



NSW Legislative Council Hansard

Crimes and Courts Legislation Amendment Bill

Extract from NSW Legislative Council Hansard and Papers Tuesday 21 November 2006.

Second Reading

The Hon. TONY KELLY (Minister for Justice, Minister for Juvenile Justice, Minister for Emergency Services, Minister for Lands, and Minister for Rural Affairs) [3.28 p.m.], on behalf of the Hon. John Della Bosca: I move:

That this bill be now read a second time.

I seek leave to have the second reading speech incorporated in *Hansard*.

Leave granted.

The Government is pleased to introduce the Crimes and Courts Legislation Amendment Bill, which makes a number of miscellaneous amendments to the criminal law and court procedures. These amendments are designed to improve the administration of the justice system.

I now turn to the detail of the bill.

Schedule 1.1 to the bill amends section 8A of the Bail Act 1978 to apply a presumption against bail to certain newly created hydroponic cannabis offences and the offence of manufacturing or producing in the presence of children an amount of a prohibited drug that is not less than the applicable commercial quantity.

Schedule 1.2 repeals section 13 (3) of the Child Protection (Offenders Prohibition Orders) Act 2004, which relates to arresting a person who has allegedly breached a child protection prohibition order. This will mean that arrested people will be treated consistently under the Bail Act provisions.

The Child Protection (Offenders Registration) Act 2000 is to be amended by schedule 1.3 to correctly cross-reference the new child pornography offences.

The Children (Criminal Proceedings) Act 1987 will be amended by schedule 1.4 to include an equivalent provision to section 100 of the Crimes (Sentencing Procedure) Act 1999 allowing action to be taken in relation to matters arising during the term of a good behaviour bond even if the term of the bond has expired.

Schedule 1.5 to the bill contains amendments to the Civil Liability Act arising from the Supreme Court case of *Bujdoso v The State of New South Wales*. In a decision handed down by the Supreme Court on 5 September 2006 a single judge found at first instance that Mr Bujdoso is entitled to retain damages awarded to him in relation to injuries sustained at the time he was a prison inmate, instead of the damages being quarantined in a trust fund for six months to be available if any victim launched a damages claim against him.

The Court found that in the circumstances of an intentional assault or other intentional tort, including the negligent failure to prevent an intentional tort, section 3B provides that the Civil Liability Act does not regulate the award of damages, which are determined in terms of normal common law entitlements; and, in any event, these damages were not covered by legislation that was intended to ensure that such awards were held on trust for the benefit of an offender's victims because Mr Bujdoso does not fall within the Act's definition of "an offender in custody".

The effect of the first limb of the decision is that any organisation, but particularly any government agency such as a prison or a school, that negligently fails to prevent an assault will be able to be sued for damages at common law instead of under the narrower liability provisions of the Civil Liability Act.

The effect of the second limb of the decision is that prisoners who were in custody a significant time ago, and hence imprisoned under old legislation, will not be affected by the requirement for damages awards to be held on trust for the benefit of the offender's victims. The amendments proposed in this bill to the Civil Liability Act will overturn that decision.

Section 3B (1) (a) is amended to make it clear that the provisions of the Act that benefit defendants by limiting the amount of damages payable do not apply in cases where the defendant committed an intentional act with intent to cause injury or death, or committed a sexual assault or other sexual misconduct. By clarifying the scope of this provision, it will be clear that the Civil Liability Act does apply where a victim of such an intentional act sues a third party for negligence for failing to prevent the intentional injury. Using the facts of the Bujdoso case as an example, the Civil Liability Act will apply where a prison inmate who has been intentionally injured by

another inmate sues the Department of Corrective Services for negligence for failing to prevent the injury. It will not apply to a civil action brought against the other inmate.

The amendments to section 26A ensure that the offender damages and offender damages trust funds provisions of the Act will apply to all inmates and prisoners, however described, and regardless of the legislation under which they were detained. As these amendments are in the nature of clarification of the original intention of the legislation, they will be given retrospective effect to the original commencement of the application of the sections that are being amended. However, the retrospectivity will not affect any final determination of legal proceedings made by a court or tribunal before the date of assent to these amendments.

In relation to the Bujdoso appeal presently pending in the Court of Appeal, the intention is that the amendments will have no effect on the final determination of damages, but the Court of Appeal will need to take the amendments into account when determining the application of the offender damages trust fund provisions.

