



New South Wales

Justice Legislation Amendment (Committals and Guilty Pleas) Bill 2017

Explanatory note

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

This Bill is cognate with the *Crimes (Sentencing Procedure) Amendment (Sentencing Options) Bill 2017*.

Overview of Bill

The objects of this Bill are to amend the *Criminal Procedure Act 1986*, the *Children (Criminal Proceedings) Act 1987*, the *Crimes (Sentencing Procedure) Act 1999* and other Acts as follows:

- (a) to replace the current procedure for committal proceedings for offences committed by adults or serious children's indictable offences, where a Magistrate conducts an inquiry into the evidence against an offender, with a new procedure overseen by a Magistrate that requires the prosecutor to disclose a brief of evidence to the accused person and to certify the charges to be proceeded with. The new committal proceedings will also provide for a formal conferencing procedure to enable opportunities for appropriate early guilty pleas to be considered during committal proceedings,
- (b) to provide for specified sentencing discounts for the utilitarian value of guilty pleas to indictable offences,
- (c) to make provision for committal proceedings in the Children's Court for indictable offences (other than serious children's indictable offences) so as to generally retain existing committal procedures,
- (d) to make other minor and consequential amendments and to provide for savings and transitional matters consequent on the enactment of the Bill.

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.

Schedule 1 Amendment of Criminal Procedure Act 1986 No 209

Schedule 1 [1] inserts definitions of *case conference*, *case conference certificate*, *case conference material*, *charge certificate* and *plea offer*.

Schedule 1 [2] revises the definition of *committal proceedings* to reflect the changes to proceedings made by the proposed Act.

Schedule 1 [3] replaces the current system for committal proceedings for indictable offences, which involves an inquiry by a Magistrate into the evidence against the accused person, with new procedures where the role of the Magistrate is to commit the accused person for committal for trial or sentence (depending on the plea by the accused person) and to oversee the steps required to be taken before committal. Before the committal takes place, steps to disclose the case against the accused person, to certify which offences are actually being proceeded with and to require the prosecutor and the accused person's legal representative to formally confer about the case, and plea intentions and offers, must be taken. The new provisions are in proposed Divisions 2–9 of Part 2 of Chapter 3 to be inserted into the *Criminal Procedure Act 1986* and which contain the following provisions:

Division 2 Committal proceedings generally

The proposed Division sets out the steps for committal proceedings and provides that committal proceedings are to be conducted by a Magistrate and are to be heard as if in open court (subject to specified exceptions that currently apply and are not being changed). Procedural provisions applying generally to criminal proceedings and relating to venue changes, representation and appearance, hearing procedures and other matters are applied to committal proceedings. The Magistrate will be required to explain the committal process and the effect of the sentencing discount scheme for guilty pleas to the accused person, verbally and by providing a written explanation. The proposed Division also makes it clear that an accused person may be dealt with under the *Drug Court Act 1998* at any stage of proceedings despite any requirement for committal proceedings.

Division 3 Disclosure of evidence

The proposed Division requires the prosecutor to serve a brief of evidence on the accused person after the committal proceedings commence and before any day specified by order by the Magistrate. The brief must contain all material that forms the basis of the prosecution case and copies of other material that is reasonably capable of being relevant to the case for the accused person and would affect the strength of the prosecution's case. The material is not required to be in admissible form or in any particular form. Copies of additional material that is later obtained by the prosecutor and is of a kind that would have been required to be included in the brief of evidence must also be served on the accused person. If a thing cannot be copied, the accused person must be allowed a reasonable opportunity to inspect the thing.

Division 4 Charge certificates

The proposed Division requires the prosecutor to file a charge certificate before a day set by the Magistrate and to serve the certificate on the accused person. The day set is to be after the brief of evidence is served by the prosecutor and not later than 6 months after the first return date for the committal proceedings or a later date set by the Magistrate. The charge certificate is to relate to the offences specified in the court attendance notice for the proceedings and to set out the offences that are being proceeded with, any offences that are no longer being proceeded with as well as

details of each of the offences that are to be proceeded with, any proposed summary back up or related offences and any other matters prescribed by the regulations. The certificate must set out details of the indictable offences in a way that is sufficient for an indictment or an averment in an indictment. The prosecutor must certify in the certificate that the available evidence is capable of establishing each element of the offences being proceeded with. A failure to file a charge certificate not later than 6 months after the first return date for the committal proceedings or any later date set may result in the discharge of the accused person by the Magistrate as to the offences the subject of the proceedings. The period of 6 months for filing a charge certificate may be extended with the consent of the accused person or if the Magistrate considers that it is in the interests of justice to do so. The prosecutor must file an amended charge certificate if the offences being proceeded with change during the proceedings. The functions of the prosecutor under the proposed Division and the Division relating to case conferences may only be exercised by the Director of Public Prosecutions, the Attorney General, an equivalent Commonwealth office holder, a special prosecutor appointed under Commonwealth law, a person authorised under Commonwealth law or an arrangement with one of those Commonwealth office holders or the legal representative of any of those persons.

