

Justice Legislation Amendment Act (No 2) 2018

No 29

[2018-29]



New South Wales

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Provisions in force

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

Notes—

- **Note**
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Authorisation

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Justice Legislation Amendment Act (No 2) 2018 No 29



New South Wales

An Act to amend various Acts and Regulations relating to courts and crimes and other related matters.

1 Name of Act

This Act is the *Justice Legislation Amendment Act (No 2) 2018*.

2 Commencement

- (1) This Act commences on the date of assent to this Act, except as provided by this section.
- (2) Schedule 1.10 [14], 1.14, 1.16, 1.17 [1]-[4] and [8], 1.18 [1]-[4], 1.19 and 1.20 commence on a day or days to be appointed by proclamation.

3 Explanatory notes

The matter appearing under the heading “Explanatory note” in Schedules 1 and 2 does not form part of this Act.

Schedule 1 Principal amendments

1.1-1.9

(Repealed)

1.10 Criminal Procedure Act 1986 No 209

[1]-[13] (Repealed)

[14] Chapter 6, Part 2B

Insert after Part 2A of Chapter 6:

Part 2B Terrorism evidence

281G Definitions

(1) In this Part:

accused person, criminal investigation, criminal proceedings and **prosecuting authority** have the same meanings as in Part 2A of this Chapter.

Commonwealth Criminal Code means the Criminal Code set out in the Schedule to the [Criminal Code Act 1995](#) of the Commonwealth.

designated terrorism evidence means any thing that is designated as terrorism evidence by a prosecuting authority, as identified in a terrorism evidence notice.

publish means disseminate or provide access to one or more persons by means of the internet, radio, television or other media.

terrorism evidence means any thing that contains or displays material that:

- (a) advocates support for engaging in any terrorist acts or violent extremism, or
- (b) relates to planning or preparing for, or engaging in, any terrorist acts or violent extremism, or
- (c) advocates joining or associating with a terrorist organisation.

terrorism evidence notice means a notice under this Part that identifies a thing as terrorism evidence.

terrorist act has the same meaning as in Part 5.3 of the Commonwealth Criminal Code.

terrorist organisation has the same meaning as in Division 102 of Part 5.3 of the Commonwealth Criminal Code.

unrepresented accused person means an accused person who is not represented by an Australian legal practitioner.

(2) In this Part:

- (a) a reference to an **accused person** does not include a reference to an Australian legal practitioner representing the accused person, and
- (b) a reference to a **prosecuting authority** does include a reference to an Australian legal practitioner representing the prosecuting authority.

281H Accused person not entitled to copy of terrorism evidence

- (1) A prosecuting authority is not required and cannot be required (whether by subpoena or any other procedure), in or in connection with any criminal investigation or criminal proceedings, to give an accused person a copy of any thing designated by the prosecuting authority as terrorism evidence.
- (2) A prosecuting authority may designate a thing as terrorism evidence only if the prosecuting authority reasonably considers the thing to be terrorism evidence.
- (3) This section applies despite anything to the contrary in this or any other Act, or any other law.

281I Procedure for dealing with terrorism evidence

- (1) If, but for this Part, a prosecuting authority would be required, in or in connection with any criminal investigation or criminal proceedings, to give to an accused person any thing designated by the prosecuting authority as terrorism evidence, the prosecuting authority must:
 - (a) identify the thing that has been designated as terrorism evidence in a written notice (a **terrorism evidence notice**), and
 - (b) serve the notice on:
 - (i) in the case of an unrepresented accused person—the accused person, or
 - (ii) in the case of an accused person represented by an Australian legal practitioner—the Australian legal practitioner.
- (2) A terrorism evidence notice must also contain the following information:
 - (a) that the prosecuting authority is not required to, and will not, give the accused person a copy of designated terrorism evidence,
 - (b) that an unrepresented accused person may view or listen to the designated terrorism evidence at a place nominated by the prosecuting authority and under the supervision of the prosecuting authority,
 - (c) the name and contact details of the person responsible for arranging for the unrepresented accused person to view or listen to the designated terrorism evidence on behalf of the prosecuting authority,
 - (d) that the prosecuting authority will give an Australian legal practitioner representing the accused person a copy of the designated terrorism evidence but the Australian legal practitioner is not to allow the accused person to view or listen to the evidence except under the supervision of the Australian legal practitioner,

- (e) that it is an offence for an accused person to be in possession of designated terrorism evidence and for an Australian legal practitioner to give possession of designated terrorism evidence to the accused person.

