

New South Wales

# Crimes Legislation Further Amendment Act 1998 No 149

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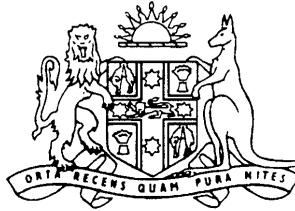
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New South Wales

## **Crimes Legislation Further Amendment Act 1998 No 149**

Act No 149, 1998

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An Act to amend the *Crimes Act 1900* and certain other Acts to make further provision with respect to self-induced intoxication, apprehended violence orders, children, coroners, the Director of Public Prosecutions, conspiracy by a husband and wife, crime prevention, evidence, appeals and procedure; and for other purposes. [Assented to 8 December 1998]

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

**1 Name of Act**

This Act is the *Crimes Legislation Further Amendment Act 1998*.

**2 Commencement**

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

**3 Amendment of Crimes Act 1900 No 40**

The *Crimes Act 1900* is amended as set out in Schedule 1.

**4 Amendment of other Acts**

The Acts specified in Schedule 2 are amended as set out in that Schedule.

**5 Explanatory notes**

The matter appearing under the heading “Explanatory note” does not form part of this Act.

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## Schedule 1 Amendment of Crimes Act 1900

(Section 3)

### [1] Section 428G Intoxication and the actus reus of an offence

Omit “evidence that the intoxication was self-induced” from section 428G (1).

Insert instead “evidence of self-induced intoxication”.

### [2] Section 562A Definitions

Insert in alphabetical order in section 562A (1):

*registrar of a court* means:

- (a) in relation to a Local Court—a Clerk of the Local Court, and
- (b) in relation to the Children’s Court—a Registrar of the Children’s Court, and
- (c) in relation to the District Court—a Registrar of the District Court.

### [3] Section 562BB Interim court orders

Insert after section 562BB (6):

- (7) The registrar of a court that has made an interim order may vary the order by extending the period during which the order is to remain in force. but only if the registrar is satisfied that the complainant and the defendant have consented to the extension.
- (8) Such a variation has effect as if it had been made by the court and section 562GC applies in respect of the registrar accordingly.

**[4] Section 578 Publication of evidence and other matters may be forbidden in certain cases**

Insert “or publication of, or publication of any report or account of, any other matter relating to the trial” after “thereof” in section 578 (1).

**[5] Section 578 (1)**

Insert “or any other matter relating to the trial” after “given in evidence”.

**[6] Section 578B Possession of child pornography**

Insert after section 578B (4):

(4A) However, subsection (4) (b) does not prevent a person being arrested for, or charged with, an alleged offence against this section before the film, publication or computer game concerned has been classified.

**[7] Section 580D**

Insert after section 580C:

**580D Abolition of rule that husband and wife cannot be guilty of conspiracy**

Any common law rule that a husband and wife cannot be found guilty of conspiracy together is abolished.

**[8] Second Schedule**

Omit “62, 77, 77A, 78,”.

Insert instead “61Q, 62, 66E, 77, 77A, 78, 935,”.

**[9] Second Schedule**

Omit “128”. Insert instead “127”.

**[10] Second Schedule**

Omit “163, 183,”. Insert instead “161, 163, 182, 183, 189B,”.

**[11] Second Schedule**

Insert “329, 331, 332,” after “251,”.

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

Insert in the Eleventh Schedule (with appropriate Part and clause numbers):

**Part Crimes Legislation Further Amendment Act 1998**

**Power of registrar to extend interim apprehended violence orders**

The power conferred on a registrar of a court to vary an interim order by the amendment made to section 562BB by the *Crimes Legislation Further Amendment Act 1998* extends to interim orders made under that section before the commencement of that amendment.

**Abolition of common law rule that husband and wife cannot be found guilty of conspiracy**

Section 580D, as inserted by the *Crimes Legislation Further Amendment Act 1998*, does not apply in respect of any act of, or omission by, a husband or wife if the act or omission occurred before the commencement of that section.

**Other amendments**

An amendment made to section 428G or the Second Schedule by the *Crimes Legislation Further Amendment Act 1998* does not apply in respect of any trial commenced before the amendment commences.

