons exist, the Land and Environment Court must have regard to whether or not the appellant was legally represented for the whole or any part of the original Local Court proceedings.

39 Determination of appeals

- (1) The Land and Environment Court may determine an appeal against conviction:
- (a) by setting aside the conviction, or
 - (b) by dismissing the appeal, or
 - (c) in the case of an appeal made with leave under section 32 (1)—by setting aside the conviction and remitting the matter to the original Local Court for redetermination in accordance with any directions of the Land and Environment Court.
- (2) The Land and Environment Court may determine an appeal against sentence:
- (a) by setting aside the sentence, or
 - (b) by varying the sentence, or
 - (c) by dismissing the appeal.
- (3) The Land and Environment Court may determine an appeal against an order referred to in section 32 (2) (a) or (b):
- (a) by setting aside the order and making such other order as it thinks just, or
 - (b) by dismissing the appeal.

40 Notice of dismissal of appeal or application for leave to appeal

- (1) If an appeal or application for leave to appeal is dismissed because of the appellant's failure to appear, the registrar of the Land and Environment Court must cause notice of that fact to be served on the appellant.
- (2) Such a notice must state the following:
- (a) that the Land and Environment Court has dismissed the appeal or application,
 - (b) that the appellant is entitled to apply for the setting aside of the order by which the order dismissing the appeal or application was made,
 - (c) that such an application must be made within 12 months after the date on which the order dismissing the appeal or application was made.

41 Revocation of orders dismissing appeals and applications for leave to appeal

- (1) An application may be made to the Land and Environment Court for the setting aside of an order under section 40 that has dismissed an appeal or application for leave to appeal because of the appellant's failure to appear (a ***dismissal order***).
- (2) An application under this section must be made within 12 months after the date on which the dismissal order is made.
- (3) After hearing such an application, the Land and Environment Court may set aside the dismissal order, either unconditionally or subject to conditions, if it is satisfied:
 - (a) that the appellant has shown sufficient cause for the failure to appear, and
 - (b) that it is in the interests of justice that the appeal or application be heard.
- (4) Section 60 applies to any sentence in respect of which a dismissal order is set aside.
- (5) No action lies against any person for anything done or omitted to be done by the person in good faith, and without notice of the setting aside of a dismissal order, for the purpose of enforcing the conviction or sentence the subject of the appeal to which the order relates.

Division 2 Appeals by prosecutors

Subdivision 1 Making of appeals

42 Appeals as of right

- (1) The Director of Public Prosecutions may appeal to the Land and Environment Court against a sentence imposed on a person by the Local Court in relation to an environmental offence for which proceedings have been prosecuted by or on behalf of a public authority (other than the Environment Protection Authority).
- (2) The Environment Protection Authority may appeal to the Land and Environment Court against a sentence imposed on a person by the Local Court in relation to an environmental offence for which proceedings have been prosecuted by or on behalf of the Environment Protection Authority.
- (2A) The prosecutor (other than the Director of Public Prosecutions or the Environment Protection Authority) may appeal to the Land and Environment Court against a sentence imposed by the Local Court in any summary proceedings in relation to an environmental offence, but only on a ground that involves a question of law alone.
- (2B) The prosecutor (including the Director of Public Prosecutions or the Environment Protection Authority) may appeal to the Land and Environment Court against:
 - (a) an order made by the Local Court that stays any summary proceedings for the

prosecution of an environmental offence, or

(b) an order made by the Local Court dismissing a matter the subject of any summary proceedings with respect to an environmental offence, or

(c) an order for costs made by the Local Court against the prosecutor in any summary proceedings with respect to an environmental offence,

but only on a ground that involves a question of law alone.

(3) An appeal must be made within 28 days after the relevant sentence is imposed.

(4) Despite subsection (3), an appeal may be lodged more than 28 days after the relevant sentence is imposed if:

(a) the sentence has been reduced on the defendant's undertaking to assist law enforcement authorities (as referred to in section 23 of the *Crimes (Sentencing Procedure) Act 1999*), and

(b) the defendant has failed, whether wholly or partly, to fulfil the undertaking.

43 Appeals requiring leave

(1) The Director of Public Prosecutions may appeal to the Land and Environment Court against:

(a) an order that has been made by a Magistrate in relation to a person in any committal proceedings with respect to an environmental offence, or

(b) an interlocutory order that has been made by the Local Court in relation to a person in summary proceedings with respect to an environmental offence,

being an offence for which proceedings have been prosecuted by or on behalf of a public authority (other than the Environment Protection Authority), but only on a ground that involves a question of law alone, and only by leave of the Land and Environment Court.

(1A) The Environment Protection Authority may appeal to the Land and Environment Court against:

(a) an order that has been made by a Magistrate in relation to a person in any committal proceedings with respect to an environmental offence, or

(b) an interlocutory order that has been made by the Local Court in relation to a person in summary proceedings with respect to an environmental offence,

being an offence for which proceedings have been prosecuted by or on behalf of the Environment Protection Authority, but only on a ground that involves a question of law alone, and only by leave of the Land and Environment Court.

- (2) An application for leave to appeal must be made within 28 days after the relevant order is made.

44 Lodgment of appeals and applications for leave to appeal

- (1) An appeal under section 42 is to be made by lodging a written notice of appeal with the registrar of the Land and Environment Court.
- (2) A notice of appeal must state the general grounds of appeal.
- (3) An application for leave to appeal under section 43 is to be made by lodging a written application for leave to appeal, together with a written notice of appeal, with the registrar of the Land and Environment Court.
- (4) An application for leave to appeal must state the general grounds of the application.

45 Documents to be forwarded to defendant and relevant court registrars

- (1) The person with whom a notice of appeal or application for leave to appeal is lodged must immediately forward a copy of it to:
 - (a) the defendant in the original Local Court proceedings, and
 - (b) the relevant registrar of the Local Court, if the person is not that registrar.
- (2) As soon as practicable after receiving a notice of appeal or application for leave to appeal, the relevant registrar of the Local Court must send the relevant papers (including a copy of any relevant order or conviction made by the Local Court) to the registrar of the Land and Environment Court.

Subdivision 2 Determination of appeals

46 Determination of applications for leave to appeal

- (1) The Land and Environment Court may determine an application for leave to appeal by dismissing the application or by granting leave to appeal.
- (2) If the Land and Environment Court dismisses an application for leave to appeal, it may make such order as to the costs to be paid by the Director of Public Prosecutions as it thinks just.
- (3) If the Land and Environment Court grants leave to appeal, it may proceed to hear the appeal immediately or it may adjourn the appeal proceedings.

47 Appeals against sentence to be by way of rehearing of evidence

- (1) An appeal is to be dealt with by way of a rehearing of the evidence given in the original Local Court proceedings, although fresh evidence may be given in the appeal proceedings, but only by leave of the Land and Environment Court.

- (2) Leave to give fresh evidence may be granted to the Director of Public Prosecutions or Environment Protection Authority only in exceptional circumstances.

48 Determination of appeals

- (1) The Land and Environment Court may determine an appeal against sentence:
 - (a) by setting aside the sentence, or
 - (b) by varying the sentence, or
 - (c) by dismissing the appeal.
- (2) The Land and Environment Court may determine an appeal against an order referred to in section 43 (1) (a) or (b) or (1A) (a) or (b):
 - (a) by setting aside the order and making such other order as it thinks just, or
 - (b) by dismissing the appeal.
- (3) The Land and Environment Court may determine an appeal against an order referred to in section 42 (2B):
 - (a) by setting aside the order and making such other order as it thinks just, or
 - (b) by setting aside the order and remitting the matter to the original Local Court for redetermination in accordance with any directions of the Land and Environment Court, or
 - (c) by dismissing the appeal.

Division 3 Miscellaneous

49 Miscellaneous powers

- (1) Without limiting its other powers, the Land and Environment Court may do any one or more of the following:
 - (a) it may specify the sitting at which the hearing of an appeal or application for leave to appeal is to be heard or continued,
 - (b) it may adjourn the hearing of an appeal or application for leave to appeal.
- (2) In determining an appeal, the Land and Environment Court may exercise any function that the Local Court could have exercised in the original Local Court proceedings.
- (3) In determining an appeal against an order referred to in section 43 (1) (a) or (b) or (1A) (a) or (b), the Land and Environment Court has the same jurisdiction as the Supreme Court with respect to such an appeal.

- (4) Subject to section 70, the Land and Environment Court may make such order as to the costs to be paid by either party (including the Crown) as it thinks just.

