COURTS AND CRIMES LEGISLATION FURTHER AMENDMENT BILL 2008

Bill introduced, and read a first time and ordered to be printed on motion by the Hon. John Hatzistergos.

Second Reading

The Hon. JOHN HATZISTERGOS (Attorney General, Minister for Justice, and Minister for Industrial Relations) [5.50 p.m.]: I move:

That this bill be now read a second time.

The Courts and Crimes Legislation Further Amendment Bill 2008 provides for miscellaneous amendments to courts and crimes-related legislation and is part of the Government's regular legislative review and monitoring program. The bill will amend a number of Acts in order to improve the operation of the courts. The bill will also make several amendments to criminal law and procedure in order to improve the administration of the criminal justice system.

Schedule 1 to the bill clarifies the qualifications necessary for appointment as a judicial member of the Administrative Decisions Tribunal. Section 14 of the Act allows a judicial officer, being a current judge or magistrate of a New South Wales court, to be appointed as a judicial member of the tribunal. An amendment is made to section 14 to provide that the reference to judicial officer includes a retired judicial officer. This makes the section consistent with section 17 of the Act, which refers to the appointment of persons who have held a judicial office as a judicial member. The amendment is made for the purposes of clarification and does not alter the criteria for eligibility for appointment.

Schedule 2 makes two amendments to the Bail Act 1978. Items [2] to [4] of schedule 2 amend section 22A of the Bail Act 1978 to clarify that a court is to refuse to entertain an application for bail by an accused person if an application in relation to the offence has already been made and dealt with by a court of the same jurisdiction. A court is not to refuse, under this section, to entertain an application for bail because a court of another jurisdiction has rejected one. The ambiguity in section 22A was highlighted in the District Court matter of *R v Petrovski* [2008] NSWDC 110. This issue has been raised with my department and me by a number of people, and in particular I acknowledge the Hon. John Ajaka for bringing this issue to my attention.

Section 22A was amended in 2007 to require a court to refuse to entertain an application for bail unless new facts or circumstances have arisen since the previous application or the applicant had no legal representation the first time around. Section 22A is aimed at preventing forum shopping to save victims from having to undergo the trauma of repeated bail applications. It is designed to strike an appropriate balance between offering greater protection to victims of crime and serving the rights of an accused to apply to a court for bail. When circumstances have changed, and for the purposes of this section circumstances are to be construed broadly, then an accused has the ability to apply for bail. The current amendment does not affect the operation of this aspect of the section. Schedule 4 makes an amendment consequential to the amendments to section 22A.

The bill amends the Births, Deaths and Marriages Registration Act 1995 to clarify that the District Court may only direct the Registrar of Births, Deaths and Marriages to register a birth if the birth occurred in New South Wales. The Registry of Births, Deaths and Marriages is responsible for recording events that occur in New South Wales. This approach is appropriate to ensure the integrity of the register and to protect against multiple recordings of births. Duplicate birth registrations can create the opportunity for fraud and multiple identities. An application has been made recently to the court seeking orders to register an adopted child who was born overseas and is now resident in New South Wales. It is unnecessary for overseas adoptions to be registered on the New South Wales register of births. Overseas-born adoptees will have a birth

certificate from their country of origin and a certificate of adoption. They can also rely on their Australian citizenship or visa for official purposes. These documents have the same status as a birth certificate. The amendment will have effect retrospectively by providing that the registrar is not required to comply with an order that contravenes the new restriction, regardless of whether the order was made before or after the commencement of the amendment.

The second amendment to the Births, Deaths and Marriages Registration Act will give the registrar a power to issue certificates to children whose adoption is registered in New South Wales. These certificates take the form of a birth certificate, but record the child's adoptive parents and any adoptive siblings and new name as though they were the child's at birth. The registrar has adopted the practice of issuing certificates in these circumstances for many years. This amendment gives legislative force to the practice and will validate existing certificates that have been issued in accordance with this practice.
The Confiscation of Proceeds of Crime Act 1989 creates a legislative framework to require offenders to pay to the State the benefits of crime and to forfeit property used in crime. A freezing notice and a restraining order may be made to ensure that a person does not dispose of tainted property. It is an offence for a person to breach a freezing notice or restraining order. Subsections 74(2) and (3) of the Act allow offences for a breach of a freezing notice or restraining order to be brought before the Local Court only if the value of the tainted property does not exceed $10,000. Schedule 4 to the bill increases the jurisdiction of the Local Court so that it can deal with breach offences if the tainted property does not exceed the civil jurisdictional limit of the Local Court, which is currently $60,000. The increase in jurisdiction will mean that the Local Court will be able to deal with the majority of prosecutions for breach of freezing notices and restraining orders. It is appropriate that the Supreme Court be required to deal with offences only where the value of the tainted property is substantial.