**Explanatory note**

The amendment to section 428G of the *Crimes Act 1900* is made for the purposes of clarification. It makes it clear that, in determining whether a person has committed an offence, evidence of any intoxication that was self-induced cannot be taken into account in determining whether the relevant conduct was voluntary (see item [1]). At present, the section precludes evidence that intoxication was self-induced from being taken into account but does not clearly preclude evidence that the person was intoxicated from being taken into account. Item [12] includes a transitional provision.

The amendment to section 562BB of the Act allows the registrar of a court to vary an interim apprehended violence order made by the court by extending the period during which it remains in force, but only if the registrar is satisfied that both the complainant and the person against whom the order is made consent to the variation (see item [3]). Item [2] defines “registrar” and item [12] includes a transitional provision.

At present, section 578 of the Act allows the Judge presiding at a trial for certain offences to make an order forbidding the publication of evidence submitted in the trial. The amendments extend this power so as to allow the Judge to forbid the publication of any matter relating to the trial (see item [4]), for example the name of a person whose identity should not be disclosed. Item [5] is a consequential amendment.

Section 578B of the Act makes it an offence to be in possession of child pornography. Proceedings for an offence against the section cannot be commenced before the film, publication or computer game concerned has been classified under the *Classification (Publications, Films and Computer Games) Act 1995* of the Commonwealth. The amendment to that section makes it clear that a person can still be arrested for, or charged with, an alleged offence against the section before the material concerned is classified (see item [6]).

New section 580D abolishes any common law rule that a husband and wife cannot be found guilty of conspiracy together (see item [7]). The existence of the rule was confirmed in a recent Queensland case (see *Byast (1997) 96 A Crim R 61*). The basis for the rule was said to be that a husband and wife are considered to be one person, possessed of one will. Item [12] includes a transitional provision.

The amendments to the Second Schedule apply certain procedural provisions in the Act to all offences, no matter what court they are tried in (see items [8]–[11]). The procedural provisions include provisions for alternative verdicts in certain cases and provisions regarding proof of certain offences. Item [12] includes a transitional provision.

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## Schedule 2 Amendment of other Acts

(Section 4)

### 2.1 Children (Criminal Proceedings) Act 1987 No 55

#### [1] Section 10 Exclusion of general public from criminal proceedings

Omit section 10 (1). Insert instead:

- (1) While a court is hearing criminal proceedings to which a child is a party:
  - (a) any person (other than a person referred to in paragraph (b) or (c)) who is not directly interested in the proceedings is to be, unless the court otherwise directs, excluded from the place where the proceedings are being heard, and
  - (b) any person who is engaged in preparing a report on the proceedings for dissemination through a public news medium is, unless the court otherwise directs, entitled to enter or remain in the place where the proceedings are being heard, and
  - (c) any family victim is entitled to enter or remain in the place where the proceedings are being heard.

#### [2] Section 10 (2)

Insert “or a family victim” after “in the proceedings”.

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

Insert after section 10 (3):

- (4) In this section:

*deceased victim*, in relation to an offence, means a person against whom the offence was committed and who has died as a direct result of the offence.

***family victim***, in relation to a criminal proceeding for an offence, means a person who, at the time the offence was committed, was a member of the immediate family of a deceased victim of the offence (whether or not the person suffered personal harm as a result of the offence).

***member of the immediate family*** of a deceased victim means:

- (a) the victim's spouse, or
- (b) the victim's de facto spouse, or partner of the same sex, who has cohabited with the victim for at least 2 years, or
- (c) a parent, guardian, or step-parent of the victim, or
- (d) a child or step-child of the victim or some other child for whom the victim is the guardian, or
- (e) a brother, sister, step-brother or step-sister of the victim.

**Explanatory note**

Section 10(1) of the *Children (Criminal Proceedings) Act 1987* currently excludes, unless the court otherwise directs, the public from hearings of criminal proceedings to which a child is a party. This exclusion does not apply to persons directly interested in the proceedings and (unless the court otherwise directs) public news media reporters. Section 10 (2) of that Act allows the court to specifically direct any person (other than the child or another person directly interested in the proceedings) to leave a hearing during an examination of a witness if it is in the interests of the child.