281J Return of designated terrorism evidence

- (1) A prosecuting authority may also serve a terrorism evidence notice in respect of evidence that it has provided to the accused person (including by subpoena or any other procedure) in or in connection with a criminal investigation or criminal proceedings that it later designates as terrorism evidence.
- (2) The notice is to identify the thing that has been designated as terrorism evidence, and is to be served on the accused person or the Australian legal practitioner who represents the accused person, in the same way as a notice under section 281I.
- (3) A terrorism evidence notice that is served under this section must also contain the following information:
 - (a) that the accused person must return the designated terrorism evidence, if it is in the person's possession, to the prosecuting authority within the period of time specified in the notice (not being less than 7 days after the notice is served on the accused person),
 - (b) that an unrepresented accused person may, after having returned the designated terrorism evidence, view or listen to the evidence at a place nominated by the prosecuting authority and under the supervision of the prosecuting authority,
 - (c) the name and contact details of the person responsible for arranging for the unrepresented accused person to view or listen to the designated terrorism evidence on behalf of the prosecuting authority,
 - (d) that an Australian legal practitioner representing an accused person may retain the designated terrorism evidence but is not to allow the accused person to view or listen to the designated terrorism evidence except under the supervision of the Australian legal practitioner,
 - (e) that it is an offence for an accused person to be in possession of designated terrorism evidence and for an Australian legal practitioner to give possession of designated terrorism evidence to the accused person.

281K Procedures for giving access to designated terrorism evidence to unrepresented accused person

- (1) After receiving a terrorism evidence notice, an unrepresented accused person may give the prosecuting authority a written notice (an **access request notice**)

that indicates that the unrepresented accused person requires access to the designated terrorism evidence.

- (2) The prosecuting authority must, as soon as practicable after receiving an access request notice, give the unrepresented accused person reasonable access to the designated terrorism evidence so as to enable them to view or listen to (but not copy) the evidence. This may require access to be given on more than one occasion.
- (3) The prosecuting authority may require any such access to take place subject to such conditions as the prosecuting authority considers appropriate to ensure that there is no unauthorised reproduction or circulation of the designated terrorism evidence and that its integrity is protected.
- (4) Without limiting subsection (3), the prosecuting authority may require any such access to take place under the supervision of the prosecuting authority or a person assisting the prosecuting authority.
- (5) A person who is given access to designated terrorism evidence by a prosecuting authority under this section must not, without the authority of the prosecuting authority:
 - (a) copy, or permit a person to copy, the designated terrorism evidence, or
 - (b) give the designated terrorism evidence to another person, or
 - (c) remove the designated terrorism evidence from the custody of the prosecuting authority, or
 - (d) publish the designated terrorism evidence.

Maximum penalty: 100 penalty units or imprisonment for 2 years, or both.

281L Improper copying or circulation of designated terrorism evidence

- (1) A person who has possession of designated terrorism evidence and who knows, or ought reasonably to know, that it is designated terrorism evidence, must not copy, or permit a person to copy, the evidence, give possession of the evidence to another person or publish the evidence except:
 - (a) for the legitimate purposes of a criminal investigation or criminal proceedings, or
 - (b) if the person is a public official, in the proper exercise of the person's public official functions (including any functions relating to education or training).

Maximum penalty: 100 penalty units or imprisonment for 2 years, or both.

