

Courts and Crimes Legislation Further Amendment Bill 2010

Explanatory note

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

Overview of Bill

The objects of this Bill are as follows:

- (a) to amend various Acts to provide legislative immunity for a person who is a member of the Guardian Ad Litem Panel and is appointed as a guardian ad litem,
- (b) to amend the *Administrative Decisions Tribunal Act 1997* to allow, in certain circumstances, the Administrative Decisions Tribunal to hear a matter where an individual has duly applied for an internal review, even if the internal review has not been finalised,
- (c) to amend the *Children (Criminal Proceedings) Act 1987* and related legislation to enable additional offenders to participate in the youth conduct order scheme established by that Act and to make other amendments to improve the administration of the scheme,
- (d) to amend the *Children's Court Act 1987* to increase the maximum term of appointment of a Children's Magistrate,
- (e) to amend the *Civil Procedure Act 2005*:
 - (i) to provide for a statutory regime for the conduct of proceedings of a representative nature in certain actions and proceedings in the Supreme Court, and
 - (ii) to facilitate the taking of pre-litigation steps in certain civil disputes to resolve or narrow the issues in dispute before the commencement of court proceedings, and
 - (iii) to extend the Uniform Rules Committee's power to make rules in relation to the means for answering questions of foreign law,
- (f) to amend the *Crimes Act 1900* to replace and modernise the offence of not providing a servant or other dependant with food and other necessities of life,
- (g) to amend the *Crimes (Criminal Organisations Control) Act 2009* to extend the period at the end of which the Ombudsman must scrutinise the exercise of powers conferred on police officers under the Act,
- (h) to amend the *Criminal Procedure Act 1986*:
 - (i) with respect to evidence in proceedings in relation to sexual offences, and
 - (ii) to allow certain aspects of committal proceedings to be conducted in the absence of the public for the purposes of facilitating the use of an electronic case management system, and
 - (iii) to enable both prosecutors and accused persons in criminal proceedings in the Supreme Court or District Court to apply for the trial of an accused person by judge alone and to set out the circumstances in which such an application is to be refused or granted by the Supreme Court or District Court, and
- (iv) to increase the maximum property value for break and enter offences that are dealt with summarily by the Local Court,
- (i) to amend the *Graffiti Control Act 2008* and related legislation for law revision purposes,
- (j) to amend the *Industrial Relations Act 1996* to enable a Commissioner who is an Australian lawyer to exercise any function of the Commission in Court Session in respect of small claims proceedings under the *Fair Work Act 2009* of the Commonwealth, and to clarify a provision in respect of small claims applications under the *Industrial Relations Act 1996*,
- (k) to amend the *Local Court Act 2007*:
 - (i) to give the Minister administering that Act power to make determinations in relation to the extended leave entitlements of Magistrates appointed before 20 September 2002, and
 - (ii) to validate a determination made with respect to extended leave of Magistrates in 2005, and
 - (iii) to increase the limit of the civil jurisdiction of the Local Court in its General Division,

- (l) to amend the *Mining Act 1992* to extend the jurisdiction of the Land and Environment Court to hear all disputes regarding the determination of whether a significant improvement to land exists (for the purposes of determining whether a mining lease may be granted over that land),
 - (m) to amend the *Supreme Court Act 1970* to enable rules to be made in relation to the Supreme Court's ability to refer to a foreign court a question as to the principles of foreign law and to provide assistance on a question as to the principles of Australian law,
 - (n) to amend the *Victims Support and Rehabilitation Act 1996* to make further provision for the scheme for victims compensation and assistance under that Act, as described in more detail below,
 - (o) to amend the *Victims Rights Act 1996* to make further provision with respect to the Charter of Victim Rights, as described in more detail below.
- The Bill also makes other minor amendments, including amendments of a consequential nature.

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.

Schedule 1 Amendment of Administrative Decision Tribunal Act 1997 No 76

Schedule 1 [3] allows the Administrative Decisions Tribunal (the ***Tribunal***) to review a decision in cases where the person is entitled to seek internal review of the decision and the person has duly applied for such a review, even if the review has not been finalised. The Tribunal may decide to review such a decision if the Tribunal is satisfied that it is necessary for the protection of the applicant's interests. Currently, under the *Administrative Decision Tribunal Act 1997*, the Tribunal may only review such a decision if the internal review has been finalised. This will permit the Tribunal to hear and determine an application for a stay of a reviewable decision, even though an application for internal review has not been finalised. **Schedule 1 [1]** is a consequential amendment that makes it clear that a person may apply to the Tribunal for review of a decision by the end of (instead of during) the default application period for the decision. **Schedule 1 [2]** makes a minor related amendment.

Schedule 1 [4] and [5] provide that a member of the panel constituted as the Guardian Ad Litem Panel by the Director-General of the Department of Justice and Attorney General (the ***Guardian Ad Litem Panel***) who is appointed by the Tribunal to represent a party who is an incapacitated person will not be personally liable in respect of any action, liability, claim or demand if the member acted in good faith for the purpose of representing the incapacitated person.

Schedule 1 [6] and [7] are savings and transitional provisions.

Schedule 2 Amendment of Adoption Act 2000 No 75

Schedule 2 provides that a member of the Guardian Ad Litem Panel who is appointed as a guardian ad litem by the Supreme Court will not be personally liable in respect of any action, liability, claim or demand if the member acted in good faith for the purpose of carrying out his or her functions as a guardian ad litem under the *Adoption Act 2000*.

Schedule 3 Amendment of Children and Young Persons (Care and Protection) Act 1998 No 157

Schedule 3 provides that a member of the Guardian Ad Litem Panel who is appointed as a guardian ad litem by the Children's Court will not be personally liable in respect of any action, liability, claim or demand if the member acted in good faith for the purpose of carrying out his or her functions as a guardian ad litem under the *Children and Young Persons (Care and Protection) Act 1998*.