Schedule 1.6 will amend the Civil Procedure Act 2005 by clarifying the rule-making powers so that rules can be made by the Uniform Civil Procedure Rule Committee in relation to access to court information. Earlier this year a discussion paper was released entitled "Review of the Policy on Access to Court Information". Although the review is yet to be finalised, it is anticipated that court rules will need to be amended to ensure that a more consistent approach is taken to the release of court information. This amendment to the Civil Procedure Act will ensure that the rule committees have the power to make more detailed rules on access to court documents and information.

Schedule 1.7 makes amendments that enhance the investigation powers under the Coroners Act 1980 by allowing a coroner to order a coronial investigation scene to be established. The order will authorise police officers and other persons to enter premises for the purpose of preserving, searching and taking possession of evidence in relation to a death, a suspected death, fire or explosion.

The new provisions replace the limited investigation power under section 25 of the Coroners Act 1980. That provision does not provide powers for the search and seizure of evidence. An order to establish a coronial investigation scene may be made, for example, when a suspected death has occurred on premises and police need to gain entry to the premises to confirm the suspected death. Once the coronial investigation scene is established, police and other persons will be able to exercise powers that are reasonably necessary to preserve evidence relevant to an investigation by the Coroner. This includes seizing and detaining anything that might provide evidence of the commission of a criminal offence. The coronial investigation scene order will be sufficient authority in these circumstances without the need to obtain a crime scene warrant under part 7 of the Law Enforcement (Powers and Responsibilities) Act 2002.

The bill makes the same amendment to the definition of "sentence" in two Acts: the Crimes (Local Courts Appeal and Review) Act 2001 and the Criminal Appeal Act 1912. Item [1] of schedule 1.8 and item [1] of schedule 1.10 amend provisions that currently outline the range of orders that constitute a "sentence". This amendment will add an additional order—namely, any decision by a court to revoke a bond and any order made by a court subsequent to that revocation.

These amendments are in response to the finding in *Barrett v Director of Public Prosecutions* in July 2006 by two judges of the Court of Criminal Appeal that no appeal lies from the Local Court to the District Court against revocation of a suspended sentence, because such a revocation was not a "sentence" as defined in section 3 of the Crimes (Local Courts Appeal and Review) Act.

Item [2] of schedule 1.8 makes a further amendment to the Crimes (Local Courts Appeal and Review) Act 2001 to provide that being found guilty of an offence, whether or not a conviction has technically been entered, is sufficient to give rise to the power to apply for an annulment under section 4 of that Act.

Schedule 1.9 makes a number of amendments to the Crimes (Sentencing Procedure) Act 1999. Item [1] creates a new sentencing option for courts by inserting new section 10A providing that the court may decline to make any further sentencing order other than the recording of a conviction against the person. This option addresses an anomaly in the sentencing regime to overcome situations where inappropriate sentences have been imposed such as fines of 50¢. Imposing very small nominal fines costs the courts, and State Debt Recovery Office, more to administer and recover, than the value of the fine; and where the offender is already serving a sentence of imprisonment, the fine is rarely recovered in any event. This amendment will address such cases.

Item [2] deals with suspended sentences by amending section 12 (3) to abolish the practice of setting the non-parole period of the sentence, at the time of imposing a suspended sentence. The current laws regulating imposing, and revoking, suspended sentences, require that the non-parole period of the suspended sentence is set at the time the sentence is imposed. Then, if the suspended sentence bond is later revoked, the court may only determine whether the sentence is to be served by way of full-time custody, periodic detention or home detention.

This current procedure prevents the courts from complying with section 24 of the Crimes (Sentencing Procedure) Act, which requires that where a person who has been subject to a bond is to be sentenced, the court must at the time of imposing sentence take into account "anything done by the offender in compliance with the offender's obligations under the order or bond". The current scheme does not allow the court to take into account whether a person has substantially complied with the bond and requirements to undertake Probation and Parole Service supervision. The proposed amendment will enable the court to take such matters into account when sentencing.

Items [2] and [3] amend section 99 to clarify that when the court sets a non-parole period, the sentence takes effect at the time the good behaviour bond is revoked rather than on the day that the sentence was imposed under section 47 of the Act. This removes the possibility of a situation arising where an offender is deemed to be in custody while she or he was at liberty on the bond, hence leaving very little or nothing left to serve of the sentence if the bond was revoked.

Items [5] to [10] of schedule 1.9 relate to the New South Wales Sentencing Council. Section 100I is amended to provide for the addition of three members to the Sentencing Council: one with experience in relation to corrective services, one with experience in relation to juvenile justice matters and one being a representative of the Attorney General's Department.