Item [1] substitutes section 10(1) of the Act to make it clear that in criminal proceedings for an offence where a child is a party, immediate members of the family of a deceased victim (a person who has died as a result of the offence concerned) are entitled to enter and remain in the place where the proceedings are being heard. Item [3] provides definitions for the substituted subsection and item [2] makes a consequential amendment.

## **2.2 Coroners Act 1980 No 27**

### **[1] Section 19 Procedure at inquest or inquiry involving indictable offence**

Omit section 19 (1) (b). Insert instead:

- (b) at any time during the course of an inquest or inquiry, the coroner is of the opinion that, having regard to all the evidence given up to that time:
  - (i) the evidence is capable of satisfying a jury beyond reasonable doubt that a known person has committed an indictable offence, and
  - (ii) there is a reasonable prospect that a jury would convict the known person of the indictable offence,

### **[2] Schedule 3 Savings and transitional provisions**

Insert after clause 7:

#### **8 Inquests and inquiries commenced before Crimes Legislation Further Amendment Act 1998**

Section 19, as amended by the *Crimes Legislation Further Amendment Act 1998*, does not apply in respect of an inquest or inquiry commenced before the amendment of that section by that Act.

#### **Explanatory note**

Section 19 (1) (b) of the *Coroners Act 1980* is amended to mirror the provisions contained in section 41 (2) and (6) of the *Justices Act 1902*. It defines the circumstances in which a coroner is required to refer a matter to the Director of Public Prosecutions.

## **2.3 Criminal Appeal Act 1912 No 16**

### **[1] Section 5DA Appeal by Crown against reduced sentence for assistance to authorities**

Insert after section 5DA (2):

- (3) A reference in subsection (1) to a sentence imposed on a person includes a reference to a sentence that was varied or imposed by the Court of Criminal Appeal.

### **[2] Section 25A**

Insert after section 25:

#### **25A Bail or special treatment pending appeal to High Court**

- (1) Any time during which a person is at liberty on bail pending the determination of the person's appeal to the High Court from an order or determination of the Court of Criminal Appeal does not count as part of any term of imprisonment or penal servitude under the person's sentence.
- (2) A person who is not released on bail is, pending the determination of the person's appeal to the High Court from an order or determination of the Court of Criminal Appeal, to be treated in such manner as may be directed by regulations made under the Acts relating to correctional centres (which is referred to in this section as special treatment).
- (3) The time during which a person receives special treatment counts as part of any term of imprisonment or penal servitude under the person's sentence.
- (4) Section 18 (4) extends to a person who appeals to the High Court from an order or determination of the Court of Criminal Appeal in the same way as it applies to an appellant referred to in that subsection.
- (5) A reference in this section to *bail* is a reference to bail whether or not granted under the *Bail Act 1978*.

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

Insert after clause 4:

**5 Crimes Legislation Further Amendment Act 1998**

Section 25A, as inserted by the *Crimes Legislation Further Amendment Act 1998*, applies to any person whose appeal to the High Court is pending at the commencement of that section or whose appeal to the High Court is made after that commencement.

**Explanatory note**

Section 442B of the *Crimes Act 1900* allows a court to reduce the sentence it would otherwise impose on a person convicted of an offence if the person has undertaken to assist law enforcement authorities. Presently, section 5DA of the *Criminal Appeal Act 1912* makes provision for the Attorney General or the Director of Public Prosecutions to appeal to the Court of Criminal Appeal against any such sentence if the person fails to fulfil the undertaking.

Item [1] amends section 5DA to ensure that such an appeal may be brought even if the sentence that is being appealed against was varied or imposed by the Court of Criminal Appeal itself.

Item [2] inserts proposed section 25A to provide that any time that a person is on bail pending an appeal to the High Court from an order or determination of the Court of Criminal Appeal does not count as part of any term of imprisonment or penal servitude under the person's sentence. The amendment is consistent with section 18 (2) of the *Criminal Appeal Act 1912* relating to appeals to the Court of Criminal Appeal and operates in the context of court powers to stay the operation of sentences pending appeals.

