COURTS AND OTHER JUSTICE PORTFOLIO LEGISLATION AMENDMENT BILL 2015

Bill introduced on motion by Ms Gabrielle Upton, read a first time and printed.

Second Reading

Ms GABRIELLE UPTON (Vaucluse—Attorney General) [9.10 p.m.]: I move:

That this bill be now read a second time.

The Government is pleased to introduce the Courts and Other Justice Portfolio Legislation Amendment Bill 2015. The bill is part of the Government's regular legislative review and monitoring program. The bill makes miscellaneous amendments to legislation affecting the operation of courts and tribunals in New South Wales, and to other legislation affecting justice-related issues. I now outline each of the amendments in turn. Schedule 1 deals with amendments to the Civil Procedure Act. Schedule 1.2 [1] introduces amendments as a result of recommendations from the statutory review of the Civil Procedure Act 2005. Schedule 1.2 [2] introduces an amendment as a result of the Chief Justice's review of the costs assessment regime. Schedule 1.2 [1] amends the Civil Procedure Act to provide that the court is not required to approve a settlement agreement if the plaintiff: has turned 18 by the time the agreement to settle is made, and is otherwise not under legal incapacity—for example, due to a cognitive disability.

Currently, section 76 of the Civil Procedure Act provides that the court must approve an agreement for compromise or settlement if the plaintiff is a person under legal incapacity. A person can be under legal incapacity in civil proceedings if he or she is under the age of 18 when proceedings are commenced. This amendment clarifies that section 76 does not apply if the plaintiff has turned 18 by the time of the agreement. This will avoid unnecessary and costly delays, as some defendants have argued previously that the court is required to approve the settlement, despite the person reaching the age of 18 by that time. Schedule 1.2 [2] amends section 101 of the Civil Procedure Act to provide that interest accrues on party-party ordered costs from the date when the costs are ordered rather than the date when the costs are paid by the receiving party, unless the court otherwise orders. Interest accrues at the prescribed rate applicable to a judgment debt.

Currently, section 101 of the Civil Procedure Act states that the interest accrues on party-party ordered costs from the date when the costs were paid by the party; in other words, the date when the party became out of pocket. However, a party must first apply to the court for such an order. This amendment implements a recommendation from the Chief Justice's review of the costs assessment regime that a default rule for interest on costs orders should be introduced. The default rule will mean that interest accrues automatically from the date on which the costs are ordered, without the need to make an application for such an order. This will simplify the issue of applying interest to costs orders. The court will retain an unfettered residual discretion to order otherwise, if the circumstances demand it—for example when charging interest from the date the costs were paid would better reflect the economic burden to the receiving party.

Schedule 1.2 [3] amends section 121 of the Civil Procedure Act to clarify what must occur when more than one garnishee order is made against a person's wage or salary. When the court makes a garnishee order against a debtor's income, the garnishee, who often is an employer, is required to withhold part of the wages owed to an employee and to pay the amount to the creditor. Currently, if a debtor has multiple debts owed to different creditors, he or she may be subject to more than one garnishee order at the same time. A debtor may apply to the court to request that a garnishee order against his or her income be made into a limited garnishee order.

Under a limited garnishee order, the amount that is taken out of the debtor's wage or salary is

reduced to a smaller amount that is paid under regular instalments. Section 121 of the Civil Procedure Act operates so that, when a limited garnishee order is already in place against a wage or salary and a subsequent garnishee order is made against the same wage or salary, the subsequent garnishee order must not exceed the amount payable under the first limited garnishee order, unless the court orders otherwise. Submissions to the statutory review of the Civil Procedure Act advised that section 121 is operating as it is intended, but that garnishees may find the wording of the section complex and confusing. This amendment is intended to clarify the operation of section 121.

Schedule 1.2 [4] amends section 123 of the Civil Procedure Act to clarify that the administrative charge that may be retained by a garnishee is in addition to the amount attached under a garnishee order. Section 123 of the Civil Procedure Act applies to both garnishee orders made against income and to garnishee orders made against bank accounts. In both cases, the garnishee is entitled to retain an administrative charge to cover the expenses of executing the order, except if a limited garnishee order has been made. The administrative charge currently is $13. Submissions to the statutory review of the Civil Procedure Act noted that there is confusion among stakeholders as to whether the administrative charge should be deducted from or be in addition to the amount that is attached to the garnishee order. This has resulted in different organisations taking different approaches.