Division 5 Case conferences

The proposed Division requires a case conference to be held between the prosecutor and the legal representative of an accused person after the filing of the charge certificate. The requirement does not apply if prior guilty pleas to each offence being proceeded with have been accepted or if the accused does not have legal representation. A case conference is also not required if an accused person raises the issue of fitness to be tried and is committed for trial under proposed Division 7. A case conference is to be held in person or by audio visual link but may also be held by telephone in exceptional circumstances. The prosecutor and the legal representative must complete and sign a case conference certificate that is to be filed by the prosecutor not later than the day set by the Magistrate. The case conference certificate is to be filed after all case conferences have been held. The legal representative of the accused person must explain the effect of the sentencing discount scheme for guilty pleas and seek to obtain instructions before the case conference. The case conference certificate is to certify the offences for which the prosecution will seek committal of the accused, information about offers to or by the accused to plead guilty, details of agreed facts or disputed facts where an offer to plead guilty has been accepted and other matters. A failure to participate in a case conference may result in the discharge of the accused person (in the case of a failure by the prosecutor to participate in a case conference or complete a case conference certificate) or committal without a case conference (in the case of any such failure by the legal representative of the accused person). Any further plea offers are to be filed and are considered to be part of the case conference certificate. A case conference certificate, or evidence of case conference or plea negotiations, will only be admissible in relevant sentencing proceedings, certain appeals and disciplinary hearings against lawyers. Matters specified in a case conference certificate are to be treated as confidential. It will be an offence to publish or permit a person to publish any case conference material (which includes the case conference certificate and evidence of things done during a case conference or for the purposes of plea negotiations).

Division 6 Examination of prosecution witnesses

The proposed Division enables the Magistrate, on the application of the prosecutor or the accused person, to direct a witness referred to in the brief of evidence (that is, a prosecution witness) to attend to give evidence at any time after a charge certificate has been filed. An application to which the other party consents must be granted but in any other case the Magistrate must be satisfied that there are substantial reasons why, in the interests of justice, the witness should attend to give oral evidence. Evidence is to be given orally but may be given by a written statement if the parties consent or the Magistrate is satisfied that it is in the interests of justice to allow the evidence to be so given. The witness may also be examined by the prosecutor and cross-examined by the accused person or the accused person's legal representative. A written statement must comply with the requirements for statements under the proposed Division and proposed Part 3A of Chapter 6 of the *Criminal Procedure Act 1986* (as inserted by **Schedule 1 [10]**). Statements in other forms may also be tendered if permitted under that proposed Division and Part (which

re-enact existing provisions permitting this). The proposed Division re-enacts some current provisions relating to witnesses' evidence and attendance at committal proceedings, including provisions relating to the attendance of victims of sexual and other offences and victim witnesses, offences relating to false information in statements and other matters relating to the requirements for and the admissibility of written and other statements.

Division 7 Committal for trial where unfitness to be tried raised

The proposed Division enables the Magistrate to commit an accused person for trial if the question of the accused person's unfitness to be tried is raised by the accused person (or his or her legal representative) or the prosecutor, and the Magistrate is satisfied that the question is raised in good faith, or raised by the Magistrate.

The Magistrate may require a psychiatric or other report on the accused person to be supplied by the accused person or the prosecutor in any case. The question of fitness to be tried may be raised at any time and the accused person may be committed for trial under the proposed Division at any time after the charge certificate is filed and before a case conference is held or after a case conference certificate is filed.