Schedule 4 Amendment of Children (Criminal Proceedings) legislation Children (Criminal Proceedings) Act 1987

Schedule 4.1 [2] replaces a definition in Part 4A (Youth conduct orders) of the *Children (Criminal Proceedings) Act 1987* (the **CCP Act**) to reflect the re-naming of the Anti-Social Behaviour Pilot Project as the Supporting Children, Supporting Families Program (the **SCSF Program**).

Schedule 4.1 [14]–[16] make consequential amendments.

Schedule 4.1 [3] expands the definition of **relevant offence** for the purposes of Part 4A of the CCP Act. The new definition will include any offence that the Children's Court has jurisdiction to hear and determine other than a prescribed sexual offence (within the meaning of the *Criminal Procedure Act 1986*), any other serious children's indictable offence or traffic offence. The current definition mirrors the offences that are covered by the *Young Offenders Act 1997*.

Schedule 4.1 [1], [4], [5] and [9] make consequential amendments.

Schedule 4.1 [7] requires the Children's Court, before it refers a child for a suitability assessment, to be satisfied that it is appropriate for a child to be dealt with under the scheme established by Part 4A of the CCP Act (the **scheme**) having regard to certain matters such as the serious nature of the offence concerned and the harm caused to victims.

Schedule 4.1 [8] precludes the Children's Court from referring a child for a suitability assessment if it considers that the appropriate penalty for the relevant offence concerned is for the child to be under the control of the Minister administering the *Children (Detention Centres) Act 1987* or the *Crimes (Administration of Sentences) Act 1999*.

Schedule 4.1 [10] confirms that the Children's Court may make a final youth conduct order without first making an interim youth conduct order. **Schedule 4.1 [6]** makes a consequential amendment.

Schedule 4.1 [11] makes it clear that if a youth conduct order is revoked in relation to a child, the child is not subject to the imposition of a more severe penalty for the relevant offence concerned than would have been the case if the order had not been made.

Schedule 4.1 [12] enables the Children's Court to make an order directing that the charge for a relevant offence to which a final youth conduct order relates be dismissed if the child concerned substantially complies with the order for the period it is in force in circumstances where the child pleaded guilty to the offence before the order was made. Currently, an order directing the dismissal of a charge may only be made if the child did not plead guilty to (or was not found guilty of) the relevant offence in relation to which the final youth conduct order relates. **Schedule 4.1 [12]** also requires the Court to give reasons whenever it refuses to exercise its power to direct that a charge be dismissed. **Schedule 4.1 [13]** makes a consequential amendment.

Schedule 4.1 [17]–[20] facilitate the exchange of information concerning the administration of the SCSF Program between agencies.

Schedule 4.1 [21] extends the period during which the scheme will be in effect to 1 September 2013.

Schedule 4.1 [22] enables the Governor to make regulations of a savings or transitional nature consequent on the enactment of the proposed Act.

Schedule 4.1 [23] inserts provisions of a savings or transitional nature consequent on the enactment of the proposed Act.

Children (Criminal Proceedings) Regulation 2005

Schedule 4.2 [1] amends the *Children (Criminal Proceedings) Regulation 2005* to extend the areas within which the scheme will be available. Currently, the scheme operates in the areas of the Campbelltown Local Area Command, Mount Druitt Local Area Command and New England Local Area Command of the NSW Police Force. The new Local Area Commands will be Blacktown, St Marys, Liverpool and Macquarie Fields.

Schedule 4.2 [2] and [3] provide for a child to be eligible to participate in the scheme if he or she has an appropriate connection with a Local Area Command that is participating in the scheme. This will be the case if:

(a) the child permanently or temporarily resides in, or is an habitual visitor to, the area of the Command, or

(b) the relevant offence (or, in the case where more than one relevant offence is sought to be dealt with, at least one of the offences) was committed, or alleged to have been committed, in the area of the Command.

Schedule 4.2 [5] makes a consequential amendment.

Schedule 4.2 [4] extends the cut off date for participation in the scheme from 1 July 2011 to 25 February 2012.

Schedule 4.2 [6] makes an amendment that is consequential on the amendments made to the CCP Act by **Schedule 4.1 [17]–[20]**.

Schedule 5 Amendment of Children’s Court Act 1987 No 53

Schedule 5 allows a Children’s Magistrate to be appointed for a period of up to 5 years, instead of the current maximum period of appointment of 3 years.

Schedule 6 Amendment of Civil Procedure Act 2005 No 28

Amendments relating to representative actions

Schedule 6.1 [1] amends section 4 of the *Civil Procedure Act 2005* (the **CP Act**) to limit the application of proposed Part 10 to civil proceedings in the Supreme Court.

Schedule 6.1 [2] inserts proposed Part 10 (sections 155–184) into the CP Act. The Part contains the following provisions:

Division 1 Preliminary

Proposed section 155 contains terms and expressions used in the proposed Part.

Representative proceedings is defined as proceedings in respect of a cause of action commenced in accordance with the proposed Part by one or more persons on their own behalf and on behalf of any other person or persons. A **representative party** in representative proceedings is defined as any person who commences the proceedings. A **defendant** in representative proceedings is defined as any person against whom representative proceedings are commenced. Proposed section 156 provides for the proposed Part to apply to proceedings commenced after the commencement of the section, whether the cause of action arose before or arises after that commencement.

Division 2 Commencement of representative proceedings

Proposed section 157 enables representative proceedings against a defendant to be brought under the proposed Part in certain circumstances. The circumstances are as follows:

- (a) there are 7 or more persons (the **claimants**) who have claims against the same proposed respondent,
- (b) one or more of these claimants seeks to commence the proceedings,
- (c) the claims of all of the claimants are in respect of, or arise out of, the same, similar or related circumstances,
- (d) the claims of all of the claimants give rise to a substantial common issue of law or fact,
- (e) all persons seeking to commence the proceedings have a sufficient interest to commence the proceedings on behalf of the claimants.

