

Legislative Council Hansard – 08 August 2017 – Proof

JUSTICE LEGISLATION AMENDMENT BILL 2017*Second Reading***The Hon. BEN FRANKLIN (15:50):** On behalf of the Hon. Don Harwin: I move:

That this bill be now read a second time.

The Government is pleased to introduce the Justice Legislation Amendment Bill 2017. The bill will update and improve the operation of the New South Wales justice system by clarifying criminal procedure and improving the efficiency and operation of legislation affecting the courts and other justice portfolio agencies. The bill will make minor amendments to a number of Acts within the Justice portfolio in order to reduce trauma for victims and witnesses, including children in sexual assault matters; address gaps and anomalies in existing offences and obstacles to the successful prosecution of certain offending behaviour; improve court process in criminal procedure in relation to proceedings involving children; orders relating to proceeds of crime and criminal assets; the diversion of defendants with cognitive impairment for assessment, treatment or support; and proceedings in the Court of Criminal Appeal; and to ensure that the language used and legislation referred to in various pieces of legislation is accurate, up-to-date and consistent.

I will now outline each of the amendments. Clause 1 of the bill sets out the short title of the proposed Act. Clause 2 provides for the commencement of the proposed Act on the date of assent, except for the amendments to the Mental Health (Forensic Provisions) Act 1990, which will commence upon proclamation. Schedule 1 contains amending provisions which amend various Acts within the Justice portfolio. Schedule 1.1 implements a proposal by the Bail Act Monitoring Group to clarify that the offence in section 50B of the Firearms Act 1996, namely giving possession of firearms or firearm parts to unauthorised persons, is a show cause offence for the purposes of bail.

The offence in section 50B is used where a firearm is supplied by one person to another but no financial element is present. It carries a maximum penalty of 14 years imprisonment. These are seen in organised crime and terrorism situations where one member of the criminal organisation will loan a firearm to another to enable that other person to use the firearm. The show cause test for bail, which was introduced under the Bail Amendment Act 2014, was always intended to apply to this offence. Recent bail decisions have indicated some uncertainty with this. This amendment will clarify where a person is charged with the firearms offence under section 50B they must show cause as to why their detention is not justified.

Schedule 1.2 amends the Children (Criminal Proceedings) Act 1987 to provide the Children's Court with a discretion, where an indictable or serious children's indictable offence is transferred to a superior court, to also transfer any back-up offence or related offence with which the person has been charged. Currently serious children's indictable offences and indictable offences that cannot properly be disposed of in a summary manner in the Children's Court are referred to the District Court or the Supreme Court. Related or back-up offences that can be resolved summarily remain in the Children's Court. The result is that two separate proceedings need to be run in the higher court and the Children's Court. This can be time consuming and does not give certainty to the young person who has been committed for trial or sentence. It can also cause unnecessary distress and confusion for victims and witnesses who may need to give evidence in multiple proceedings. This amendment will streamline the procedure, improve efficiency and provide greater certainty to young people, victims and witnesses.

The amendment will give the Children's Court the discretion to transfer related and back-up offences where proceedings for a more serious offence have been transferred to a higher court. The Children's Court will not be required to transfer these proceedings but the option will be there where the court considers it appropriate. The amendment replicates with some adjustments the powers that already exist with respect to referring summary matters where more serious charges are committed from the Local Court to higher courts. To inform the Children's Court about what matters can be transferred the prosecutor will be required to produce a certificate for the court specifying the back-up or related offences. If the Children's Court decides to transfer any of these proceedings they will then be dealt with by the higher court, similar to the way higher courts currently deal with summary proceedings transferred from the Local Court. Higher courts will have the power to remit summary matters back to the Children's Court where necessary to ensure that young defendants are not disadvantaged by this process.

Schedule 1.3[1] amends the Confiscation of Proceeds of Crime Act 1989 to clarify that the time limit for making an application for a forfeiture order or a pecuniary order under the Act is six months from the day on which the person was sentenced, rather than on the day on which the person was convicted. Currently the Act allows applications to be made for the forfeiture of property where a person is convicted of a serious offence as defined under section 5 of the Act. These confiscation applications must be made before the end of the relevant period in relation to the conviction as defined under section 4 (1) of the Act. In practice in criminal proceedings a person can be convicted at different points in proceedings. Judges will often not pronounce conviction until sentence, however the date of conviction is taken to be the date when the determination of guilt was made, being the date the jury found the accused guilty or the accused entered a plea of guilty. If sentencing occurs more than six months after the determination of guilt the relevant period has expired and an application can only be commenced with the leave of the Supreme Court. This amendment will clarify that confiscation orders can be sought within six months of final sentence. It will provide certainty of the time frame for both prosecution and defence.