Division 8 Committal for trial or sentence

The proposed Division requires the Magistrate to commit the accused person for trial or sentence after a case conference certificate is filed, or if a case conference is not required to be held, after the charge certificate is filed. An accused person must be committed for trial unless the accused person pleads guilty to the offence and that plea is accepted by the Magistrate. An accused person may plead guilty to an offence and is to be committed for sentence at that time if the plea is accepted by the Magistrate. A plea cannot be accepted without the consent of the prosecutor if the charge certificate has not been filed. A plea cannot be accepted before a case conference certificate has been filed if a case conference has been held. An accused person who is not legally represented at committal proceedings must not be committed for sentence or trial unless the Magistrate is satisfied that the person has had a reasonable opportunity to obtain legal representation for, or legal advice about, the committal proceedings. If a guilty plea is accepted, the Attorney General or the Director of Public Prosecutions may, at their discretion, direct that no further proceedings be taken for the offence concerned.

Division 9 Procedure on committal

The proposed Division re-enacts sections 103–106 and 108 of the *Criminal Procedure Act 1986*.

Schedule 1 [4] and [6] re-number Division headings as a consequence of the amendment made by **Schedule 1 [3]**.

Schedule 1 [5] updates a provision that entitles an accused person to 1 copy of the transcript of any evidence taken in committal proceedings to reflect the changes made by the proposed Act to the taking of evidence in the proceedings.

Schedule 1 [7] makes an amendment consequential on the amendment made by **Schedule 1 [3]**.

Schedule 1 [8] changes the cut off point for withdrawing an election to have an offence dealt with on indictment so that the election is required to be made before the person is committed for trial, if the person has pleaded not guilty to the offence.

Schedule 1 [10] inserts proposed Part 3A of Chapter 6 of the *Criminal Procedure Act 1986*. The proposed Part contains a power to make regulations setting out requirements for written or recorded statements for use as evidence in committal proceedings. The proposed Part also re-enacts other provisions applying to such statements, including provisions setting out the circumstances when recorded statements and certain transcripts may be used instead of written statements, the form of statements and the use of statements on the death of a person who made the statement. **Schedule 1 [9]** makes a consequential amendment.

Schedule 1 [11] applies provisions relating to the use of statements as evidence, in the case of death, illness or absence from Australia, to statements tendered in committal proceedings conducted by the Children's Court.

Schedule 1 [12] requires the proposed offences relating to false or misleading witnesses' statements (inserted by **Schedule 1 [3]** and **Schedule 3.1 [6]**) to be dealt with summarily, unless the prosecutor or the person charged with the offence elects to have the offence dealt with on indictment.

Schedule 1 [13] inserts savings and transitional provisions consequent on the enactment of the proposed Act.

Schedule 2 Amendment of Crimes (Sentencing Procedure) Act 1999 No 92

Schedule 2 [1] and [2] include the provisions establishing the new sentencing discount (as inserted by **Schedule 2 [4]**) for the utilitarian value of guilty pleas to offences dealt with on indictment in the factors to be considered in sentencing.

Schedule 2 [3] excludes a consideration of the effect of the utilitarian value of pleading guilty, in relation to offences dealt with under the new sentencing discount provisions (as inserted by **Schedule 2 [4]**), from the general provision that requires a court to take a guilty plea into account. The new provisions provide a specified sentence discount for that value.

Schedule 2 [4] inserts proposed Division 1A of Part 3 into the *Crimes (Sentencing Procedure) Act 1999*. The proposed Division requires a court sentencing a person for an offence that has been dealt with on indictment to apply a sentencing discount for the utilitarian value of a guilty plea of 25% (if the plea was accepted before committal), 10% (if the offender was committed for trial and pleaded guilty at least 14 days before the first day of the trial or if the offender accepted an offer, or offered, to plead guilty at least 14 days before the first day of the trial and pleaded guilty at the first available opportunity) or 5% (in any other case).

In the case of an ex officio indictment or if a count for a new offence is added to an indictment, the sentencing discount for the new offence will be 25% (if an offer to plead guilty was made as soon as practicable after the indictment was filed or amended and recorded in a negotiations document), 10% (in other circumstances, if the guilty plea was made at least 14 days before the first day of the trial or if the offender accepted an offer, or offered, to plead guilty at least 14 days before the first day of the trial and pleaded guilty at the first available opportunity) or 5% (in any other case). The discount of 25% will not apply in a case of an ex officio or amended indictment if the elements of the new offence are substantially the same as the elements of the offence contained in the original indictment and the penalty is the same as or less than the penalty for the offence the subject of the original indictment, or if the accused person had previously rejected an offer to plead guilty to the offence the subject of the later indictment.