Proposed section 158 (1) provides that a person has a sufficient interest to commence representative proceedings against one or more defendants on behalf of others if that person would have standing to commence proceedings against the defendants on the person’s own behalf. It also provides that such standing to continue representative proceedings is not lost simply because the person ceases to have an individual claim against a defendant.

Proposed section 158 (2) makes it clear that representative proceedings may be taken against several defendants even if not all group members have a claim against all defendants. The provision overcomes the view to the contrary expressed in relation to the operation of Part IVA of the *Federal Court of Australia Act 1976* of the Commonwealth in *Philip Morris (Australia) Ltd v Nixon* [2000] FCA 229.

Proposed section 159 provides that generally there is no requirement for consent to being a group member in representative proceedings. However, such consent is required from any of the following:

- (a) the Commonwealth, a State or a Territory,
- (b) a Minister or other officer of any such jurisdiction,
- (c) a body corporate (other than an incorporated company or association) established for public purposes under a law of any such jurisdiction.

Proposed section 160 provides that a person under a legal incapacity may be a group member even though the person does not have a tutor. However, a tutor is required if the person wishes to take any step in the proceedings.

Proposed section 161 sets out additional information that must be contained in the originating process that commences representative proceedings.

Proposed section 162 enables a group member to opt out of representative proceedings by written notice given in accordance with rules of court before a date fixed for that purpose by the Supreme Court.

Proposed section 163 enables the Supreme Court, on the application of a representative party, to alter the description of the group of persons in respect of which representative proceedings have been commenced.

Proposed section 164 enables the Supreme Court to order either that representative proceedings continue or no longer continue under the proposed Part if at any stage the group members are fewer than 7.

Proposed section 165 enables the Supreme Court to direct that representative proceedings no longer continue under the proposed Part if the cost of distributing relief to group members is excessive, or to stay the proceedings to the extent that they relate to such relief.

Proposed section 166 (1) enables the Supreme Court to order that proceedings in the Court no longer continue under the proposed Part in certain circumstances if it considers it is in the interests of justice to do so. The circumstances are if:

- (a) the costs that would be incurred if the proceedings were to continue as representative proceedings are likely to exceed the costs that would be incurred if each group member conducted separate proceedings, or
- (b) all the relief sought can be obtained by means of proceedings other than representative proceedings under the proposed Part, or
- (c) a representative party is not able to adequately represent the interests of the group members, or
- (d) the representative proceedings will not provide an efficient and effective means of dealing with the claims of group members, or
- (e) it is otherwise inappropriate that the claims be pursued by means of representative proceedings.

Proposed section 166 (2) makes it clear that it is not inappropriate for representative proceedings to be brought on behalf of a limited group of identified individuals. This is consistent with the view taken by the Full Court of the Federal Court in relation to the operation of Part IVA of the *Federal Court of Australia Act 1976* of the Commonwealth in *Multiplex Funds Management Limited v Dawson Nominees Pty Limited* [2007] FCAFC 200.

Proposed section 167 specifies the effect of an order under the proposed Part for the discontinuance of representative proceedings. The section provides that such proceedings may be continued by a representative party against a defendant on the party's own behalf. It also enables the Supreme Court to join former group members as applicants in such continued proceedings.

Proposed section 168 enables the Supreme Court to give directions in respect of the determination of issues in representative proceedings that are common to some, but not all, group members. For this purpose, the Court may direct the establishment of sub-groups in the proceedings and the appointment of sub-group representative parties.

Proposed section 169 enables the Supreme Court to give a direction that a group member appear in proceedings for the purpose of determining an issue relating only to the claims of that member.

Proposed section 170 provides that if an issue cannot conveniently be determined by the Supreme Court by giving directions under proposed section 168 or 169, the Court may:

- (a) if the issue concerns only the claim of a particular member—give directions relating to the commencement and conduct of separate proceedings by that member, or
- (b) if the issue is common to the claims of all members of a sub-group—give directions relating to the commencement and conduct of representative proceedings in relation to the claims of those members.

Proposed section 171 enables the Supreme Court to substitute another group member as representative party (or sub-group representative party) if it considers that the existing representative party (or sub-group representative party) is not able to adequately represent the interests of group members (or sub-group members).

Proposed section 172 enables the Supreme Court to order a stay of execution in respect of relief awarded to a group member in representative proceedings if the group member has brought other proceedings. The stay operates until those other proceedings are determined.

Proposed section 173 requires any settlement or discontinuance of representative proceedings to be approved by the Supreme Court.

Proposed section 174 enables a representative party, with the leave of the Supreme Court, to settle the party's individual claim against the defendant and withdraw as a representative party.

Division 3 Notices

Proposed section 175 requires notices to be given to group members in representative proceedings in relation to certain matters (including, for instance, dates for opting out of the proceedings).

Proposed section 176 provides for the form and content of, and the manner for giving, such notices to group members.

Division 4 Powers of the Court

Proposed section 177 specifies the powers of the Supreme Court in determining representative proceedings, including determining individual entitlements to relief.

Proposed section 178 enables the Supreme Court, in determining representative proceedings, to order the establishment of a fund consisting of money to be distributed to group members. It also enables the Court to make orders in respect of the administration of the fund.

Proposed section 179 provides for the content and effect of judgments given by the Supreme Court in representative proceedings.

Division 5 Appeals

Proposed section 180 provides for appeals to the Court of Appeal from judgments of the Supreme Court in representative proceedings also to be conducted as representative proceedings.

Division 6 Miscellaneous

Proposed section 181 provides that the Supreme Court may not award costs against a person on whose behalf representative proceedings have been commenced (other than a representative party) except as authorised by proposed section 168 or 169.

Proposed section 182 provides for the suspension of certain limitation periods on the commencement of representative proceedings.

Proposed section 183 confers a general power on the Supreme Court to make such orders as it considers appropriate or necessary to ensure that justice is done in representative proceedings.