50 Limits on appeals

- (1) No appeal may be made to the Land and Environment Court under this Part against a decision of the Local Court:
- (a) that is or has previously been the subject of an appeal or application for leave to appeal to the Land and Environment Court under this Part, or
 - (b) that is or has previously been the subject of an appeal or application for leave to appeal to the Supreme Court under Part 5.
- (2) Subsection (1) (b) does not prevent a person who has made an appeal or application for leave to appeal to the Supreme Court under Part 5 from making an appeal or application for leave to appeal to the Land and Environment Court under this Part if:
- (a) the Supreme Court has remitted the matter on appeal to the Local Court for redetermination, and the Local Court has redetermined the matter, or
 - (b) the Supreme Court has refused leave to appeal in relation to:
 - (i) an appeal made on a ground of mixed law and fact, or
 - (ii) an appeal with respect to an environmental offence.
- (3) No application to set aside or vary any conviction or sentence of the Local Court that could be the subject of an appeal under this Part may be made to the Land and Environment Court (whether in its civil or criminal jurisdiction) except by way of an appeal under this Part.

51 Rules of court

Rules of court may be made under the [Land and Environment Court Act 1979](#) with respect to the jurisdiction conferred by this Part on the Land and Environment Court.

Part 5 Appeals from Local Court to Supreme Court

Division 1 Appeals by defendants

Subdivision 1 Making of appeals

52 Appeals as of right

- (1) Any person who has been convicted or sentenced by the Local Court, otherwise than with respect to an environmental offence, may appeal to the Supreme Court against the conviction or sentence, but only on a ground that involves a question of law alone.

- (2) An appeal must be made within such period after the date of the conviction or sentence as may be prescribed by rules of court.

53 Appeals requiring leave

- (1) Any person who has been convicted or sentenced by the Local Court, otherwise than with respect to an environmental offence, may appeal to the Supreme Court against the conviction or sentence on a ground that involves:
 - (a) a question of fact, or
 - (b) a question of mixed law and fact,but only by leave of the Supreme Court.
- (2) Any person who has been convicted or sentenced by the Local Court with respect to an environmental offence, may appeal to the Supreme Court against the conviction or sentence, but only on a ground that involves a question of law alone, and only by leave of the Supreme Court.
- (3) Any person against whom:
 - (a) an order has been made by a Magistrate in relation to the person in any committal proceedings, or
 - (b) an interlocutory order has been made by the Local Court in relation to the person in summary proceedings,may appeal to the Supreme Court against the order, but only on a ground that involves a question of law alone, and only by leave of the Supreme Court.
- (4) An application for leave to appeal must be made within such period after the date of the conviction, sentence or order as may be prescribed by rules of court.

Subdivision 2 Determination of appeals

54 Determination of applications for leave to appeal

- (1) The Supreme Court may determine an application for leave to appeal by dismissing the application or by granting leave to appeal.
- (2) Leave to appeal must not be granted in relation to an application with respect to an environmental offence unless the Supreme Court is satisfied that the appeal is likely to require the resolution of a matter relating to constitutional law or a matter of general application.
- (3) If the Supreme Court dismisses an application for leave to appeal, it may make such order as to the costs to be paid by the appellant as it thinks just.

- (4) If the Supreme Court grants leave to appeal, it may proceed to hear the appeal immediately or it may adjourn the appeal proceedings.

55 Determination of appeals

- (1) The Supreme Court may determine an appeal against conviction:
- (a) by setting aside the conviction, or
 - (b) by setting aside the conviction and remitting the matter to the Local Court sitting at the place at which the original Local Court proceedings were held for redetermination in accordance with the Supreme Court's directions, or
 - (c) by dismissing the appeal.
- (2) The Supreme Court may determine an appeal against sentence:
- (a) by setting aside the sentence, or
 - (b) by varying the sentence, or
 - (c) by setting aside the sentence and remitting the matter to the Local Court sitting at the place at which the original Local Court proceedings were held for redetermination, in relation to sentence, in accordance with the Supreme Court's directions, or
 - (d) by dismissing the appeal.
- (3) The Supreme Court may determine an appeal against an order referred to in section 53 (3) (a) or (b):
- (a) by setting aside the order and making such other order as it thinks just, or
 - (b) by dismissing the appeal.

Division 2 Appeals by prosecutors

Subdivision 1 Making of appeals

56 Appeals as of right

- (1) The prosecutor may appeal to the Supreme Court against:
- (a) a sentence imposed by the Local Court in any summary proceedings, or
 - (b) an order made by the Local Court that stays any summary proceedings for the prosecution of an offence, or
 - (c) an order made by the Local Court dismissing a matter the subject of any summary proceedings, or

- (d) an order for costs made by a Magistrate against the prosecutor in any committal proceedings, or
 - (e) an order for costs made by the Local Court against the prosecutor in any summary proceedings,
- other than an order or sentence with respect to an environmental offence, but only on a ground that involves a question of law alone.

- (2) An appeal must be made within such period after the date of the sentence or order as may be prescribed by rules of court.

57 Appeals requiring leave

- (1) The prosecutor may appeal to the Supreme Court against:

- (a) a sentence imposed by the Local Court with respect to an environmental offence, or
- (b) an order that has been made by a Magistrate in relation to a person in any committal proceedings, or
- (c) an interlocutory order that has been made by the Local Court in relation to a person in summary proceedings,

but only on a ground that involves a question of law alone, and only by leave of the Supreme Court.

- (2) An application for leave to appeal must be made within such period after the date of the sentence or order as may be prescribed by rules of court.

Subdivision 2 Determination of appeals

58 Determination of applications for leave to appeal

- (1) The Supreme Court may determine an application for leave to appeal by dismissing the application or by granting leave to appeal.
- (2) Leave to appeal must not be granted in relation to an application with respect to an environmental offence unless the Supreme Court is satisfied that the appeal is likely to require the resolution of a matter relating to constitutional law or a matter of general application.
- (3) If the Supreme Court dismisses an application for leave to appeal, it may make such order as to the costs to be paid by the prosecutor as it thinks just.
- (4) If the Supreme Court grants leave to appeal, it may proceed to hear the appeal immediately or it may adjourn the appeal proceedings.

59 Determination of appeals

- (1) The Supreme Court may determine an appeal against sentence:
 - (a) by setting aside the sentence, or
 - (b) by varying the sentence, or
 - (c) by dismissing the appeal.
- (2) The Supreme Court may determine an appeal against an order referred to in section 56 (1) (b), (c), (d) or (e) or 57 (1) (b) or (c):
 - (a) by setting aside the order and making such other order as it thinks just, or
 - (b) by dismissing the appeal.

Division 3 Miscellaneous

60 Limits on appeals

A person may not appeal to the Supreme Court under this Part against a decision of the Local Court:

- (a) that is or has previously been the subject of an appeal or application for leave to appeal to the Supreme Court under this Part, or
- (b) that is or has previously been the subject of an appeal or application for leave to appeal to the Court of Criminal Appeal under the [Criminal Appeal Act 1912](#).

61 Rules of court

Rules of court may be made under the [Supreme Court Act 1970](#) with respect to the jurisdiction conferred by this Part on the Supreme Court.

Part 6 Provisions common to all appeals

62 Effect of defect in notice of appeal or application for leave to appeal

- (1) A notice of appeal or application for leave to appeal is not invalid merely because of a defect, whether of substance or form, in the notice or application.
- (2) An appeal court hearing an appeal or application for leave to appeal may amend any such notice or application if it is satisfied that the notice or application is capable of amendment and ought to be amended.
- (3) Such an amendment may be made subject to such conditions as to adjournment as the appeal court thinks just.
- (4) An appeal court may dispose of an appeal or application for leave to appeal, despite

the relevant notice or application having not been served on an interested party, if it is satisfied that the party:

- (a) is aware of the date, time and place fixed for dealing with the appeal or application and has not been prejudiced as a consequence of the notice or application having not been served, or
- (b) is avoiding service of the notice or application, or
- (c) cannot, after reasonable search and inquiry, be found.

63 Stay of execution of sentence pending determination of appeal

(1) This section applies to:

- (a) any sentence, and
- (b) any penalty, restitution, compensation, forfeiture, destruction, disqualification or loss or suspension of a licence or privilege that arises under an Act as a consequence of a conviction,

in respect of which an appeal or application for leave to appeal is made under this Act.

(2) The execution of any such sentence, and the operation of any such penalty, restitution, compensation, forfeiture, destruction, disqualification or loss or suspension of a licence or privilege, is stayed:

- (a) except as provided by paragraphs (b) and (c), when notice of appeal is duly lodged, or
- (b) in the case of an appellant whose appeal is the subject of an application for leave, when leave to appeal is granted, or
- (c) in the case of an appellant who is in custody when the appeal is made or leave to appeal is granted, when the appellant is entitled to be released from custody on bail under section 14 of the *Bail Act 2013* or bail is dispensed with under that Act.

