

JIRS Updates related to COVID-19

Issue 4: 29 May 2020

This Newsletter contains a summary of legislation, case law and other material published on the Judicial Information Research System (JIRS) addressing changes to the administration of criminal justice as a result of the COVID-19 pandemic. Updates will be published as needed.

RECENT LEGISLATION

21/05/2020

[Privacy Amendment \(Public Health Contact Information\) Act 2020 \(Cth\)](#) — inserts [Pt VIIIA](#) into [Privacy Act 1988 \(Cth\)](#) to create temporary regime for usage and deletion of public health contact information — creates new offences relating to COVID app data and COVIDSafe app including non-permissible collecting, using or disclosing COVID app data ([s 94D](#)) and requiring use of COVIDSafe ([s 94H](#)) — Criminal Code (Cth), [s 15.1](#) applies so that it is still an offence where occurring wholly outside Australia — commenced 16 May 2020 (s 2) — [Second Reading Speech](#) — [Explanatory Memorandum](#)

The [Privacy Amendment \(Public Health Contact Information\) Act 2020](#) (Cth) inserts a new [Pt VIIIA](#) into the [Privacy Act 1988](#) (Cth) creating a *temporary* regime, commencing 16 May 2020, governing the usage and deletion of COVID app data (app data) uploaded through the COVIDSafe app (the app) onto the Commonwealth National COVID Data Store (the database). The objects of [Pt VIIIA](#) are to encourage uptake of COVIDSafe and to enable faster and more effective contact tracing: [s 94B](#).

The Office of the Australian Information Commissioner (OAIC) is the key regulator with power to investigate whether [Pt VIIIA](#) has been contravened and to prosecute for offences against the Part: Div 4. These powers extend to investigating and assessing an entity or a State or Territory authority's handling of app data: ss [94T](#), [94U](#). The Act amending applies to State and Territory health authorities to the extent of activities concerning the app data: [s 94X](#). An individual's app data is "personal information" for the purposes of the *Privacy Act*: [s 94Q](#).

Offences relating to the app or app data

The following new offences attract a maximum penalty of 5 years imprisonment and/or a fine of \$63,000 (300 penalty units): Div 2. Section [15.1](#) of the *Criminal Code* applies to the offences, so that if the offence occurred wholly outside Australia, it would still be an offence if it meets the offence requirements: [s 94J](#).

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- Non-permissible collection, use or disclosure It is an offence to collect, use or disclose app data where not permitted: [s 94D\(1\)](#). Permissible persons and purposes are set out in [s 94D\(2\)](#) and include the investigation of whether Pt VIIIA has been contravened or for prosecuting a person for an offence against the Part ([s 94D\(2\)\(e\)](#)).
- Upload app data without consent It is an offence to upload, or cause the upload of, app data without consent being given to the upload by the app user or, on the user's behalf, by his or her parent, guardian or carer: [s 94E](#).
- Retain or disclose uploaded data outside Australia It is an offence to retain app data on a database outside Australia: [s 94F\(1\)](#). A further offence is committed if the app data is disclosed to another person, not employed by a State or Territory health authority, who is outside Australia and the data is not disclosed for the purpose of undertaking contact tracing: [s 94F\(2\)](#).
- Decrypt encrypted COVID app data It is an offence to decrypt encrypted app data stored on a communication device: [s 94G](#).
- Require use of COVIDSafe It is an offence to require another person to download the app, have the app in operation or, consent to uploading app data to the database: [s 94H\(1\)](#). It is also an offence to refuse to enter into, or continue, a contract or arrangement with another person (including an employment contract); take adverse action (within the meaning of the [Fair Work Act 2009](#)) against another person; refuse to allow another person to enter either public premises or those the other person has a right to enter; refuse to allow another person to participate in an activity; or refuse to receive or provide goods or services, on the grounds the other person has not downloaded or operated the app, or consented to uploading the data: [ss 94H\(2\)\(a\)-\(i\)](#).

Repeal

[Pt VIIIA](#) will be repealed 90 days after the Health Minister (Cth) makes a determination under [s 94Y\(1\)](#) on the basis the app is no longer required to prevent or control, or is no longer effective in preventing or controlling the entry, emergence, establishment or spread, of COVID-19 in Australia. Reports on the operation and effectiveness of the app and the database will occur on a six-monthly basis starting as soon as practicable after the end of the 6 month period from 16 May 2020: [s 94ZA](#).

Note: Similar provisions concerning the collection, use, disclosure, treatment and decryption of the app data and coercing the use of the app were formerly made in a determination under [s 477\(1\)](#) of the *Biosecurity Act 2015*. This determination was repealed on 16 May 2020.