Proposed section 184 enables the Supreme Court to order that a representative party's costs in representative proceedings in which damages have been awarded be recoverable from the damages awarded.

Schedule 6.1 [3] amends Schedule 6 to the CP Act to preserve certain existing proceedings of a representative character.

Amendments relating to dispute resolution

Schedule 6.2 [2] inserts proposed Part 2A (Steps to be taken before the commencement of proceedings) in the CP Act. The proposed Part contains the following provisions:

Proposed section 18A includes definitions of terms used in the proposed Part and other interpretive provisions.

Proposed section 18B provides for the civil disputes and civil proceedings to which the proposed Part is or is not to apply. The proposed Part enables the Governor to make regulations excluding disputes and proceedings from the Part. A similar power to make rules of court for that purpose is also conferred, subject to the regulations. Proposed section 18C enables the Governor to make regulations setting out pre-litigation protocols. Rules of court may also set out such protocols. A **pre-litigation protocol** is a set of provisions setting out steps that will constitute reasonable steps for the purposes of the pre-litigation requirements in their application to a specified class of civil disputes to which the proposed Part applies.

Proposed section 18D requires each person involved in a civil dispute to which the proposed Part applies to comply with the **pre-litigation requirements** set out in proposed section 18E before the commencement of any civil proceedings in a court in relation to that dispute.

Proposed section 18E provides that each person involved in a civil dispute to which the proposed Part applies is to take reasonable steps having regard to the person's situation, the nature of the dispute (including the value of any claim and complexity of the issues) and any applicable pre-litigation protocol:

- (a) to resolve the dispute by agreement, or
- (b) to clarify and narrow the issues in dispute in the event that civil proceedings are commenced.

The proposed section also gives examples of reasonable steps, such as the exchange of relevant information and documents and the use of alternative dispute resolution processes where appropriate.

Proposed section 18F limits the use of information or documents by a party who receives them as part of an exchange carried out in accordance with the pre-litigation requirements.

Proposed section 18G requires a plaintiff who commences civil proceedings to which the proposed Part applies to file a dispute resolution statement at the time the originating process for the proceedings is filed. The statement is to indicate the steps taken before the commencement of proceedings to narrow or resolve the issues in dispute and, if no steps are taken, the reasons why such steps were not taken.

Proposed section 18H requires a defendant in civil proceedings to which the proposed Part applies who has been served with a copy of a dispute resolution statement filed by the plaintiff to file a dispute resolution statement at the time the defendant files a defence in the proceedings. The statement is to indicate whether the defendant agrees with the plaintiff's statement and, if not, specify the reasons for the disagreement and specify other reasonable steps that the defendant believes can be taken to resolve the dispute.

Proposed section 18I provides that a dispute resolution statement is to comply with such additional requirements as may be specified in rules of court.

Proposed section 18J requires a legal practitioner engaged to represent a person involved in a civil dispute to which the proposed Part applies to provide certain information and advice about the person's pre-litigation responsibilities. A failure to provide the information and advice will be relevant in determining whether the legal practitioner should have costs awarded against him or her.

Proposed section 18K provides that a failure to comply with the pre-litigation requirements or to file a dispute resolution statement does not generally prevent the commencement or affect the validity of proceedings.

Proposed section 18L provides that, as a general rule, each person involved in a civil dispute (or each party to civil proceedings) to which the proposed Part applies is to bear that person's or party's own costs of compliance with the pre-litigation requirements.

Proposed section 18M enables a court, in certain circumstances, to order that a party to civil proceedings or a legal practitioner is to pay some or all of the costs of another party to the proceedings of complying with the pre-litigation requirements.

Proposed section 18N enables a court to take into account the failure by a party to civil proceedings to comply with the pre-litigation requirements for the purposes of:

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

Proposed section 18O limits the disclosure of information concerning a mediation undertaken for the purposes of complying with the pre-litigation requirements. The proposed section also extends protection from the laws of defamation for publications made in such a context.

Schedule 6.2 [1] inserts a definition of *civil dispute* in the CP Act by reference to the meaning of that term in proposed Part 2A.

Schedule 6.2 [3]–[7] amend section 56 of the CP Act:

- (a) to recognise that the facilitation of the just, quick and cheap resolution of the real issues in civil disputes is also part of the overriding purpose of the CP Act and rules of court, and
- (b) to impose a duty on a party to a civil dispute or civil proceedings to take reasonable steps to resolve or narrow the issues in dispute in accordance with the provisions of proposed Part 2A (if any) that are applicable to the dispute or proceedings in a way that is consistent with the overriding purpose, and
- (c) to prevent legal practitioners and persons with a relevant interest in civil proceedings, by their conduct, from causing parties to civil disputes or civil proceedings to be put in breach of their duties under section 56.

Schedule 6.2 [8] confers new powers to make uniform rules with respect to pre-litigation requirements (both under proposed Part 2A and otherwise).

Schedule 6.2 [9] provides for savings and transitional matters.

Miscellaneous amendments

Schedule 6.3 [1] extends the Uniform Rules Committee's power to make rules in respect of the means for answering questions of foreign law and their application.

Schedule 6.3 [2] amends Schedule 6 to the CP Act to enable the making of savings and transitional regulations.

Schedule 6.4 amends the *Uniform Civil Procedure Rules 2005* as a consequence of the amendments in Schedule 6.1.

Schedule 7 Amendment of Community Services (Complaints, Reviews and Monitoring) Act 1993 No 2

Schedule 7 provides that a member of the Guardian Ad Litem Panel who is appointed by the Administrative Decisions Tribunal will not be personally liable in respect of any action, liability, claim or demand if the member acted in good faith for the purpose of carrying out his or her functions under the *Community Services (Complaints, Reviews and Monitoring) Act 1993*.