The proposed section also provides that a person who is not released on bail pending such an appeal to the High Court is to be treated in the manner directed by regulations under legislation relating to correctional centres and that the time during which the person receives such treatment counts towards the person's sentence. The proposed section applies section 18 (4) of the *Criminal Appeal Act 1912* to such appeals enabling rules or regulations to be made under the correctional centres legislation relating to the manner in which an appellant is to be transported or kept in custody pending an appeal.

Item [3] is a transitional provision.

## **2.4 Criminal Assets Recovery Act 1990 No 23**

### **Section 32 Establishment and use of Proceeds Account**

Insert “, crime prevention programs, programs supporting safer communities” after “law enforcement” in section 32 (3) (d).

#### **Explanatory note**

The *Criminal Assets Recovery Act 1990* requires certain money to be paid into a Confiscated Proceeds Account in the Special Deposits Account at the Treasury. Such money may only be paid out of that fund in accordance with section 32 (3) of that Act. The amendment to section 32 (3) (d) of the *Criminal Assets Recovery Act 1990* allows money in the Confiscated Proceeds Account to be spent in aid of (in addition to the purposes already specified in that paragraph) crime prevention programs or programs supporting safer communities, as directed by the Treasurer in consultation with the Minister for Police (being the Minister currently administering the *Criminal Assets Recovery Act 1990*).

## **2.5 Criminal Procedure Act 1986 No 209**

### **[1] Section 33J Maximum penalties for Table 1 offences**

Omit “(including an attempt to commit the offence concerned)” from section 33J (4).

### **[2] Section 33J (4B)**

Insert after section 33J (4A):

(4B) The maximum penalty that a Local Court may impose for the offence of:

- (a) attempting to commit an offence, or
- (b) being an accessory before or after the fact in relation to an offence that is a felony, or
- (c) aiding, abetting, counselling or procuring the commission of an offence that is a misdemeanour, or
- (d) conspiring to commit an offence, or
- (e) inciting the commission of an offence,

is the same as the maximum penalty that a Local Court may impose for the offence concerned.

**[3] Section 33K Maximum penalties for Table 2 offences**

Omit “(including an attempt to commit the offence concerned)” from section 33K (2).

**[4] Section 33K (2) (k)**

Insert after 33K (2) (j):

- (k) for an offence under section 10 or 20 of the *Liens on Crops and Wool and Stock Mortgages Act 1898*—imprisonment for 12 months, or a fine of 50 penalty units, or both.

**[5] Section 33K (2A)**

Insert after section 33K (2):

(2A) The maximum penalty that a Local Court may impose for the offence of:

- (a) attempting to commit an offence, or
- (b) being an accessory before or after the fact in relation to an offence that is a felony, or
- (c) aiding, abetting, counselling or procuring the commission of an offence that is a misdemeanour, or
- (d) conspiring to commit an offence, or
- (e) inciting the commission of an offence,

is the same as the maximum penalty that a Local Court may impose for the offence concerned.

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

Omit the heading to Part 5 of the Table. Insert instead:

**Part 5 Ancillary offences**

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**[7] Part 9A, Table 1**

Insert after clause 28:

**28A Conspiracies**

Conspiring to commit any offence mentioned in a preceding Part of this Table.

**28B Incitement**

Inciting the commission of any offence mentioned in a preceding Part of this Table.

**[8] Part 9A, Table 1, clause 30**

Omit “section 32 (a)–(f)”. Insert instead “32 (1) (a)–(f)”.

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

Renumber Part 3 in Table 2 to Part 9A as Part 8, and relocate after Part 7.

**[10] Part 9A, Table 2**

Renumber clause 5 as clause 16 and relocate after Part 8 (as renumbered by item [9]).

**[11] Part 9A, Table 2**

Insert after clause 10:

**10A Frauds concerning liens on crops and wool or stock mortgages**

An offence under section 10 or 20 of the *Liens on Crops and Wool and Stock Mortgages Act 1898*.

**[12] Part 9A, Table 2**

Omit the heading to Part 7 of the Table. Insert instead:

**Part 7 Ancillary offences**

**[13] Part 9A, Table 2**

Insert after clause 13:

**14 Conspiracies**

Conspiring to commit any offence mentioned in a preceding Part of this Table.

**15 Incitement**

Inciting the commission of any offence mentioned in a preceding Part of this Table.

