

First print



New South Wales

# Crimes Legislation Amendment Bill 1997

## Explanatory note

This explanatory note relates to this Bill as introduced into Parliament.

### Overview of Bill

The object of this Bill is to make miscellaneous amendments to the following Acts relating to criminal law and procedure:

*Bail Act 1978*

*Crimes Act 1900*

*Criminal Appeal Act 1912*

*Criminal Procedure Act 1986*

*Justices Act 1902*

*Listening Devices Act 1984*

The amendments are explained in detail below in relation to each Act amended.

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## Outline of provisions

**Clause 1** sets out the name (also called the short title) of the proposed Act.

**Clause 2** provides for the commencement of the proposed Act on a day or days to be appointed by proclamation.

**Clause 3** is a formal provision giving effect to the Schedule which contains amendments to the Acts listed above.

## Schedule 1      Amendment of Acts

### Bail Act 1978

Section 6 of the *Bail Act 1978* enables bail to be granted under the Act in respect of the periods set out in the section. The proposed amendment (Schedule 1.1 [2]) will enable bail to be granted to a person during the following periods:

- (a) the period between the making and hearing of an application to annul a conviction under section 100A of the *Justices Act 1902*,
- (b) the period between the referral of a conviction under section 100B of the *Justices Act 1902* and the hearing of the matter referred,
- (c) the period between the annulment of a conviction under section 100A or 100B of the *Justices Act 1902* and the rehearing of the information in respect of which the conviction was made,
- (d) the period between an application for review under section 45 of the *Children (Criminal Proceedings) Act 1987* of a decision in respect of an offence and the determination of the application,
- (e) the period between the determination of an application for review under section 45 of the *Children (Criminal Proceedings) Act 1987* of a decision in respect of an offence and any further proceedings on the information laid or complaint made in relation to the offence.

Schedule 1.1 [1] contains a consequential amendment.

Schedule 1.1 [3] contains a transitional provision.

## **Crimes Act 1900**

### **Offenders who are minors**

Section 61S of the *Crimes Act 1900* currently provides that, for the purposes of sections 61H–61U of that Act, a person is not, by reason only of age, to be presumed incapable of having sexual intercourse, or intent to have sexual intercourse, with another person. The provision has the effect of abolishing the common law presumption that a boy under 14 years of age is incapable of sexual intercourse in relation to the sexual assault offences referred to in sections 61H–61U (offences in the nature of rape and other offences relating to sexual assault). The proposed amendment will extend the application of section 61S to other offences where the presumption might otherwise apply (for example, offences under sections 66A–66D of having sexual intercourse with children under 10, or between 10 and 16, years of age (Schedule 1.2 [1])).

### **Time for commencing prosecutions relating to unlawful access to data in a computer**

Section 309 (1) of the *Crimes Act 1900* makes it an offence for a person, without authority or lawful excuse, to intentionally obtain access to a program or data stored in a computer. As the offence is a summary offence, section 56 of the *Justices Act 1902* requires any prosecution for the offence to be commenced within 6 months after the date the program or data is accessed. The proposed amendment will extend the 6-month period to 2 years in order to enable adequate time for the detection of such offences (Schedule 1.2 [2]).

### **Prosecutions for concealing a serious offence**

Section 316 (1) of the *Crimes Act 1900* makes it an offence for a person who knows or believes that a serious offence has been committed and that he or she has information that might be of material assistance in securing the apprehension of the offender or the prosecution or conviction of the offender to fail, without reasonable excuse, to bring the information to the attention of the police or another appropriate authority. Proposed section 316 (4) will require the approval of the Attorney General to be obtained before a prosecution for an offence against the subsection is commenced against a person who has formed the knowledge or belief that an offence has been committed or obtained the information referred to in the subsection in the

course of practising or following a profession, calling or vocation prescribed by the regulations. A regulation could be made to cover, for example, lawyers, doctors, nurses or social workers. Proposed section 316 (5) enables the making of the regulation (Schedule 1.2 [3]).

### **Orders for taking of photographs, finger-prints and other particulars**

Section 353A (4) of the *Crimes Act 1900* enables a court that finds an offence specified by section 353A (7) proven against a person to order the person to submit to the taking of any particulars necessary for the identification of the person, including the person's photograph or finger-prints. At present the specified offences include certain driving offences under the *Traffic Act 1909* but do not include the offence of negligently driving a motor vehicle on a public street occasioning death or grievous bodily harm. The proposed amendment will enable an order to be made when such an offence is proven (Schedule 1.2 [4]).