(2A) Subsection (2) does not operate to stay a suspension or disqualification of a driver licence that arose as the consequence of a conviction if, immediately before the proceedings giving rise to the conviction, a suspension was in force under Division 4 of Part 7.4 of the *Road Transport Act 2013* (or a former corresponding provision within the meaning of that Act) for the offence to which the conviction relates.

(2B) However, an appeal court may order that a suspension or disqualification referred to in subsection (2A) be stayed if the court considers a stay to be appropriate in the circumstances.

(3) Subject to any order of the appeal court, a stay of execution continues in force until the appeal is finally determined.

- (4) Such an order is to be made only if the appeal court is satisfied, in proceedings on an application by the prosecutor, that the appellant has unduly delayed the appeal proceedings.
- (5) In this section, a reference to an appellant who is in custody includes a reference to a person who is the subject of an intensive correction order or home detention order within the meaning of the *Crimes (Administration of Sentences) Act 1999*.

64 Extension of appeal proceedings to other convictions and sentences

If an appeal or application for leave to appeal has been duly made in respect of one conviction or sentence (the **primary conviction or sentence**), an appeal court may hear and determine an appeal or application for leave to appeal in respect of any other conviction or sentence made or imposed on the same day, and in respect of the same person, as the primary conviction or sentence, and may do so even though an appeal or application for leave to appeal has not been duly made in respect of the other conviction or sentence.

65 Appeal not to succeed on narrow technical grounds

- (1) A conviction, order or sentence is not to be set aside on an appeal merely because of:
 - (a) an omission or mistake in the form of the conviction or order, or
 - (b) an error in law in the order or sentence,

if it appears to the appeal court that there were sufficient grounds before the Local Court to have authorised a conviction, order or sentence free from the omission, mistake or error.

- (2) In such a case, the appeal court:
 - (a) may amend the conviction, order or sentence and determine the appeal as if the omission, mistake or error did not exist, or
 - (b) may remit the matter to the Local Court to make the conviction or order, or impose the sentence, authorised by law and to amend the conviction, order or sentence accordingly.

66 Unavailability of original Magistrate

If an appeal court remits a matter to the Local Court and the Magistrate who made the original conviction or order or imposed the original sentence:

- (a) has ceased to hold office as a Magistrate, or
- (b) is for any other reason unable to continue to hear and determine the matter,

the matter is to be dealt with by another Magistrate nominated by the Chief Magistrate.

67 Withdrawal of appeals and applications

- (1) An appeal or application for leave to appeal may at any stage be withdrawn by the appellant, but only by leave of the appeal court.
- (2) In granting leave for an appeal or application for leave to appeal to be withdrawn, the appeal court may make such orders as are necessary to place the appellant as nearly as practicable in the same position as if the appeal or application had not been made.
- (3) Any order made by the appeal court in respect of an appeal or application for leave to appeal that is withdrawn is taken to have been made by the Local Court.

68 Court may confirm or vary conviction or sentence with effect from earlier day

- (1) An appeal court may order that a conviction or sentence confirmed or varied by it on appeal, or any part of it:
 - (a) is to take effect (as confirmed or varied) on and from a day specified in the order, or
 - (b) in the case of a sentence that has been served in part, is to recommence (as confirmed or varied) on and from a day specified in the order,being the day on which the order is made or an earlier day.
- (1A) An appeal court may, for the purposes of making an order under subsection (1) in relation to a sentence that consists of, or includes, a disqualification from holding a driver licence (within the meaning of the *Road Transport Act 2013*), take into account:
 - (a) any period during which the defendant's driver licence was suspended under section 224 of the *Road Transport Act 2013* (or a former corresponding provision within the meaning of that Act), and
 - (b) any other periods after committing the offence to which the sentence relates during which the defendant held, or did not hold, a driver licence that would have permitted the defendant to drive a motor vehicle.

Note—

Section 224 of the *Road Transport Act 2013* enables a police officer to suspend, by written notice, a person's driver licence within 48 hours after the person is charged with certain offences involving alcohol or drug use under that Act. The suspension has effect until the charge is heard and determined by a court. Also, section 63 of this Act provides for the stay of the execution of a sentence pending determination of appeal under this Act.

- (2) The order has effect despite any stay of execution that has been in force in respect of the sentence appealed against.

68A Double jeopardy not to be taken into account in prosecution appeals against

sentence

- (1) An appeal court must not:
 - (a) dismiss a prosecution appeal against sentence, or
 - (b) impose a less severe sentence on any such appeal than the court would otherwise consider appropriate,because of any element of double jeopardy involved in the respondent being sentenced again.
- (2) This section extends to an appeal under the *Criminal Appeal Act 1912* and accordingly a reference in this section to an appeal court includes a reference to the Court of Criminal Appeal.

69 Effect on good behaviour bonds of confirmation of sentence

If an appeal court confirms a sentence on appeal, any good behaviour bond that the appellant entered into as a consequence of the original sentence continues to have effect according to its terms, except to the extent to which the appeal court otherwise directs and despite any stay of execution that has been in force in respect of the sentence.

70 Limit on costs awarded against public prosecutor

- (1) Costs are not to be awarded in favour of an appellant whose conviction is set aside unless the appeal court is satisfied:
 - (a) that the investigation into the alleged offence was conducted in an unreasonable or improper manner, or
 - (b) that the proceedings in the Local Court were initiated without reasonable cause or in bad faith, or were conducted by the prosecutor in an improper manner, or
 - (c) that the prosecutor unreasonably failed to investigate (or to investigate properly) any relevant matter:
 - (i) that the prosecutor was or ought reasonably to have been aware of, and
 - (ii) that suggested that the appellant might not be guilty or that, for any other reason, the proceedings should not have been brought, or
 - (d) that, because of other exceptional circumstances relating to the conduct of the proceedings by the prosecutor, it is just and reasonable to award costs in favour of the appellant.
- (2) This section does not apply to the awarding of costs against a respondent acting in a private capacity.
- (3) For the purposes of subsection (2), an officer of an approved charitable organisation

(within the meaning of the *Prevention of Cruelty to Animals Act 1979*) is taken not to be acting in a private capacity if the officer acts as the respondent in any appeal arising from proceedings under that Act or section 9 (1) of the *Veterinary Practice Act 2003*.

71 Variation of sentences of Local Court

- (1) An appeal court may not vary a sentence so that the sentence as varied could not have been imposed by the Local Court.
- (2) An appeal court may not make an order or impose a sentence that could not have been made or imposed by the Local Court.
- (3) Any sentence varied or imposed by an appeal court, and any order made by an appeal court under this Act, has the same effect and may be enforced in the same manner as if it were made by the Local Court.

72 Orders for costs

An appeal court that orders an appellant or respondent to pay costs:

- (a) (Repealed)
- (b) must state a time within which the costs or other amount must be paid.

73 Evidence of setting aside of conviction or sentence

- (1) If a conviction or sentence is set aside on an appeal, the registrar of the appeal court must cause a memorandum to that effect to be endorsed on the conviction or on the order by which the sentence was imposed.
- (2) A copy of the memorandum is sufficient evidence that the conviction or sentence has been set aside.

Part 7 Review of convictions and sentences

Division 1 Preliminary

74 Definitions

- (1) In this Part:

biological material means human blood, semen, hair, saliva, skin tissue or other biological material from which DNA information may be obtained, whether the material separately identified or present in other material.

conviction includes:

- (a) a verdict of the kind referred to in section 22 (1) (c) or (d) of the *Mental Health (Forensic Provisions) Act 1990*, being a verdict that the accused person committed

the offence charged or an offence available as an alternative to the offence charged, or

- (b) an acquittal on the ground of mental illness, where the mental illness was not set up as a defence by the person acquitted.

judicial officer means a judicial officer (or former judicial officer) within the meaning of the *Judicial Officers Act 1986*.

previous review provisions means the provisions of:

- (a) Part 13A of the *Crimes Act 1900* as in force before the repeal and transfer of those provisions to this Part by the *Crimes (Appeal and Review) Amendment (DNA Review Panel) Act 2006*, or
- (b) section 475 of the *Crimes Act 1900*, or section 26 of the *Criminal Appeal Act 1912*, as in force before the repeal of those sections by the *Crimes Legislation (Review of Convictions) Amendment Act 1993*.

sentence includes a sentence or order imposed or made by any court following a conviction.