**Explanatory note**

**Conspiring to commit and inciting the commission of certain offences**

Part 9A of the *Criminal Procedure Act 1986* requires certain indictable matters to be dealt with summarily by a Local Court. The offences listed in Table 1 to Part 9A are to be dealt with summarily unless the prosecuting authority or the person charged with the offence concerned elects to have the matter dealt with on indictment. The offences listed in Table 2 to Part 9A are to be dealt with summarily unless the prosecuting authority elects to have the matter dealt with on indictment.

However the offence of conspiring to commit, or inciting the commission of, an offence listed in Table 1 or Table 2 is still required to be dealt with on indictment. The proposed amendments contained in items [7] and [13] will enable offences of conspiring to commit, or inciting the commission of, offences listed in Table 1 and Table 2 to also be dealt with summarily. Items [2] and [5] provide for penalties for such offences as well as clarifying the penalties for attempt and being an accessory before or after the fact in relation to an offence and aiding, abetting, counselling or procuring the commission of an offence. Items [1], [3], [6] and [12] make consequential amendments.

**Frauds under the Liens on Crops and Wool and Stock Mortgages Act 1898**

Currently, offences under sections 10 and 20 of the *Liens on Crops and Wool and Stock Mortgages Act 1898* can be dealt with on indictment only.

The proposed amendment contained in item [11] will enable such offences to be dealt with summarily unless the prosecuting authority elects to have the matter dealt with on indictment. The proposed amendment contained in item [4] will provide that the maximum penalty for such an offence dealt with summarily will be imprisonment for 12 months, or a fine of 50 penalty units, or both.

**Other amendments**

Item [8] corrects a cross-reference.

Items [9] and [10] renumber and relocate a Part and clause in Table 2 to Part 9A.

## **2.6 Director of Public Prosecutions Act 1986 No 207**

### **Section 20A Proceedings for order under Part 15A (Apprehended violence) of Crimes Act 1900**

Omit section 20A (2). Insert instead:

- (2) Even if the Director does not institute and conduct such proceedings, the Director may:
  - (a) institute and conduct, on behalf of a complainant, appeals in any court arising from such proceedings, and
  - (b) conduct, on behalf of a complainant as respondent, appeals in any court arising from such proceedings.

#### **Explanatory note**

Section 20A of the *Director of Public Prosecutions Act 1986* enables the Director of Public Prosecutions to institute and conduct, on behalf of a complainant, proceedings under Part 15A of the *Crimes Act 1900* for an apprehended violence order (**AVO proceedings**) and conduct, on behalf of the complainant as respondent, appeals in any court in relation to such AVO proceedings.

The amendment makes it clear that the Director may conduct appeals on behalf of the complainant as appellant in respect of AVO proceedings. The amendment also makes it clear that the Director's functions in relation to such appeals may be exercised even if the Director did not institute and conduct the AVO proceedings.

## **2.7 Drug Misuse and Trafficking Act 1985 No 226**

### **[1] Sections 20 and 28 (b)**

Omit "or procures" wherever occurring.

Insert instead " , procures, solicits or incites".

### **[2] Section 30 Indictable offences—summary disposal of unless prosecution elects otherwise**

Insert after section 30 (1) (c)

- (c1) an offence under section 26 of conspiring to commit an offence referred to in paragraph (a), (b) or (c).

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**[3] Section 30 (1) (e)**

Omit the paragraph. Insert instead:

- (e) an offence under section 28 of conspiring to commit, or of aiding, abetting, counselling, procuring, soliciting or inciting the commission of, an offence under a law in force outside New South Wales which corresponds to section 23 (1), 24 (1) or 25 (1) or (1A),

**[4] Section 31 Indictable offences—summary disposal of unless prosecution or accused elects otherwise**

Insert after section 31 (1) (c):

- (c1) an offence under section 26 of conspiring to commit an offence referred to in paragraph (a), (b) or (c).

**[5] Section 31 (1) (e)**

Omit the paragraph. Insert instead:

- (e) an offence under section 28 of conspiring to commit, or of aiding, abetting, counselling, procuring, soliciting or inciting the commission of, an offence under a law in force outside New South Wales which corresponds to section 23 (1), 24 (1) or 25 (1) or (IA).

