COURTS LEGISLATION AMENDMENT (DISRESPECTFUL BEHAVIOUR) BILL 2016

First Reading

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

Second Reading

Ms GABRIELLE UPTON (Vaucluse—Attorney General) (11:2): I move:

That this bill be now read a second time.

The Government is pleased to introduce the Courts Legislation Amendment (Disrespectful Behaviour) Bill 2016. As Attorney General, I am proud to continue to enshrine respect for our courts, our judges and our magistrates. Our civil society is based on the rule of law and community respect for our institutions and their practices. Regrettably, there are people who fail to appreciate the freedoms won and the important independent role our courts play in allowing our society to prosper, to continue and to be peaceable. Courts are a fundamental part of our democracy in applying our laws of the land. The courts of New South Wales deal with thousands of cases each year in situations that are often stressful and difficult. Following and respecting the practice and convention of the court is integral to the smooth flow of proceedings and to affording all of those involved in proceedings their fundamental right to procedural fairness. Civility, respect and consideration must be demonstrated in our courtrooms across the State.

Judges and magistrates of New South Wales have several tools at their disposal to ensure the smooth running of their courts, including the law of contempt, which deals with serious behaviour intended to disrupt and undermine the operation of the court. However, in November of last year a New South Wales District Court trial highlighted that other types of disrespectful behaviour, such as failure to stand for a judge unaccompanied by any other overt intentions or actions, may not amount to contempt. The strong public reaction to this case revealed a widely held community view that there is indeed a minimum standard of respectful behaviour that should take place in court. Refusing to stand for a judge fell short of that community standard.

As the first law officer of the State, I was personally concerned to hear of disrespect shown in our courts and to our judicial officers who do their job without fear or favour every day. However, the behaviour in that instance did not meet the threshold for contempt. I shared the community's concerns that this conduct could not be addressed with the proper penalty and that individuals who show such blatant disrespect for our judiciary could do so with no consequences. It became clear to me that the current law of contempt does not adequately address widespread community concern about the level of respect that the community expects should be shown to the courts, judiciary, court officers and the broader justice system.

In December 2015, I announced that the New South Wales Government would introduce a bill into Parliament in 2016 to bridge this gap between contempt and the community expectations of respectful behaviour in our courts. The common law of criminal contempt already addresses behaviour that is disruptive to the court. In contrast, the new offence will address disrespectful behaviour that is contrary to established court practices and convention. This new offence adds to the range of tools available to judges and magistrates to enable them to effectively manage their courtrooms. It does not detract from any measure available to those judicial officers that is currently available.

The new offence introduced by this bill is a summary offence against deliberate behaviour in court, which is disrespectful. The elements of the offence require an intentional physical act rather than an involuntary act. But since the offence is clearly seeking to reflect established court practice and convention, it will not require a person to intend to be disrespectful to the court; for example, deliberately failing to stand when requested may be disrespectful, even if the person did not cause or intend to cause disrespect by remaining seated.

The benefits of the bill are twofold. First, judges and magistrates will be provided with an additional tool to regulate proceedings and manage their courtrooms. However, the courts will still have all existing tools at their disposal to do just that. Secondly, the bill sends a clear message that adherence to established practice and conventions of the justice system is a fundamental expectation of all who appear before our courts. Following my announcement in December 2015 of the new offence being brought before this House and now in this bill, the Department of Justice consulted with key stakeholders, including the courts, the NSW Police Force, the Law Society of New South Wales, the New South Wales Bar Association, Legal Aid, the Office of the Public Defender and other government agencies about the new offence.

The feedback received from stakeholders has been considered and, where possible, taken into account in drafting the new offence. The Government is firmly of the view that this bill is an

appropriate response to a gap in the law as it currently stands. I welcome the support that the bill received in the upper House last night. I will now turn to the details of the bill. The bill creates an offence of disrespect in court in court-specific legislation—the Supreme Court Act 1979, the District Court Act 1973, the Land and Environment Court Act 1979, the Local Court Act 2007 and the Coroners Act 2009. This approach will allow slight jurisdictional differences to be taken into account in each court.

The offence will apply in all courts in New South Wales other than the Children's Court. The Children's Court adopts a less formal procedure tailored to the needs of children and young people. It is, in part, a therapeutic jurisdiction. The offence will not apply in tribunals. Tribunal hearings involve civil matters presided over by members or commissioners—rather than judges or magistrates. Tribunals have a more informal approach to the rules of evidence and procedure, and there is a high proportion of self-represented parties. Similarly, in the Land and Environment Court, the offence has been made applicable only to judicial proceedings before a judge, not administrative matters that are presided over by a commissioner.

The new offence will apply to behaviour within the courtroom by people "appearing before a court" and will include the accused, defendants, parties and witnesses. These are people whose presence in court is necessary for the court's proceedings. The offence will not apply to people in the public gallery, who can simply be ejected from the court room; legal practitioners, as they have their own set of professional standards and responsibilities enforced by the professional bodies such as the Solicitors' Rules and Barristers' Rules; or police prosecutors in the Local Court, as these officers are subject to separate standards set out in the Police Act 1990.

The offence will apply to behaviour that is disrespectful to the court or the judge according to established court practice and convention. In this way the offence will reflect community expectations as to how people should conduct themselves when appearing in court. It is not uncommon for courts to apply objective tests that reflect current community standards such as this, including when determining other summary offences such as offensive conduct or offensive language.

The offence requires intentional or deliberate behaviour, which will include a physical or verbal act, or failure to act. This means an offence would not be committed where, for example, a failure to stand was a result of a linguistic miscommunication or where the physical act was the result of an involuntary impulse that the person cannot control. Importantly, it will not be necessary to show a person has an intention to be disrespectful to the court in order for the offence to be made out. In other words, the physical or verbal act must be a voluntary action, but the offender need not have been motivated by disrespect for the court in doing that action for it to be captured by this section.