- (2) In this Part, a reference to a review of, or an inquiry into, a conviction or sentence includes a reference to a review of, or an inquiry into, any aspect of the proceedings giving rise to the conviction or sentence.

75 Exercise of Supreme Court's jurisdiction

- (1) The jurisdiction of the Supreme Court under this Part is to be exercised by the Chief Justice or by a Judge of the Supreme Court who is authorised by the Chief Justice to exercise that jurisdiction.
- (2) References in this Part to the Supreme Court are to be construed accordingly.

Division 2 Petitions to Governor

76 Petitions to Governor

A petition for a review of a conviction or sentence or the exercise of the Governor's pardoning power may be made to the Governor by the convicted person or by another person on behalf of the convicted person.

77 Consideration of petitions

- (1) After the consideration of a petition:
- (a) the Governor may direct that an inquiry be conducted by a judicial officer into the conviction or sentence, or

- (b) the Minister may refer the whole case to the Court of Criminal Appeal, to be dealt with as an appeal under the *Criminal Appeal Act 1912*, or
 - (c) the Minister may request the Court of Criminal Appeal to give an opinion on any point arising in the case.
- (2) Action under subsection (1) may only be taken if it appears that there is a doubt or question as to the convicted person's guilt, as to any mitigating circumstances in the case or as to any part of the evidence in the case.
- (3) The Governor or the Minister may refuse to consider or otherwise deal with a petition. Without limiting the foregoing, the Governor or the Minister may refuse to consider or otherwise deal with a petition if:
- (a) it appears that the matter:
 - (i) has been fully dealt with in the proceedings giving rise to the conviction or sentence (or in any proceedings on appeal from the conviction or sentence), or
 - (ii) has previously been dealt with under this Part or under the previous review provisions, or
 - (iii) has been the subject of a right of appeal (or a right to apply for leave to appeal) by the convicted person but no such appeal or application has been made, or
 - (iv) has been the subject of appeal proceedings commenced by or on behalf of the convicted person (including proceedings on an application for leave to appeal) where the appeal or application has been withdrawn or the proceedings have been allowed to lapse, and
 - (b) the Governor or the Minister is not satisfied that there are special facts or special circumstances that justify the taking of further action.
- (3A) The Governor or the Minister may defer consideration of a petition if:
- (a) the time within which an appeal may be made against the conviction or sentence (including an application for leave to appeal) is yet to expire, or
 - (b) the conviction or sentence is the subject of appeal proceedings (including proceedings on an application for leave to appeal) that are yet to be finally determined, or
 - (c) the petition fails to disclose sufficient information to enable the conviction or sentence to be properly considered.
- (4) The Minister must cause a report to be given to the registrar of the Criminal Division of the Supreme Court as to any action taken by the Governor or the Minister under

this section (including a refusal to consider or otherwise deal with a petition).

- (5) A petition (however described) that does not expressly seek a review of a conviction or sentence or the exercise of the Governor's pardoning power may be dealt with as if it did if the Minister is of the opinion that it should be so dealt with.

Division 3 Applications to Supreme Court

78 Applications to Supreme Court

- (1) An application for an inquiry into a conviction or sentence may be made to the Supreme Court by the convicted person or by another person on behalf of the convicted person.
- (2) The registrar of the Criminal Division of the Supreme Court must cause a copy of any application made under this section to be given to the Minister.

79 Consideration of applications

- (1) After considering an application under section 78 or on its own motion:
- (a) the Supreme Court may direct that an inquiry be conducted by a judicial officer into the conviction or sentence, or
 - (b) the Supreme Court may refer the whole case to the Court of Criminal Appeal, to be dealt with as an appeal under the *Criminal Appeal Act 1912*.
- (2) Action under subsection (1) may only be taken if it appears that there is a doubt or question as to the convicted person's guilt, as to any mitigating circumstances in the case or as to any part of the evidence in the case.
- (3) The Supreme Court may refuse to consider or otherwise deal with an application. Without limiting the foregoing, the Supreme Court may refuse to consider or otherwise deal with an application if:
- (a) it appears that the matter:
 - (i) has been fully dealt with in the proceedings giving rise to the conviction or sentence (or in any proceedings on appeal from the conviction or sentence), or
 - (ii) has previously been dealt with under this Part or under the previous review provisions, or
 - (iii) has been the subject of a right of appeal (or a right to apply for leave to appeal) by the convicted person but no such appeal or application has been made, or
 - (iv) has been the subject of appeal proceedings commenced by or on behalf of the convicted person (including proceedings on an application for leave to

appeal) where the appeal or application has been withdrawn or the proceedings have been allowed to lapse, and

(b) the Supreme Court is not satisfied that there are special facts or special circumstances that justify the taking of further action.

(3A) The Supreme Court may defer consideration of an application under section 78 if:

(a) the time within which an appeal may be made against the conviction or sentence (including an application for leave to appeal) is yet to expire, or

(b) the conviction or sentence is the subject of appeal proceedings (including proceedings on an application for leave to appeal) that are yet to be finally determined, or

(c) the application fails to disclose sufficient information to enable the conviction or sentence to be properly considered.

(3B) This section does not authorise a direction to be given, or a referral to be made to the Court of Criminal Appeal, if the Supreme Court is satisfied that the grounds for the direction or referral arise only from:

(a) the fact that the convicted person was:

(i) questioned under section 24 of the *Crime Commission Act 2012*, or

(ii) required under section 24 or 29 of that Act to produce a document or thing, or

(b) either or both of the following:

(i) evidence obtained directly from that questioning or requirement,

(ii) any further information, evidence, document or thing obtained as a result of the questioning or the production of the document or thing.

(4) Proceedings under this section are not judicial proceedings. However, the Supreme Court may consider any written submissions made by the Crown with respect to an application.

(5) The registrar of the Criminal Division of the Supreme Court must report to the Minister as to any action taken by the Supreme Court under this section (including a refusal to consider or otherwise deal with an application).

Division 4 Inquiries

80 Inquiries

An inquiry is to be conducted as soon as practicable after a direction for it has been given under section 77 or 79.

81 Procedure for conducting inquiry

- (1) An inquiry under this Division is to be conducted by:
 - (a) a judicial officer appointed by the Governor, if the conduct of an inquiry was directed by the Governor, or
 - (b) a judicial officer appointed by the Chief Justice, if the conduct of an inquiry was directed by the Supreme Court.
- (2) The judicial officer conducting the inquiry has:
 - (a) the powers, authorities, protections and immunities conferred on a commissioner by Division 1 of Part 2 of the *Royal Commissions Act 1923*, and
 - (b) in the case of a person who is a Judge of the Supreme Court or whose instrument of appointment under this section expressly so provides, the powers and authorities conferred on a commissioner by Division 2 of Part 2 of the *Royal Commissions Act 1923* (except for section 17).
- (3) The *Royal Commissions Act 1923* applies to any witness summoned by or before the judicial officer conducting the inquiry (except for sections 13 and 17 and, subject to subsection (2) (b), Division 2 of Part 2).
- (4) If it appears that the character of any person (being a person who was a witness at the proceedings from which the conviction or sentence arose) may be affected by the inquiry, the judicial officer must permit the person to be present at the inquiry and to examine any witness who attends the inquiry.

82 Action to be taken on completion of inquiry

- (1) On completing an inquiry under this Division, the judicial officer must cause a report on the results of the inquiry (incorporating a transcript of the depositions given in the course of the inquiry) to be sent to:
 - (a) the Governor, in the case of an inquiry held on the direction of the Governor, or
 - (b) the Chief Justice, in the case of an inquiry held on the direction of the Supreme Court.
- (2) The judicial officer may also refer the matter (together with a copy of the report) to the Court of Criminal Appeal:
 - (a) for consideration of the question of whether the conviction should be quashed (in any case in which the judicial officer is of the opinion that there is a reasonable doubt as to the guilt of the convicted person), or
 - (b) for review of the sentence imposed on the convicted person (in any case in which the judicial officer is of the opinion that there is a reasonable doubt as to any

matter that may have affected the nature or severity of the sentence).

- (3) After considering a report furnished to the Chief Justice under this section, the Supreme Court must cause its own report on the matter (together with a copy of the judicial officer's report) to be sent to the Governor.
- (4) The Governor may then dispose of the matter in such manner as to the Governor appears just.

Division 5 Court of Criminal Appeal

83 Definitions

In this Division:

Court means the Court of Criminal Appeal.

pardon means a pardon granted under the prerogative of mercy.