Schedule 5 makes two amendments to the Crimes Act. Item [1] of schedule 5 extends the definition of "conveyance" for the purposes of the offence of taking and driving a conveyance to include military vehicles. This ensures that all military vehicles, such as tanks and armoured personnel carriers, are protected from theft and joyriding by section 154A of the Crimes Act.

Item [2] of schedule 5 creates two new offences in the Crimes Act involving damaging property whilst in the company of another person or persons. The offence will carry six years imprisonment as a maximum penalty. Otherwise, where fire or explosives occasion the property damage it is proposed that the offence will carry 11 years imprisonment. Earlier this year we saw a particularly vicious gang attack at Merrylands High School, and in the past week we have seen gangs using gas to explode automatic teller machines. Property damage committed by gangs is a particularly cowardly and dangerous act.

These new offences with higher penalties will send a clear message to would-be offenders and to the courts about the condemnation this Parliament has for those who commit these acts in the company of others. It is acknowledged that people who commit offences in company may be encouraged to commit more serious criminal acts than they would otherwise do and such behaviour is deserving of a more serious penalty. Of course, the new offence does not change the common law. Those who are in the company of the principal offender, even if they do not damage the property themselves, could still be exposed to the full force of the law, and find themselves charged with aiding and abetting or complicity in the offence and so subject to the same penalty.

Schedule 5 to the bill amends the Criminal Appeal Act 1912 to rectify an anomaly in the appeal process from the Drug Court, which was highlighted by the Court of Criminal appeal in the case of *Bell v R.* [2007] NSWCCA 369. In that case the court found that the sentences imposed by the Drug Court pursuant to the exercise of its jurisdiction under section 24 of the Drug Court Act could not be appealed to the Court of Criminal Appeal. The court found that appeals against sentences under part 2 of the Drug Court Act could be brought before the Court of Criminal Appeal, while an appeal against sentences imposed under the Drug Court's summary jurisdiction under section 24 of the Act must be brought in the District Court. This meant that an offender had to take appeals in two different jurisdictions depending on how his or her matter came to be

dealt with by the Drug Court. The change allows all sentences imposed by the Drug Court to be dealt with by the Court of Criminal Appeal.

Schedule 7 to the bill makes minor amendments to criminal procedure. The first relates to the procedures for the issue of subpoenas for production. Section 222 of the Criminal Procedure Act 1986 provides for the issue of subpoenas. A subpoena may be returnable on a future date when the proceedings have been listed or, with leave of the registrar, on any other date. There is no obligation upon a party requesting the issue of a subpoena to inform the other party of its issue. As a result the other party may be unaware of the issue of a subpoena. Section 222 has been amended to introduce an obligation upon the party requesting the issue of the subpoena to serve a copy of the subpoena on the other party. This is consistent with the obligation that exists in the civil jurisdiction of the court.

The second issue being addressed relates to procedures for issuing arrest warrants. The Crimes and Courts Legislation Amendment Act 2006 was assented to on 29 November 2006 and will introduce time frames for the expiration of arrest warrants. Chapter 4, part 4, of the Criminal Procedure Act currently applies to proceedings before the Local Court. The bill will extend the application of part 4 to other courts so that provisions relating to arrest warrants apply uniformly. The bill also introduces transitional provisions to provide expiration time frames for warrants issued prior to the commencement of schedule 1.11 to the Crimes and Courts Legislation Amendment Act 2006. The bill provides that arrest warrants issued prior to the commencement of the new legislation will expire after a period of 20 years after issue. This is consistent with the longstanding practice that allowed police to return unexecuted warrants to the court after a period of 20 years. The expiration of an arrest warrant does not prevent police from applying for a further warrant.

Lastly, item [10] of Schedule 7 amends the Criminal Procedure Act 1986 to prescribe the common law offence of false imprisonment as an offence which is tried summarily in the Local Court unless either the prosecutor or the accused elects to have the matter dealt with on indictment. Until now the offence has been one that could only be prosecuted on indictment in the District or Supreme Court.

