Courts and Crimes Legislation Amendment Bill 2015 (Proof)

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COURTS AND CRIMES LEGISLATION AMENDMENT BILL 2015

Second Reading

The Hon. DAVID CLARKE (Parliamentary Secretary) [3.28 p.m.], 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 and Crimes Legislation Amendment Bill 2015. This bill is part of the Government's regular legislative review and monitoring program, and makes miscellaneous amendments to legislation affecting the operation of the courts and tribunals of New South Wales and other legislation administered by the Attorney General and Minister for Justice. I will now outline each of the amendments in turn.

Schedule 1 covers amendments concerning the Civil and Administrative Tribunal. Schedule 1.1 amends the Children and Young Persons (Care and Protection) Act 1998 to restrict the proceedings in which a risk of harm report can be admitted into evidence before the NSW Civil and Administrative Tribunal [NCAT]. Before the New South Wales Civil and Administrative Tribunal commenced, section 29 of the Children and Young Persons (Care and Protection) Act provided that risk of harm reports could be admitted into evidence only in the Guardianship and Victims Compensation tribunals. Section 29 was unintentionally widened when the Civil and Administrative Legislation (Repeal and Amendment) Act 2013 commenced. As a result, risk of harm reports can now be admitted in all NSW Civil and Administrative Tribunal proceedings. While in practice the NSW Civil and Administrative Tribunal would allow these reports into evidence only where they are relevant, it is important that risk of harm reports remain as confidential as possible. This amendment therefore re-establishes the previous position.

Schedules 1.2, 1.3 and 1.4 to the bill contain four amendments to the Civil and Administrative Tribunal Act 2013 and regulations. These amendments were proposed by the President of the NSW Civil and Administrative Tribunal and are minor or technical in nature. The first amendment will allow the NSW Civil and Administrative Tribunal to grant leave for a person to be represented by an Australian legal practitioner without specifying the practitioner by name. Currently, the NSW Civil and Administrative Tribunal Act permits leave to be granted to an identified representative only. This can be inefficient where, for example, a person is represented by Legal Aid and a different solicitor appears on each occasion. The second amendment will permit the NSW Civil and Administrative Tribunal to revoke orders it makes to appoint a person as guardian ad litem for a party to represent a party or that a person be represented separately. There may be situations where it is appropriate to revoke these kinds of orders—for example, if the person is not acting in the person's best interests.

The third amendment replaces references to the "Health Practitioner Division List" with "Health Practitioner List". This clarifies that there is no Health Practitioner Division of the NSW Civil and Administrative Tribunal.

It does not make any substantive changes to how the list operates. The fourth amendment to the NSW Civil and Administrative Tribunal Act will allow senior professional members of the Guardianship Division to sit on internal guardianship appeals. The Act currently does not permit these members to hear appeals. This was a drafting oversight. Senior professional members have specialist expertise in guardianship matters and should be permitted to hear internal appeals.

Schedule 1.5 contains a minor amendment to section 12 of the Water Act 1912 to correct a drafting oversight. The amendment updates the Water Act to reflect the fact that the NSW Civil and Administrative Tribunal is now responsible for making decisions for the purposes of the section. Schedule 2 concerns amendments regarding guardianship. Schedules 2.1 and 2.2 contain minor and technical amendments to the Guardianship Act 1987 and Guardianship Regulation 2010 that were proposed by the President of the Guardianship Tribunal prior to its integration with the NSW Civil and Administrative Tribunal. The first amendment will ensure that enduring guardians are included as a party to guardianship applications and reviews of guardianship orders. Currently, enduring guardians must make an application for joinder to become a party despite having sufficient interest to be included as a party, partly because their authority to make decisions is suspended by the operation of a guardianship order. This amendment will eliminate the need for these procedural hearings and improve the efficiency of the NSW Civil and Administrative Tribunal.

