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CRIMES AND COURTS LEGISLATION AMENDMENT BILL 2013

Second Reading

The Hon. DAVID CLARKE (Parliamentary Secretary) [11.19 a.m.], on behalf of the Hon. Michael Gallacher, I move:

That this bill be now read a second time.

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

Leave granted.

The Government is pleased to introduce the Crimes and Courts Legislation Amendment Bill 2013.

The purpose of the bill is to make miscellaneous amendments to courts and crimes-related legislation, as part of the Government's regular legislative review and monitoring program.

The bill amends a number of Acts to improve the efficiency and operation of the State's courts and tribunals and criminal laws.

I will now outline each of the amendments in turn.

Item [1] of schedule 1 amends the definition of a "domestic violence death" for the purposes of the investigation of deaths by the Domestic Violence Death Review Team. The Domestic Violence Death Review Team was established in 2010 under the Coroners Act 2009. It investigates the causes of "domestic violence deaths" in New South Wales to reduce their incidence by improving relevant systems and services. These amendments are made in response to recommendations of the Domestic Violence Death Review Team's most recent annual report. There are two aspects to the amendment. Firstly, it clarifies that the team can only investigate deaths which occur in the context of domestic violence. Secondly, the definition of domestic violence death is expanded to include: deaths of persons who were bystanders to domestic violence; were new partners (or mistakenly believed by the perpetrator to be a new partner) of a former partner of the perpetrator; or who were a relative or kin of a person in a domestic relationship with the perpetrator.

Item [4] of schedule 1 amends the definition of "domestic relationship" for the purposes of investigations to remove the qualification that there must have been previous episodes of domestic violence between the person and the perpetrator.

Item [5] of schedule 1 replaces the list of members of the Domestic Violence Death Review Team to reflect the change in names for certain positions and departments and to include a representative of Corrective Services New South Wales as a member of the team.

Items [2], [3] and [6] of schedule 1 make consequential amendments including amending the definition of "domestic relationship" in section 101C of the Coroners Act 2009.

Item [1] of schedule 2 clarifies section 4 of the Crimes (Appeal and Review) Act 2001. That section provides that an application for annulment of a conviction or sentence may be made if the applicant did not appear before the Local Court when the conviction or sentence was imposed. Section 4 was previously section 100O of the now repealed Justices Act 1902, which made clear that an annulment application could only be made in relation to a conviction or order made in the absence of the applicant or any sentence imposed in their absence.

Section 4 is less clear, however, and applicants have successfully applied for annulment where they have been convicted in their absence in order to effectively overturn sentences subsequently imposed when they were in court. This contributes to inefficiency and effectively provides for an irregular avenue of sentence appeal.

The bill will amend the section to clarify that the applicant may only seek to annul the particular conviction or sentence made in his or her absence.

A further amendment is also proposed to ensure that annulment applications are only made in appropriate circumstances. Section 182 of the Criminal Procedure Act 1986 allows an accused to elect to have a matter dealt with in their absence by lodging notice in writing of an intention to plead guilty or not guilty. If the accused elects to plead guilty and proceed to sentence they may also lodge material which the magistrate can take into account in mitigation.

Subsection 182 (3) provides that where a person lodges such a notice they are not required to attend court and are "taken to have attended court on that date".

However, some accused are also successfully making annulment applications under section 4 on the basis of being convicted in their absence where they had in fact elected to have the matter dealt with in their absence under section 182.

Item [1] therefore amends section 4 to make clear that persons who elect to have their matter finalised in their absence cannot then apply to have their conviction or sentence annulled on the basis they were not "in appearance" before the court.

These amendments will not lead to a reduction in the rights of accused persons but will clarify the ambiguity of the provisions.

Item [2] of schedule 2 amends section 23 of the Crimes (Appeal and Review) Act 2001. Section 23 provides for appeals by prosecutors against sentences and costs orders, however, refers only to sentences when providing for the 28-day limitation period in section 23 (3), thereby implying that appeals against costs may be made by prosecutors at any time.

Item [2] will amend section 23 (3) to provide that appeals in relation to both sentences and costs must be lodged within 28 days.

Item [1] of schedule 3 amends section 3 (1) of the Crimes (Forensic Procedures) Act 2000 to make clear that the definition of "non-intimate forensic procedures" includes measurements of total height and body parts.

The Crimes (Forensic Procedures) Act regulates "intimate forensic procedures", such as taking tissue, bodily fluid and intrusive measurements, and "non-intimate forensic procedures", such as photographs and body measurements. Section 3 (1) of the Act defines these "non-intimate forensic procedures". Without consent, these require the order of a senior police officer for people in custody, or a court order for people not in custody.

