JUSTICE PORTFOLIO LEGISLATION (MISCELLANEOUS AMENDMENTS) BILL 2016

Second Reading

The Hon. DAVID CLARKE (11:33): 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 Justice Portfolio Legislation (Miscellaneous Amendments) Bill 2016. This bill is part of the Government's regular legislative review and monitoring program. The bill makes miscellaneous amendments to legislation to clarify criminal procedure and improve the efficiency and operation of legislation affecting the courts and other justice cluster agencies. All of the proposals in this bill have been widely consulted on. Many proposals originated with stakeholders who have "on the ground" experience of our justice system and are well placed to advise government on the minor clarifications, corrections and improvements required to make sure the system works in the best way possible. I thank all stakeholders who have contributed to the development of this bill, in particular the heads of jurisdiction, the Bar Association, the Law Society and various government agencies.

By way of summary, the bill includes amendments to improve the Child Sexual Assault Evidence Pilot, which commenced in March 2016 as part of the Government's election commitment to reduce trauma to children during trials for child sexual assault by prerecording their evidence and using children's champions to help them communicate their evidence. Additional amendments will enhance existing safeguards for victims of sexual assault, both children and adults, when giving their evidence. The bill will also address gaps and anomalies in bail laws.

Further amendments will: improve criminal procedure and law enforcement, including the implementation of a recommendation of the Ombudsman; ensure that entitlements for judicial officers are fair and transparent; improve efficiency in court procedure; clarify the jurisdiction of the NSW Civil and Administrative Tribunal and the Local Court regarding claims for unpaid strata levies; improve the operation of the Legal Profession Uniform Law; and make technical adjustments to sentencing procedure in response to recommendations of the Law Reform Commission 2013 sentencing report and members of the judiciary. Together, these miscellaneous amendments will update and improve the operation of the justice system in New South Wales.

I will now outline each of the amendments in the order in which they appear in the bill. The bill contains amendments to both the Bail Act 2013 and the Bail Amendment Act 2015. The amendments to both Acts follow ongoing monitoring of the legislation by the Government and introduce measures to increase efficiency in Local Court bail proceedings and also to remedy some oversights in the original drafting of the legislation. Schedule 1.1 makes four amendments to the Bail Act 2013. Item [1] of schedule 1.1 inserts the definition of a "supervision order", currently in section 16B, into the definitions found in section 4. Item [2] of schedule 1.1 removes the definition of "supervision order" in section 16B to reflect this change.

Item [3] of schedule 1.1 will enable a prosecutor to apply for bail conditions to be imposed on a grant of bail to the accused. This amendment will avoid an unintended technicality requiring a prosecutor to first make a detention application before making submissions to the court in relation to bail conditions. The amendment will allow prosecutors to make variation applications where they are seeking conditional bail for people who have no current bail conditions—for example, where the prosecution was commenced by way of a future court attendance notice. This change will make bail proceedings more efficient. Item [4] of schedule 1.1 will allow the Local Court or authorised justice to hear a variation application to vary conditions of bail imposed by a higher court where the accused and prosecutor consent to the terms of the variation application.

I now turn to the amendments to the Bail Amendment Act 2015. The Bail Amendment Act 2015 contained amendments to implement the final recommendations of the Hatzistergos review of the Bail Act 2013, the report of the Sentencing Council on bail, and the joint Commonwealth-New South Wales

Martin Place siege review. The further amendments contained within this bill remedy drafting oversights in the Bail Amendment Act 2015. Schedule 1.2 to the bill contains these amendments. Item [1] of schedule 1.2 amends the Bail Amendment Act 2015 to extend the show cause test under section 16B of the Bail Act 2013 to apply to a serious indictable offence that is committed by an accused person while the person is the subject of a warrant authorising the arrest of the person issued under the Criminal Procedure Act 1986 and the Crimes (Sentencing Procedure) Act 1999.

This change remedies a drafting oversight in the implementation of the recommendations of the Hatzistergos review. Item [2] of schedule 1.2 amends the Bail Amendment Act 2015 to extend the factors that a bail authority must consider in the "unacceptable risk" test under section 18 of the Bail Act 2013 to include whether the accused person has a history of compliance or non-compliance with a supervision order. This change also remedies a drafting oversight in the implementation of the recommendations of the Hatzistergos review.