The bill amends the Crown Prosecutors Act 1986 and the Public Defenders Act 1995 to ensure that Crown Prosecutors and Public Defenders can be suspended and removed from office for unsatisfactory performance as well as misconduct. In 2006, when allegations were made that Patrick Power, a Deputy Senior Crown Prosecutor, had child pornography on his work computer, it became apparent that because Crown Prosecutors are statutory officers appointed under the Crown Prosecutors Act, neither the Director of Public Prosecutions nor any other officer had the power to suspend him from office while the allegations were being investigated. Likewise, in relation to Public Defenders, there is no power for the Senior Public Defender to suspend a Public Defender if allegations regarding their competency to hold office are being investigated.

The bill amends the Crown Prosecutors Act 1986 to allow the Director of Public Prosecutions to suspend Crown Prosecutors, Deputy Senior Crown Prosecutors and the Senior Crown Prosecutor whenever grounds for removal from office are suspected. A similar amendment has been made to the Public Defenders Act 1995 to allow the Senior Public Defender to suspend Public Defenders and Deputy Senior Public Defenders from office where it is suspected that grounds for removal from office exist. The Governor's power to remove Public Defenders differs slightly from the grounds that apply in relation to Crown Prosecutors.

Whereas the Governor has the power to remove a Public Defender from office on grounds of unsatisfactory performance, this power does not exist in relation to Crown Prosecutors. The bill will now allow the Governor to remove a Crown Prosecutor for unsatisfactory performance. The grounds for removal or suspension of Crown Prosecutors will mirror the grounds for removal or suspension of Public Defenders. The bill ensures that there is an appropriate level of accountability for the conduct of these statutory officers. The introduction of a power of suspension will ensure that management can respond immediately to any allegation of serious misconduct or criminal behaviour.

Schedules 9 and 10 to the bill amend the Drug Court Act and the Dust Disease Tribunal Act by expanding the eligibility of appointment to sit in these courts and tribunals. At present only a judge of the District Court may be appointed to the Drug Court or the Dust Disease Tribunal. The bill amends the appointment provisions to allow any judge of a New South Wales court to be appointed to either the Drug Court or the Dust Disease Tribunal. This increases the flexibility of the use of judicial resources and opens the door for superior court judges to be potentially appointed.

The Evidence Amendment Act 1997 implements the recommendations of the 2005 report of the Australian Law Reform Commission, the New South Wales Law Reform Commission and the Victorian Law Reform Commission entitled "Uniform Evidence Law." The amendments will commence in conjunction with amendments to the Commonwealth law. This bill makes minor amendments to give effect to the recommendations in the report and to ensure consistency with the Commonwealth Act. Recommendation 14-9 of the report was to clarify the meaning of "lawyer" in the Evidence Act 1995 to make clear whether the lawyer must hold a current practising certificate, or whether it is sufficient to be admitted as a practitioner on the roll. An Australian lawyer is defined in the Legal Profession Act 2004 as a person who is admitted to the legal profession under that Act or a corresponding law. Similar amendments are made in the bill to clarify references to Australian lawyers contained in the Mental Health Act 2007 and the Pharmacy Practice Act 2006.

The Evidence Amendment Act 2007 expands the protection afforded by a certificate issued by a court when persons are compelled to give evidence that tends to incriminate them. At present, the Evidence Act provides that a certificate given by a court under section 128 protects against that evidence being used in any other court proceedings in New South Wales. The certificate, however, does not prevent the evidence being used in other proceedings, for example, disciplinary proceedings, not before a New South Wales Court. The Evidence Amendment Act 2007 is intended to expand the protection provided by the certificate so that the evidence cannot be relied upon in any proceedings before a person or body authorised to hear, receive and examine evidence. Items [1] to [3] of schedule 11 correct the omissions in the original amending Act to give effect to this proposal.

The bill amends the Industrial Relations Act 1996 to bring the procedures for contempt before the Industrial Court into line with the procedures that apply in the Supreme Court. In the decision of Industrial *Registrar v Matters*—[2007] NSWIR Comm 250—the Industrial Court found that proceedings for contempt of court were statute barred as they had been commenced more than 12 months after the alleged conduct constituting the contempt. Proceedings in relation to contempt before the Supreme Court and other New South Wales courts are dealt with as a common law offence and no time limitation applies. Contempt before the Industrial Commission is a statutory offence under section 180 of the Industrial Relations Act 1996. Section 398 of the Act provides a 12-month time limit for commencing proceedings for any offence under the Act including contempt. The bill will remove the application of section 398 to contempt proceedings to ensure consistency in procedures for contempt between the Industrial Court and other courts.