When the garnishee deducts the administrative charge from the amount that is garnisheed, the creditor will be underpaid. This can create a loop of debt and enforcement, as the creditor may need to seek a further garnishee order. The statutory review found that section 123 is not intended to operate to place a burden on the creditor and recommended that the section be clarified to state that the administrative charge may be deducted in addition to the amount that is garnisheed. The statutory review noted that when the debtor does not possess sufficient funds to satisfy both the amount that is attached to the garnishee order and the administrative charge, the garnishee should be permitted to deduct the administrative charge as soon as funds next become available—for example, when the employee is next paid.

Schedule 1.2 [5] inserts a note into section 126 of the Civil Procedure Act to clarify that charging orders for specified security interests are not available for judgments of the Local Court. Those orders may be sought only in respect of judgments of the District Court and the Supreme Court. Charging orders operate as an equitable charge and the Local Court does not exercise equitable jurisdiction. A number of parties who appear in the Local Court nevertheless attempt to apply for a charging order. This note will help to avoid these unnecessary applications. Schedule 1.2 [6] provides that amendments made to the Civil Procedure Act will commence on assent, but will not extend to proceedings commenced before the commencement of the schedule.

I now deal with amendments to other instruments. Schedules 1.1, 1.4, 1.5, 1.15 and 1.16 make amendments to various instruments to transfer the fee-setting power and fee amounts for applications that are made to the New South Wales Civil and Administrative Tribunal [NCAT] under the Community Land Management Act 1989 and the Strata Schemes Management Act 1996 into the Civil and Administrative Tribunal Regulation 2013. Those fees were omitted from the consolidation of fee-setting powers that occurred as a result of the amalgamation of the former Consumer, Trader and Tenancy Tribunal into NCAT. The amendments will facilitate the transfer of fees into the NCAT legislation so that all fees for applications to NCAT will be in a single location. The current fee amounts will not change as a result of these amendments.

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I turn to classification of publications, films and computer games. Schedule 1.3 makes amendments to the Classification (Publications, Films and Computer Games) Enforcement Act 1995 to ensure that New South Wales complies with recent changes to the National Classification Scheme and is consistent with the corresponding Commonwealth legislation. Currently, under the New South Wales

Act, film festivals and other cultural organisations can apply to the Classification Board for an exemption that will allow them to show films that have not been classified. This bill amends the New South Wales Act to reflect new arrangements, so that organisations no longer need to make a written application for exemption. Instead, they will simply need to register online to obtain a conditional cultural exemption for their event. This simplifies and streamlines the application process.

I turn to reporting requirements for the Child Death Review Team. Schedule 1.6 to the bill amends Part 5A of the Community Services (Complaints, Reviews and Monitoring) Act 1993 [CRAMA] to enable the Child Death Review Team to report on child deaths in New South Wales every two years, rather than annually. The team is convened by the NSW Ombudsman and is responsible for keeping a register of all child deaths in New South Wales for classifying and analysing these deaths for patterns and trends, and for undertaking research into the causes of death. Based on its findings, the team then makes recommendations to government and relevant non-government agencies aimed at preventing future deaths.

The purpose of these amendments is to increase the effectiveness of the team's role in preventing child deaths and in the reporting of child deaths by the team to the New South Wales Parliament. Specifically, it is proposed that the obligation of the team to report on child deaths, which are currently provided on an annual basis, be done biennially. Generating data and producing an annual report on child deaths, in addition to its other activities, consumes the best part of the team's resources and impacts on its ability to undertake substantial work on prevention strategies emerging from its data and analysis. The proposed amendment will allow the team to report to the New South Wales Parliament every two years on child deaths in New South Wales in line with the NSW Ombudsman's reporting requirements in relation to reviewable deaths under part 6 of CRAMA.

Resources freed up through the amendments will enable the team to devote more of its time to key targeted initiatives aimed at preventing child deaths from various causes. For example, if the team identifies a spike in an infectious disease, such as whooping cough, the most effective strategy would be to engage with primary health and relevant preventative networks to take preventative actions. Biennial reporting will continue to identify trends and, in fact, it should enhance the identification of real trends over the longer term as opposed to spikes or anomalies that may occur during a 12-month period. The current demands of reporting also limit the team's capacity to publish specific issues papers as provided for under section 34H of CRAMA. These papers highlight particular risks and safety measures emerging through the team's work.

This important function allows for an in-depth analysis of causes of child deaths, and comprehensive and informed responses towards prevention. It is also proposed that the team report on child deaths actually occurring during the reporting period, rather than those registered during this period, and that the team report as soon as possible after June, rather than within four months after June. Both of these amendments will align the work of the team with the Ombudsman's reportable deaths function. The proposed amendments have the support of all of team members, including nominated government representatives, as well as the support of the Committee on the Ombudsman, the Police Integrity Commission and the Crime Commission.