Section 133 of the Law Enforcement (Powers and Responsibilities) Act 2002 provides that police may take all necessary identification evidence where a person is in lawful custody. Amending section 3 (1) so non-intimate forensic procedures include height and body part measurements will provide for consistency with the Law Enforcement (Powers and Responsibilities) Act and ensure courts are empowered to make orders for such measurements under the Crimes (Forensic Procedures) Act where people are not in custody.

The Supreme Court has commented on the apparent anomaly in two recent cases. It held in the 2012 decision of *Coffen v Goodhart* that the definition of "non-intimate forensic procedure" in section 3 (1) does not include measurements of total height. The Court's reasoning was subsequently applied in the decision of *ACP v Munro* in relation to total height and body measurements. The presiding judge in the latter case queried whether Parliament should address the anomaly which precluded orders for either total height or body part measurements unless for biomechanical analysis.

Item [1] of schedule 4 amends section 43 of the Crimes (Sentencing Procedure) Act 1999, which permits a court to reopen proceedings where it has imposed a penalty contrary to law, or failed to impose a penalty required by law. Section 43 (6) lists the types of penalties to which the provision applies.

Amendments to the Graffiti Control Act 2008, which commenced on 10 December 2012, included allowing courts to impose a driver licence order in respect of a graffiti offence. It is proposed to include these orders in section 43 (6), to ensure that a court that makes an error when imposing a driver licence order can re-open proceedings to correct it.

Item [1] of schedule 5 amends section 306M of the Criminal Procedure Act 1986, which defines "personal assault offence" for the purposes of determining when a vulnerable person may give evidence via closed-circuit television [CCTV].

Section 306M currently refers to repealed sections 562ZG and 5621 of the Crimes Act 1900. These sections previously provided for the offences of intimidation or stalking and breach of an Apprehended Violence Order respectively. Those offences are now contained in sections 13 and 14 of the Crimes (Domestic and Personal Violence) Act 2007 and the proposed amendments will update the references to those offences in the definition of "personal assault offence" in section 306M.

Schedule 6 amends sections 3 and 11B of the Drug Misuse and Trafficking Act 1985 to extend the offences in the Act which apply to tablet presses to encapsulators and unique parts of same.

Section 11B of the Drug Misuse and Trafficking Act 1985 makes it an offence to possess a tablet press without lawful excuse with a maximum penalty of 20 penalty units and/or two years imprisonment. Section 24A of the Act makes it an offence to possess drug manufacture or production apparatus with intent to manufacture illicit drugs. What constitutes "drug manufacture or production apparatus" is set out in schedule 3 of the Drug Misuse and Trafficking Regulation 2011 and it currently includes "pill or tablet presses". Section 24A carries a maximum penalty of 2,000 penalty units and/or 10 years imprisonment.

In order to address concerns expressed by the NSW Police Force that the term "tablet press" in the Act would not capture drug encapsulators, item [1] of schedule 6 includes a definition of "encapsulator" to capture all machines capable of producing prohibited drugs. An encapsulator will be defined as a device that is capable of being used to

produce a prohibited drug in a capsule or similar form and includes a unique part of any such device.

A definition of tablet press will also be included essentially replicating the existing reference in section 11B. The offence in section 11B will also be amended to apply to both tablet presses and drug encapsulators. Currently, a disassembled tablet press or one from which a single vital part has been removed may fall outside the definition in section 11B as it would not be "capable of being used to produce a prohibited drug". The amended definition of tablet press and the definition of drug encapsulator therefore also include "a unique part of such a device" so that the offence provisions will capture these items.

The use of the term "unique parts" should ensure that common machine parts used in machines other than tablet presses and encapsulators are not captured by the offence provisions.

Item [1] of schedule 7 is a consequential amendment to schedule 3 of the Drug Misuse and Trafficking Regulation 2011 so that it also refers to drug encapsulators. This means that these devices will also be captured as drug manufacture or production apparatus for the purposes of the offence in section 24A of the Act.

The existing defences to the offences are not affected and will remain in place.

Item [1] of schedule 8 amends section 19 of the Evidence Act 1995 in response to a recommendation of the New South Wales Supreme Court in *LS v Director of Public Prosecutions and Another*. This does not represent any change to the law of spousal privilege but simply clarifies an ambiguous provision.

Section 18 of the Evidence Act 1995 allows a person to object to giving evidence against certain family members, including their spouse or de facto partner in criminal proceedings. If such an objection is raised, the court can excuse the person from giving the evidence if it finds that it would harm the witness, or their relationship, and the harm outweighs the desirability of the evidence being given.

Section 279 of the Criminal Procedure Act 1986 creates a separate privilege regime for people who are giving evidence against a spouse or de facto partner in a domestic violence or child assault offence. Section 279 applies different considerations for the court when considering whether to excuse a spouse from giving evidence in these matters.