Schedule 1.3 amends the Children (Criminal Proceedings) Act 1987 to allow for committal proceedings for a child co-defendant in the Children's Court and an adult co-defendant in the Local Court to be joined in the Children's Court at the discretion of the Children's Court. Currently, in criminal proceedings involving two or more co-defendants the Children's Court can hear committal proceedings for a young person and an adult co-defendant if the adult is less than three years older than the young person. In cases involving a young person and an adult co-defendant who is more than three years older than the young person, separate committals must be run in both the Children's Court and the Local Court. This may mean that victims and other witnesses who give evidence at the committal appear on two separate occasions before doing so again at trial.

The costs of conducting separate committal proceedings in terms of court, prosecution and defence time and resources, as well as the impact on witnesses required to give evidence on multiple occasions are a significant reason to extend the circumstances in which joint committal proceedings involving children and adults can be heard. The amendments will provide the Children's Court with the discretion to allow joint hearings of committal proceedings in the Children's Court, regardless of the age of the adult co-accused, if the Children's Court is of the opinion that it is in the interests of justice to do so. The amendments will not operate in reverse to permit children to be joined with the adult co-accused in Local Court committal proceedings.

Schedule 1.4 makes amendments to the Crimes Act 1900. Item [1] of schedule 1.4 extends the limitation period for commencing a prosecution for the summary offence of unauthorised access to or modification of restricted data held in a computer from the standard six months for a summary offence to 12 months from when the offence was alleged to have been committed. The NSW Police Force advises that extending the limitation period for this offence is necessary because offences of this nature are often detected some time after their commission and only after analysis of technical information, which can in itself take some time to complete. Items [2] and [3] of schedule 1.4 remove references to repealed provisions in schedule 10 of the Crimes Act 1900. These references include offences, Acts and codes that are no longer in force.

Schedule 1.5 amends the Crimes (Domestic and Personal Violence) Amendment (Review) Act 2016 to resolve a drafting oversight. The amendment will enable regulations of a savings and transitional nature to be made about how the provisions of the legislation apply to existing applications for apprehended violence orders [AVOs]. The Crimes (Domestic and Personal Violence) Amendment (Review) Act 2016—the amendment Act—made a number of amendments to the Crimes (Domestic and Personal Violence) Act 2007 to provide victims of violence with further protection by introducing additional prohibitions that can be imposed as part of an AVO and to increase defendants' compliance with AVOs by rewriting the conditions in AVOs in plain English. The amendment Act has not yet been commenced. As currently drafted, the provisions of the amendment Act do not affect applications for AVOs that were made, but not finalised, before the commencement of the amendment Act.

It is important that the new provisions contained in sections 35 and 36 of the amendment Act relating to AVO conditions apply to existing applications. These protections should be afforded to all victims seeking an AVO, not just those who make an application after the amendments. In addition, the limited capacity of supporting technology to maintain systems for both old and new AVOs simultaneously may cause operational difficulties for courts, police and the community. The amendment will enable the regulations to provide that the new provisions relating to AVO conditions apply to any proceeding arising from an application for an AVO that was made, but not finalised, before the amendment Act commenced.

Schedule 1.6 amends the Crimes (Sentencing Procedure) Act 1999 to make minor amendments to clarify some aspects of sentencing law. Items [1] and [2] of schedule 1.6 provide that the court may impose a fixed term for an offence included in the Standard Non-Parole Period [SNPP] scheme if the term is equal to or greater than the non-parole period the court would have set, had the court imposed a head sentence and non-parole period. This will implement a recommendation of the NSW Law Reform Commission in its 2013 sentencing report to provide courts with the flexibility to impose a fixed term if they wish to do so, while ensuring that the integrity of the SNPP scheme is preserved.

The Crimes (Sentencing Procedure) Act 1999 prohibits a court from setting a non-parole period when the sentence is for six months or less. That means these sentences must be fixed terms. Item [3] of schedule 1.6 provides that if a court imposes an aggregate sentence of more than six months for multiple offences, it would not need to be a fixed term, even if the individual sentences the court would have imposed would have been less than six months. This is a clarifying amendment to remove any doubt and to address concerns raised by the judiciary. The Crimes (Sentencing Procedure) Act 1999 already states that the Local Court may impose multiple sentences of imprisonment up to a total of five years. Item [4] of schedule 1.6 makes it clear that the Local Court may also impose an aggregate sentence of imprisonment of up to five years. This amendment aims to avoid doubt, so it is clear that when the Local Court imposes an aggregate sentence its jurisdiction is the same as accumulating sentences. This will implement a recommendation of the NSW Law Reform Commission in its 2013 sentencing report.