Schedule 8 Amendment of Consumer, Trader and Tenancy Tribunal Act 2001 No 82

Schedule 8 provides that a member of the Guardian Ad Litem Panel who is appointed by the Consumer, Trader and Tenancy Tribunal of New South Wales to represent a person who is a minor, is disabled or mentally incapacitated or is otherwise a special class of person prescribed by the regulations will not be personally liable in respect of any action, liability, claim or demand if the member acted in good faith for the purpose of carrying out his or her functions under the *Consumer, Trader and Tenancy Tribunal Act 2001*.

Schedule 9 Amendment of Crimes Act 1900 No 40

Schedule 9 makes it an offence for a person who is under a legal duty to provide another person with the necessities of life to intentionally or recklessly fail, without reasonable excuse, to provide that person with the necessities of life, if such a failure causes a danger of death or causes serious injury or the likelihood of serious injury to that person. The maximum penalty for this offence is imprisonment for 5 years.

The new offence replaces and modernises the current offence in the *Crimes Act 1900* of not providing any wife, apprentice, servant or insane person with the necessary food, clothing or lodging, where a person is legally liable to do so and which endangers the life of, or causes serious injury (or the likelihood of serious injury) to, the wife, apprentice, servant or insane person.

Schedule 10 Amendment of Crimes (Criminal Organisations Control) Act 2009 No 6

Schedule 10 extends the period within which the Ombudsman must scrutinise the exercise of powers conferred on police officers under the *Crimes (Criminal Organisations Control) Act 2009* from 2 years to 4 years. Consequently, the date by which the Ombudsman is to prepare a report of the Ombudsman's work and activities connected with it is also extended to 4 years.

Schedule 11 Amendment of Criminal Appeal Act 1912 No 16

Schedule 11 is related to the amendments to the *Criminal Procedure Act 1986* described at **Schedule 12.1** below. **Schedule 11 [1]** provides for an appeal to the Court of Criminal Appeal by a protected confider who is not a party to proceedings in which there is a decision to grant leave to produce a document or adduce evidence that contains a protected confidence that relates to the protected confider. An appeal is also granted to a person who, because of the leave, is required to produce a document or adduce evidence that contains a protected confidence. Finally, if a court determines that a document or evidence does not contain a protected confidence, a person may appeal if the person claims the document or evidence does, despite the determination, contain a protected confidence in relation to which the person is a protected confider. Any such appeal is permitted only if the Court of Criminal Appeal gives leave to appeal or if the judge or magistrate of the court of trial certifies that the decision is a proper one for determination on appeal.

Schedule 11 [2] provides for transitional matters.

Schedule 12 Amendment of Criminal Procedure Act 1986 No 209

Amendments relating to evidence in sexual offence matters

Schedule 12.1 [1] extends the special arrangements set out in Division 1 (Evidence in certain sexual offence proceedings) of Part 5 of Chapter 6 of the *Criminal Procedure Act 1986* to a witness (other than the complainant) in criminal proceedings who is alleged to have been the victim of acts of the accused person that would constitute a prescribed sexual offence were those acts to occur in New South Wales at the time of the proceedings. **Schedule 12.1 [2]** makes a consequential amendment.

Schedule 12.1 [3] clarifies that a reference to criminal proceedings in Division 2 (Sexual assault communications privilege) of Part 5 of Chapter 6 of the *Criminal Procedure Act 1986* includes pre-trial and interlocutory proceedings.

Schedule 12.1 [4] extends the definition of **sexual assault offence** for the purposes of that Division to include acts that would constitute a prescribed sexual offence if those acts had occurred in this State, had occurred at some later date or had both occurred in this State and occurred at some later date.

Schedule 12.1 [5] rearranges some matter that was formerly in sections 297–299, 303 and 304 of the *Criminal Procedure Act 1986* that related to the admissibility of protected confidences and adds some additional requirements to those provisions. These new requirements now mean that a document or evidence containing a protected confidence (a communication made during counselling by, to or about a victim of a sexual offence) can only be produced or adduced into evidence in relation to criminal proceedings with the leave of the court. Protected confidences continue to be inadmissible in relation to preliminary criminal proceedings (committal and bail proceedings).

A court must satisfy itself that a witness, party or protected confider (the victim or other person who made the protected confidence), who may have grounds for making an application for leave or objecting to the production of a document or the adducing of evidence, is aware of the relevant provisions of Division 2 of Part 5 of Chapter 6 of the *Criminal Procedure Act 1986* and has been given a reasonable opportunity to

seek legal advice. This extends a similar requirement that currently applies only in respect of witnesses and parties. A protected confider who is not a party may appear in criminal proceedings or preliminary criminal proceedings if a document is sought to be produced or evidence is sought to be adduced that may disclose a protected confidence made by, to or about the protected confider. If a question arises relating to a document or evidence, a court may order the document or evidence to be produced or adduced to it for inspection or consideration. This is to be done in the absence of any jury. The document or evidence can be disclosed to a party other than the protected confider only if it does not contain a protected confidence or the court has given leave and the disclosure is consistent with that leave.

An applicant for leave is required to give notice of the application to each relevant protected confider (or the protected confider's nominee) as soon as is reasonably practicable. If the protected confider is not a party to the proceedings the notice can instead be given to the prosecutor (or if the regulations prescribe another person or body, to that other person or body). The prosecutor or prescribed person or body must give a copy to the protected confider within a reasonable time after its receipt. A court cannot grant leave until at least 14 days after all necessary notices have been given. The court can fix a shorter period. The court can also waive a requirement to give notice in exceptional circumstances, if the principal protected confider consents or if notice has already been given in the proceedings in relation to the protected confidence.

A court when determining whether to grant leave is now required to take a number of factors into account including that the effectiveness of counselling is likely to be dependent on the maintenance of the confidentiality of the counselling relationship and that the adducing of the evidence is likely to infringe a reasonable expectation of privacy. The court is also able to permit a confidential statement to be made to it by or on behalf of the principal protected confider (the victim) by affidavit specifying the harm the confider is likely to suffer if the application for leave is granted. The court must not disclose a confidential statement to a party other than the victim.