### **Autrefois convict and autrefois acquit**

The special pleas of autrefois convict and autrefois acquit assert that the accused person has already been convicted or acquitted of the offence with which he or she is charged. Currently the issue is determined by a jury. The proposed amendment provides for such pleas, which almost always involve complex matters of law, to be determined by a judge and not a jury (Schedule 1.2 [5]).

### **Savings and transitional provisions**

Schedule 1.2 [6] contains savings and transitional provisions relating to the amendments to the *Crimes Act 1900* described above.

### **Criminal Appeal Act 1912**

#### **Crown appeal against sentence where related summary offences are dealt with under Part 10 of the Criminal Procedure Act 1986**

Sections 5AA and 5AD of the *Criminal Appeal Act 1912* provide a right of appeal against conviction and sentence to a person convicted by the Supreme Court or District Court in the exercise of its jurisdiction to deal with related summary offences under Part 10 of the *Criminal Procedure Act 1986*

(described in more detail below in relation to the amendments to that Act contained in Schedule 1.4 [4]–[7]). However, the Crown currently has no right of appeal against an inadequate sentence imposed by the Supreme Court or District Court in the exercise of that jurisdiction.

Proposed section 5DB will confer such a right of appeal. The powers conferred on the Court of Criminal Appeal in respect of such an appeal are broadly similar to those conferred by section 131AB of the *Justices Act 1902* (Schedule 1.3 [1]).

Schedule 1.3 [2]–[4] makes consequential amendments.

The proposed amendments will not apply to any appeal from a decision made in proceedings in respect of an offence committed before the commencement of the amendments (Schedule 1.3 [6]).

### **Powers of judge sitting alone**

Section 22 of the *Criminal Appeal Act 1912* sets out the powers that a judge of the Court of Criminal Appeal sitting alone may exercise in the same manner as they may be exercised by the Court, and subject to the same provisions. The proposed amendment adds to the powers already listed the power to dismiss an appeal as incompetent (Schedule 1.3 [5]).

### **Criminal Procedure Act 1986**

#### **Procedure for dealing with related summary matters**

Accused persons who are charged with indictable offences may also be charged with summary offences relating to the same matter (“related summary offences”). Such charges are commonly called “back up charges” and may be proceeded with after the indictable offence has been dealt with.

A related summary offence is defined in Part 10 of the *Criminal Procedure Act 1986* as a summary offence that is capable of being dealt with by a Local Court that arises from substantially the same circumstances as those from which the indictable offence arose.

Part 10 currently gives the Supreme Court and District Court a discretion, at the end of the trial for the indictable offence, to dispose of related summary offences without the jury (but only if both the prosecuting authority and the accused person consent). The Supreme Court or District Court deals with the related summary offence as if it were a Local Court. If the Courts do not exercise the discretion the matter will be heard by a Local Court.

Part 10 provides no mechanism to assist a Court to decide which related summary offences might be dealt with under Part 10 or to distinguish the charges for related summary offences that cannot lead to a conviction if the person is convicted of the indictable offence concerned because of the overlap in the elements of the indictable and summary offences.

The proposed amendments insert a definition of the latter category of offences ("back up summary offences") and distinguishes these from related summary offences as currently defined.

The proposed amendments will require the prosecuting authority to specify all the back up summary offences and related summary offences with which a person charged with an indictable offence has been charged. The amendments will require the Supreme Court and District Court (unless the court considers it inappropriate to do so) to dismiss any charges for back up summary offences while retaining the existing discretion to deal with related summary offences under Part 10 in the case of the other specified summary offences (Schedule 1.4 [4]–[13]).

Schedule 1.4 [1] and [14] inserts a Schedule containing provisions of a savings or transitional nature. The proposed Schedule will also enable regulations of a savings or transitional nature to be made to supplement the other provisions of the Schedule.

### **Procedure for dealing with offences relating to false instruments**

At present offences under sections 300–302 of the *Crimes Act 1900* are listed in Table 1 to Part 9A of the *Criminal Procedure Act 1986* and so are required to be dealt with summarily unless the prosecuting authority or the person charged with the offence elects to have them dealt with on indictment. The proposed amendments provide for the offences to continue to be dealt with in this way where the value of the property, or amount of remuneration, greater remuneration or financial advantage in respect of which the offence is charged exceeds \$5,000 (or is not specified) (Schedule 1.4 [2]) but provides for offences where the value or amount does not exceed \$5,000 to be listed in Table 2 to Part 9A (Schedule 1.4 [3]). The effect of this will be that in those cases the offences are required to be dealt with summarily unless the prosecuting authority elects to have them dealt with on indictment.