Item [5] of schedule 1.6 enables Intensive Correction Orders that are to be served consecutively, or partly concurrently and partly consecutively, to commence when appropriate rather than immediately. This fixes a technical drafting error by reinserting subsections 71 (2) and 71 (3) into the Crimes (Sentencing Procedure) Act 1999, which were mistakenly deleted by the Courts and Other Justice Portfolio Legislation Amendment Act 2015. Schedule 1.7 makes amendments to the Criminal Procedure Act 1986. Item [1] of schedule 1.7 inserts a new provision into the Criminal Procedure Act 1986 to allow the Chief Justice of the Supreme Court and the Chief Judge of the District Court to replace a trial judge in criminal jury trial proceedings if the judge dies, becomes ill or is otherwise unable to continue. Currently, if a judge becomes unable to continue a trial due to incapacity, the jury must be discharged and the trial must be recommenced. This can result in considerable financial and emotional costs to the parties, the witnesses, the jury members, the legal representatives, the courts and the community.

This new provision will ensure that, in appropriate circumstances, the Chief Justice of the Supreme Court and the Chief Judge of the District Court will be able to appoint a substitute judge to continue the trial to avoid the need for the trial to recommence. This amendment is limited to trials conducted by jury only, as the ultimate finding of guilt on the facts is for the jury to determine. The role of the presiding judge is limited to making rulings as to evidence, summing up, giving directions to the jury and delivering the sentence—functions that can be reasonably performed by another judicial officer should the original presiding judge become unable to continue due to death or severe illness. The new provision is not intended to be used in administrative situations or in the case of temporary illness, which may be better dealt with by an adjournment. Parties will have the opportunity to make submissions to the head of jurisdiction of the court as to whether a substitute judge should be appointed or the trial recommenced.

The amendment includes a non-exhaustive list of factors to guide decision-making under the provision, including the progress of the trial, whether any key witnesses have given evidence, and the

estimated length and complexity of the trial. A significant factor may also be the nature of the evidence and whether a full transcript of the proceedings is available for the substitute judge to familiarise themselves with the proceedings. The amendments specify that if a substitute judge is appointed, the rulings of the previous judge as to evidence is binding, unless the substitute judge is of the opinion that it would not be in the interests of justice for the ruling to continue. This will ensure that the substitute judge is not required to revisit all the evidence that has been heard in the proceedings, unless other evidence is received that justifies such an approach on a particular issue.

Items [2] and [3] of schedule 1.7 amend section 291 of the Criminal Procedure Act 1986 to provide that when a sexual assault complainant's evidence is being given, regardless of whether this is in person, via video link or recording, proceedings will be held in a closed court unless otherwise ordered. Section 291 of the Criminal Procedure Act 1986 currently provides that the court must be closed when a complainant gives evidence in proceedings for a prescribed sexual offence, unless the court orders otherwise. The purpose of this provision is to reduce the trauma suffered by victims when giving evidence about sexual offences. However, section 291 (6) provides that when a recording of a victim's evidence is tendered or played in a retrial, the court is not required to be closed. The existence of this provision creates a risk that a victim's recorded evidence could be played in open court in a retrial, causing further distress to the victim. The amendment will ensure that the court is closed when a victim's recorded evidence is being played to limit further trauma and distress.

The Criminal Procedure Act 1986 currently provides that a recorded interview between a child under 16 and a police officer may be admitted as evidence in a sexual assault trial. Item [4] of schedule 1.7 clarifies that an interview may be admitted regardless of whether the police officer is from New South Wales or another jurisdiction. Item [5] makes a consequential amendment. Items [6] to [11] of schedule 1.7 relate to the Child Sexual Offence Evidence Pilot—the pilot—provisions, which are contained in the Criminal Procedure Act 1986. Item [6] of schedule 1.7 amends the Criminal Procedure Act 1986 to expand the pilot to include all child prosecution witnesses. Currently, the pilot provisions apply only to children who are victims in the proceedings. This means that non-victim witnesses must give evidence at trial rather than at a prerecorded hearing and are not eligible to utilise the services of a children's champion. The proposed amendment will ensure that all child prosecution witnesses are eligible for prerecorded hearings and the use of children's champions. This will further the pilot's aim of reducing the stress and duration of court proceedings for children in child sexual assault matters.