The second amendment to the Guardianship Act ensures that a person with a power of attorney will be included as a party to applications to review a financial management order or review of an appointment of a manager. Presently, attorneys are included in applications for a financial management order but not in applications for a review. An attorney's authority is suspended during the operation of a financial management order and may recommence if the order is revoked. The Government considers they have sufficient interest to be included as a statutory party in relation to reviews.

The third amendment to the Guardianship Act will replace the term "alternative enduring guardian" with the term "substitute enduring guardian". Currently, the Guardianship Act allows an instrument of appointment of an enduring guardian to appoint another person to be an alternative enduring guardian who can exercise functions if the original guardian dies, resigns or has an incapacity. The word "alternative" may be misleading to the public as it may imply that either the alternative enduring guardian or the original enduring guardian can exercise functions at any time. This is clarified by replacing the word "alternative" with "substitute".

The fourth amendment to the Guardianship Act 1987 will allow the NSW Civil and Administrative Tribunal to proceed as if an application for a guardianship and/or financial management order has been made when reviewing the appointment of an enduring guardian, without the need to first revoke the appointment. Currently, section 6K of the Guardianship Act provides that on reviewing the appointment of an enduring guardian the NSW Civil and Administrative Tribunal may either revoke the appointment or confirm the appointment with or without varying the functions of the enduring guardian. Where the NSW Civil and Administrative Tribunal has decided to revoke the appointment of an enduring guardian, it may proceed as if an application for a guardianship and/or financial management order has been made. This amendment will improve section 6K of the Guardianship Act by providing greater flexibility for the NSW Civil and Administrative Tribunal to make decisions in the best interests of the appointer, especially where a guardianship or financial management order might be needed for only a short time.

The fifth amendment to the Guardianship Act allows the NSW Civil and Administrative Tribunal to renew and vary a guardianship order when reviewing the order. This amendment addresses situations where a person may request the NSW Civil and Administrative Tribunal to review a guardianship order close to the end of the term of the order and another review would otherwise be required within a short time period. The sixth amendment to the Guardianship Act will allow people to apply for a financial management order for themselves and will provide that a person subject to a financial management order can apply for the review of an appointment of a financial manager.

The seventh amendment to the Guardianship Act replaces a reference to the now repealed section 68 of the Guardianship Act with a reference to the section that has replaced it, that is, section 61 of the Civil and Administrative Tribunal Act. The eighth amendment to the Guardianship Act will allow for the NSW Civil and Administrative Tribunal to review both a financial management order and the appointment of a manager at

the same time. Currently, a financial management order and the appointment of a manager are considered to be two separate orders. This causes confusion upon reviews. This amendment will also clarify that the power to vary an order includes the power to insert or remove an exclusion pursuant to section 25E. This will ensure that a tribunal constituted by fewer than three members can insert or remove exclusions upon the review of an order.

The ninth and final amendment to the Guardianship Act will allow the NSW Civil and Administrative Tribunal to review the appointment of a manager within a specified time. For example, the NSW Civil and Administrative Tribunal may appoint the NSW Trustee and Guardian as a manager to resolve a particular legal and financial issue, with a review within two months if it is considered that a suitable private person could take over once that issue has been resolved. Overall, the amendments to the Guardianship Act will provide the NSW Civil and Administrative Tribunal with flexibility to manage guardianship orders by streamlining the tribunal process and will result in improved efficiency.

Schedule 3 contains amendments concerning acting judicial officers. Schedules 3.1 to 3.8 contain amendments to various court and tribunal Acts. Schedules 3.1, 3.2, 3.3, 3.4 and 3.7 amend the Children's Court Act 1987, the District Court Act 1973, the Drug Court Act 1998, the Dust Diseases Tribunal Act 1989 and the Local Court Act 2007 to enable the Attorney General to appoint a judicial officer who can act as head of jurisdiction for a particular absence or for any absence that occurs from time to time.