Schedule 12.1 [6] and [7] make consequential amendments.

Schedule 12.1 [8] permits regulations to be made dealing with the giving of subpoenas in criminal proceedings or preliminary criminal proceedings that involve a prescribed sexual offence.

Schedule 12.1 [9] provides for transitional matters.

Miscellaneous amendments

Schedule 12.2 [1] allows certain aspects of committal proceedings to be conducted in the absence of the public, but only for the purpose of facilitating the use of an electronic case management system in those proceedings under the *Electronic Transactions Act 2000*. The hearing of a matter may be conducted in the absence of the public, with the consent of the parties to the proceedings concerned, if the matter:

- (a) arises after the first appearance of the accused person in committal proceedings, and
- (b) is of a procedural nature, and
- (c) does not require the resolution of a disputed issue, and
- (d) does not involve a person giving oral evidence.

Schedule 12.2 [2] substitutes the existing provision of the *Criminal Procedure Act 1986* relating to trial by judge alone in criminal proceedings in the Supreme Court and the District Court. Currently, an accused person may elect to have a trial by judge alone, with the consent of the Director of Public Prosecutions, and the election must be accepted by the court if it is satisfied that the accused person obtained legal advice in relation to the election. Under the new section 132, both the accused person and the prosecutor may apply to the court for an order that the accused person be tried by judge alone. The order must be made if both agree but cannot be made if the accused person does not agree. If the prosecutor does not agree, the court may make an order if it considers it to be in the interests of justice to do so. The court must not make an order unless it is satisfied that the accused person has obtained legal advice about the effect of the order. Despite all of those provisions, the court may make an order if there is a substantial risk of jury tampering offences occurring and there is no other way of reasonably mitigating that risk. New section 132A provides for the time within which applications for orders must be made and applications in joint trials.

Schedule 12.2 [3] makes the indictable offence of entering with intent to commit a serious indictable offence of stealing, maliciously destroying or damaging property, the value of which does not exceed \$60,000 (as opposed to the current value limit of such property at \$15,000) capable of being tried summarily.

Schedule 12.2 [4] and [5] provide for savings and transitional matters.

Schedule 13 Amendment of Graffiti Control legislation

Schedule 13.1 incorporates the definition of *fine* from the *Fines Act 1996* into the *Graffiti Control Act 2008*. This ensures that an order requiring an offender to perform community clean up work can be made in respect of the full amount of any penalty, costs or amount imposed in respect of a graffiti offence that would be recoverable as a fine under the *Fines Act 1996*. **Schedule 13.2** repeals clause 12 of the *Graffiti Control Regulation 2009*, which is made redundant by the proposed amendment to the *Graffiti Control Act 2008*.

Schedule 14 Amendment of Industrial Relations Act 1996 No 17

Schedule 14 [1] provides that a Commissioner (who is an Australian lawyer) may exercise any function of the Commission in Court Session (that is, the Industrial Court) in respect of small claims proceedings dealt with under section 548 of the *Fair Work Act 2009* of the Commonwealth (*small claims proceedings*). A party to the small claims proceedings may apply to the Commission in Court Session to review, confirm, vary or discharge, or take such other action as the Commission in Court Session thinks fit in respect of, an order made by the Commissioner in such proceedings. The amendment is made in connection with a proposal to amend the *Fair Work Act 2009* of the Commonwealth to confer power on the Industrial Court to hear small claims proceedings.

Schedule 14 [2] makes it clear that a Commissioner who is an Australian lawyer and who is empowered to hear a small claims application under the *Industrial Relations Act 1996* constitutes the Industrial Relations Commission for the purposes of that hearing. Recent amendments to the *Industrial Relations Act 1996* permit small claims applications to be dealt with by such a Commissioner.

Schedule 15 Amendment of Local Court Act 2007 No 93

Jurisdictional limit of Local Court

Schedule 15 [2] increases the jurisdictional limit of the Local Court sitting in its General Division to \$100,000 from the previous \$60,000 limit. However, in relation to a claim for damages arising from personal injury or death, the Local Court's jurisdictional limit remains at \$60,000. **Schedule 15 [7]** includes a transitional provision to ensure that changes to the jurisdictional limit of the Local Court will not affect proceedings instituted in the Local Court prior to the commencement of the amendment.

Extended leave for Magistrates

Schedule 15 [5] confers power on the Minister to make determinations with respect to the extended leave entitlements of Magistrates appointed before 20 September 2002. At present, Magistrates appointed before that date have an entitlement to accrue extended leave on the basis of section 25 (1) of the *Local Courts Act 1982*, as in force before its repeal. For those Magistrates, service in the public sector is treated as equivalent to service as a Magistrate for the purposes of accrual of extended leave. The new provision will give the Minister power to offer Magistrates with pre-2002 extended leave entitlements the opportunity to “cash out” their existing extended leave entitlements (by electing to be paid a gratuity) and then to accrue leave under an alternative extended leave scheme. Under the alternative extended leave scheme, prior service in the public sector, or as a Magistrate, before the date of election can be disregarded.

Schedule 15 [7] includes a transitional provision to validate a determination made by the Minister in 2005 that would have been validly made if the above amendment had been in force. It also allows the Minister to make arrangements under which Magistrates or former Magistrates who did elect to be paid a gratuity under the 2005 determination can opt to repay the gratuity, and have their pre-2002 extended leave entitlements reinstated.

Schedule 15 [1], [3] and [4] are consequential amendments.

Other amendments

Schedule 15 [6] enables savings and transitional regulations to be made as a consequence of the proposed amendments.