Section 19 of the Evidence Act 1995 presently states that section 18 does not apply "in proceedings for an offence against or referred to in section 279." It is clearly intended to exclude the application of section 18 to spouses and de facto partners who are giving evidence if the regime in section 279 of the Criminal Procedure Act applies to them instead.

However, in *LS v Director of Public Prosecutions and Another* the court noted that the wording of section 19 of the Evidence Act 1995 does not make this intent clear, particularly because the words "referred to" are open to broad interpretation.

In light of that decision, it is proposed to amend section 19 of the Evidence Act 1995 to clarify that section 18 of that Act does not apply if the person could be compelled to give evidence in proceedings under section 279. This amendment does not alter the existing provisions and simply makes the provision clear in accordance with the Supreme Court's decision in *LS v Director of Public Prosecutions and Another*.

Schedule 9 amends the Justices of the Peace Act 2002 to provide legislative authority for a Justice of the Peace [JP] to certify a copy of an original document as a true and accurate copy. There is presently no legal basis under any New South Wales Act for a Justice of the Peace to certify copies of original documents, despite this being a function commonly performed by them. Item [2] of schedule 9 therefore inserts section 8A into the Act, which expressly provides that a Justice of the Peace may certify copies of original documents.

Item [1] of schedule 10 amends section 229 of the Law Enforcement (Powers and Responsibilities) Act 2002, which provides the Local Court's jurisdiction in respect of applications for property in police custody section 229 presently restricts applications to circumstances where the value of the property does not exceed $40,000. The amendment will amend the limit to $100,000 to align it with the court's current jurisdictional limit in civil proceedings, which is $100,000.

Item [1] of schedule 11 removes section 33 (1) (d) of the Local Court Act 2007 in order to unify the procedure for administering applications for possession and delivery of goods so that they are consistent with other actions under the Australian Consumer Law in the civil jurisdiction of the Local Court.

The proposal is in response to the conferral of jurisdiction on the Local Court under the Commonwealth's National Consumer Credit Protection Act 2009. Under section 187 of that Act, the court may determine matters under the National Credit Code, including authorising a credit provider to take possession of mortgaged goods and ordering a person in possession of mortgaged goods to deliver them to a credit provider.

This jurisdiction is subject to the court's general jurisdictional limits. Some applications must be commenced as civil proceedings, but others must be commenced as special jurisdiction applications, even where the substantive orders sought are the same. The situation is confusing for plaintiffs, defendants and the court.

Removing section 33 (1) (d) ensures that all proceedings for these orders are heard and determined by the court in its civil jurisdiction, thus unifying the procedure with other applications under the Australian Consumer Law in the Local Court.

Schedule 12 amends sections 40 (3) and 40 (4) of the Minors (Property and Contracts) Act 1970 to increase the

jurisdictional limits of the District Court and Local Court when dealing with certain matters under the Act relating to contractual and testamentary capacity and proprietary rights and obligations of people under the age of 21. For example, the Act regulates a court's power to affirm a civil act, such as a contract, on behalf of a minor.

The District Court's current jurisdictional limit under the Act refers to proceedings where the matter in question does not exceed $100,000. It is proposed to increase this limit to align with the District Court's current jurisdictional limit in civil proceedings of $750,000. The Local Court's current jurisdiction under the Act is limited to proceedings where the matter in question does not exceed $10,000. It is proposed to amend this limit to $100,000 to align it with the Local Court's current jurisdictional limit in other civil proceedings. The Supreme Court's unlimited jurisdiction will remain.

Items [1] and [5] of schedule 13 of the bill clarify the procedure to be followed when a person making a statutory declaration cannot read English. In New South Wales, a statutory declaration or affidavit must be written in English. Sections 24A and 27A of the Oaths Act 1900 established additional safeguards that authorised witnesses must follow when a person making a statutory declaration or affidavit is blind or illiterate.

The courts have interpreted the word "illiterate" to include circumstances where the person is illiterate in English, even if they may be literate in another language. To clarify the legislation, items [1] and [5] of schedule 13 will reword sections 24A and 27A so that those provisions use the wording "illiterate or otherwise unable to read written English."

Section 26 of the Oaths Act 1900 has been interpreted as meaning Justices of the Peace do not have legislative authority to witness affidavits or statutory declarations that are intended for use in jurisdictions other than New South Wales, even where the laws of the relevant jurisdiction would permit the New South Wales Justice of the Peace to do so.

There are certain occasions where Justices of the Peace may need to take affidavits for use in non-New South Wales courts, or may be asked to witness statutory declarations for use in other jurisdictions. For example, a New South Wales Justice of the Peace might be asked to witness an affidavit where the deponent lives near the New South Wales border but will use the affidavit in proceedings in a non-New South Wales court.

Items [2] and [3] of schedule 13 will therefore clarify that the authority of a Justice of the Peace to take an oath, declaration or affidavit in New South Wales for use in New South Wales also extends to oaths, declarations or affidavits made for use in jurisdictions other than New South Wales.