The Criminal Procedure Act 1986 presently provides that the pilot provisions apply only to proceedings for prescribed sexual offences. There has been uncertainty about whether the pilot provisions will extend to proceedings where an accused person faces charges for both prescribed sexual offences as well as other offences. Item [7] of schedule 1.7 amends the Criminal Procedure Act 1986 to make it clear that the pilot provisions will apply to evidence given by children in proceedings that include both prescribed sexual offences and other offences, such as non-sexual offences against children.

Currently, the Criminal Procedure Act 1986 provides that the pilot provisions do not apply to matters that were listed for trial before the commencement of the pilot legislation. Item [8] of schedule 1.7 clarifies that the pilot provisions apply to proceedings that have been listed for trial before the commencement of the pilot legislation but are then subsequently re-listed for trial after the commencement of that legislation. The amendment resolves a drafting oversight in clause 83 of schedule 2 to the Criminal Procedure Act 1986 and will ensure that children who would greatly benefit from the provisions are not excluded from the pilot. Item [9] of schedule 1.7 makes it clear that the amendments in items [7] and [8] of schedule 1.7 apply from the date the pilot legislation commenced.

Item [10] of schedule 1.7 amends the Criminal Procedure Act 1986 to correct a minor drafting error in clause 88 (1) of Schedule 2 to the Criminal Procedure Act 1986 by removing a redundant reference to the word "explain". Item [11] of schedule 1.7 amends the Criminal Procedure Act 1986 to add tertiary qualifications in teaching to the acceptable qualifications for children's champions. The legislation presently requires that a children's champion must have a tertiary qualification in psychology, social work, speech pathology or occupational therapy. However, in the most recent recruitment process

for children's champions there were no eligible Aboriginal and Torres Strait Islander applicants. Concerns have been raised that the lack of Aboriginal and Torres Strait Islander children's champions may mean that some Aboriginal and Torres Strait Islander child witnesses cannot be supported as well as they could be if an Aboriginal and Torres Strait Islander children's champion were available. Extending eligibility to teachers will increase the pool of eligible applicants, particularly Aboriginal and Torres Strait Islander applicants.

I turn to amendments to the District Court Act 1973 and Supreme Court Act 1970. Schedule 1.8 and items [1] and [2] of schedule 1.18 amend the District Court Act 1973 and the Supreme Court Act 1970 to make clear that acting judges are remunerated when they continue to deal with matters after their commission concludes. Each Act provides that acting judges may continue to deal with any heard or partly heard matters after their commission expires, and in such circumstances acting judges have all the entitlements and functions of a judge. However, this is currently contradicted in sections that provide an acting judge is entitled to be remunerated so long as he or she holds office. The amendments will remove the contradictory sentences from sections 18 (3B) of the District Court Act 1973 and section 37 (3B) of the Supreme Court Act 1970.

Turning to amendments to the Drug Misuse and Trafficking Act 1985 and the Drug Misuse and Trafficking Amendment (Drug Exhibits) Act 2016, the bill makes changes to the Drug Misuse and Trafficking Act 1985 and the Drug Misuse and Trafficking Amendment (Drug Exhibits) Act 2016 to address a drafting error in the amending Act. Schedule 1.9 amends the Drug Misuse and Trafficking Act 1985 to change the person responsible for authorising qualified persons to issue certificates with respect to plant identification for prosecutions under the Drug Misuse and Trafficking Act 1985 from the "Director-General of the Department of Industry and Investment" to "Secretary of the Department of Industry, Skills and Regional Development". Schedule 1.10 removes the provisions in the amending Act that make incorrect amendments.

I turn to amendments to the Land and Environment Court Act 1979, Local Court Act 2007 and Statutory and Other Offices Remuneration Act 1975. Schedules 1.11, 1.13 and items [2] and [3] of schedule 1.15 amend the Land and Environment Court Act 1979, the Local Court Act 2007 and the Statutory and Other Offices Remuneration Act 1975 to ensure that the Statutory and Other Offices Remuneration Tribunal, rather than the Governor, can determine the remuneration for acting commissioners of the Land and Environment Court and acting magistrates of the Local Court. This will ensure consistency with how the remuneration of full-time commissioners and magistrates is determined annually by the Statutory and Other Offices Remuneration Tribunal. A further amendment is made to section 13 of the Land and Environment Court Act 1979 to provide that travelling and subsistence allowances for acting commissioners are determined by the Minister. This is a continuation of the present situation, which mirrors the arrangement for full-time commissioners.