All court and tribunal Acts contain provisions that govern who is authorised to act as head of the court during an absence in office. In some cases, either the Governor or the Attorney General must provide a judge with a commission to act. In other cases, default provisions allow the next most senior judge to act if no commission is provided. However, this is not always the case. This can cause difficulties, especially where the head of the court needs to take leave unexpectedly. These amendments will provide the Local Court, the District Court, the Dust Diseases Tribunal, the Drug Court and the Children's Court with consistent provisions regarding acting arrangements. The heads of these courts support the amendments.

Not all court and tribunal Acts are being amended. The Coroner's Court, the Workers Compensation Commission and the NSW Civil and Administrative Tribunal already have an equivalent provision. The Chief Justice of the Supreme Court, the Chief Judge of the Land and Environment Court and the President of the Industrial Relations Commission advised that the amendments are not required in their particular courts. Schedule 3.2 to the bill contains an amendment to the District Court Act 1973 that will allow retired judges of the Family Court of Australia to act as judges of the District Court after they reach the age of 72. Currently, section 18 (4A) of the District Court Act permits retired Federal Court judges to act as District Court judges after they turn 72, as well as retired judges of other State and Territory supreme and country courts. However, there is no equivalent provision for retired Family Court judges.

A number of former Family Court judges hold commissions as acting judges of the District Court. Currently, these judges will have to leave when they turn 72. This amendment will enable those judges to continue acting after the age of 72 until they reach the age of 77. The Chief Judge of the District Court supports the amendment. Schedules 3.2, 3.5 3.6, 3.7 and 3.8 amend the Local Court Act 2007, the District Court Act 1973, the Supreme Court Act 1970, the Industrial Court Act 1996 and the Land and Environment Court Act 1979 to enable acting judges, magistrates and commissioners of the Land and Environment Court to be appointed for a period of up to five years. Currently, acting judges, magistrates and commissioners of the Land and Environment Court can be appointed for 12-month terms. These appointments can be renewed each year until the statutory age limit is reached.

In the Local Court, the District Court, the Industrial Court and the Land and Environment Court the age limit for judges and magistrates is 75. In the Supreme Court the age limit is 77, where a judge retires at 72. This amendment will enable acting judges, magistrates and commissioners of the Land and Environment Court to be appointed for up to five years. The provision still allows acting judges to be given shorter terms. The statutory age limit for all acting judges will also be lifted to 77 years. Lifting the acting judge age limit to 77 years will enable highly talented and experienced judges to keep working when they are able and willing to do so.

I understand that concerns about this non-controversial amendment were raised in the Legislative Assembly

last week by the Opposition and The Greens. I note that the member for Balmain, the Hon. Jamie Parker, referred to a letter from the President of the Bar Association dated 6 May 2015 which raised concern about extending acting judicial appointments up to five years. Specifically, The Greens expressed concern that the amendment could undermine judicial independence, reduce security of tenure for judges and lead to an increase in the occurrence of perceived conflicts of interest due to younger legal practitioners being appointed to the judicial bench.

With all due respect, I state for the record that the Opposition, The Greens and the Bar Association have misinterpreted the amendments in this bill regarding the appointment of acting judicial officers for a term of up to five years. To address the concerns raised by the Opposition, The Greens and the Bar Association, I will provide some further context in relation to this amendment. The Government is astutely aware of the importance of the independence of the judiciary. It also understands and appreciates the constitutional requirement to retain a strong ratio of full-time judicial officers compared to acting judges. Nothing in this bill purports to affect that ratio.

The current "Guidelines for the Appointment of Acting Judicial Officers" clearly states that the Government's policy is that acting judicial appointments should be made from those who are retired judges or who are approaching retirement. I reiterate that the "Guidelines for the Appointment of Acting Judicial Officers", which have been in place since October 2010, will remain government policy. These amendments were specifically requested by the Chief Judge of the District Court. The Chief Judge has reiterated to the Government that his preference is for the amendment to allow acting judicial appointments for up to five years. The Chief Judge maintains that appointments for up to five years will significantly diminish the administrative burden on the judiciary, the government and the Department of Justice.