The bill amends the Land and Environment Court Act 1979, the Mining Act 1992 and the Petroleum (Onshore) Act 1991 to transfer the jurisdiction of the Mining Warden to the Land and Environment Court. Mining wardens deal with a broad range of disputes between miners and landholders in matters such as boundaries and rights to minerals and water. In New South Wales Mining wardens have a history that dates back to the nineteenth century. They have been responsible for determining disputes in relation to mining activities since the earliest days of mining within this State. Members of the Local Court magistracy have undertaken the role of Chief Mining Warden. In October 2008, Magistrate Bailey retired as the Chief Mining Warden after more than a decade in this role. The retirement of Magistrate Bailey and the absence of a continuing body of knowledge and experience in this specialist area within the magistracy prompted a review of the Warden's Court.

In consultation with the Department of Primary Industries and the Land and Environment Court a

decision has been made to transfer the jurisdiction of the Mining Warden to the Land and Environment Court. The Land and Environment Court deals with areas of law similar in nature to that dealt with by the Mining Warden, such as claims formerly dealt with by the Coal Compensation Board and the Mines Subsidence Board. The Land and Environment Court provides responsive and high-quality services, and resolves disputes in a prompt and cost-effective manner. The court regularly conducts on-site hearings, has an electronic call-over service and travels to country locations to deal with disputes.

The bill amends the Land and Environment Court Act to ensure that the Land and Environment Court will have processes that will accommodate the mining disputes. The bill establishes a new class 8 to deal specifically with matters under the Mining Act and the Petroleum (Onshore) Act. A commissioner will be qualified to deal with matters in class 8 if the commissioner is an Australian lawyer. When dealing with mining matters a commissioner may be referred to as a Commissioner for Mining. The new class 8 will deal with civil disputes relating to mining matters. Class 8 will pick up the civil procedures that are currently available in other classes of the Land and Environment Court under the Civil Procedure Act 2005 and the Uniform Civil Procedure Rules. This will ensure consistency in procedures between civil matters relating to mining law and other civil matters.

Criminal prosecutions under the Mining Act will be capable of being dealt with within class 5 of the jurisdiction of the Land and Environment Court. Many mining issues arise in the Lightning Ridge district, which has one of the world's richest deposits of black opal. The Mining Warden regularly travels to Lightning Ridge to determine matters arising within this district. The Land and Environment Court will be similarly capable of travelling to Lightning Ridge to deal with matters so as to avoid inconvenience to parties having to travel long distances to attend court. In addition to the power to determine disputes the Mining Warden has a number of inquiry functions. By way of example, section 334 of the Mining Act allows the Minister to direct a warden to hold an inquiry into any matter arising under the Act and to provide a report of that inquiry to the Minister.

This aspect of the role of the Mining Warden is purely administrative. In a modern judiciary it is not necessary for judicial officers to hold an inquiry and provide reports to Ministers. These provisions have been repealed so that only the adjudicative functions of the Mining Warden have been transferred to the Land and Environment Court. Local Courts will also retain jurisdiction to deal with monetary claims arising from mining disputes up to the value of $60,000 and will be capable of dealing with criminal prosecutions in the same way as the former Mining Warden. These changes will ensure that this specialist jurisdiction is consolidated and more effectively supported within the structure of a superior court. The knowledge and expertise of the Chief Mining Warden, Magistrate Bailey, will be available to assist the Land and Environment during the transitional stage.
The Chief Judge of the Land and Environment Court, the Hon. Justice Preston, has been instrumental in supporting the transfer of jurisdiction to the Land and Environment Court. It is anticipated that these amendments will take effect early next year, and the Chief Judge has indicated a willingness to facilitate court forums with stakeholders prior to the commencement of the legislation to discuss processes and ensure a seamless transition from the mining warden to the Land and Environment Court. I extend my gratitude to the Chief Judge for his support in this regard. The bill also amends section 40 of the Land and Environment Court Act in relation to the power of the court to impose easements.

Currently, applications for an easement over land can be made where the court has made a determination to grant or modify a development consent on an appeal under the Act. The bill will amend the Act to provide that applications for an easement over land may be made where an appeal under sections 96, 96A, 96AA or 97 is pending before the court. This amendment will provide more flexibility in procedure and will allow applications for an easement relevant to the grant or modification of development consent to be dealt with at the same time as the appeal seeking the grant of development consent.

The Local Court Act 2007 provides that when a magistrate either resigns or retires from office

the magistrate may, despite vacating office, continue to hear and determine any proceedings that the magistrate has either heard or partly heard. The provision is a practical way of ensuring that magistrates can conclude cases they are dealing with rather than requiring another magistrate to recommence proceedings. The new Local Court Act is not anticipated to commence until sometime next year. In the meantime this bill introduces a similar provision in the Local Courts Act 1982.