A sentencing discount will also be applied in the following cases:

- (a) if an offender has been found fit for trial after being committed for trial, the matter has not been remitted to a Magistrate for continued committal proceedings and the offender pleads guilty. The discount will be 25% (if the offender pleaded guilty as soon as practicable after the offender was found fit to be tried), 10% (if the guilty plea was made at least 14 days before the first day of the trial or if the offender accepted an offer, or offered, to plead guilty at least 14 days before the first day of the trial and pleaded guilty at the first available opportunity) or 5% (in any other case),
- (b) if an offender made an offer in a case conference certificate or other prior negotiations document to plead guilty to a different offence than the offence the subject of proceedings when the offer was made, the offer was initially rejected and never accepted and the offender was subsequently found guilty of the different offence or a reasonably equivalent offence. The discount will be 25% (if the offer was made before committal), 10% (if the

offer was made after committal and at least 14 days before the first day of the trial) or 5% (if the offer was made less than 14 days before or on or after the first day of the trial),

- (c) if an offender makes an offer, recorded in a case conference certificate or other negotiation document, to plead guilty to a different offence than the offence the subject of proceedings when the offer was made, the offer is rejected but later accepted by the prosecutor after the offender is committed for trial and the offender pleaded guilty to the different offence at the first available opportunity. The discount will be 25% (if the offer was made before committal), 10% (if the offer was made after committal and at least 14 days before the first day of the trial) or 5% (if the offer was made less than 14 days before or on or after the first day of the trial).

For the purpose of determining which discount will apply, the first day of the trial is the first day set for the trial that is not vacated.

The proposed Division enables a court not to apply, or to reduce, the sentencing discount for a guilty plea to an offence that is dealt with on indictment in the following circumstances:

- (a) if the court determines, on its own motion or on the application of the prosecution, that it should not apply or should be reduced because the level of culpability in the commission of the offence is so extreme that the community interest in retribution, punishment, community protection and deterrence can only be met by doing so. If a case conference certificate has been filed in any applicable committal proceedings, the prosecutor may only make the application if the certificate records that the prosecutor notified the offender's legal representative of the intention to make such an application,
- (b) if the court determines that it should not apply or should be reduced because the utilitarian value of the guilty plea has been eroded by a dispute as to facts raised by the accused person at the sentencing hearing and that was not determined in favour of the accused person.

The court must record whether and how the sentencing discount was applied. There is to be no sentencing discount for a guilty plea in the case of a sentence of life imprisonment. The sentencing discount scheme does not apply to Commonwealth offences or to offences committed by persons under the age of 18 years if they were under 21 years when the relevant proceedings commenced.

Schedule 2 [5] inserts savings and transitional provisions consequent on the enactment of the proposed Act.

Schedule 3 Amendment of other Acts

Schedule 3.1 Children (Criminal Proceedings) Act 1987 No 55

Schedule 3.1 [1] applies the new committal proceedings provisions inserted by **Schedule 1 [3]** into the *Criminal Procedure Act 1986* to serious children's indictable offences.

Schedule 3.1 [2] applies the committal proceedings provisions inserted by **Schedule 3.1 [6]** to proceedings in the Children's Court where a person requests to have an offence (other than a serious children's offence) dealt with on indictment. Generally, any such offence before the Children's Court is dealt with summarily unless the defendant requests to have the offence treated as an indictable offence or the Court decides (after the prosecution evidence is given) that the matter should be dealt with as an indictable offence.

Schedule 3.1 [3] continues proceedings where a request is made to have a matter dealt with on indictment as summary proceedings until all prosecution evidence is completed. The Children's Court will be required to discharge a person who makes an election if the Court is not of the opinion that, having regard to all the evidence before the Court, the evidence is capable of satisfying a reasonable jury, properly instructed, beyond reasonable doubt that the person has committed an indictable offence.

Schedule 3.1 [4] applies the committal proceedings provisions inserted by **Schedule 3.1 [6]** to proceedings for an indictable offence (other than a serious children's indictable offence) in the Children's Court where the Court is of the opinion, after all the prosecution evidence is taken, that

the evidence is capable of satisfying a jury beyond reasonable doubt that the person has committed an indictable offence and that the charge may not properly be disposed of in a summary manner.

Schedule 3.1 [5] applies the part of the relevant committal proceedings provisions dealing with procedures following a guilty plea inserted by **Schedule 3.1 [6]** to proceedings for an indictable offence (other than a serious children's indictable offence) in the Children's Court where the person pleads guilty to the offence and the Children's Court is of the opinion that the charge may not be properly disposed of in a summary manner.

