

South Australia



**CRIMINAL LAW CONSOLIDATION (APPEALS) AMENDMENT ACT  
1995**

**No. 90 of 1995**

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**ELIZABETHAE II REGINAE**

A.D. 1995

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No. 90 of 1995

An Act to amend the Criminal Law Consolidation Act 1935.

[Assented to 7 December 1995]

The Parliament of South Australia enacts as follows:

**Short title**

1. (1) This Act may be cited as the *Criminal Law Consolidation (Appeals) Amendment Act 1995*.

(2) The *Criminal Law Consolidation Act 1935* is referred to in this Act as "the principal Act".

**Commencement**

2. This Act will come into operation on a day to be fixed by proclamation.

**Amendment of s. 348—Interpretation**

3. Section 348 of the principal Act is amended—

(a) by inserting after the definition of "appellant" the following definitions:

"conviction" in relation to a case where a court finds a person guilty of an offence but does not record a conviction, includes the formal finding of guilt;

"court" means the Supreme Court or the District Court;;

(b) by inserting after the definition of "information" the following definition:

"issue antecedent to trial" means a question (whether arising before or at trial) as to whether proceedings on an information or a count of an information should be stayed on the ground that the proceedings are an abuse of process of the court;;

(c) by inserting after the definition of "judge" the following definition:

"question of law" includes a question about how a judicial discretion should be exercised or whether a judicial discretion has been properly exercised;.

**Substitution of s. 350**

4. Section 350 of the principal Act is repealed and the following section is substituted:

**Reservation of questions of law**

350. (1) A court by which a person has been, is being or is to be tried or sentenced for an indictable offence may reserve for consideration and determination by the Full Court a question of law on an issue—

- (a) antecedent to trial; or
- (b) relevant to the trial or sentencing of the defendant,

and the court may (if necessary) stay the proceedings until the question has been determined by the Full Court.

(2) A question of law must be reserved for consideration and determination by the Full Court if—

- (a) the Full Court so requires (on an application under this section or under another provision of this Part<sup>1</sup>); or
- (b) the question arises in the course of a trial that results in an acquittal and the Attorney-General or the Director of Public Prosecutions applies to the court of trial to have the question reserved for consideration and determination by the Full Court.

(3) Unless required to do so by the Full Court, a court must not reserve a question of law for consideration and determination by the Full Court if reservation of the question would unduly delay the trial or sentencing of the defendant.

(4) If a person is convicted, and a question of law relevant to the trial or sentencing is reserved for consideration and determination by the Full Court, the court of trial or the Supreme Court may release the person on bail on conditions the court considers appropriate.

<sup>1</sup> See section 352 (2).

**Substitution of s. 351**

5. Section 351 of the principal Act is repealed and the following sections are substituted:

**Case to be stated by trial judge**

351. (1) When a court reserves a question of law for consideration and determination of the Full Court, the presiding judge must state a case setting out—

- (a) the question of law reserved; and
- (b) the circumstances out of which the reservation arises; and
- (c) any findings of fact necessary for the proper determination of the question reserved.

(2) The Full Court may, if it thinks necessary, refer the stated case back for amendment.

**Powers of Full Court on reservation of question of law**

**351A.** (1) The Full Court may determine a question of law reserved under this Part and make consequential orders and directions.

*Examples—*

The Full Court might, for example, quash an information or a count of an information or stay proceedings on an information or a count of an information if it decides that prosecution of the charge is an abuse of process.

The Full Court might, for example, set aside a conviction and order a new trial.

**(2) However—**

- (a)** a conviction must not be set aside on the ground of the improper admission of evidence if—
  - (i)** the evidence is merely of a formal character and not material to the conviction; or
  - (ii)** the evidence is adduced for the defence; and
- (b)** a conviction need not be set aside if the Full Court is satisfied that, even though the question reserved should be decided in favour of the defendant, no miscarriage of justice has actually occurred; and
- (c)** if the defendant has been acquitted by the court of trial, no determination or order of the Full Court can invalidate or otherwise affect the acquittal.

**Costs**

**351B.** (1) If a question of law is reserved on application by the Attorney-General or the Director of Public Prosecutions on an acquittal, the Crown is liable to pay the taxed costs of the defendant in proceedings for the reservation and determination of the question of law.

(2) If the defendant does not appear in the proceedings, the Crown must instruct counsel to present argument to the Court that might have been presented by counsel for the defendant.

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**Substitution of s. 352**

6. Section 352 of the principal Act is repealed and the following section is substituted:

**Right of appeal in criminal cases**

**352. (1) Appeals lie to the Full Court as follows:**

- (a) if a person is convicted on information—
  - (i) the convicted person may appeal against the conviction as of right on any ground that involves a question of law alone;
  - (ii) the convicted person may appeal against the conviction on any other ground with the leave of the Full Court or on the certificate of the court of trial that it is a fit case for appeal;
  - (iii) the convicted person or the Director of Public Prosecutions may appeal against sentence passed on the conviction (other than a sentence fixed by law) on any ground with the leave of the Full Court;
- (b) if a court makes a decision on an issue antecedent to trial that is adverse to the prosecution, the Director of Public Prosecutions may appeal against the decision—
  - (i) as of right, on any ground that involves a question of law alone; or
  - (ii) on any other ground with the leave of the Full Court;
- (c) if a court makes a decision on an issue antecedent to trial that is adverse to the defendant—
  - (i) the defendant may appeal against the decision before the commencement or completion of the trial with the leave of the court of trial (but leave will only be granted if it appears to the court that there are special reasons why it would be in the interests of the administration of justice to have the appeal determined before commencement or completion of the trial);
  - (ii) the defendant may, if convicted, appeal against the conviction under paragraph (a) asserting as a ground of appeal that the decision was wrong.

(2) If an appeal or an application for leave to appeal is made to the Full Court under this section, the Full Court may require the court of trial to state a case on the questions raised in the appeal or proposed appeal and the matter will then be dealt with in accordance with the provisions applicable to cases stated in the same way as if the questions had been reserved.

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**Amendment of s. 353—Determination of appeals in ordinary cases**

7. Section 353 of the principal Act is amended by inserting after subsection (3) the following subsection:

(3a) If an appeal is brought against a decision on an issue antecedent to trial, the Full Court may exercise any one or more of the following powers:

- (a) it may confirm, vary or reverse the decision subject to the appeal; and
- (b) it may make any consequential or ancillary orders that may be necessary or desirable in the circumstances.

**Substitution of s. 357**

8. Section 357 of the principal Act is repealed and the following section is substituted:

**Appeal to Full Court**

357. (1) An appeal to the Full Court, or an application for leave to appeal to the Full Court under this Act, must be made in accordance with the appropriate rules of court.

(2) The Full Court may (either before or after the time allowed by the rules has expired) extend the time for making such an appeal or application.

**Repeal of s. 358**

9. Section 358 of the principal Act is repealed.

**Repeal of s. 368**

10. Section 368 of the principal Act is repealed.

**Transitional provision**

11. (1) If an information was laid in the Supreme Court or the District Court before the commencement of this Act, the amendments effected by this Act do not apply to the proceedings founded on that information or any related proceedings and the provisions of the principal Act affected by the amendments continue to apply as if the amendments had not been made.

(2) If an information is laid in the Supreme Court or the District Court on or after the commencement of this Act, the amendments effected by this Act apply to the proceedings founded on the information and any related proceedings.

In the name and on behalf of Her Majesty, I hereby assent to this Bill.

ROMA MITCHELL Governor