**[6] Sections 32 (1) (f), 33 (1) (d) and 33AA (1) (b) (iii)**

Omit “or procuring” wherever occurring.

Insert instead “, procuring, soliciting or inciting”.

**Explanatory note**

The *Drug Misuse and Trafficking Act 1985* contains a scheme that is intended to parallel the scheme contained in Part 9A of the *Criminal Procedure Act 1986*, which requires certain indictable offences to be dealt with summarily (except in certain circumstances).

The proposed amendments update references in the *Drug Misuse and Trafficking Act 1985* so as to more properly reflect the scheme contained in Part 9A of the *Criminal Procedure Act 1986*.

## **2.8 Firearms Act 1996 No 46**

### **Section 80 Disposal of surrendered or seized firearms**

Insert “or the Children's Court” after “Local Court” in section 80 (1).

#### **Explanatory note**

The amendment to section 80 of the Firearms Act 1996 makes it clear that the Children's Court has the power to order the forfeiture, return or other disposal of firearms on an application made by a police officer or by any person who claims to be the owner of the firearms surrendered to or seized by a police officer.

## **2.9 Justices Act 1902 No 27**

### **Section 41 Procedure on hearing of charge of indictable offence**

Insert “section 90 (Discretion to exclude admissions) or” after “in” in section 41 (8A).

#### **Explanatory note**

Section 41 (8A) of the *Justices Act 1902* provides that, for the purposes of committal proceedings, a Justice, or Justices, must not exclude evidence on any of the grounds set out in Part 3.11 (Discretions to exclude evidence) of the *Evidence Act 1995*.

The proposed amendment will also prevent a Justice, or Justices, in committal proceedings from excluding evidence on the basis of the discretion set out in section 90 (Discretion to exclude admissions) of the *Evidence Act 1995*.

## **2.10 Prohibited Weapons Act 1989 No 26**

### **Section 15 Disposal of surrendered or seized weapons or articles**

Insert “, or the Children's Court,” after “alone”.

#### **Explanatory note**

The amendment to section 15 of the *Prohibited Weapons Act 1989* makes it clear that the Children's Court has the power to order the forfeiture, return or disposal of a surrendered or seized prohibited weapon or prohibited article on an application made by a police officer or by any person who claims to be the owner of the weapon or article.

## **2.11 Weapons Prohibition Act 1998**

### **Section 40 Disposal of surrendered or seized prohibited weapons**

Insert “or the Children’s Court” after “Local Court” wherever occurring.

#### **Explanatory note**

The amendment to section 40 of the *Weapons Prohibition Act 1998* makes it clear that the Children’s Court has the power to order the forfeiture, return or disposal of a surrendered or seized prohibited weapon on an application made by a police officer or by any person who claims to be the owner of the weapon.

## **2.12 Young Offenders Act 1997 No 54**

### **[1] Section 17 Records of warnings**

Omit “but must not record the name of the child concerned or any information that might identify the child other than information relating to age, gender or racial background”.

### **[2] Section 17 (2)**

Insert at the end of section 17:

- (2) The record is to contain the matters prescribed by the regulations for the purposes of this section.

### **[3] Section 68 Interventions not to be disclosed as criminal history**

Insert “warning.” after “subject of a” in section 68 (1).

**[4] Section 68 (1) (a) and (b)**

Insert “warning,” before “caution or conference” wherever occurring.

Explanatory note

Item [1] amends section 17 of the *Young Offenders Act 1997* to repeal the prohibition against investigating officials recording the name of a child given a warning under that Act or any other information that might identify that child. Item [2] inserts section 17 (2) into the Act. This subsection will allow the regulations to prescribe the information that must be contained in a record made under section 17 of the Act. Items [3] and [4] amend section 68 of the Act to make it clear that if a person has been the subject of a warning, that person is not required to disclose any information concerning that warning to any person for any purpose and a question concerning a person’s criminal history is to be taken not to refer to any such warning (subject to the exceptions set out in section 68 (2)).

[Minister’s second reading speech made in—  
Legislative Assembly on 25 November 1998  
Legislative Council on 1 December 1998]