Schedule 1.12 amends the Legal Profession Uniform Law Application Act 2014 for two main purposes: to clarify provisions relating to the issue of certificates of determination for costs assessment and to clarify when the time for lodging appeals begins to run; and to provide for annual reports required under the legal profession legislation to be tabled when Parliament is not sitting. This will permit annual reports that are submitted outside a parliamentary session to be made public, and will mean that tabling does not need to be delayed until Parliament is sitting again. Item [1] of schedule 1.15 amends section 11C of the Statutory and Other Offices Remuneration Act 1975 to facilitate a living away from home allowance claimable by judicial officers as part of a salary sacrifice arrangement.

Judicial officers can access salary sacrifice arrangements only for the provision of a motor vehicle and payments of employee contributions to a superannuation scheme. The amendment means judicial officers will be eligible to claim a living away from home allowance for up to 12 months when on a temporary full-time work assignment that requires living away from their usual place of residence. A living away from home allowance administered as part of a salary sacrifice arrangement will give judicial officers an amount of their salary that is exempt from paying income or fringe benefits tax. This amendment will ensure that judicial officers have access to an allowance that is currently available to all private and public

sector employees who receive salary sacrifice arrangements as part of their remuneration package. It will not alter the total remuneration provided to judicial officers, which is determined by the Statutory and Other Offices Remuneration Tribunal.

Amendments to the Strata Schemes Management Act 2015 includes the amendment of sections 85 and 86 through schedule 1.16. The Act has not yet commenced. The amendment to section 86 clarifies that the NSW Civil and Administrative Tribunal [NCAT] can hear claims for unpaid strata levies only if the parties have other proceedings before the tribunal. Where the only issue is an unpaid strata levy owners' corporations should file that claim in court. This will ensure that claims are dealt with quickly and efficiently. Nearly half of all claims for unpaid strata levies in the Local Court are resolved by default judgement. This means that the lot owner did not respond to the court case and the owners' corporation automatically received judgement in their favour.

NCAT does not have default judgement provisions. If these claims are filed in NCAT, owners' corporations will need to attend a hearing even if the lot owner does not appear. This could result in claims taking longer, which is not in the interests of owners' corporations. The amendment also clarifies that owners' corporations may only recover interest and expenses as part of a claim for unpaid strata contributions, and that expenses must be reasonably incurred and reasonable in amount. This is the current position at law under section 80 of the Strata Schemes Management Act 1996, which is the equivalent of the new section 86.

Amendments to the Supreme Court Act 1970, items [1] and [2], are detailed above. Item [3] of schedule 1.17 amends section 48 of the Supreme Court Act 1970 to ensure that appeals from judicial registrars of the District Court no longer go to the Court of Appeal in the first instance. This is a procedural amendment identified by the Chief Justice of the Supreme Court and President of the Court of Appeal, who are of the view that the current appeal route is an anomaly.

Amendments to the Surveillance Devices Act 2007 include new schedule 1.18 to allow police and other law enforcement officers to film all lawful searches. Section 8 of the Surveillance Devices Act 2007 currently prohibits the use of optical surveillance devices, which includes hand-held video or still cameras, when police are on premises without the consent of the occupant, unless there is a relevant exemption. Current exemptions allow police to record the conduct of most, but not all, lawful searches.

As part of its review of section 74 of the Firearms Act 1996 and the Restricted Premises Act 1943, the NSW Ombudsman's office identified that the video recording of searches—namely declared searches conducted under section 10 of the Restricted Premises Act or warrantless searches, such as those conducted under Firearm Prohibition orders—are in breach of the Surveillance Devices Act 2007. The NSW Police Force and the Department of Justice further identified that the video recording of additional types of lawful searches are in breach of the Surveillance Devices Act 2007. These proposed amendments will create consistency by enabling police to video record all lawful searches. Video recordings provide better evidence than the police notebook by providing a more comprehensive record of what happens during the search. Video recordings also facilitate police accountability for the execution of searches. I commend the bill to the House.