Schedule 16 Amendment of Mining Act 1992 No 29

Schedule 16 [1] gives the Land and Environment Court jurisdiction to determine whether land contains a significant improvement for the purposes of the *Mining Act 1992*. If land contains a significant improvement, the grant of a mining lease over the land is not permitted, except with the written consent of the owner of the improvement. Under the current provisions, a landholder of land may lodge a claim with the Director-General of the Department of Industry and Investment that something is a significant improvement on land. That claim is conclusive, unless an applicant for a mining lease objects to the claim and, on inquiry into the objection by a person appointed by the Director-General, the thing is found not to be a significant improvement. The amendments give the Land and Environment Court the jurisdiction to make all determinations relating to the issue of the existence of any significant improvement on land. Accordingly,

Schedule 16 [4] removes the current inquiry provisions for the determination of such disputes. Additionally, as the Land and Environment Court will now make determinations regarding any claim that there is a significant improvement on land, **Schedule 16 [3]** provides that an applicant for a mining lease must be notified by the Director-General that there is a claim regarding a significant improvement to the land. These amendments replace the current requirement for an objection to be lodged with the Director-General.

Schedule 16 [2] makes a consequential amendment. **Schedule 16 [5] and [6]** provide for transitional matters.

Schedule 17 Amendment of Supreme Court Act 1970 No 52

Schedule 17 enables rules to be made under the *Supreme Court Act 1970* and the *Civil Procedure Act 2005* for or with respect to the referral by the Supreme Court of a question as to the principles of a law of a country other than Australia or their application to a court of a country other than Australia (a **foreign court**). Conversely, rules may also be made in relation to the provision by the Supreme Court to a foreign court of information, advice or assistance on a question as to the principles of Australian law or their application.

Schedule 18 Amendment of Victims Support and Rehabilitation Act 1996 No 115

Schedule 18 amends the *Victims Support and Rehabilitation Act 1996*:

- (a) to ensure that acts of violence committed against a primary victim over a period of time by the same perpetrator or perpetrators are generally treated as being part of the same act of violence for the purposes of determining applications for the award of statutory compensation under that Act, and
- (b) to confer a discretion on a compensation assessor or the Victims Compensation Tribunal to treat acts that would otherwise be regarded as being part of the same act of violence, including acts committed against a primary victim over a period of time by the same perpetrator or perpetrators, as not being part of the same act of violence, and
- (c) to extend the scheme for statutory compensation for prescribed expenses, which currently covers particular kinds of actual expenses that a primary victim incurs as a direct result of an act of violence, to cover all such actual expenses, and
- (d) to ensure that, if a secondary or family victim dies, he or she ceases to be eligible for statutory compensation and any pending application for statutory compensation made on his or her behalf does not survive, and
- (e) to streamline the procedures relating to approved counselling services, including by enabling payments to be made for an initial period of counselling to primary and secondary victims of up to 10 hours, rather than 2 hours, and
- (f) to clarify that, if a person's application for statutory compensation has been dismissed, the person cannot apply for and be awarded the same kind of statutory compensation in respect of the same act of violence, and
- (g) to ensure that a primary or secondary victim of an act of violence cannot generally claim statutory compensation in respect of any act of violence that predates an earlier application in respect of another act of violence that has been determined by the awarding of compensation, and
- (h) to make certain procedural changes in relation to statutory compensation for family victims, including by limiting the circumstances in which the Director, Victims Services, Department of Justice and Attorney General may give leave for the acceptance of applications by family victims that are lodged out of time, and
- (i) to provide for the withdrawal and lapsing of applications for statutory compensation, and
- (j) to clarify that the awarding of costs in respect of an application for statutory compensation is discretionary and to prevent an applicant from appealing to the Victims Compensation Tribunal against a determination of a compensation assessor that relates to costs, and
- (k) to facilitate the efficient processing of any matter before the Victims Compensation Tribunal by providing that it is to conduct a hearing into the matter only if satisfied that the matter cannot be properly determined without a hearing, and
- (l) to require any person who is convicted of an offence (whether or not punishable by imprisonment) to pay a victims compensation levy.

Acts of violence

Schedule 18 [2] makes the amendments to section 5 of the *Victims Support and Rehabilitation Act 1996* (the **VSR Act**) described in paragraphs (a) and (b) above.

Victims Assistance Scheme

Schedule 18 [4] and [5] amend section 14A of the VSR Act to rename the existing scheme of statutory compensation for prescribed expenses as **Victims Assistance** (in line with the term used in practice) and to extend that scheme to all actual expenses, rather than particular actual expenses prescribed by the regulations under the VSR Act, that are incurred by a primary victim as a direct result of an act of violence.

Schedule 18 [3], [6], [7], [9]–[12], [15], [29], [34], [38], [43] and [44] make consequential amendments.

Schedule 18 [8] re-enacts the existing section 14A (4) and also extends it to enable the regulations under the VSR Act to make provision for or with respect to the particular kinds of actual expenses for which a person may or may not be compensated by way of Victims Assistance.

Applications of deceased victims

Sections 14 (2) and 14A (8) of the VSR Act currently provide that a primary victim who dies ceases to be eligible for statutory compensation and any pending applications for statutory compensation made on his or her behalf do not survive.

Schedule 18 [13] and [14] amend sections 15 and 16, respectively, to make similar provision in relation to the death of a secondary or family victim.

Approved counselling scheme

Section 21 of the VSR Act currently provides for payments for approved counselling services to be made with the approval of a compensation assessor or, in the case of a period of counselling exceeding 20 hours, the Director, Victims Services, Department of Justice and Attorney General (the **Director**). The section also provides for payment of approved counselling services to primary and secondary victims for an initial period of two hours.

Schedule 18 [16] and [17] amend section 21 to confer the function of authorising any payments for approved counselling services on the Director.

Schedule 18 [21] makes an amendment that is related to those amendments. In particular, it amends section 21 to make provision in relation to the review of decisions of the Director, including decisions made by delegates of the Director.

Schedule 18 [16] also amends section 21 as follows:

- (a) to enable the Director to authorise payments for an initial period of up to ten hours, rather than two hours, of counselling to primary and secondary victims,
- (b) to ensure that the Director may not authorise payments for more than 22 hours unless satisfied that there are exceptional reasons for doing so.