- (2) The exceptions provided for by subsection (1) (a) and (b) do not authorise:
- (a) an Australian legal practitioner representing an accused person to give possession of designated terrorism evidence to the accused person, except while the accused person is under the supervision of the Australian legal practitioner, or
 - (b) an accused person to copy, or to permit a person to copy, or to publish any designated terrorism evidence or to give possession of any designated terrorism evidence to any other person other than an Australian legal practitioner representing the person or the prosecuting authority.

- (3) In this section:

public official means a public official (within the meaning of the *Independent Commission Against Corruption Act 1988*) who has possession of designated terrorism evidence as a result of the exercise of, or an opportunity that arose in the exercise of, public official functions in or in connection with a criminal investigation or criminal proceedings.

281M Accused person not to possess designated terrorism evidence

- (1) An accused person who knows, or ought reasonably to know, that evidence is designated terrorism evidence must not be in possession of that evidence, except while under the supervision of:
- (a) in the case of an unrepresented accused person—the prosecuting authority or a person assisting the prosecuting authority, or
 - (b) in the case of an accused person represented by an Australian legal practitioner—the Australian legal practitioner.

Maximum penalty: 100 penalty units or imprisonment for 2 years, or both.

- (2) This section does not apply to designated terrorism evidence that is in the possession of an accused person if:
- (a) a terrorism evidence notice has been served on the accused person requiring the person to return the designated terrorism evidence to the prosecuting authority, and
 - (b) the period within which the designated terrorism evidence must be returned has not ended.

281N Prosecuting authority entitled to retain possession of terrorism evidence during criminal proceedings

- (1) If, during any criminal proceedings, an unrepresented accused person is given

terrorism evidence, or a copy of terrorism evidence, by the prosecuting authority in the proceedings, the court must, on application by the prosecuting authority, direct the unrepresented accused person to return the terrorism evidence or copy to the custody of the prosecuting authority at or before the end of each day during which the proceedings are heard.

- (2) At the completion of any criminal proceedings in which terrorism evidence is tendered by the prosecuting authority, or terrorism evidence given to the unrepresented accused person by the prosecuting authority is tendered by the unrepresented accused person, the court must, on application by the prosecuting authority, direct that the terrorism evidence, and any copies of the terrorism evidence made for the purposes of the proceedings, be returned to the custody of the prosecuting authority.

[15]-[18]

Explanatory note

Item [1] of the proposed amendments provides that an exhibit detail sheet that is issued under the NSW Police Force exhibits management system and that is certified by a member of the NSW Police Force is prima facie evidence of the dealings with the exhibit that are listed in the sheet.

Item [5] extends the current provision that compels the spouse or de facto partner of an accused person to give evidence in proceedings for a domestic violence or child assault offence so that a parent or child of an accused person is also compellable to give evidence in those proceedings. Item [8] provides that family members of an accused person (other than the spouse) are not compellable in domestic violence proceedings, if the accused person is under the age of 18 years. They may still be compellable under the *Evidence Act 1995*. Items [2]-[4], [6], [7] and [9]-[13] are consequential amendments.

Item [14] inserts a new scheme that restricts access to evidence in a criminal investigation or criminal proceedings that the prosecuting authority reasonably considers to be terrorism evidence.

Proposed section 281G contains relevant definitions. A **prosecuting authority** means the Director of Public Prosecutions, a police officer or other public official who is responsible for a criminal investigation or criminal proceedings. **Terrorism evidence** means any thing that contains or displays material that:

- (a) advocates support for engaging in any terrorist acts or violent extremism, or
- (b) relates to planning or preparing for, or engaging in, any terrorist acts or violent extremism, or
- (c) advocates joining or associating with a terrorist organisation.

Proposed section 281H provides that a prosecuting authority is not required, in or in connection with a criminal investigation or criminal proceedings, to give evidence to an accused person that it designates as terrorism evidence. A prosecuting authority may designate a thing as terrorism evidence only if it reasonably considers it to be terrorism evidence.