The bill amends the Mental Health Act 2007 to transfer the function of conducting mental health inquiries from magistrates of the Local Court to the Mental Health Review Tribunal. Part 2 of division 3 of the Mental Health Act requires a person to be brought before a magistrate for a mental health inquiry if medical examiners find that the person is mentally ill and is to be involuntarily detained. A magistrate must then conduct a mental health inquiry to determine whether or not, on the balance of probabilities, the person is a mentally ill person. The current model for magistrate inquiries stems from a time prior to the establishment of the Mental Health Review Tribunal. The tribunal is a specialist body with greater knowledge and experience in mental health care issues. Consolidating the work of magistrates within the jurisdiction of the tribunal provides advantages, including increased accountability, by making it easier to track what happens to detained persons in the mental health care system and promoting greater consistency in approach to the conduct of inquiries. The transfer of this work away from magistrates will also remove the stigma of mental health proceedings being associated with the criminal justice system.

The transfer of mental health inquiries to the tribunal will achieve efficiencies as the tribunal has the capacity to hold inquiries with the aid of audiovisual link technology. The tribunal will also have the capacity to require authorised medical officers of a mental health facility to provide additional information and medical reports for the purpose of an inquiry. A single member of the tribunal who is either the president, a deputy president or a member who is an Australian lawyer will conduct mental health inquiries. Consequential amendments are made to the Protected Estates Act 1983, the Mental Health Legislation Amendment (Forensic Provisions) Act 2008 and the Mental Health (Criminal Procedure) Act 1990.

The bill will amend the Supreme Court Act 1970 to increase the age limit for acting judges who retire at the compulsory retirement age. Section 37 of the Supreme Court Act 1970 provides that an acting judge may not be appointed beyond the age of 75 years. This age limit restricts an already small pool of eligible candidates. To ensure the continued effective operation of the Supreme Court the age limit of acting judges will be increased to 77 years, provided that the acting judge retired at the statutory retirement age. The statutory retirement age for judges in New South Wales courts is 72 years and 70 years in Commonwealth courts. The distinction between those reaching the statutory retirement age and those who do not has regard to the duration that the judicial officer has been retired from permanent duties. A judicial officer who reaches the statutory retirement age will have more current experience as a permanent judicial officer and may be capable of continuing duties in an acting capacity for a further five to seven years. A judicial officer who retires early will only be able to continue as an acting judge until the current age limit of 75 years. This cap effectively means that judges in New South Wales are forced to retire even in circumstances where they are willing and able to continue to serve the community.

It is appropriate that some age limits apply in respect of permanent judges in view of the difficulties in removing a judge whose ability may be in decline. However, changes in demographics and workforce characteristics mean that it is appropriate to review our understanding of when a person is to be considered too old to continue judicial service. The community should not be deprived of the benefit of a high-calibre judge simply because of the compulsory age limits. The increase in the age limit for acting judges to 77 years will ensure that the Supreme Court is able to maintain a sufficient pool of retired judges as acting juges to assist the operation of the court. Acting judges provide flexibility to the court to manage short-term increases in workloads and to cover temporary absences. Acting judges are drawn exclusively from the ranks of retired judges.

Schedule 28 amends the Young Offenders Act 1997 to provide consistency with respect to the age at which a child can choose the identity of his or her support person. Item [1] of schedule 28 will allow children aged 14 to choose the adult who accompanies them whilst police explain a formal caution. Item [2] of schedule 28 will allow children over the age of 14 to choose the adult who accompanies them whilst a Youth Justice Conference is explained by police. Items [1] and [2] of schedule 27 amend the Surveillance Devices Act 2007 Act to clarify that the cameras and audio recorders built into tasers issued to police can be used to monitor their use. These cameras and recording devices are an added and important protection against the misuse of tasers. They also provide important protection to police against false allegations of misuse. Importantly, the recording devices attached to tasers are not permitted by this amendment to be used for covert surveillance unrelated to the use of the taser.

Items [3] to [5] of schedule 27 are a small clarification to the Surveillance Devices Act 2007. The amendment makes clear that the power to enter premises to install a surveillance device extends to premises that provide access to vehicles and objects within vehicles that are under surveillance. Previously, section 21 of the Act was unclear in this regard. This bill addresses a number of issues to improve the criminal law of New South Wales and the operation of our courts, as well as to ensure that court services meet the needs of participants and the legal community. The bill's amendments will promote an efficient and effective criminal and civil justice system. I commend the bill to the House.