The judicial bench book will be updated to provide guidance to judges, magistrates and the community about the procedure relating to this new offence, including issues of procedural fairness that are currently afforded to persons in relation to possible contempt matters and will likewise apply in relation to the new offence. This includes recommending that the judge or magistrate provide the person concerned with a warning that their conduct may amount to a breach of the section and allowing that person an opportunity to correct their behaviour or apologise before deciding to refer the matter to the Attorney General.

The decision to refer a person to be charged with the new offence would be at the discretion of the presiding judge or magistrate, or on the initiative of the Attorney General. Proceedings may be brought only with the consent of the Attorney General, or the Attorney General's delegates, being the Solicitor General or Crown Advocate. This is a significant safeguard as judges and magistrates have several tools to deal with unacceptable behaviour in court and, as with contempt referrals, this new offence should be used only where appropriate.

The process for prosecuting the new offence will be similar to when a possible contempt of court matter is referred to the Attorney General for consideration. In keeping with the procedure for contempt, the matter would be referred by the Attorney General—either on his or her own initiative or following a referral by the presiding judge or magistrate—to the Crown Solicitor's Office. The Crown Solicitor's Office would then prepare an advice for either the Solicitor General or Crown Advocate, who, as the delegate of the Attorney General, will then make a determination as to whether a prosecution should proceed.

The bill provides that the offence can only be prosecuted by a person or class of persons authorised to do so by the Secretary of the Department of Justice. The prosecution of the offence will be conducted by the Crown Solicitor's Office, as instructed by the Department of Justice. The Crown Solicitor's Office already handles prosecutions for contempt in the Supreme Court and therefore has expertise in the area. Police will not be able to lay charges for disrespect of court. The Crown Solicitor's Office will have regard to the prosecution guidelines issued by the Office of the Director of Public Prosecutions.

In accordance with the prosecution guidelines, the Crown Solicitor's Office will consider discretionary factors in balancing whether prosecuting the matter is in the public interest. Even where there is a prima facie case and reasonable prospects of securing a conviction, the Prosecution Guidelines require regard to public interest and policy considerations, including vulnerabilities of the accused, such as the youth, age, maturity, intelligence, physical health, mental health or special disability or infirmity of the accused; the accused's antecedents and background, including culture and language ability; the seriousness or triviality of the alleged offence; and the extent to which the alleged offence is of considerable general public concern.

These safeguards, which already exist, will militate against the risk the new offence could have a disproportionate impact on children, Aboriginal and Torres Strait Islander people and other vulnerable people. Prosecutions for the new offence will generally occur in the Local Court after the relevant court appearance that gives rise to the charge. This means the court proceeding where the alleged disrespectful behaviour occurs would not be interrupted to deal with the behaviour. It is also possible to prosecute these matters in the Children's Court if the accused is a juvenile or in the summary jurisdiction of the Supreme Court if the alleged offence occurred in that jurisdiction.

The Crown Solicitor's Office, acting on instructions from the Department of Justice, will have 12 months to commence a prosecution before the matter becomes statute barred. This will allow time for the substantive legal proceeding to be finalised and for the appropriate level of consideration to be given to possible prosecutions. The penalty for the new offence will be half the maximum penalty for contempt when dealt with summarily by the Local Court or District Court. The maximum penalty will be 14 days imprisonment—as opposed to 28 days for contempt—and/or 10 penalty units, which is currently $1,100—as opposed to $2,200 for contempt. A lower penalty is appropriate as the offence is intended to capture behaviour that does not meet the higher threshold for contempt.

The bill provides that judges and magistrates cannot be called as witnesses in these matters. This is the same as the position in proceedings for contempt, where judges and magistrates are generally not called as witnesses to give evidence. The bill also provides that certain types of evidence will be admissible in proceedings for the charge of disrespect in court. Official transcripts and recordings will often provide the best evidence of what occurred in court but other forms of evidence, such as eyewitness accounts, may be necessary. This evidentiary provision of course does not alter the burden of proof in criminal matters, where the prosecution must prove all elements of the offence beyond reasonable doubt.

This new offence is not intended to affect the inherent jurisdiction or any powers the court has to regulate its proceedings. This includes the other practical tools that judges and magistrates use to preside over their courts, such as the power to eject a person from the courtroom, issue a warning or seek an apology. Often the best response to disrespectful behaviour is a practical one, and the community must not lose sight of the fact that the primary purpose of our courts is to finalise the cases before them in a just, fair and expeditious manner.

Importantly, the new offence will not curtail or limit the power and authority of judges and magistrates to find a person in contempt of court, or to refer matters of possible contempt to the Solicitor General or Crown Advocate—as the delegate of the Attorney General—or the Supreme Court to consider whether contempt proceedings should be commenced. However, the bill also makes clear that a person cannot suffer double jeopardy for behaviour that may be viewed as both disrespectful and contemptuous. The bill will commence on proclamation once the appropriate education and training has been released by the Judicial Commission and provided to the legal profession. This bill makes sure our laws are in line with community expectations. Showing disrespect to our justice system is unacceptable and must have consequences.

The courts deserve our respect, as do the laws of the land, and so do the people who preside over the courts—the people who work in the courts and who go there every day to ensure that justice is done. This is where we draw the line as a community. I am proud to enforce that boundary. The Government believes that the creation of this new offence reinforces the community's expectation that the courts and the law must be respected, and that a certain standard of behaviour in court is required of all citizens in New South Wales. I commend the bill to the House.