This amendment was suggested by the chairperson of the council, given the fundamental link between Corrective Services and sentencing issues, the distinct factors involved in the sentencing of juveniles and the options available, and the relationship between the work of the council and the policy work of the department's Criminal Law Review Division. Section 100J is amended to provide that the Sentencing Council has a public education function relating to sentencing matters.

Schedule 1.11 makes various amendments to the Criminal Procedure Act 1986. Items [1] to [3], and [11] and [12] clarify that a person is authorised to commence criminal prosecutions by section 14 of the Act or any other law. The amendments also provide that a person who purports to be a public officer is, in the absence of evidence to the contrary, presumed to be acting in an official capacity. Items [4] to [6] and [13] to [15] seek to streamline the provisions for commencing indictable and summary prosecutions.

The current procedures require a court attendance notice to be filed at a court registry within seven days after service with an endorsement as to service. The amendments seek to remove the nexus between the service and the jurisdiction of the court. The amendments will restore the jurisdictional requirements to the position that existed prior to amendments introduced on 7 July 2003. Service of a court attendance notice is a matter that is considered by the court at the time that it is hearing and determining proceedings rather than at the time of filing the court attendance notice. These amendments will reflect this position.

Item [7] reinstates a provision that existed under the Justices Act 1902 that exempts transcripts of recorded interviews of a child from having to be endorsed by the child who was interviewed. The need to take a separate written statement from a child witness who has participated in a recorded interview is unnecessary and inconsistent with the simplified procedures of the Evidence (Children) Act 1997.

Items [8] to [10] of schedule 1.11 amend section 91 to make the scheme for witnesses being called at committal consistent with Local Court committal practice. This amendment will remove a few technical impracticalities in the Act and clarify that a magistrate may order that a person is to attend to give evidence at committal, regardless of whether that person's statement is handed up to the magistrate during the course of an argument under section 91.

Items [16] to [18] will alter the time period in which summary proceedings may be commenced where the alleged offence involves the death of a person. These amendments arise from coronial recommendations made by former State Coroner Abernethy and Deputy State Coroner Pinch. At present, section 179 of the Criminal Procedure Act 1986 provides that summary proceedings must commence within six months of the alleged incident. If the alleged offence relates to the death of a person whose death is subject to a coronial investigation, the Coroner should have the opportunity to fully investigate the circumstances surrounding the cause and manner of death prior to summary prosecutions being instituted. The proposed amendment will increase the time frame to commence a summary prosecution that involves the death of a person to either six months after the conclusion of the inquest or two years after the alleged incident, whichever first occurs.

Items [19] to [20] introduce time frames for the expiration of arrest warrants. At the present time the majority of arrest warrants issued do not have an expiration period and, potentially, warrants might be executed on relatively minor matters many years after the prosecution witnesses cannot be found and evidence is no longer available. The introduction of time frames allows warrants to expire after a reasonable period of time having regard to the seriousness of the offence. The expiration of a warrant will not prevent a further warrant being issued if the prosecution believes that a successful prosecution could still be maintained.

In 2005 the Confiscation of Proceeds of Crime Act 1989 was amended to provide a new system involving

freezing notices for the seizure of tainted property. Schedule 1.12 amends the Director of Public Prosecutions Act 1986 to make it clear that the Director of Public Prosecutions may take over freezing notice proceedings from police under the Confiscation of Proceeds of Crime Act 1989 where the Director of Public Prosecutions is responsible for the criminal prosecution.

Schedule 1.13 amends the District Court Act 1973 so that the Chief Judge is to consult with the Attorney General prior to making any direction that substantially changes the frequency of sittings at a particular location. As changes in the allocation of sittings may impact upon administrative services that support the court and access to justice by the community, it is appropriate for consultation to take place on these matters. A similar amendment is included in this bill relating to the sittings of Local Courts.

Item [2] of schedule 1.13 amends the District Court Act 1973 so that the provisions relating to the attendance of witnesses and the issue of subpoenas under part 3 of chapter 4 of the Criminal Procedure Act 1986 apply to the criminal jurisdiction of the District Court. This amendment will bring the District Court procedures into line with those that apply in the Local Court. It will also allow public officers such as the Director of Public Prosecutions' officers to adopt more streamlined procedures that will allow them to issue subpoenas without the need to attend the court registry.

Schedule 1.14 to the bill corrects some practical anomalies in the Drug Court Act 1998 and related legislation. Consequential amendments are made to the Criminal Appeal Act 1912 by schedule 1.10. The amendments will further advance the efficient functioning of the court. The amendments clarify how and where appeals from the Drug Court may be conducted, the way in which breaches of bonds are to be referred to the Drug Court, when the Drug Court may exercise its power to bring in offences that have not been formally referred to it, and the sentencing law requirements that will apply when the Drug Court imposes initial sentences.

