COURTS LEGISLATION AMENDMENT (DISRESPECTFUL BEHAVIOUR) BILL 2016

First Reading

Bill introduced, and read a first time and ordered to be printed on motion by the Hon. David Clarke, on behalf of the Hon. John Ajaka.

Second Reading

The Hon. DAVID CLARKE (11:40): On behalf of the Hon. John Ajaka: 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. Courts are a fundamental part of our society and our system of government. We rely on our courts to enforce our laws to adjudicate individual disputes and, most importantly, to deliver justice and uphold the rule of law. The tradition and revered role of the courts is such that the community expects that certain levels of behaviour should be adhered to in the courtroom. The courts of New South Wales deal with thousands of cases every year in situations that are sometimes difficult and stressful. Following and respecting the procedures and rules of the court is integral to the smooth flow of proceedings and affording all involved their right to procedural fairness.

Judges and magistrates in New South Wales have several ways of ensuring the smooth running of their courts, including the law of contempt, which deals with serious behaviour intended to disrupt and undermine the operation of a court. However, in November 2015, a New South Wales District Court trial highlighted that other types of disrespectful behaviour, such as a failure to stand for a judge unaccompanied by any other overt intentions or actions, may not amount to contempt. The public reaction to this case revealed a strong and widely held community sentiment that behaviour in courts, such as refusing to stand for a judge, is unacceptable. However, the behaviour did not, in that instance, meet the threshold for a charge of contempt. This case confirmed the current law of contempt does not adequately reflect widespread community concern about the level of respect that should be shown to the court, judiciary, court officers and the wider justice system by people who appear in court.

In December 2015 the Attorney General announced that the New South Wales Government would introduce a bill into Parliament in 2016 to bridge this gap between contempt and community expectations of behaviour in court. The new offence introduced by this bill is a summary offence against deliberate behaviour in court that is disrespectful. The elements of the offence require an intentional physical act rather than an involuntary act, but as the offence is seeking to establish court practice and convention, it will not require the 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 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 the existing tools at their disposal to conduct their proceedings. Secondly, the bill sends a clear message that adherence to our laws and procedures of the judicial system is a fundamental expectation of all who appear before the courts. Following the Attorney's announcement of a new offence in December 2015, the Department of Justice consulted with key stakeholders, including the courts, the NSW Police Force, the Law Society of New South Wales, New South Wales Bar Association, Legal Aid, the Office of the Public Defender and other government agencies about the proposed new offence. The feedback received from stakeholders has been considered and taken into account in drafting the new offence, where possible. The Government is of the firm view that this bill is an appropriate response to a gap in the law as it currently stands.

I now turn to the detail of the bill. The bill creates an offence of disrespect in court in court-specific legislation such as 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 that is tailored to the needs of children and young people. The offence will also 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 courtroom; legal practitioners, as have 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 because 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 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 will not be committed where, for example, a failure to stand was the result of a linguistic miscommunication or 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 benchbook 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, which are currently accorded to persons relating to possible contempt matters and will likewise apply 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 a new offence will 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's delegates, being the Solicitor-General or Crown advocate. This is a significant safeguard because 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 to the Crown Solicitor's Office which would then prepare an advice. The advice is then forwarded to 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; seriousness or triviality of the alleged offence; and the extent to which the alleged offence is of considerable general public concern. These safeguards 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 which 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 have been released by the Judicial Commission and provided to the legal profession. This bill makes sure our laws are in line with community expectations. In a State governed by the rule of law, the courts are a vital institution that must be respected. The Government believes that the creation of this new offence reinforces the expectation that the courts and the law should be respected, and that a certain standard of behaviour is therefore appropriate. I commend the bill to the House.

Debate adjourned.