Proposed section 281I requires a prosecuting authority to notify an unrepresented accused person, or the Australian legal practitioner representing an accused person, that evidence has been designated as terrorism evidence and will not be provided to the accused person. The notice must also specify how the unrepresented accused person may view the evidence under the supervision of the prosecuting authority and indicate that an accused person who is represented will be able to view the evidence under the supervision of the accused person's Australian legal practitioner, who will be given the evidence.

Proposed section 281J enables a prosecuting authority to require an accused person to return any terrorism evidence in the accused person's possession that the prosecuting authority has later designated as terrorism evidence.

Proposed section 281K sets out how an unrepresented accused person will be given access to designated terrorism evidence. It will be an offence for a person who is given access to designated terrorism evidence by a prosecuting authority to copy or

publish the evidence, to give the evidence to another person or to remove the evidence from the custody of the prosecuting authority. The maximum penalty is 100 penalty units or imprisonment for 2 years, or both.

Proposed section 281L makes it an offence for a person who has possession of designated terrorism evidence and who knows, or ought reasonably to know, it is designated terrorism evidence to copy or publish the evidence or to give the evidence to another person, except for the legitimate purposes of a criminal investigation or criminal proceedings or in the proper exercise of a public official's function. The maximum penalty is 100 penalty units or imprisonment for 2 years, or both. The proposed section makes it clear that an Australian legal practitioner is not permitted to give designated terrorism evidence to an accused person and that an accused person must not copy or publish designated terrorism evidence or give the evidence to any person except the accused person's Australian legal practitioner or the prosecuting authority.

Proposed section 281M makes it an offence for an accused person who knows, or ought reasonably to know, that evidence is designated terrorism evidence to be in possession of that evidence. The maximum penalty is 100 penalty units or imprisonment for 2 years, or both.

Proposed section 281N relates to terrorism evidence that has not been designated as terrorism evidence and that is given to an accused person or tendered to the court during criminal proceedings. The court must, on request by the prosecuting authority, require such evidence to be returned to the prosecuting authority at the end of each day of criminal proceedings or at the completion of the proceedings.

Item [15] amends the current prohibition on the disclosure of certain confidential sexual assault counselling communications to provide that a person cannot seek to compel (whether by subpoena or any other procedure) a victim of a sexual assault offence to disclose the identity of the victim's counsellor.

Items [16] and [17] amend provisions relating to a pilot scheme that enables a child who is a complainant or witness in child sexual assault proceedings to give evidence by means of a pre-recorded hearing. Item [16] clarifies that a child complainant or witness is able to give evidence by means of a pre-recorded hearing even if the child becomes an adult before the proceedings are finalised. Item [17] clarifies that an indictment presented at a pre-recorded hearing cannot be amended after it has been presented, except in certain circumstances.

Item [18] contains transitional provisions.

1.11-1.13

(Repealed)

1.14 Guardianship Act 1987 No 257

[1] Section 3F Persons who are "parties" to proceedings under this Act

Insert after section 3F (3) (e):

(e1) the Public Guardian,

[2] Section 3F (4) (e1) and (e2)

Insert after section 3F (4) (e):

(e1) the Public Guardian,

(e2) the NSW Trustee,

Explanatory note

Item [1] of the proposed amendments extends the list of persons who are parties to proceedings in the NSW Civil and

Administrative Tribunal relating to a review of a guardianship order to include the Public Guardian. Item [2] includes the Public Guardian and the NSW Trustee and Guardian as parties to proceedings relating to a review of an appointment of an enduring guardian.

1.15

(Repealed)

1.16 Land and Environment Court Act 1979 No 204

[1] Section 20 Class 4—environmental planning and protection, development contract and strata renewal plan civil enforcement

Insert in alphabetical order in section 20 (3) (a):

Coal Mine Subsidence Compensation Act 2017,

[2] Section 21 Class 5—environmental planning and protection summary enforcement

Insert after section 21 (hf):

(hg) proceedings under section 55 of the *Coal Mine Subsidence Compensation Act 2017,*

Explanatory note

Item [1] of the proposed amendments provides that certain civil proceedings under the *Coal Mine Subsidence Compensation Act 2017* are to be dealt with in Class 4 of the Court's jurisdiction. Item [2] provides that summary proceedings under that Act are to be dealt with in Class 5 of the Court's jurisdiction.