84 Quashing of conviction following pardon

- (1) The Court may quash a conviction in respect of which a free pardon has been granted.
- (2) However, the mere fact that a free pardon has been granted does not entitle the person to whom the pardon has been granted to a quashing of the conviction.
- (3) An application for the quashing of the conviction may be made to the Court by the person to whom the pardon has been granted or by another person on behalf of that person.
- (4) However, such an application may not be made in respect of a free pardon arising from an inquiry under Division 4 if the matter has previously been dealt with under this Division as a consequence of a reference to the Court, under section 82 (2) (or so dealt with under the corresponding previous review provisions), by the judicial officer conducting the inquiry.
- (5) The registrar of the Court must cause a copy of any application made under this section to be given to the Minister.

85 Procedure on application for quashing of conviction

- (1) In any proceedings on an application under section 84:
 - (a) the Crown has the right of appearance, and
 - (b) the Court is to consider:
 - (i) the report on the matter that is prepared by the judicial officer under section 82, and

- (ii) any report on the matter that is prepared by the Supreme Court under section 82, and
 - (iii) any submissions on any such report that are made by the Crown or by the convicted person to whom the proceedings relate, and
- (c) no other evidence is to be admitted or considered except with the leave of the Court.
- (2) The rules governing the admissibility of evidence do not apply to any such proceedings.
- (3) For the purpose of enabling the convicted person to make submissions with respect to a report referred to in subsection (1), the convicted person is entitled to receive a copy of the report.
- (4) The provisions of Parts 3 and 4 of the *Criminal Appeal Act 1912* relating to proceedings on an appeal under section 5 (1) of that Act apply to proceedings on an application under section 84, as if:
- (a) any reference to an appeal were a reference to proceedings on such an application, and
 - (b) any reference to an appellant were a reference to the convicted person.

86 Reference to Court under section 77 (1) (b) or 79 (1) (b) following petition to Governor or application to Supreme Court

On receiving a reference under section 77 (1) (b) or 79 (1) (b), the Court is to deal with the case so referred in the same way as if the convicted person had appealed against the conviction or sentence under the *Criminal Appeal Act 1912*, and that Act applies accordingly.

87 Request to Court under section 77 (1) (c) following petition to Governor

- (1) On receiving a request under section 77 (1) (c), the Court is to consider, and furnish the Minister with its opinion on, the point raised by the request.
- (2) The Governor may then dispose of the matter in such manner as to the Governor appears just.

88 Reference to Court under section 82 (2) following inquiry

- (1) On receiving a reference under section 82 (2) (a), the Court is to deal with the matter so referred in the same way as if an application had been made to the Court under section 84 (3), and sections 84 and 85 apply accordingly.
- (2) On receiving a reference under section 82 (2) (b), the Court is to deal with the matter so referred in the same way as it is required to deal with matter the subject of an

application under section 84 (3), and section 85 applies to proceedings on the matter so referred as if the references in that section to an application under section 84 were references to a reference under section 82 (2) (b).

Division 6 DNA evidence

89-95 (Repealed)

96 Duty of police officers and other officers to retain certain biological material evidence

- (1) This section applies to physical evidence comprising or containing biological material (**relevant biological material**) obtained by any member of the NSW Police Force in connection with the investigation or prosecution of an offence for which a person was convicted (the **convicted person**), but only if:
 - (a) the offence was punishable by imprisonment for life or 20 years or more, and
 - (b) the convicted person was sentenced to imprisonment or full-time detention for the offence following a trial on indictment.
- (2) It is the duty of members of the NSW Police Force (or members of any other authority of the State) to retain relevant biological material in their possession or control.
- (2A) The retention of a swab or sample taken from the relevant biological material is sufficient compliance with the duty if:
 - (a) the swab or sample taken is enough to permit DNA testing, and
 - (b) the swab or sample was taken by a member of the NSW Police Force or the NSW Forensic & Analytical Science Service (or its successor) qualified to take forensic swabs or samples.
- (3) However, that duty does not apply to relevant biological material if:
 - (a) the material is required, by the order of any court, to be returned to the person to whom the material belongs, or
 - (b) the owner of the material is the victim of the offence concerned and the material is required to be returned promptly to minimise inconvenience to the victim, or
 - (c) the material is of such size or nature as to render its retention impracticable (but only if steps have been taken to retain a portion of the material sufficient for DNA testing), or
 - (d) the material has already been subject to DNA testing and the testing indicates that it relates only to the convicted person concerned, or
 - (e) the convicted person has ceased to be subject to the sentence imposed for the offence (whether in custody or on parole) or subject to an extended supervision or

continuing detention order under the *Crimes (High Risk Offenders) Act 2006*, or

- (f) the material is required by or under any Act to be given to another person or destroyed.
- (4) An authority of the State is not under a duty to retain biological material if the material is given to a court or another authority of the State and has not been returned.
- (5) A person who, knowing that relevant biological material is required to be retained under this section, destroys or tampers with the material (or a swab or sample taken from the material) with the intention of preventing the material (or swab or sample) being subjected to DNA testing is guilty of an offence.

Maximum penalty: Imprisonment for 10 years.

97 Information about and testing of retained biological material

- (1) This section applies with respect to biological material (***retained biological material***) that is or may be in the possession or control of members of the NSW Police Force or members of any other authority of the State in connection with an offence for which a person has been convicted.
- (2) The Commissioner of Police (or the head of any other authority of the State) may, at the request of a person convicted of an offence (the ***convicted person***) or his or her legal representative, do either or both of the following:
 - (a) provide information to the person making the request about whether the NSW Police Force (or the authority) has retained biological material in connection with that offence and, if so, what that material comprises,
 - (b) arrange for such items of retained biological material as may be specified in a request to be sent to the NSW Forensic & Analytical Science Service (or its successor) for DNA testing and then forward the results of that testing to the person making the request.
- (3) The convicted person is liable for the cost of any DNA testing of retained biological material that is carried out at the request of the convicted person or his or her legal representative.
- (4) A person who has made a request under this section may apply to the Supreme Court for an order (a ***compliance order***) requiring the Commissioner of Police (or the head of any other authority of the State) to comply with the request to him or her.
- (5) The Supreme Court may make a compliance order if:
 - (a) the offence committed by the convicted person was punishable by imprisonment for life or 20 years or more, and

- (b) the convicted person's claim of innocence for the offence may be affected by DNA information obtained from biological material retained by members of the NSW Police Force or members of another authority of the State, and
 - (c) the convicted person continues to be subject to the sentence imposed for the offence (whether in custody or on parole) or subject to an extended supervision or continuing detention order under the *Crimes (High Risk Offenders) Act 2006*.
- (6) Despite subsection (5) (a), the Supreme Court may make a compliance order even if the offence for which the convicted person was convicted was not an offence of the kind referred to in that paragraph if the Court considers that special circumstances exist with respect to the offence that warrant the making of the order.
- (7) In determining whether there are special circumstances for the purposes of subsection (6), the Supreme Court is to have regard to the following matters and any other relevant matter:
- (a) the nature and seriousness of the offence concerned,
 - (b) the length of any sentence currently being served by the convicted person,
 - (c) whether the convicted person has exhausted all avenues of appeal,
 - (d) the interests of justice.
- (8) Nothing in this section permits:
- (a) the Commissioner of Police (or the head of any other authority of the State) to provide information that may reveal the identity of a person other than the convicted person in connection with the offence for which he or she was convicted, or
 - (b) the head of one authority of the State to provide information about, or arrange DNA testing for, retained biological material held by another authority of the State.

Part 8 Acquittals

Division 1 Preliminary

98 Definitions

- (1) In this Part:

administration of justice offence means any of the following offences:

- (a) bribery of, or interference with, a juror, witness or judicial officer,
- (b) perversion of (or conspiracy to pervert) the course of justice,

(c) perjury.

life sentence offence means murder or any other offence punishable by imprisonment for life.

Note—

On the enactment of this Part, the following offences were offences punishable by imprisonment for life:

- (a) murder (section 19A of the *Crimes Act 1900*),
- (b) an offence under section 61JA (1) of the *Crimes Act 1900* (Aggravated sexual assault in company),
- (c) an offence under section 23 (2), 24 (2), 25 (2), 25 (2A), 26, 27 or 28 of the *Drug Misuse and Trafficking Act 1985*, being an offence that relates to a large commercial quantity of certain prohibited plants or drugs.

15 years or more sentence offence means an offence punishable by imprisonment for life or for a period of 15 years or more.

- (2) For the purposes of this Part, the retrial of an acquitted person for an offence includes a trial if the offence is not the same as the offence of which the person was acquitted.
- (3) In this Part, a reference to the proceedings in which a person was acquitted includes, if they were appeal proceedings, a reference to the earlier proceedings to which the appeal related.