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[COVID-19 Legislation Amendment \(Emergency Measures—Miscellaneous\)](#)

[Act 2020](#) — introduces temporary measures as result of COVID-19 pandemic — amends *Children (Community Service Orders) Act 1987* to enable court to order community service, where unavailable due to pandemic, if satisfied work will become available during period of order — amends *Crimes (Administration of Sentences) Act 1999* to provide parole authority with additional powers for offenders sentenced to 3 years imprisonment or less — amends *Mental Health Act 2007* to allow assessments by audio visual link — amends various Acts to allow authorised officers to authorise persons to answer questions by audio/audio visual link — commenced on 14 May 2020 (other than Sch 1.12) (see s 2, LW 11.05.2020) — [Second Reading Speech](#) — [Explanatory Note](#)

The *COVID-19 Legislation Amendment (Emergency Measures—Miscellaneous) Act 2020* makes amendments to various Acts, the most relevant of which are discussed below and which commenced on 14 May 2020.

Children (Community Service Orders) Act 1987: [Sch 1.4](#)

If community service work cannot be provided to a child as a result of the COVID-19 pandemic, new s 9A enables a court to make a children's community service order if it is satisfied that community service work will become available during the period of the proposed order.

New s 14A provides that, during the COVID-19 pandemic, a person may present by audio, or audio visual, link for the purpose of enabling the administration of a community service order to be commenced. These amendments expire on 26 September 2020 unless prescribed by regulation, but no later than 26 March 2021.

Crimes (Administration of Sentences) Act 1999: [Sch 1.8](#)

New s 159 applies to an offender who is sentenced to imprisonment for 3 years or less and who is in custody following revocation of their statutory parole or parole order under s 159 and permits the State Parole Authority to make an order releasing an offender on parole in the same way as it can for an offender sentenced to more than 3 years imprisonment: s 159(3) applying Div 2, Pt 6.

[Savings and transitional provisions](#): new s 137 validates anything done by the State Parole Authority between 26 February 2018 and the commencement of the proposed amendments if it would have been valid had the proposed amendments been in force: Sch 5, Pt 26, cl 137.

Mental Health Act 2007: [Sch 1.21](#)

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New s 203 enables an assessment of a person detained in a mental health facility to be carried out by a medical practitioner or accredited person via audio visual link, for the purposes of determining under s 27 whether the person is a mentally ill person or mentally disordered person. Assessments may be done by audio visual link only if it is necessary because of the COVID-19 pandemic and if the assessment can be carried out with sufficient skill or care by audio visual link so as to form the required opinion about the person: s 203(3).

These amendments expire on 26 September 2020 unless prescribed by regulation, but no later than 26 March 2021.

Powers of authorised officers

A number of Acts are amended to allow authorised officers to authorise a person whom the officer suspects on reasonable grounds has knowledge about a certain matter to answer questions about the matter using an audio link or audio visual link.

The Acts that are amended are:

- *Biodiversity Conservation Act 2016*: Sch 1.3 amends [s 12.19](#)
- *Crown Land Management Act 2016*: Sch 1.9 amends [s 10.23](#)
- *Environmental Planning and Assessment Act 1979*: Sch 1.11 amends [s 9.23](#)
- *Fisheries Management Act 1994*: Sch 1.14 amends [s 256](#)
- *Mining Act 1992*: Sch 1.22 amends [s 248L](#)
- *Protection of the Environment Operations Act 1997*: Sch 1.25 amends [s 203](#)
- *Water Management Act 2000*: Sch 1.33 amends [s 338B](#)

The amendments to these Acts regarding the powers of authorised officers are repealed on 13 November 2020.

18/05/2020

COVID-19 Legislation Amendment (Emergency Measures—Attorney General) Act 2020 — introduces temporary measures as result of COVID-19 — amends *Court Security Act 2005* to enable court security officers to determine whether a person is suffering from COVID-19 — amends *Criminal Procedure Act 1986* to allow accused persons to lodge written plea — amends *Electronic Transactions Act 2000* to expand regulation-making power with regards to processing of documents — amends *Evidence (Audio and Audio Visual Links) Act 1998* to further provide for use of audio visual links in court proceedings during COVID-19 — amends *Sheriff Act 2005* to enable sheriff's officers to assist agencies in their COVID-19 response —

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commenced on 14 May 2020 (see s 2, LW 11.05.2020) — [Second Reading Speech](#) — [Explanatory Note](#)

The [COVID-19 Legislation Amendment \(Emergency Measures—Attorney General\) Act 2020](#) makes amendments to various Acts administered by the Attorney General in response to the COVID-19 pandemic. The Act commenced on the date of assent (14 May 2020).