1.17 Law Enforcement (Powers and Responsibilities) Act 2002 No 103

[1] Section 3 Interpretation

Insert “(including a knife blade, razor blade or any other blade)” after “knife” in paragraph (b) of the definition of **dangerous implement** in section 3 (1).

[2] Section 23

Insert in Division 1 of Part 4, after section 22:

23 Power to search persons for dangerous implements without warrant in public places and schools

- (1) A police officer may, without a warrant, stop, search and detain a person who is in a public place or a school, and anything in the possession of or under the control of the person, if the police officer suspects on reasonable grounds that the person has a dangerous implement unlawfully in the person's possession or under the person's control.

- (2) To avoid doubt, if the person is in a school and is a student at the school, the police officer may also search the person's locker at the school and examine any bag or other personal effect that is inside the locker.
- (3) For the purposes of this section, the fact that a person is present in a location with a high incidence of violent crime may be taken into account in determining whether there are reasonable grounds to suspect that the person has a dangerous implement in the person's possession or under the person's control.
- (4) In conducting a search of a student in a school under this section, a police officer must, if reasonably possible to do so, allow the student to nominate an adult who is on the school premises to be present during the search.
- (5) A police officer may seize and detain anything found as a result of a search under this section that the police officer has reasonable grounds to suspect is a dangerous implement that is unlawfully in the person's possession or under the person's control.
- (6) For the purposes of this section:
 - (a) **locker** includes any facility for the storage of a student's personal effects, and
 - (b) anything inside a person's locker is taken to be under the control of the person.

[3] Part 4, Division 2 Additional personal search and seizure powers in public places and schools

Omit the Division.

[4] Section 82 Entry by invitation

Omit "subsection (1)" from section 82 (3A). Insert instead "this section".

[5]-[7] (Repealed)

[8] Section 198A Giving of directions to groups of persons

Insert "(or the warning referred to in section 198 (6) in the case of a direction given under section 198)" after "the direction" in section 198A (2).

Explanatory note

Item [2] of the proposed amendments amends an existing police power to require a person in a public place or a school to submit to a search of the person (or a student's locker) if the police officer suspects on reasonable grounds that the person has a dangerous implement. A police officer will be able to stop, search and detain a person who is in a public place or a school (and to search a school student's locker) in those circumstances. The police officer will also be able to seize and detain any dangerous implement found during a search, instead of the existing power to require the person to produce any dangerous implement or other metal object. Item [3] removes the offence of failing to comply with a police officer's requirements relating to a search and removes a power to confiscate dangerous implements, which are no longer necessary because of the amended powers. Item [1]

is a consequential amendment.

Item [5] provides that an occupier of premises in respect of which a crime scene warrant is issued may apply to a Magistrate (and no longer to a registrar of the Local Court) for a review of the warrant. Item [6] is a consequential amendment.

Item [7] provides that the time taken for a person to undertake a breath test or breath analysis or to provide a blood or urine sample under Division 4 of Part 10 (which applies in relation to an alleged offence under section 25A (2) of the *Crimes Act 1900*) is not to be included when calculating the investigation period that begins when a person is arrested and is limited to 6 hours (unless extended by a warrant).

Item [8] provides that when a police officer gives a move on direction to a group of intoxicated persons in a public place, the police officer is not required to repeat the associated warning (a warning that it is an offence to be intoxicated and disorderly in a public place at any time within 6 hours after the move on direction is given) to each person in the group.

Item [4] corrects a cross-reference.

1.18 Mental Health (Forensic Provisions) Act 1990 No 10

[1] Section 33 Mentally ill persons

Omit “employed in the Department of Justice” from section 33 (5A) (a).