I turn to amendments to the Crimes (Sentencing Procedure) Act 1999. Schedule 1.7 makes minor amendments to the Crimes (Sentencing Procedure) Act 1999 in relation to alternative sentencing orders. Schedule 1.7 [1] amends section 71 to change the commencement of an intensive correction order from up to 21 days to on the date on which it is made. The 21-day period was originally inserted to allow time for Corrective Services NSW to establish the operational requirements for an intensive correction order. This time period is no longer operationally required, and Corrective Services NSW reports that in rare circumstances offenders may re-offend in the period before commencement.

It has also been reported that the delay can cause offenders to lose motivation to comply with the requirements for an intensive correction order. The amendment will allow an intensive correction order to commence immediately. Schedule 1.7 [2] amends section 86 to allow suitable work placements for a community service order to be undertaken in another State or Territory, but only if the offender is able and willing to travel to that State or Territory. Offenders who reside in border towns, such as Queanbeyan, may miss out on opportunities to do community service work if it is located in another State or Territory. The amendment will provide more flexibility for offenders in these areas to undertake community service work.

I turn to the powers of police officers and public officers to issue court attendance notices [CAMs]. Schedule 1.8 amends the Criminal Procedure Act 1986 to clarify the powers of police officers and public officers to issue a court attendance notice to commence proceedings for an offence. Criminal proceedings are generally commenced under the Criminal Procedure Act by the issuing of a court attendance notice. A CAN may be issued by police and other public officers, including Independent Commission Against Corruption and Police Integrity Commission officers. As a matter of practice ICAC and PIC have commenced criminal prosecutions for statutory and common law offences arising out of their investigations by issuing a CAN to the accused person. A recent local court judgement has questioned the power of an ICAC officer to commence a prosecution for a common law offence by issuing a CAN.

It has always been the intention of the legislation to allow police officers and public officers to commence criminal prosecutions for both statutory and common law offences by issuing a court attendance notice. This issue was discussed by the Hon. Murray Gleeson, AC, and Mr Bruce McClintock, SC, in the 2015 Independent Panel Review of the Independent Commission Against Corruption as it related to ICAC. Rather than relying on the common law power to commence prosecutions, the amendments create a clear statutory power for police officers and pubic officers, like ICAC and PIC officers, to commence criminal prosecutions for all New South Wales offences by issuing a court attendance notice. In relation to ICAC and PIC, these prosecutions are only commenced on the advice of the Director of Public Prosecutions [DPP]. After the prosecution is underway the DPP will take over the matter. The redrafted provisions adopt a more plain English approach to the system that will make it easier for all to understand. This clarification is supported by the Law Society, the Bar Association and the DPP.

I turn to appearances by audio or audiovisual link. Schedule 1.9 amends the Evidence (Audio and Audio Visual Links) Act 1998 to clarify that the court must consider the views of any party to proceedings before making a direction that a witness may give evidence or make submissions via audio or audiovisual link. Currently, section 5B (2) (c) refers only to the court being required to consider the views of the party. This ambiguity has been subject to different judicial interpretations. The amendment will ensure that the interests of all parties are considered before a direction is made.

I move to contempt of court fines. Schedule 1.10 amends the Fines Act 1996 to clarify that any monetary penalty that is imposed by a court for contempt of court is included in the meaning of a fine for the purposes of that Act. Currently, it is not clear that fines that are imposed for civil contempt are included in the definition. If a person is found to have committed civil contempt and subsequently refuses to pay the fine into court, it would not be appropriate for court administrators to commence proceedings in the Local Court to obtain a judgement debt for enforcement of the court's own orders. Accordingly, the most appropriate mechanism for courts to enforce contempt of court fines is through the Office of State Revenue under the Fines Act.

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This will ensure that the courts authority to punish those who commit contempt of court is maintained and that justice is administered effectively. Parties who are alleged to have committed contempt of

court are given the opportunity to make submissions to the court on the issue and to appear at a formal hearing. If a fine is issued against a person or company for civil contempt and the person or company is not able to pay the full fine, the courts may extend the time to pay or allow the contemnor to pay by instalments. If that person does not respond to the courts request for payment, the fine will be referred to the Office of State Revenue.