Court Security Act 2005: [Sch 1.1](#)

[Division 1A](#) is inserted into Pt 3 to enable a security officer to make requirements of persons entering or in court premises, to determine whether a person is suffering from a symptom related to COVID-19 or is likely to have been exposed to COVID-19, including enabling court security officers to use thermal imaging scans or contactless thermometers to check a person's temperature: s 12D. Requirements may also be made to refuse a person entry to the court premises or to leave the court premises: s 12E. If a security officer makes a requirement of a person in accordance with s 12E(3), the person must comply with the requirement. Maximum penalty — 5 penalty units: s 12E(4).

If the person is a juror on a jury panel, and they do not comply with a scan, temperature check or answer questions about their health under s 12D(1), the matter should be referred to the relevant judicial officer or coroner: s 12F. Section 12G provides for a notification process if a person is required to leave the court premises under Division 1A or refused entry to the court premises and the person was required to attend court on that day.

The amendment is repealed on 26 September 2020 unless the regulations prescribe a later date for the repeal, not being later than 26 March 2021. *Criminal Procedure Act 1986*: [Sch 1.2](#)

Section 182 is amended to provide that an accused person who has been served with a court attendance notice and who has been granted or refused bail, or in relation to whom bail has been dispensed with, is not prevented from lodging a written plea of guilty or not guilty under s 182 of the *Criminal Procedure Act 1986*.

The provision ceases to have effect (and is automatically repealed) on the day that Ch 7, Pt 5 (Response to COVID-19 pandemic) of the [Criminal Procedure Act](#) is repealed, being 26 September 2020 or a later day prescribed by the regulations but not later than 26 March 2021 (see s 367).

Electronic Transactions Act 2000: [Sch 1.3](#)

Section 17 is amended to allow for the making of regulations that modify or suspend requirements, permissions or arrangements in relation to certification, execution, production, filing, lodgement or service of documents and imposing of requirements relating to the form

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and content of a document and processes for making a document and other related matters.

Evidence (Audio and Audio Visual Links) Act 1998: [Sch 1.4](#)

[Section 22C](#) is amended to further provide for the use of audio visual link in court proceedings during COVID-19.

New subsections 22C(2A), (3A) provide for an accused person who is not in custody to appear by AVL in certain proceedings. Section 22C(6) makes this power subject to the direction being in the interests of justice, having regard to the public health risk posed by COVID-19, the efficient use of court resources and any other relevant matter. The requirement that AVL facilities be available and that the party must be able to communicate with their legal representative privately also apply.

A note inserted after s 22C(1) makes it clear that the *Evidence (Audio and Audio Visual Links) Act 1998* continues to apply to proceedings that are not covered by the COVID-19 special provisions.

Subsections 22C(4), (5) restore the existing arrangements for government agency witnesses, under which a government agency witness is to give evidence by way of audio visual link unless the court otherwise directs.

Section 22C(9) makes it clear that the the appearance of witnesses in proceedings by way of audio visual link does not apply to an accused person giving evidence in proceedings concerning an offence allegedly committed by the accused person.

Sheriff Act 2005: [Sch 1.5](#)

[Section 7C](#) is inserted to allow the Sheriff, with the approval of the Secretary of the Department of Communities and Justice, to enter into an agreement with the head of another public service agency to enable a sheriff's officer to assist that other agency in its COVID-19 pandemic response (s 7C(2)). The amendment grants a sheriff's officer the power to issue directions to persons when providing that assistance (s 7C(4)). Failure to comply with a direction is an offence under s 7C(7). Maximum penalty — 10 penalty units.

Under subsections 7C(9), 10, a sheriff's officer may also, in limited circumstances, enter premises or arrest or detain a person if the person has failed to comply with a direction or the officer believes on reasonable grounds that it is necessary because the power must be exercised urgently or a direction will be insufficient.

These powers will only be available in connection with premises at which a person is required to reside pursuant to an order under the [Public Health Act 2010](#) relating to COVID-19 or other premises prescribed by the regulations: s 7C(14).

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This section has effect for the prescribed period, that is until 26 September 2020 or a later day prescribed by the regulations but not later than 26 March 2021: s 17C(14).

RECENT CASES

29/05/2020

Sentencing — historical child sexual offences — sentence not manifestly excessive notwithstanding strong subjective case — evidence relating to COVID-19 pandemic not fresh evidence and not admissible to support manifest excess ground — risks of COVID-19 in prison system moderated by controls introduced by Corrective Services — [Cabezuela v R \[2020\] NSWCCA 107](#)

Editor's Note: this Recent Law item deals only with the applicant's appeal so far as it relates to the COVID-19 pandemic.

The applicant was convicted of 27 historical child sexual offences and sentenced to an aggregate sentence of 28 years imprisonment with a non-parole period of 18 years.

The applicant appealed his sentence on grounds including that having regard to the COVID-19 pandemic and its relationship to the applicant's advanced age (79 years at sentence), poor health status and custodial arrangements, the sentence was manifestly excessive. The applicant sought leave to introduce fresh evidence to support this ground.