I am advised that the Oaths Act 1900 allows affidavits and statutory declarations to be made by more than one deponent or declarant. However, this is not clearly stated and there is no guidance in the Act on how this is to be done. Item [4] of schedule 13 therefore establishes how an oath, declaration or affidavit that is to be made by more than one person may be made.

Section 34 of the Oaths Act 1900 requires that a person witnessing a statutory declaration or affidavit must fulfil certain identity requirements. The witness must see the face of the other person, know them or confirm their identity in accordance with the regulations, and certify on the declaration or affidavit that those identity requirements have been complied with.

Item [6] of schedule 13 will clarify that the section 34 identification requirements do not apply to Commonwealth statutory declarations or affidavits. This is because statutory declarations made in New South Wales in relation to a law of the Commonwealth, or in connection with the administration of a Commonwealth Government department or agency, are governed by the Commonwealth Statutory Declarations Act 1959. An affidavit made in New South Wales for use in proceedings in a Commonwealth court will be governed by the Evidence Act 1995 (Cth) and the relevant Commonwealth court rules.

Item [1] of schedule 14 replaces the existing definition of "restricted record" in section 3 of the Telecommunications (Interception and Access) Act 1987 with a definition consistent with the relevant Commonwealth legislation.

The definition of a "restricted record" currently includes a record of information obtained by means of interception, such as transcripts and references to intercepted material, as well as any copies made of such records. However, the definition of "restricted record" under the Commonwealth Telecommunications (Interception and Access) Act 1979 limits the definition of "restricted record" to "a record other than a copy".

Sections [5] and [8] of the New South Wales legislation create strict record keeping obligations for restricted records. The disparity in the definition of "restricted record" under the New South Wales and Commonwealth Acts places a significant administrative burden on NSW Police Force to manage originals and copies of restricted records.

Other Australian jurisdictions have already changed their definition to reflect the Commonwealth definition, and it is proposed to do the same in New South Wales.

Item [2] of schedule 14 omits section 4 (c) of the Telecommunications (Interception and Access) Act 1987. Section 4 (c) requires the chief officer of an eligible authority to keep a copy of each instrument revoking a telecommunications interception warrant. The copy must be certified in writing by a certifying officer to be a true copy of the instrument. When the Act was first introduced, the Australian Federal Police [AFP] was the agency responsible for making applications for telecommunications interception warrants on behalf of the NSW Police Force. Consequently, the Australian Federal Police would retain the original revocation instrument, while NSW Police Force would keep a certified copy.

The NSW Police Force is now able to apply for telecommunications interception warrants without the involvement of the Australian Federal Police. Consequently, it is an unnecessary burden to require each revocation to be certified as a

true copy, when the original revocation instrument is in any event retained by NSW Police Force.

Item [2] of schedule 15 amends section 66 of the Young Offenders Act 1997 to allow de-identified information about warnings, cautions and conferences to be disclosed the Australian Bureau of Statistics [ABS] and the Australian Institute of Criminology [AIC] for research and statistical purposes.

Item [3] of schedule 15 retrospectively authorises the information exchange that has occurred to date, permitting these bodies to retain the information they have already collected in this manner. This will assist in the provision of ongoing research and statistics.

The de-identified information New South Wales police provide to the Australian Bureau of Statistics and the Australian Institute of Criminology includes: a unique identifier for each person proceeded against, their age, sex, indigenous status, date of action, legal process type, offence type and number of offences.

This information is provided to the Australian Bureau of Statistics on the basis that it is Australia's official statistical organisation. In particular, the National Crime Statistics Unit in the Australian Bureau of Statistics provides a national review of crime in Australia as well as comparable data across jurisdictions. There is a clear public interest in the Australian Bureau of Statistics being able to collect statistical data about responses to juvenile crime.

Similarly, information is provided to the Australian Institute of Criminology for evidence-based research. For instance, the Standing Council on Law and Justice has commissioned the Australian Institute of Criminology to maintain national monitoring programs for homicide, firearms, armed robbery and deaths in custody. The NSW Police Force provides de-identified information about these incidents to the Australian Institute of Criminology and, where relevant, the legal action taken against alleged offenders, including young offenders.

Item [1] of schedule 15 confirms that, like the Bureau of Crime Statistics and Research and the Ombudsman, the Australian Bureau of Statistics and Australian Institute of Criminology do not have to comply with requirements for the destruction of records under the Young Offenders Act.

Schedule 16 amends the Young Offenders Regulation 2010 to provide that information disclosed to the Australian Bureau of Statistics and the Australian Institute of Criminology under the Act can only be used for research, statistics and the publication of statistics and research. The amendment also makes it clear that publications of statistics and research must not identify any child.
I commend the bill to the House.