Division 2 Retrial after acquittal for very serious offence

99 Application of Division

- (1) This Division applies where:
 - (a) a person has been acquitted of an offence, and
 - (b) according to the rules of law relating to double jeopardy (including rules based on abuse of process), the person is thereby precluded or may thereby be precluded from being retried for the same offence, or from being tried for some other offence, in proceedings in this State.

Note—

Under section 100 a person to whom this Division applies can only be retried for a life sentence offence (in the case of fresh or compelling evidence). Under section 101 a person to whom this Division applies can only be retried for a 15 years or more sentence offence (in the case of a tainted acquittal).

- (2) This section extends to a person acquitted in proceedings outside this State of an offence under the law of the place where the proceedings were held. However, this section does not so extend if the law of that place does not permit that person to be retried and the application of this Division to such a retrial is inconsistent with the Commonwealth Constitution or a law of the Commonwealth.

- (3) This section extends to a person acquitted before the commencement of this Division.

100 Court of Criminal Appeal may order retrial—fresh and compelling evidence

- (1) The Court of Criminal Appeal may, on the application of the Director of Public Prosecutions, order an acquitted person to be retried for a life sentence offence if satisfied that:
- (a) there is fresh and compelling evidence against the acquitted person in relation to the offence, and
 - (b) in all the circumstances it is in the interests of justice for the order to be made.
- (2) If the Court of Criminal Appeal orders an acquitted person to be retried, the Court is to quash the person's acquittal or remove the acquittal as a bar to the person being retried for the offence (as the case requires).
- (3) The Court of Criminal Appeal may order a person to be retried for a life sentence offence under this section even if the person had been charged with and acquitted of manslaughter or other lesser offence.
- (4) The Court of Criminal Appeal cannot order a person to be retried for a life sentence offence under this section where the person had been charged with and acquitted of the life sentence offence but had been convicted instead of manslaughter or other lesser offence.

101 Court of Criminal Appeal may order retrial—tainted acquittals

- (1) The Court of Criminal Appeal may, on the application of the Director of Public Prosecutions, order an acquitted person to be retried for a 15 years or more sentence offence if satisfied that:
- (a) the acquittal is a tainted acquittal, and
 - (b) in all the circumstances it is in the interests of justice for the order to be made.
- (2) If the Court of Criminal Appeal orders an acquitted person to be retried, the Court is to quash the person's acquittal or remove the acquittal as a bar to the person being retried for the offence (as the case requires).
- (3) The Court of Criminal Appeal may order a person to be retried for a 15 years or more sentence offence under this section even if the person had been charged with and acquitted of a lesser offence.

102 Fresh and compelling evidence—meaning

- (1) This section applies for the purpose of determining under this Division whether there is fresh and compelling evidence against an acquitted person in relation to an offence.

- (2) Evidence is **fresh** if:
- (a) it was not adduced in the proceedings in which the person was acquitted, and
 - (b) it could not have been adduced in those proceedings with the exercise of reasonable diligence.
- (3) Evidence is **compelling** if:
- (a) it is reliable, and
 - (b) it is substantial, and
 - (c) in the context of the issues in dispute in the proceedings in which the person was acquitted, it is highly probative of the case against the acquitted person.
- (4) Evidence that would be admissible on a retrial under this Division is not precluded from being fresh and compelling evidence merely because it would have been inadmissible in the earlier proceedings against the acquitted person.

103 Tainted acquittals—meaning

- (1) This section applies for the purpose of determining under this Division whether the acquittal of an accused person is a tainted acquittal.
- (2) An acquittal is **tainted** if:
- (a) the accused person or another person has been convicted (in this State or elsewhere) of an administration of justice offence in connection with the proceedings in which the accused person was acquitted, and
 - (b) it is more likely than not that, but for the commission of the administration of justice offence, the accused person would have been convicted.
- (3) An acquittal is not a tainted acquittal if the conviction for the administration of justice offence is subject to appeal as of right.
- (4) If the conviction for the administration of justice offence is, on appeal, quashed after the Court of Criminal Appeal has ordered the acquitted person to be retried under this Division because of the conviction, the person may apply to the Court to set aside the order and:
- (a) to restore the acquittal that was quashed, or
 - (b) to restore the acquittal as a bar to the person being retried for the offence, as the case requires.

104 Interests of justice—matters for consideration

- (1) This section applies for the purpose of determining under this Division whether it is in the interests of justice for an order to be made for the retrial of an acquitted person.
- (2) It is not in the interests of justice to make an order for the retrial of an acquitted person unless the Court of Criminal Appeal is satisfied that a fair retrial is likely in the circumstances.
- (3) The Court is to have regard in particular to:
 - (a) the length of time since the acquitted person allegedly committed the offence, and
 - (b) whether any police officer or prosecutor has failed to act with reasonable diligence or expedition in connection with the application for the retrial of the acquitted person.

105 Application for retrial—procedure

- (1) Not more than one application for the retrial of an acquitted person may be made under this Division in relation to an acquittal.
- (1A) An application may be made for a further retrial of a person acquitted in a retrial under this Part but only if it is made on the basis that the acquittal at the retrial was tainted.
- (2) An application for the retrial of an acquitted person cannot be made under this Division unless the person has been charged with the offence for which a retrial is sought or a warrant has been issued for the person's arrest in connection with such an offence.

Note—

Section 109 requires the Director of Public Prosecutions' approval for the arrest of the accused or for the issue of a warrant for his or her arrest.

- (3) The application is to be made not later than 28 days after the person is so charged with that offence or the warrant is so issued for the person's arrest. The Court of Criminal Appeal may extend that period for good cause.
- (4) The Court of Criminal Appeal must consider the application at a hearing.
- (5) The person to whom the application relates is entitled to be present and heard at the hearing (whether or not the person is in custody). However, the application can be determined even if the person is not present so long as the person has been given a reasonable opportunity to be present.
- (6) The powers of the Court of Criminal Appeal under section 12 of the *Criminal Appeal Act 1912* may be exercised in connection with the hearing of the application.

- (7) The Court of Criminal Appeal may at one hearing consider more than one application under this Division for a retrial (whether or not relating to the same person), but only if the offences concerned should be tried on the same indictment.
- (8) If the Court of Criminal Appeal determines in proceedings on an application under this Division that the acquittal is not a bar to the person being retried for the offence concerned, it must make a declaration to that effect.

106 Retrial

- (1) An indictment for the retrial of a person that has been ordered under this Division cannot, without the leave of the Court of Criminal Appeal, be presented after the end of the period of 2 months after the order was made.
- (2) The Court must not give leave unless it is satisfied that:
 - (a) the prosecutor has acted with reasonable expedition, and
 - (b) there is good and sufficient cause for the retrial despite the lapse of time since the order was made.
- (3) If, after the end of the period of 2 months after an order for the retrial of an accused person was made under this Division, an indictment for the retrial of the person has not been presented or has been withdrawn or quashed, the person may apply to the Court of Criminal Appeal to set aside the order for the retrial and:
 - (a) to restore the acquittal that was quashed, or
 - (b) to restore the acquittal as a bar to the person being tried for the offence, as the case requires.
- (4) If the order is set aside, a further application cannot be made under this Division for the retrial of the accused person in respect of the offence concerned.
- (5) At the retrial of an accused person, the prosecution is not entitled to refer to the fact that the Court of Criminal Appeal has found that it appears that there is fresh and compelling evidence against the acquitted person or, as the case requires, that it is more likely than not that, but for the commission of the administration of justice offence, the accused person would have been convicted.

Division 3 Appeals on questions of law

107 Directed jury acquittals or acquittals in trials without juries

- (1) This section applies to the acquittal of a person:
 - (a) by a jury at the direction of the trial Judge, or

- (b) by a Judge of the Supreme Court or District Court in criminal proceedings for an indictable offence tried by the Judge without a jury, or
 - (c) by the Supreme Court or the Land and Environment Court in its summary jurisdiction in any proceedings in which the Crown was a party.
- (2) The Attorney General or the Director of Public Prosecutions may appeal to the Court of Criminal Appeal against any such acquittal on any ground that involves a question of law alone.
 - (3) An appeal may be made within 28 days after the acquittal or, with the leave of the Court of Criminal Appeal, may be made after that period.
 - (4) The accused person is entitled to be present and heard at the appeal. However, the appeal can be determined even if the person is not present so long as the person has been given a reasonable opportunity to be present.
 - (5) The Court of Criminal Appeal may affirm or quash the acquittal appealed against.
 - (6) If the acquittal is quashed, the Court of Criminal Appeal may order a new trial in such manner as the Court thinks fit. For that purpose, the Court may (subject to the [Bail Act 2013](#)) order the detention or return to custody of the accused person in connection with the new trial.
 - (7) If the acquittal is quashed, the Court of Criminal Appeal cannot proceed to convict or sentence the accused person for the offence charged nor direct the court conducting the new trial to do so.
 - (8) This section does not apply to a person who was acquitted before the commencement of this section.