Contrary to the views made by The Greens in the Legislative Assembly last week, judicial independence will be enhanced because of the amendments in the bill, leading to greater security of tenure for acting judicial officers. At the moment, acting judges can only be appointed for a maximum of 12 months. This has created a heavy, unnecessary administrative burden for the courts, as they have to seek the appointment or renewal of acting judicial officers every 12 months. A key objective of this amendment is to reduce red tape for the heads of jurisdiction and give greater certainty to both acting judicial officers and the courts about the availability of acting judges.

The Government confirms that the amendment does not mandate five-year terms. It simply provides the courts with greater flexibility regarding the length of an acting appointment where that is considered appropriate. I understand that the final concern raised by The Greens related to a somewhat unjustified fear that younger legal practitioners would be plucked from relative obscurity and appointed as acting judicial officers. Under this Government, all judicial officers in New South Wales are appointed on merit. Age is not held against any applicant. A candidate who has demonstrated they have the required abilities, skills and experience to perform the role of a judicial officer should be appointed, regardless of their age.

As discussed earlier in my speech, the current "Guidelines for the Appointment of Acting Judicial Officers" clearly states the Government's policy is that acting judicial appointments should be made from those who are retired judges or who are approaching retirement. Nothing in this amendment will undermine this policy. The amendment should not be controversial. It provides greater efficiency for the courts by reducing the administrative burden on the judiciary, the government and the Department of Justice. It was requested by the Chief Judge of the District Court. The amendment supports the Government's policy to reduce administrative red tape, where possible, and allows the judiciary to use their time more efficiently and to focus on providing stronger justice outcomes for the people of New South Wales.

Schedule 4.1 amends the Crimes (Administration of Sentences) Act 1999 to enable information exchange between the Commissioner of Corrective Services and the Commissioner of Fines Administration. This is limited to information that assists in the exercise of the statutory functions of both commissioners. The amendment will permit Corrective Services NSW to disclose certain details about inmates to help the Commissioner of Fines Administration identify which inmates in custody have outstanding fines. The Commissioner of Fines Administration can then take steps to help those inmates, such as delaying fine enforcement action while they are in custody and offering them appropriate payment options.

The amendments will also enable Corrective Services NSW to help eligible inmates make arrangements to work off the value of the fine by undertaking certain programs, treatment and counselling in custody through a work and development order under section 99B of the Fines Act 1996. This is especially important, as we know that when people have outstanding debt on leaving prison their chances of reoffending are increased.

To achieve this, the amendments are intended to override the Privacy and Personal Information Protection Act 1998, which would otherwise prevent Corrective Services NSW from disclosing personal information about inmates for these purposes without their consent. By permitting the sharing of limited information about inmates, the amendment will enable relevant agencies and inmates to identify whether there are outstanding fines and to take steps to resolve them. The amendment is modelled on a similar provision already in the Children (Detention Centres) Act 1987.

Schedule 4.2 to the bill contains amendments to the Jury Act 1977 that will enable Roads and Maritime Services to provide customer identification numbers to the Sheriff's Office for the purpose of determining whether a person should be excluded from jury service. Currently, Roads and Maritime Services is authorised to provide the Sheriff's Office with driver licence numbers, but these are not always the same as customer identification numbers. This amendment will enhance the ability of the Sheriff's Office ability to identify people who are ineligible for jury service because of their criminal history.

Schedule 4.3 to the bill contains several minor amendments to the Land and Environment Court Act 1979. The first amendment will add class 4 proceedings to the classes of proceedings in the Land and Environment Court where a commissioner may assist judges. Class 4 proceedings relate to civil enforcement and judicial review of decisions under planning and environmental laws. The proposed amendment will permit commissioners to assist and advise the judge adjudicating a matter. Commissioners can already do this in classes 1, 2 and 3 of the court's proceedings and this amendment will ensure that commissioners can provide their specialist, non-legal expertise to the benefit of the court in appropriate class 4 matters. The remaining amendments to the Land and Environment Court Act in schedule 4.3 remove several references to repealed legislation in provisions establishing the court's appeal jurisdiction. These references are obsolete as no relevant appeals can now be brought.