Schedule 3.1 [6] inserts proposed Division 3A of Part 3 of the *Children (Criminal Proceedings) Act 1987*. The proposed Division sets out the procedures for committal proceedings for an indictable offence (other than a serious children's indictable offence) following the completion of prosecution evidence (which is dealt with in the same manner as for summary proceedings). The Magistrate must give the accused person a warning (in the form prescribed by the regulations) before giving the accused person an opportunity to give evidence. The accused person is to be given an opportunity to give evidence and to call witnesses, as well as an opportunity to examine and cross-examine witnesses. After all the evidence is taken, the Children's Court is to determine whether or not in its opinion, having regard to all the evidence before the Court, there is a reasonable prospect that a reasonable jury would convict the accused person of an indictable offence. For the purpose of making its determination, the Court may consider additional prosecution evidence in the form of written or recorded statements that were included in a brief of evidence prepared for the summary part of the trial or that are in appropriate form for use in committal proceedings under the *Criminal Procedure Act 1986*. The statements must comply with the same requirements that apply to statements tendered in committal proceedings (as inserted by **Schedule 1 [10]**). The accused person must be committed for trial if the Court is of the opinion that a reasonable jury would convict the accused person of an indictable offence. If not of that opinion, the Court must immediately order the accused person to be discharged in relation to the offence. An accused person may plead guilty at any time in the committal proceedings and the Court may accept or reject the guilty plea and commit the person for sentence in the District Court or the Supreme Court if the plea is accepted. An accused person may apply to the Children's Court to have a committal for trial set aside if the person was not present, and was not legally represented, when the person was committed for trial. The procedures for dealing with an accused person after committal that are contained in the *Criminal Procedure Act 1986* are applied to an accused person who is committed for trial or sentence, as are other procedural provisions under that Act. It will be an offence to make a false or misleading statement, or a false or misleading representation, in a statement tendered under the proposed Division. The proposed Division also contains a power to make regulations about statements, explanations and other matters.

Schedule 3.1 [7] inserts savings and transitional provisions consequent on the enactment of the proposed Act.

Schedule 3.2 Children's Court Act 1987 No 53

Schedule 3.2 substitutes the provision containing the rule-making power of the Children's Court to reflect the powers of the Local Court and to specify that the powers extend to practice and procedure in criminal proceedings and any proceedings under any other law under which jurisdiction or any function is conferred on the Children's Court and any incidental matter. Rules may also be made with respect to Children's Registrars and other officers of the Court and the review of orders and decisions of any such persons.

Schedule 3.3 Criminal Appeal Act 1912 No 16

Schedule 3.3 updates a reference to provisions substituted by **Schedule 1 [3]**.

Schedule 3.4 Director of Public Prosecutions Act 1986 No 207

Schedule 3.4 revises the definition of *committal proceedings* to reflect the changes to proceedings made by the proposed Act and also makes a consequential amendment.

Schedule 3.5 Independent Commission Against Corruption Act 1988 No 35

Schedule 3.5 revises a reference to the commencement of committal proceedings to remove a reference to the taking of prosecution evidence, so as to reflect the changes to committal proceedings made by the proposed Act.

Schedule 3.6 Interpretation Act 1987 No 15

Schedule 3.6 revises the definition of *committal proceedings*, which is applied to all legislation by the *Interpretation Act 1987*, subject to a contrary intention, to reflect the changes to proceedings made by the proposed Act.

Schedule 3.7 Mental Health (Forensic Provisions) Act 1990 No 10

Schedule 3.7 [1] enables proceedings for an offence instituted against an accused person to be remitted to a Magistrate for the holding of a case conference, as a continuation of committal proceedings for the offence, if the accused person is found fit to be tried for the offence or is no longer raising the issue of fitness to be tried and was committed for trial before a case conference was held. Proceedings may be remitted on the application of the accused person or on the motion of the court dealing with the matter of the accused person's fitness to be tried. An application may be refused by that court if it is not satisfied that it is in the interests of the accused person to remit the matter.

Schedule 3.7 [2] inserts savings and transitional provisions consequent on the enactment of the proposed Act.

Schedule 3.8 Supreme Court Act 1970 No 52

Schedule 3.8 updates a reference to provisions substituted by **Schedule 1 [3]**.

Schedule 3.9 Victims Rights and Support Act 2013 No 37

Schedule 3.9 updates a reference to provisions substituted by **Schedule 1 [3]**.