At this stage, the enforcement options under the Fines Act will come into play, which include giving the person a further 28 days to pay an enforcement order, to organise a time to pay or to make a Centrepay arrangement, or to make a financial hardship application. These procedures ensure that the needs of any vulnerable people are protected and that they are not unnecessarily disadvantaged. Contempt of court, regardless of whether it is classified as criminal or civil in nature, is a serious charge that can result in imprisonment. Monetary penalties are a mechanism that the courts may use to punish contemnors but avoid sending the person to jail. These fines must have a clear enforcement mechanism should the contemnor continue to disobey the directions of the court and refuse to make payment. The amendment will clarify that the enforcement options under the Fines Act apply to all monetary penalties imposed by the courts for contempt.

Clause 1.11 of the bill will amend the Government Information (Public Access) Act 2009 [GIPA] to provide that documents that have been subject to a decision by the State Parole Authority under section 194 of the Crimes (Administration of Sentences) Act 1999 are subject to the conclusive presumption of overriding public interest against disclosure. Currently, if the State Parole Authority has determined that particular documents should not be disclosed, and a GIPA application is made for the same documents, a second decision-making process is required to be undertaken. The factors relevant to a decision under section 194 of the Crimes (Administration of Sentences) Act are broadly similar to the factors relevant to a decision not to disclose a document under the GIPA legislation; for example, if the documents would jeopardise an investigation, adversely affect the security of a correctional facility or endanger any person, or if they would reveal the medical reports of an offender or place a person at risk of harm. There are already a number of similar documents included in schedule 1 to the GIPA Act and the overriding public interest against disclosure. This amendment will eliminate the need for double decision making processes to be undertaken and ensure consistency.

Clause 1.12 amends the Legal Aid Commission Act 1979 to clarify the appeal rights and procedures that apply if the Legal Aid Commission makes a decision about an application for a grant of legal aid via its online application process. Legal Aid's online application process streamlines applications by allowing them to be automatically determined if the application meets certain criteria. The applicant then receives an immediate notification from the system about the outcome of the application. Only legal practitioners may make applications to Legal Aid on behalf of their clients via the online process. Self-applicants must fill in hard copy applications, which are determined by a Legal Aid grants officer. If a legal practitioner is dissatisfied with the outcome of an application, the amendments clarify that there is a right of appeal to the independent Legal Aid Review Committee. The amendment does not introduce any new procedures or appeal right, but it makes it clear that the rights of appeal extend to the determination or redetermination of online applications. The amendment also makes it clear that the applicant must be given notice of the right of appeal and the reasons for the determination or redetermination must be recorded.

Clauses 1.13 and 1.14 introduce amendments to the Legal Profession Uniform Application Law as a result of recommendations made by the Chief Justice. Subclauses 1.13 [1] and 1.13 [4] will give costs assessors the discretion to hold an oral hearing for the purposes of determining an application. This may be useful when one party is unrepresented and the issues may be best resolved through oral rather than written submissions. They may also assist where the issues relate to matters where there is no written documentation, such as where the parties are in dispute about verbal terms in a costs agreement. Oral hearings will have to be conducted in accordance with the costs assessment rules.

These will be developed by the Costs Assessment Rules Committee, which includes costs assessors, judges of the Supreme Court and representatives of the Law Society and Bar Association. Subclause 1.13 [2] and clause 1.14 allow parties to apply for a review of a costs assessment determination within 30 days unless an application for an extension is granted. This lifts the existing entitlement from the regulations into the Act.

Subclause 1.13 [3] provides that appeals against reviews of costs assessment decisions may be made to the District Court if the amount of costs in dispute is more than $25,000, or by leave if it is less. Additionally, appeals may be made to the Supreme Court if the amount in dispute is more than $100,000. Otherwise, leave is required. Currently, almost all costs assessment appeals go to the District Court. This amendment will reinstate the supervisory jurisdiction of the Supreme Court over practitioner's costs and will ensure that the Supreme Court has the power to hear the more significant or complex costs assessment appeals. As I said, the amendments were proposed by the Chief Justice to improve the costs assessment procedures in New South Wales. Costs assessment is generally used where a dispute arises between a client and law firm about a bill of costs, or where parties to proceedings have had a costs order made.

Subclause 1.13 [5] amends schedule 3 to the Legal Profession Uniform Law Application Act 2014 to allow the Chief Justice to nominate acting or retired judges and existing Supreme Court judges to the Legal Profession Admission Board. This amendment will increase the pool of eligible judges to hold the position and will ensure that the Chief Justice is able to nominate the best and most appropriate judges or former judges to the board. Overall, the amendments in this bill will improve the administration of justice in this State. They will assist the courts, tribunals and other agencies within the Department of Justice to perform their important work more efficiently. I commend the bill to the House.

Debate adjourned on motion by Mr Greg Warren and set down as an order of the day for a future day.

Pursuant to resolution private members' statements proceeded with.