The Court (Walton J; Hoeben CJ at CL and Harrison J agreeing) dismissed the appeal.

The aggregate sentence is not manifestly excessive: [115], [131]ff.

The evidence sought to be led by the applicant relating to the COVID-19 pandemic is not fresh evidence, in the sense that there was any material relating to COVID-19 that existed at the time of the applicant's sentence proceedings, the import of which was not known or not fully appreciated. Thus, as a matter of general principle, the evidence would not be admissible in this appeal: [124], [126], *Borg v R [2020] NSWCCA 67* at [46].

Similar issues relating to COVID-19 were raised in the sentence appeal in [Scott v R \[2020\] NSWCCA 81](#). However, the Court was not required to consider the application of those principles because, in contrast to this case, a conclusion was reached that the sentence imposed was manifestly excessive. Rather, the evidence as to the implications of COVID-19 was taken into account for the purposes of re-sentencing. The authorities referred to in *Scott* (at [163]) did not provide a basis for admitting evidence on the implications of COVID-19 on sentencing: [129]–[130].



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The evidence of COVID-19 was directed to the additional burden that the applicant may suffer in custody due to his age and health, a factor which was given considerable weight by the sentencing judge. The new evidence relied upon may not be utilised to impugn the sentencing judgment which is not otherwise susceptible to challenge on the manifest excess grounds: [131].

This is not a case where the receipt of the material in question may have impacted upon the sentence imposed, or where a comparatively short sentence may have been affected by new evidence of an additional burden which fell upon the applicant. The nature of the offences and the offending are of such seriousness that, even if substantially greater weight were given to these subjective factors of age, infirmity of health and additional custodial restrictions such as limitations on contact and exercise due to the effects of COVID-19, no different sentence would properly follow: [132].

Despite initial fears, the prison system has not been the source of any outbreaks of COVID-19, such as the type that has occurred, for example, in aged care facilities. It may be accepted the applicant would be anxious about the present circumstances but the risks he faces are moderated by the controls introduced by Corrective Services and the vigilant screening of prison staff: [133].

15/05/2020

Appeals — re-sentencing — child sexual assault — 72 year old applicant with pre-existing medical conditions — sentence manifestly excessive given exceptional nature of case — potential impact of COVID-19 pandemic considered on re-sentence — [Scott v R \[2020\] NSWCCA 81](#)

The applicant was convicted of multiple offences of child sexual assault and sentenced to an aggregate sentence of 6 years with a non-parole period of 3 years, 6 months. The applicant appealed against his sentence on the ground of manifest excess.

With the COVID-19 pandemic unfolding in Australia, the applicant submitted that he was at a high risk of contracting the virus, being 72 years of age and suffering from a number of ailments including asthma, “pre-type 2 diabetes” and atherosclerotic disease.

The Court (Hamill J; Brereton JA and Fagan J agreeing) concluded, in the exceptional circumstances of this case including the objective seriousness of the offences and the applicant’s compelling subjective case, that the sentence was manifestly excessive: [150]–[153]. The submissions regarding COVID-19 were taken into account in re-sentencing the applicant to an aggregate sentence of 5 years with a non-parole period of 2 years, 6 months.

Regarding the effect of the pandemic, the Court disregarded the material relied on by the applicant from media articles, opinion pieces and web-pages extracted from “WebMD”, and took into account the material the applicant, and respondent, provided from Justice Health or

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from the websites of government departments such as the Commonwealth Health Department: [158], [160]–[162]; see also the discussion about the applicant’s attempt to re-open the case in light of the pandemic at [154]ff.

It must be accepted that the applicant, due to his age and medical conditions, will “experience a level of stress, anxiety, and even fear at the potentially fatal consequences to him were he to be infected with the COVID-19 virus in prison” that is far greater than a younger, healthier, inmate: [162]; *RC v R; R v RC* [2020] NSWCCA 76 at [254].

Of particular relevance is the applicant’s advanced age and the fact that he has asthma and other medical conditions that make him more vulnerable to potentially grave complications should he contract the virus. Custodial institutions have particular problems in controlling the spread of a virus such as COVID-19. However, to this point no inmate has tested positive in any Corrective Services facility in New South Wales and, it seems, any cases amongst staff at the hospitals have been contained. There is no evidence that the virus has spread further or made its way into the general prison population. The Department says it has taken steps to minimise the risk of the virus entering the prisons. One of those steps has been to suspend all social and family visits, a matter that makes the conditions of incarceration of most inmates more onerous: [166].

Taking into account the applicant’s advanced age, the putative partial accumulation of sentences, his medical conditions and his wife’s circumstances, there are special circumstances in this case to allowing for an adjustment of the length of the parole period: [168].

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