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### **Justices Act 1902**

The proposed amendment is consequential on the proposed amendments to the *Criminal Procedure Act 1986* relating to the procedure for dealing with related summary matters (Schedule 1.4 [4]–[7]) described above.

### **Listening Devices Act 1984**

Sections 13 and 14 of the *Listening Devices Act 1984* make evidence of private conversations that have been unlawfully obtained or obtained inadvertently pursuant to a warrant inadmissible in criminal proceedings except in specified circumstances. The proposed amendments make it clear that the reference to criminal proceedings extends to proceedings in connection with bail.





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New South Wales

# Crimes Legislation Amendment Bill 1997

No. , 1997

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## **A Bill for**

An Act to amend the *Crimes Act 1900* and certain other Acts to make miscellaneous amendments relating to criminal law and procedure; and for other purposes.

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**The Legislature of New South Wales enacts:**

**1 Name of Act**

This Act is the *Crimes Legislation Amendment Act 1997*.

**2 Commencement**

This Act commences on a day or days to be appointed by proclamation. 5

**3 Amendment of Acts**

Each Act specified in Schedule 1 is amended as set out in that Schedule.

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## Schedule 1 Amendment of Acts

(Section 3)

### 1.1 Bail Act 1978 No 161

#### [1] Section 6 Grant of bail for certain periods

Omit "and" where lastly occurring in section 6 (g3). 5

#### [2] Section 6 (g4)–(g8)

Insert after section 6 (g3):

- (g4) the period between the making and hearing of an application to annul a conviction under section 100A of the *Justices Act 1902*, 10
- (g5) the period between the referral of a conviction under section 100B of the *Justices Act 1902* and the hearing of the matter referred,
- (g6) the period between the annulment of a conviction under section 100A or 100B of the *Justices Act 1902* and the rehearing of the information in respect of which the conviction was made, 15
- (g7) the period between an application for review under section 45 of the *Children (Criminal Proceedings) Act 1987* of a decision in respect of an offence and the determination of the application, 20
- (g8) the period between the determination of an application for review under section 45 of the *Children (Criminal Proceedings) Act 1987* of a decision in respect of an offence and any further proceedings on the information laid or complaint made in relation to the offence, and 25

**[3]      Schedule 1 Savings and transitional provisions**

Insert after Part 3:

**Part 4      Crimes Legislation Amendment Act 1997**

**7 Application of amendments**

Section 6, as amended by the *Crimes Legislation Amendment Act 1997*, extends: 5

(a) to applications to annul convictions, and referrals of convictions, made under section 100A and 100B, respectively, of the *Justices Act 1902*, and

(b) to applications made under section 45 of the *Children (Criminal Proceedings) Act 1987*, 10

before the commencement of the amendment made to section 6 by the *Crimes Legislation Amendment Act 1997*.

**1.2      Crimes Act 1900 No 40** 15

**[1]      Section 61S Offenders who are minors**

Omit “of sections 61H–61U” from section 61S (1).  
Insert instead “of any offence”.

**[2]      Section 309 Unlawful access to data in computer**

Insert after section 309 (4): 20

(5) A prosecution for an offence under subsection (1) may be commenced at any time within 2 years after the time when the offence is alleged to have been committed.

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**[3] Section 316 Concealing serious offence**

Insert after section 316 (3):

- (4) A prosecution for an offence against subsection (1) is not to be commenced against a person without the approval of the Attorney General if the knowledge or belief that an offence has been committed was formed or the information referred to in the subsection was obtained by the person in the course of practising or following a profession, calling or vocation prescribed by the regulations for the purposes of this subsection. 5  
10
- (5) The Governor may make regulations, not inconsistent with this Act, prescribing a profession, calling or vocation as referred to in subsection (4).

**[4] Section 353A Power to search person, make medical examination, take photograph, finger-prints etc** 15

Omit section 353A (7) (b). Insert instead:

- (b) an offence under section 4 of the *Traffic Act 1909* of driving a motor vehicle upon a public street negligently occasioning death, negligently occasioning grievous bodily harm, furiously or recklessly or at a speed or in a manner that is dangerous to the public, 20

**[5] Section 399 Plea of autrefois convict etc**

Insert at the end of the section:

- (2) If an accused pleads autrefois convict or autrefois acquit, a Judge, without the presence of a jury, is to decide the issue. 25

**[6] Eleventh Schedule Savings and transitional provisions**

Insert after Part 9:

**Part 10 Crimes Legislation Amendment Act 1997**

**30 Offenders who are minors**

The amendment made to section 61S by the *Crimes Legislation Amendment Act 1997* does not apply in respect of an act or omission giving rise to proceedings for an offence that occurred before the amendment commenced. 5

**31 Increase in time limit for prosecutions for offences relating to unlawful access to data in computer 10**

The amendment made to section 309 by the *Crimes Legislation Amendment Act 1997* does not apply in respect of an act or omission giving rise to proceedings for an offence referred to in that section that occurred before that amendment commenced. 15

**32 Orders under section 353A (4)**

Section 353A (7) (b), as amended by the *Crimes Legislation Amendment Act 1997*, does not apply in relation to an offence found proved before the commencement of the amendment made to that paragraph by that Act. 20

**33 Plea of autrefois convict or autrefois acquit**

Section 399 (2), as inserted by the *Crimes Legislation Amendment Act 1997*, does not apply to a plea of autrefois convict or autrefois acquit made before the commencement of that subsection. 25



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**1.3 Criminal Appeal Act 1912 No 16**

**[1] Section 5DB**

Insert after section 5DA:

**5DB Appeals by Crown against sentences for related summary offences in criminal cases dealt with by the Supreme Court or District Court**

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- (1) The Attorney General or the Director of Public Prosecutions may appeal to the Court of Criminal Appeal against any sentence imposed by the Supreme Court or District Court on the conviction of a person for a related summary offence in the exercise of its jurisdiction under Part 10 of the *Criminal Procedure Act 1986*. 10
- (2) The Court of Criminal Appeal may, in its discretion, do any one or more of the following: 15
  - (a) confirm, quash, set aside or vary the sentence,
  - (b) impose such sentence as to the Court of Criminal Appeal may seem proper,
  - (c) exercise, by order, any power that the Supreme Court or District Court might have exercised. 20
- (3) Any sentence varied or imposed, or any order made, by the Court of Criminal Appeal under this section is to have the same effect and be enforced in the same manner as if it had been imposed by the Supreme Court or District Court. 25
- (4) The Court of Criminal Appeal may not:
  - (a) vary a sentence so that the sentence as varied could not have been imposed by the Supreme Court or District Court, or
  - (b) impose a sentence that could not have been imposed by the Supreme Court or District Court, 30as the case may be.

- (5) The power of the Court of Criminal Appeal to hear and determine an appeal under this section is to be exercised by such single judge of the Supreme Court as the Chief Justice may direct unless:
- (a) the judge considers that the appeal should be dealt with by 2 or more judges and notifies the Chief Justice accordingly, or
  - (b) an appeal is lodged under this Act in relation to the related indictable offence.
- (6) On an appeal under this section against a sentence, new evidence or information may be given with the leave of the Court of Criminal Appeal. However new evidence or information may be given by the prosecution only in exceptional circumstances.
- (7) Except as provided by subsection (6), nothing in this section limits section 12.

**[2] Section 10 Time for appealing**

Omit “or under” from section 10 (4). Insert instead “under”.

**[3] Section 10 (4)**

Insert “or under section 5DB” after “or 5AD”. 20

**[4] Section 14A Crown appeals—absence of respondent**

Omit “or 5DA”. Insert instead “, 5DA or 5DB”.

**[5] Section 22 Powers of a judge sitting alone**

Insert at the end of section 22 (1):

- (k) the power to dismiss an appeal as incompetent. 25

**[6] Schedule 1 Savings and transitional provisions**

Insert after clause 2:

**3 Crimes Legislation Amendment Act 1997**

The amendments to this Act made by Schedule 1.3 [1]–[4] to the *Crimes Legislation Amendment Act 1997* do not enable an appeal to be brought against a sentence imposed in proceedings in respect of an offence committed before the commencement of the amendments.

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**1.4 Criminal Procedure Act 1986 No 209**

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**[1] Section 3C**

Insert after section 3B:

**3C Savings, transitional and other provisions**

Schedule 1 has effect.

**[2] Part 9A, Table 1 Indictable offences that are to be dealt with summarily unless prosecuting authority or person charged elects otherwise**

15

Omit clause 13. Insert instead:

**13 False instruments**

An offence under section 300, 301 or 302 of the *Crimes Act 1900* (other than an offence listed in clause 4B of Table 2 to this Part) or an offence under section 302A of that Act.