In relation amendments relating to the New South Wales Trustee and Guardian Act 2009, schedule 4 to the bill contains an amendment to the New South Wales Trustee and Guardian Act 2009 to allow the Mental Health Review Tribunal to revoke a financial management order relating to a person who is or was or has now ceased to be a forensic patient if satisfied that the person has the capacity to manage his or her own affairs or it is in his or her best interests. In addition, the amendment will ensure that a financial management order for a person who is or was or has now ceased to be a civil mental health patient can be revoked by the NSW Civil and Administrative Tribunal [NCAT] if it is satisfied that the person has the capacity to manage his or her own affairs or it is in his or her own best interests.

This amendment was suggested by the Mental Health Review Tribunal, in part by including a reference to "forensic patient", and it corrects an oversight that occurred when the forensic patient provisions were separated from the civil patient provisions in 2007. It also enables the tribunal to revoke an order where a person remains in a mental health facility but has not yet been discharged. Managing one's own affairs can be an important step in a patient's rehabilitation and these amendments go to that policy outcome. The proposal parallels the powers set out in section 25P of the Guardianship Act 1987.

In relation to amendments relating to the Oaths Act 1900, schedule 4.5 to the bill contains three minor amendments to the Oaths Act 1900 and clarifies that New South Wales justices of the peace [JPs] may witness statutory declarations and affidavits for use in tribunals and arbitration in Australian jurisdictions other than New South Wales. Currently, the Oaths Act refers to witnessing non-New South Wales statutory declarations and affidavits for use in court proceedings outside New South Wales. The Crown Solicitor's Office has advised that the word "court" in the Oaths Act should not necessarily be interpreted as including a tribunal.

The first amendment to the Oaths Act clarifies that New South Wales JPs may witness statutory declarations and affidavits intended for use in a tribunal in an Australian jurisdiction outside New South

Wales. The second amendment amends the Act so that documents may be witnessed in New South Wales by JPs for the purposes of any arbitration whether it is held in New South Wales or interstate. This clarifying amendment is to avoid any doubt.

Section 26 of the Oaths Act currently only authorises JPs to witness statutory declarations interstate where they are required for court proceedings. The third and final amendment to the Oaths Act will authorise New South Wales JPs to witness in New South Wales all types of statutory declarations required for use interstate to ensure that JPs are authorised to witness statutory declarations required for public administrative purposes, as well as for court proceedings. The amendments are necessary to ensure that JPs in New South Wales may witness affidavits and statutory declarations required for use in Australian jurisdictions outside New South Wales. They will also apply retrospectively to any oaths, affidavits or statutory declarations made or witnessed before the commencement of the amendments made by this bill. That is appropriate so there is certainty.

Finally, in relation to the amendments to the Trees (Disputes Between Neighbours) Act 2006, schedule 4.6 to the bill contains amendments to part 2A of the Trees (Disputes Between Neighbours) Act 2006 to include land zoned rural residential or its current zoning equivalent. Currently, home owners located in rural residential zoned properties have no recourse under the Trees (Disputes Between Neighbours) Act to minimise the impact of high hedges located on neighbouring properties. The only legal option available to rural residential home owners is to sue their neighbour under the tort of nuisance, which can involve large financial and time costs.

The amendment will enable rural residential home owners to make applications to the Land and Environment Court to resolve disputes with neighbours relating to planted hedges that are over the height of 2.5 metres that are causing severe obstruction of sunlight to a window or views. This amendment implements the sole legislative recommendation of the 2013 statutory review of the Trees (Disputes Between Neighbours) Act. It provides rural residential zoned home owners with the same legal remedies afforded to home owners in residential areas, delivering rural residential home owners with a cost-effective means of resolving disputes regarding high hedges. The amendments in the bill will improve the administration of justice in this State and will assist the courts and other agencies within the Department of Justice to perform their work more efficiently. I commend the bill to the House.