Schedule 18 [18]–[20] make consequential amendments.

Eligibility to receive statutory compensation in respect of same act of violence

Section 23 (1) of the VSR Act currently provides that a person is not eligible to receive more than one award of statutory compensation in respect of the same act of violence. **Schedule 18 [24]** amends section 23, by inserting a new subsection (1A), to clarify that a person whose application for statutory compensation has been dismissed cannot, after making a further application, be awarded statutory compensation in respect of the same act of violence and in the same capacity of primary, secondary or family victim.

Schedule 18 [24] also inserts proposed section 23 (1B) as a consequence of the new section 23 (1A). **Schedule 18 [23]** makes a further consequential amendment.

Claims may not be made for acts of violence occurring before successful claim lodged

Schedule 18 [25] inserts proposed section 23A into the VSR Act. Under proposed section 23A (1), a primary or secondary victim is generally not entitled to claim statutory compensation in respect of an act of violence (the **uncompensated act of violence**) if:

- (a) the victim has been awarded statutory compensation in respect of another act of violence, and
- (b) the uncompensated act of violence occurred before the person lodged the application in respect of the other act of violence.

The uncompensated act of violence may or may not have occurred before the other act of violence in respect of which the award has been made.

Proposed section 23A (2) provides for two exceptions to proposed section 23A (1).

The first is to deal with cases in which the victim has been prevented from making an application for statutory compensation as a secondary victim because of section 22 (2) of the VSR Act. Section 22 (2) provides that a secondary victim is not entitled to claim statutory compensation before one year has elapsed since the act of violence concerned, unless certain procedural requirements are complied with. The second exception is that the Victims Compensation Tribunal (the **VCT**) or a compensation assessor is satisfied that the case involves exceptional circumstances.

Procedural changes applying to family victims

Section 26 of the VSR Act currently provides that any application for statutory compensation by a family victim must be duly lodged within 2 years after the death of the primary victim. The section further provides that the Director may give leave for the acceptance of an application lodged out of time.

Schedule 18 [26] amends section 26 to limit the circumstances in which the Director may give leave for the acceptance of an application of a family victim.

Section 29 (1A) of the VSR Act provides that a family victim may be awarded compensation whenever the compensation assessor who is determining the claim is satisfied that there are no other family victims who are likely to apply for compensation. Section 29 (1B) currently provides that the assessor may assume this is the case if 3 months has elapsed since the original application was made and no other family victim has come forward. **Schedule 18 [28]** omits section 29 (1B).

Withdrawal and lapsing of applications

Schedule 18 [27] inserts proposed sections 26A and 26B into the VSR Act, which provide for the withdrawal and lapsing, respectively, of applications for statutory compensation.

Costs

Section 35 (1) of the VSR Act currently provides that an applicant for statutory compensation is entitled to be paid his or her costs in respect of the application in accordance with the scale of costs prescribed by the rules. This entitlement is subject to section 35 (3), which enables the VCT or a compensation assessor to award an applicant more or less than is provided for in the scale of costs or to decline to make any award of costs.

Schedule 18 [30] amends section 35 to clarify that the awarding of costs is discretionary. The maximum amounts of costs are to be provided by the rules. This is reflected in proposed section 35 (3) and (3A) (inserted by **Schedule 18 [31]**), which otherwise re-enacts the existing section 35 (3).

Schedule 18 [32] makes a consequential amendment.

Schedule 18 [33] inserts a clarifying note to section 35 (8).

Schedule 18 [34] re-enacts section 36 (1A) of the VSR Act and also extends it to provide that an applicant for statutory compensation may not appeal against a determination of a compensation assessor in relation to costs.

Appeals and references to the Victims Compensation Tribunal

Section 38 (2) of the VSR Act currently provides that, if the VCT is satisfied that a matter that has been appealed or referred to it can be properly determined without a hearing, it is to proceed to determine the matter accordingly.

Schedule 18 [36] amends section 38 to ensure that the VCT conducts a hearing into such a matter only if it is satisfied that it cannot be properly determined without a hearing. **Schedule 18 [35]** makes a consequential amendment.

Compensation levies

Part 5 of the VSR Act currently makes a person liable to pay a victims compensation levy if the person is convicted by the Supreme Court, the District Court, the Drug Court, the Local Court or the Children's Court of an offence that is punishable by imprisonment. All such levies are paid into the Victims Compensation Fund, established under the VSR Act, from which payments for statutory compensation, costs and approved counselling and other payments incurred in the administration of the VSR Act are made.

Schedule 18 [40] amends section 78 of the VSR Act to expand the relevant offences to which Part 5 applies to all offences (whether or not punishable by imprisonment), as well as offences dealt with by the Land and Environment Court and the Industrial Relations Commission in Court Session. **Schedule 18 [1]** makes a consequential amendment.

Other amendments

Schedule 18 [22], [37] and [38] make statute law revision amendments.

Schedule 18 [39] makes a consequential amendment.

Schedule 18 [41] and [42] are savings and transitional provisions.

Schedule 19 Amendment of Victims Rights Act 1996 No 114

Schedule 19 amends the *Victims Rights Act 1996*:

- (a) to amend the provisions in the Charter of Victims Rights (the **Charter**) to express them as matters that will be, rather than should be, afforded to victims of crime, and
- (b) to amend the Charter to provide that a victim may make a complaint about a breach of the Charter and will, on request, be provided with information on the procedure for making a complaint, and
- (c) to extend the application of the Charter to the provision of services to victims of crime by non-government agencies or persons funded by the State to provide those services, and
- (d) to provide for the publication of codes, guidelines and other practical guidance on the implementation of the Charter, and
- (e) to increase the number of members of the Victims Advisory Board that represent the general community from 4 to 6 members, and
- (f) to update the references to the Victims of Crime Bureau to refer to VictimsServices, which is the branch of the Department of Justice and Attorney General that carries out functions of the Bureau.