Schedule 1.15 to the bill amends the Drug Misuse and Trafficking Act 1985. The bill creates a new offence of possessing a tablet press capable of being used in the manufacture or production of a prohibited drug, with a defence available if the court is satisfied that the tablet press is used to produce tablets in connection with an activity that is not unlawful, or the person possessing the tablet press otherwise had a reasonable excuse for doing so.

The bill creates a new aggravated version of the offences under the Act of allowing the use of premises as drug premises or organising drug premises, where a child is exposed to prohibited drugs or plants, a drug supply process or equipment capable of being used in a drug supply process. The bill also amends part 3A of the Drug Misuse and Trafficking Act 1985 to enable prohibited plants to be destroyed pre-trial in the same manner and under the same circumstances that the Act currently provides with respect to prohibited drugs.

Schedule 1.16 amends the Electronic Transactions Act 2000. The Attorney General's Department has established the CourtLink computer system to provide a range of electronic court services to clients. Schedule 1.16 amends the Electronic Transactions Act 2000 by making it clear that information concerning legal proceedings contained on an electronic case management system may be exchanged with other persons or agencies.

Schedule 1.17 amends the Evidence (Audio and Audio Visual Links) Act 1998 to remove the restriction against the use of videolink technology in relation to weekend and public holiday bail courts. Bail courts are regularly conducted on weekends and public holidays in country and regional areas. A large proportion of accused persons appearing at weekend and public holiday bail courts do not have legal representation. A trial is proposed to use videolink technology on weekends and public holidays. The trial will enable bail courts in country areas to be centralised to a fully operational court facility where an accused person could obtain assistance from a Legal Aid solicitor.

Schedule 1.18 amends the Evidence (Children) Act 1997 to make it clear that it is not necessary to serve a copy of video recorded evidence of a child witness in civil proceedings including apprehended proceedings under part 15A of the Crimes Act 1900. Section 76 of the Criminal Procedure Act 1986 provides that an accused person in criminal proceedings is not generally entitled to receive a copy of the recording of a person—other than a transcript of the recording. Video evidence provided by children may contain sensitive, graphic and traumatic details of incidents. This amendment will ensure that video recordings are not unnecessarily released to other parties in civil proceedings.

Schedule 1.19 amends the Land and Environment Court Act 1979. The amendments are intended to improve the procedures of the court by expanding the use of conciliation conferences that facilitate the effective resolution of disputes. Preliminary conferences under section 34 of the Act will now be available in relation to planning appeals under section 97 of the Environmental Planning and Assessment Act 1979 as well as class 3 proceedings. The amendments promote a flexible approach to resolving disputes and maximise the opportunity to avoid legalistic and adversarial proceedings.

Schedule 1.20 amends the Local Courts Act 1982 by introducing a process of consultation between the Chief

Magistrate and the Attorney General if there are substantial changes in the sittings of the Local Court. A further amendment is introduced to the procedures for commencing application notices under part 6 of the Local Courts Act 1982. These changes mirror the procedural changes made for commencing court attendance notices under the Criminal Procedure Act 1986.

Schedule 1.21 amends part 4 of the Summary Offences Act 1988. This part, which deals with public assemblies, is amended to give more flexibility to the approval and management of public assemblies, so that an assembly that is held in accordance with terms agreed between the Commissioner of Police and the organiser will be lawful under the Act. The bill also enables notices under the part to be served by modern means, such as email and fax.

Schedule 1.22 amends the Telecommunications (Interception) (New South Wales) Act 1987. Item [1] makes amendments to the name of the Act to reflect equivalent amendments made to the complementary Commonwealth legislation, and item [2] updates the cross-reference to the Commonwealth Act's new name. Item [3] amends section 11 to require information on the telecommunications interception inspections conducted in the relevant year by the Ombudsman to be included in the Ombudsman's annual report to Parliament—in terms that mirror a recent change to the complementary Commonwealth legislation.

Schedule 1.23 amends the Witness Protection Act 1995. The amendments deal with a small number of protected witnesses who were managed under the previous administrative system before the Act was introduced but are no longer on a witness protection program. The amendments will back-capture these people, and allow for certain measures to be taken by the authorities to protect the witnesses' assumed identities under the legislative scheme. In summary, these amendments will improve the efficiency and operation of the criminal justice system and the courts. I commend the bill to the House.