[2] Section 33 (5AA) and (5AB)

Insert after section 33 (5A):

(5AA) A function conferred on a juvenile justice officer by an order under this section is taken to be a function under the *Children (Detention Centres) Act 1987* and the juvenile justice officer has the same functions in respect of the defendant as the officer has in respect of a detainee under that Act and the regulations under that Act.

(5AB) If a correctional officer has power under an order under this section to take a defendant to or from a place, that power is taken to be a function under the *Crimes (Administration of Sentences) Act 1999* and the correctional officer has the same functions in respect of the defendant as the officer has in respect of an inmate under that Act and the regulations under that Act.

[3] Section 33 (5C) and (5D)

Insert after section 33 (5B):

(5C) An order under subsection (1) (b) or (1D) (b) that a defendant be brought back before a Magistrate or authorised officer may be satisfied by taking the defendant to an appropriate police officer for the making of a bail decision in respect of the defendant.

(5D) An appropriate police officer may make a bail decision in respect of a defendant brought before the appropriate police officer under this section (despite section 43 (3) of the *Bail Act 2013*).

[4] Section 33 (6)

Omit the subsection. Insert instead:

(6) In this section:

appropriate police officer means a police officer who may make a bail decision under the *Bail Act 2013* in respect of a person accused of an offence who is present at a police station.

authorised officer has the same meaning as in the *Criminal Procedure Act 1986*.

correctional officer has the same meaning as in the *Crimes Administration of Sentences) Act 1999*.

juvenile justice officer has the same meaning as in the *Children (Detention Centres) Act 1987*.

[5] (Repealed)

Explanatory note

Item [2] provides that a juvenile justice officer or correctional officer who is ordered to take a defendant to a mental health facility for a mental health assessment has the same functions in respect of the defendant (including powers to restrain, search and use reasonable force and safeguards applying to the use of those powers) as the officer otherwise has in respect of a juvenile detainee or adult inmate.

Item [3] enables a defendant, following a mental health assessment, to be taken to a police station for a police officer to decide whether or not to grant the defendant bail, instead of being taken before a Magistrate or authorised officer.

Item [4] inserts relevant definitions and item [1] is a consequential amendment.

Item [5] removes the requirement for the District or Supreme Court to notify the Minister for Health of the making of an order detaining or releasing an accused person following a jury's return of a special verdict that the person was not guilty of an offence by reason of mental illness.

1.19 Powers of Attorney Act 2003 No 53

Section 35 Who are interested persons and parties in relation to applications

Insert after section 35 (2) (c):

(c1) the NSW Trustee and Guardian,

Explanatory note

The proposed amendment extends the list of persons who are parties to proceedings in the Supreme Court or the NSW Civil and Administrative Tribunal relating to a review of an enduring power of attorney to include the NSW Trustee and Guardian.

1.20 Succession Act 2006 No 80

[1] Section 22 Court must be satisfied about certain matters

Omit “allow representation of all persons” from section 22 (e).

Insert instead “allow representation, as the Court considers appropriate, of persons”.

[2] Section 91 Grant of probate or administration to enable application to be dealt with

Omit “the applicant” from section 91 (2).

Insert instead “any person the Court considers appropriate”.

Explanatory note

Item [1] of the proposed amendments clarifies an existing provision that applies in an application by a person to make, alter or revoke a will of a person who lacks testamentary capacity. The Supreme Court (the **Court**) is currently required to be satisfied that adequate steps have been taken to allow representation of all persons with a legitimate interest in the application. The amendment makes it clear that the Court can determine the appropriate level of representation of those persons.

Item [2] provides that, when there is an application before the Court for a family provision order or a notional estate order in respect of an estate, the Court may grant interim administration of the estate to any person the Court considers appropriate, rather than only to the person applying for the family provision order or notional estate order.

1.21-1.23

(Repealed)

Schedule 2 (Repealed)