Note—

See section 5C of the [Criminal Appeal Act 1912](#) for appeals against the quashing of an indictment.

108 Appeals not affecting existing acquittal

- (1) This section applies to the acquittal of a person:
 - (a) in any proceedings tried on indictment (whether in respect of the whole or part of the indictment), or
 - (b) in any proceedings tried by the Supreme Court or the Land and Environment Court in its summary jurisdiction in which the Crown was a party.
- (2) The Attorney General or the Director of Public Prosecutions may submit for determination by the Court of Criminal Appeal any question of law arising at or in connection with the trial (together with a statement of the circumstances out of which the question arose). The Court is to hear and determine any such question.

- (3) The determination by the Court of Criminal Appeal of the question submitted does not in any way affect or invalidate the verdict of acquittal or any other decision given at the trial.
- (4) Any person charged at the trial or affected by the decision is entitled to be heard before the Court of Criminal Appeal on the determination of the question submitted. If the person does not propose to be represented, the Attorney General or Director of Public Prosecutions is to instruct (and pay the reasonable costs of) counsel to argue the question before the Court on behalf of the person.
- (5) The hearing and determination of any question under this section is to be held in camera.
- (6) The following is not to be published:
 - (a) any report of a submission made under subsection (2),
 - (b) any report of proceedings under this section that discloses the identity of the person charged at the trial or affected by the decision given at the trial.

Any such publication is punishable as a contempt of the Supreme Court.

Division 4 Miscellaneous

109 Authorisation of police investigations

- (1) This section applies to any police investigation of the commission of an offence by an acquitted person in connection with the possible retrial of the person for the offence under Division 2.
- (2) For the purposes of this section, a police investigation is an investigation that involves:
 - (a) any arrest, questioning or search of the acquitted person (or the issue of a warrant for the arrest of the person), or
 - (b) any forensic procedure carried out on the person or any search or seizure of premises or property of or occupied by the person,whether with or without his or her consent.
- (3) A police officer is not to carry out or authorise a police investigation to which this section applies unless the Director of Public Prosecutions:
 - (a) has advised that in his or her opinion the acquittal would not be a bar to the trial of the acquitted person in this State for the offence, or
 - (b) has given his or her written consent to the police investigation on the application in writing of the Commissioner or a Deputy Commissioner of Police.

- (4) The Commissioner or a Deputy Commissioner of Police may make an application for the police investigation only if satisfied that relevant evidence for the purposes of an application for a retrial under Division 2 has been obtained or is likely to be obtained as a result of the investigation.
- (5) The Director of Public Prosecutions may not give his or her consent to the police investigation unless satisfied that:
 - (a) there is, or there is likely as a result of the investigation to be, sufficient new evidence to warrant the conduct of the investigation, and
 - (b) it is in the public interest for the investigation to proceed.

110 (Repealed)

111 Restrictions on publication

- (1) A person must not publish any matter for the purpose of identifying or having the effect of identifying:
 - (a) an acquitted person the subject of a police investigation referred to in section 109 (or of an application for authority for such an investigation), or
 - (b) an acquitted person the subject of an application for a retrial under Division 2 or an appeal under Division 3, or
 - (c) the acquitted person the subject of an order for retrial under this Part or who is being retried under this Part,unless the publication is authorised by order of the Court of Criminal Appeal or of the court before which the acquitted person is being retried.
- (2) The relevant court may make an order under this section only if the court is satisfied that it is in the interests of justice to do so.
- (3) Before making an order under this section, the Court is to give the acquitted person a reasonable opportunity to be heard on the application for the order.
- (4) The Court may at any time vary or revoke an order under this section.
- (5) The prohibition on publication under this section ceases to have effect (subject to any order under this section):
 - (a) when there is no longer any step that could be taken which would lead to the acquitted person being retried under this Part, or
 - (b) if the acquitted person is retried under this Part, at the conclusion of the trial, whichever is the earliest.

- (6) Nothing in this section affects any prohibition of the publication of any matter under any other Act or law.
- (7) A contravention of the prohibition on publication under this section is punishable as contempt of the Supreme Court.

112 Other appeal or review rights not affected

- (1) Nothing in this Part affects a right of appeal in respect of a person's acquittal on the ground of mental illness where mental illness was not set up as a defence by the person, as provided by section 5 (2) or 5AA (2) of the [Criminal Appeal Act 1912](#).
- (2) Nothing in this Part affects a right of appeal or review under this or any other Act or law in respect of a person's acquittal.

Part 9 Miscellaneous

113 Applications and appeals in relation to children

- (1) An application or appeal in respect of a child may be made under this Act either by the child or, on behalf of the child:
 - (a) by the child's legal representative, or
 - (b) except as provided by paragraph (c), by a person having parental responsibility for the child, or
 - (c) if the Director-General of the Department of Community Services or a designated agency has the care responsibility for the child, by the Director-General.
- (2) In subsection (1), **care responsibility**, **designated agency** and **parental responsibility** have the same meanings as they have in the [Children and Young Persons \(Care and Protection\) Act 1998](#).

114 Prerogative of mercy preserved

Nothing in this Act limits or affects in any manner the prerogative of mercy.

115 Attorney General may exercise functions of Director of Public Prosecutions

- (1) Any function that by or under this Act is conferred or imposed on the Director of Public Prosecutions may, at any time and in any case, be exercised by the Attorney General, and may be so exercised even if the same or a similar function has already been exercised in the same case by the Director of Public Prosecutions.
- (2) Any function exercised by the Attorney General pursuant to this section is taken to have been exercised by the Director of Public Prosecutions.

116 Act not to apply to Magistrate's ministerial functions

This Act does not apply to or in respect of a Magistrate's exercise of ministerial functions, except to the extent to which this Act expressly so provides.

117 Bail Act 2013 to prevail

The *Bail Act 2013* prevails to the extent of any inconsistency between that Act and this Act.

117A Proceedings for offences

Proceedings for an offence under this Act or the regulations (other than under section 96) may be dealt with summarily before the Local Court.

118 Regulations

- (1) The Governor may make regulations, not inconsistent with this Act, for or with respect to any matter that by this Act is required or permitted to be prescribed or that is necessary or convenient for carrying out or giving effect to this Act.
- (2) To the extent to which any other Act so provides, the regulations may modify the operation of this Act for the purposes of its application to matters arising under that other Act.

119 Savings, transitional and other provisions

Schedule 1 has effect.

120 Review of Act

- (1) The Minister is to review this Act to determine whether the policy objectives of the Act remain valid and whether the terms of the Act remain appropriate for securing those objectives.
- (2) The review is to be undertaken as soon as practicable after the period of 5 years from the date of assent to this Act.
- (3) A report on the outcome of the review is to be tabled in each House of Parliament within 12 months after the end of the period of 5 years.
- (4) A review of the provisions of Part 8 is to be undertaken as soon as practicable after the period of 5 years after their insertion into this Act by the *Crimes (Appeal and Review) Amendment (Double Jeopardy) Act 2006* (and the report of the outcome of that review is to be tabled in each House of Parliament within 12 months after the end of that period) despite anything to the contrary in this section.

Schedule 1 Savings, transitional and other provisions

(Section 80)

Part 1 Preliminary

1 Savings and transitional regulations

- (1) The regulations may contain provisions of a savings or transitional nature consequent on the enactment of the following Acts:

this Act

Courts Legislation Amendment Act 2003, but only in relation to the amendments made to this Act

Courts Legislation Amendment Act 2004, but only in relation to the amendments made to this Act

Crimes (Appeal and Review) Amendment (Double Jeopardy) Act 2006

Crimes (Appeal and Review) Amendment (DNA Review Panel) Act 2006

Crimes and Courts Legislation Amendment Act 2006, but only in relation to the amendments made to this Act

Crimes (Appeal and Review) Amendment Act 2009

Crimes (Appeal and Review) Amendment (Double Jeopardy) Act 2009

any other Act that amends this Act

- (2) Such a provision may, if the regulations so provide, take effect from the date of assent to the Act concerned or a later day.
- (3) To the extent to which such a provision takes effect from a date that is earlier than the date of its publication in the Gazette, the provision does not operate so as:
- (a) to affect, in a manner prejudicial to any person (other than the State or an authority of the State), the rights of that person existing before the date of that publication, or
 - (b) to impose liabilities on any person (other than the State or an authority of the State) in respect of anything done or omitted to be done before the date of that publication.