20

**[3]      Part 9A, Table 2 Indictable offences that are to be dealt with summarily unless prosecuting authority elects otherwise**

Insert before the heading to Part 3:

**4B False instruments**

An offence under section 300, 301 or 302 of the *Crimes Act 1900* where the value of the property, or amount of remuneration, greater remuneration or financial advantage, in respect of which the offence is charged does not exceed \$5,000. 5

**[4]      Section 34 Definitions and application 10**

Insert in alphabetical order in section 34 (1):

*back up summary offence*, in relation to an indictable offence, means a summary offence:

- (a) all the elements of which are elements that are necessary to constitute the indictable offence, and 15
- (b) that is to be prosecuted on the same facts as the indictable offence.

**[5]      Section 34, definition of "related summary offence"**

Insert "but does not include a back up summary offence" after "arisen". 20

**[6]      Section 34A**

Insert after section 34:

**34A Certification of related summary offences**

- (1) On committal for trial of a person charged with an indictable offence: 25
  - (a) the prosecuting authority must inform the Magistrate (or justice or justices) as to whether or not the person has been charged with any back up summary offence or related summary offence, and

- 
- (b) if the person has been charged with any back up summary offence or related summary offence, the prosecuting authority is to produce to the court a certificate specifying each back up summary offence and related summary offence with which the person has been charged. 5
- (2) This section does not prevent the person referred to in subsection (1) being charged with any summary offence after committal.
- [7] Section 35 Manner of dealing with certain summary offences related to indictable offences 10**
- Omit section 35 (1). Insert instead:
- (1) If at the conclusion of the trial of an accused person for an indictable offence, a court finds the accused person guilty of the offence, the court: 15
- (a) is (unless it considers it inappropriate in the circumstances to do so) to order that the charge in relation to each back up summary offence be dismissed, and
- (b) may deal with any back up summary offence the charge for which is not dismissed under paragraph (a) and any related summary offence with which the accused person has been charged in accordance with this Part. 20
- (1A) If at the conclusion of the trial of an accused person for an indictable offence, a court finds the accused person not guilty of the offence, the court may deal with any back up summary offence or related summary offence with which the person has been charged in accordance with this Part. 25
- 30
- [8] Section 35 (2)**
- Insert “any back up summary offence referred to in subsection (1) (b) or (1A) or” after “deal with”.

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Schedule 1      Amendment of Acts

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**[9]      Section 35 (3)**

Omit "Nothing".

Insert instead "Except as provided by subsection (1), nothing".

**[10]      Section 35 (3) and (4)**

Insert "back up summary offence or" after "deal with a" wherever occurring.      5

**[11]      Section 35 (4)**

Insert "back up summary offence or" after "relation to a".

**[12]      Sections 36 and 37**

Insert "back up summary offence or" before "related summary offence" wherever occurring.      10

**[13]      Section 36 (4)**

Insert "back up summary offences or" after "respect to".

**[14]      Schedule 1**

Insert after section 56:      15

**Schedule 1      Savings, transitional and other provisions**

(Section 3C)

**Part 1      Preliminary**

**1 Regulations**      20

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

Schedule 1.4 to the *Crimes Legislation Amendment Act 1997*      25

- 
- (2) A provision referred to in subclause (1) may, if the regulations so provide, take effect from the date of assent to the Act concerned or from a later date.
- (3) To the extent to which a provision referred to in subclause (1) 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 its publication, or 10
  - (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 its publication. 15

## **Part 2 Provisions consequent on Schedule 1.4 to Crimes Legislation Amendment Act 1997**

### **2 Application of amendments to Part 10**

The amendments to this Act made by Schedule 1.4 [4]–[13] to the *Crimes Legislation Amendment Act 1997* do not apply in respect of a summary offence if the person charged with the indictable offence to which the summary offence is related is committed for trial for the indictable offence before the commencement of the amendments. 20  
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## **1.5 Justices Act 1902 No 27**

### **Section 39 Documents to be transmitted for trial**

Insert “the certificate mentioned in section 34A of the *Criminal Procedure Act 1986* (if any),” after “witnesses,” in section 39 (1).

**1.6      Listening Devices Act 1984 No 69**

**[1]      Section 13 Inadmissibility of evidence of private conversations  
when unlawfully obtained**

Insert “(including proceedings for or in connection with the grant of  
bail)” after “criminal proceedings” in section 13 (1).

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**[2]      Section 13 (2) (d)**

Omit “if”.

Insert instead “(or in proceedings for or in connection with the grant  
of bail in any such proceedings) if”.

**[3]      Section 14 Admissibility of evidence of private conversation  
when obtained inadvertently pursuant to warrant**

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Insert “(including proceedings for or in connection with the grant of  
bail)” after “criminal proceedings” in section 14 (1).