Part 2 Provisions consequent on enactment of this Act

Division 1 General

2 Definition

In this Part:

appointed day means:

- (a) in relation to a provision of the *Justices Act 1902* that has been repealed, the day on which the repeal commences, or
- (b) in relation to a provision of this Act, the day on which the provision commences.

3 Applications and referrals under Part 4A of *Justices Act 1902*

Part 4A of the *Justices Act 1902* continues to apply to and in respect of any application or reference under that Part that had not been finally dealt with before the appointed day as if that Act had not been repealed.

4 Appeals and applications under Part 5 of *Justices Act 1902*

Part 5 of the *Justices Act 1902* continues to apply to and in respect of any appeal or application under that Part that had not been finally dealt with before the appointed day as if that Act had not been repealed.

5 Appeals and applications under Part 5A of *Justices Act 1902*

Part 5A of the *Justices Act 1902* continues to apply to and in respect of any appeal or application under that Part that had not been finally dealt with before the appointed day as if that Act had not been repealed.

6 Appeals and applications under Part 5B of *Justices Act 1902*

Part 5B of the *Justices Act 1902* continues to apply to and in respect of any appeal or application under that Part that had not been finally dealt with before the appointed day as if that Act had not been repealed.

7 Construction of certain references

Subject to this Schedule and the regulations, in any Act or instrument:

- (a) a reference to a provision of the *Justices Act 1902* for which there is a corresponding provision in this Act extends to the corresponding provision of this Act, and
- (b) a reference to any act, matter or thing referred to in a provision of the *Justices Act 1902* for which there is a corresponding provision in this Act extends to the corresponding act, matter or thing referred to in the corresponding provision of this Act.

Part 3 Provisions consequent on enactment of [Courts Legislation Amendment Act 2003](#)

8 Application of amendment to section 68

The amendment made to section 68 by Schedule 1 [2] to the [Courts Legislation Amendment Act 2003](#) extends to appeals that were commenced before the commencement of the amendment but not finally determined before that commencement.

Part 4 Provision consequent on enactment of [Courts Legislation Amendment Act 2004](#)

9 Appeal against refusal of application under section 4

Sections 11A and 16A, as inserted by the [Courts Legislation Amendment Act 2004](#), and sections 13 and 14 as amended by that Act, extend to apply to and in respect of an application under section 4 that was refused by the Local Court before the commencement of Schedule 3 to that Act, unless, on that commencement, an appeal against the relevant conviction or sentence is pending in the District Court or has been dealt with by that Court.

Part 5 Provisions consequent on enactment of [Crimes and Courts Legislation Amendment Act 2006](#)

10 Application of amendment to definition of “sentence”

The amendment to the definition of **sentence** in section 3 (1) made by the [Crimes and Courts Legislation Amendment Act 2006](#) extends to orders referred to in paragraph (ba) of that definition that were made before the commencement of that amendment, but does not affect any appeal proceedings or application under this Act that was finally determined before the commencement of that amendment.

Part 6 Provisions consequent on enactment of [Crimes \(Appeal and Review\) Amendment \(DNA Review Panel\) Act 2006](#)

11 Definition

In this Part:

amending Act means the [Crimes \(Appeal and Review\) Amendment \(DNA Review Panel\) Act 2006](#).

12 Review of previous convictions and sentences

Part 7 of this Act, as inserted by the amending Act, extends to convictions and sentences entered or imposed before the commencement of that Part.

13 Pending applications under Part 13A of Crimes Act for review of convictions and sentences

- (1) A petition or application that was made under Part 13A of the *Crimes Act 1900* before the repeal and transfer of that Part by the amending Act and that had not been finally determined under that Part immediately before its repeal is taken to be a petition or application under the corresponding provision of Part 7 of this Act.
- (2) Any referral or report with respect to such a petition or application that was made under Part 13A of the *Crimes Act 1900* is taken to have been made under the corresponding provision of Part 7 of this Act.

14 Pending applications to set aside conviction following free pardon

An application to the Court of Criminal Appeal that was made under Part 13A of the *Crimes Act 1900* before the repeal and transfer of that Part by the amending Act for the purpose of setting aside a conviction for an offence for which a free pardon has been granted and that had not been finally determined under that Part immediately before its repeal is taken to be an application under section 84 of this Act.

Part 7 Provision consequent on enactment of Crimes (Appeal and Review) Amendment Act 2009

15 Application of amendments

Any amendment made by the *Crimes (Appeal and Review) Amendment Act 2009* applies only in respect of appeals, applications for leave to appeal and applications for annulment made after the commencement of the amendment.

Part 8 Provision consequent on enactment of Crimes (Appeal and Review) Amendment (Double Jeopardy) Act 2009

16 Application of amendment

Section 68A, as inserted by the *Crimes (Appeal and Review) Amendment (Double Jeopardy) Act 2009*, extends to an appeal that was commenced but not finally determined before the insertion of the section.

Part 9 Provision consequent on enactment of Courts and Other Legislation Further Amendment Act 2013

17 Application of amendment concerning appeals

The amendment made to section 59 by the *Courts and Other Legislation Further Amendment Act 2013* extends to an appeal that was commenced but not finally determined before the commencement of the amendment.

Part 10 Provisions consequent on enactment of Crimes (Appeal and Review) Amendment (DNA Review Panel) Act 2013

18 Definitions

In this Part:

abolition day means the day on which section 97 is substituted by the amending Act.

amending Act means the *Crimes (Appeal and Review) Amendment (DNA Review Panel) Act 2013*.

19 Application of amendments to section 96

Section 96 (as amended by the amending Act) extends to biological material within the meaning of Part 7 of this Act obtained before the substitution of section 96 (1) by the amending Act that is in the possession or control of any members of the NSW Police Force (or members of any other authority of the State) on that substitution.

20 Abolition of DNA Review Panel

- (1) The DNA Review Panel is abolished on the abolition day.
- (2) Each member of the DNA Review Panel ceases to hold office as such on the abolition day.
- (3) A person who ceases to hold an office by operation of this clause is not entitled to any remuneration or compensation because of the loss of that office.
- (4) The DNA Review Panel ceases to have any functions under Division 6 of Part 7 of this Act on the abolition day (including the function of determining or finalising any pending applications to it under section 92).

21 Pending searches and DNA testing

- (1) If the DNA Review Panel arranged for a search for biological material or DNA testing (or both) following an application under section 92 before the abolition day and the results of the search or testing (or both) had not yet been provided to it by that day:
 - (a) the Commissioner of Police is authorised and required to arrange for the completion of any such search or DNA testing (or both), and
 - (b) the NSW Forensic & Analytical Science Service (or its successor) is authorised and required to complete any DNA testing arranged by the DNA Review Panel or the Commissioner of Police and provide the results to the Commissioner, and
 - (c) the Commissioner of Police is authorised and required to forward the results of any DNA testing provided to the Commissioner under this subclause to the applicant for the search and testing.

- (2) If the DNA Review Panel had disclosed the results of DNA testing to the Commissioner of Police before the abolition day but not to the applicant for the testing, the Commissioner of Police is authorised and required to forward the results to the applicant.
- (3) Nothing in this clause requires or permits the Commissioner of Police to disclose information obtained from the DNA testing of biological material obtained from a convicted person that may reveal the identity of a person other than the convicted person in connection with the offence for which he or she was convicted.

22 Pending referrals in Court of Criminal Appeal

Section 94 (as in force immediately before its repeal by the amending Act) continues to apply in relation to any matter that was referred to the Court of Criminal Appeal under that section before that repeal if the proceedings in relation to that matter were not concluded by that time.

Part 11 Provisions consequent on the enactment of [Crime Commission Legislation Amendment Act 2014](#)

23 Pending applications to Supreme Court for inquiry into a conviction or sentence

- (1) In this clause, **relevant application** means an application to the Supreme Court under section 78.
- (2) Section 79 (3B) applies in relation to relevant applications pending immediately before the commencement of that subsection, as well as to either or both of the following:
 - (a) relevant applications made on or after the commencement of that subsection,
 - (b) any action proposed to be done by the Supreme Court on or after that commencement when acting on its own motion under section 79.
- (3) A reference in section 79 (3B):
 - (a) to section 24 of the [Crime Commission Act 2012](#) is taken to include a reference to section 16 of the [New South Wales Crime Commission Act 1985](#), and
 - (b) to section 29 of the [Crime Commission Act 2012](#) is taken to include a reference to section 17 of the [New South Wales Crime Commission Act 1985](#).

Schedule 2 (Repealed)