Schedule 1.3 [6] provides for a transitional provision to support this amendment. The transitional provision will mean that the new way of calculating the time limit applies to any matters that are currently on foot as well as future matters. This will give clarity to the way the amendment is to be applied. Other amending provisions of the Confiscation of Proceeds of Crime Act 1989 provide for more minor technical amendments. Schedules 1.3 [2], [3] and [5] insert explanatory notes in the Confiscation of Proceeds of Crime Act 1989 to assist with the interpretation of provisions relating to determining the value or benefit that a person derives from a serious offence, including a drug trafficking offence. The explanatory notes will not affect the current operation of the provisions.

Schedule 1.3 [4] updates references to a Commonwealth Act, the Service and Execution of Process Act 1901, in the Confiscation of Proceeds of Crime Act 1989 to ensure that the legislation referred to is accurate and up-to-date. Schedule 1.4 amends the Court Security Act 2005 to provide that the maximum penalty for a person possessing a knife without reasonable excuse in court premises is the same maximum penalty for a person having custody without reasonable excuse of a knife in a public place or school under the Summary Offences Act 1988. The maximum penalty for such an offence is 20 penalty units or imprisonment for two years, or both. An inadvertent result of the introduction of the Crimes Legislation Amendment (Possession of Knives in Public) Act 2009 was an inconsistency in the maximum penalty for similar offences under section 8 (1) (b) of the Court Security Act and section 11C (1) of the Summary Offences Act. This amendment will ensure that the maximum penalty for these offences is realigned and there is consistency in the criminal penalty regime.

Schedule 1.5 [1] amends the Crimes Act 1900 to clarify that petrol is a destructive substance for the purpose of the offence under section 47 of that Act. Section 47 relates to throwing a corrosive fluid or destructive or explosive substance on a person with the intent to burn, maim, disfigure, disable or do grievous bodily harm to the person. Currently there is some uncertainty about whether liquid petrol would be scientifically considered to be an explosive substance in all circumstances. The amendment clarifies that petrol is an explosive substance for the purposes of section 47.

Schedule 1.5 [2] amends the money laundering offences in the Crimes Act 1900 to allow an offence under section 193C (2) dealing with property suspected of being proceeds of crime with a value less than \$100,000 to be the subject of an alternative verdict in a trial for an offence under section 193C (1) of the that Act dealing with property suspected of being proceeds of crime with a value of \$100,000 or more. The amendment will clarify that where the court is not satisfied beyond a reasonable doubt that the value of the property being dealt with is over \$100,000 the court can consider whether the accused person is guilty of the offence for property less than \$100,000 under section 193C (2).

Schedule 1.6 amends the Crimes (Sentencing Procedure) Act 1999 to require in proceedings relating to prescribed sexual offences a victim impact statement [VIS] to be read in a closed court and with a support person present unless the court otherwise directs. Currently a complainant is entitled to a support person under section 294C of the Criminal Procedure Act 1986 and a closed court under section 291 of the same Act when giving evidence in prescribed sexual offence proceedings.

However, these provisions do not apply when a VIS is read out in court. Further, although there is a general discretionary power in section 291A of the Criminal Procedure Act for the court to be closed during proceedings in respect of a prescribed sexual offence, there is currently no automatic requirement for the court to be closed, nor for the victim to have a support person present when a VIS is read out in court.

This amendment will align the protections for sexual assault victims when a VIS is read out in sentencing proceedings with protections that currently are afforded when a victim is giving evidence during trial. This will provide greater protections and support to victims of sexual violence and minimise further trauma and embarrassment. To ensure the principles of open justice are maintained, the court will have the discretion not to close the court when there are special reasons in the interests of justice to do so, or where the complainant consents. This is consistent with the existing discretion for complainants giving evidence in prescribed sexual assault proceedings.

Schedule 1.7 amends the Criminal Appeal Act 1912 to provide that the NSW Court of Criminal Appeal may vacate a determination made by the Supreme Court in its summary jurisdiction and order a new trial in such manner as the Court of Criminal Appeal thinks fit. I seek leave to incorporate the remainder of my second reading speech in *Hansard*.

Leave granted.

This amendment responds to the Court of Criminal Appeal's obiter observation in *Bulga Underground Operations Pty Ltd v Nash* [2016] NSWCCA 37 that, where an error in conviction is established on appeal from the District Court in its summary jurisdiction, the Court of Criminal Appeal has no power to order a new trial where appropriate. The successful appellant would be acquitted in such circumstances.

Criminal Assets Recovery Act 1990

Schedule 1.8[1] amends the Criminal Assets Recovery Act 1990 to include the offence under section 23A of the Drug Misuse and Trafficking Act 1985 as a drug trafficking offence for the purposes of the Criminal Assets Recovery Act 1990. The offence under section 23A relates to enhanced indoor cultivation of prohibited plants in presence of children,

The Criminal Assets Recovery Act allows for forfeiture orders and restraining orders to be made in relation to interests in property derived from a serious crime related activity. Under section 6(2) of the Act, a "serious crime related activity" is taken to include a "drug trafficking offence". Currently, similar offences under Part 2 Division 2 of the Drug Misuse and Trafficking Act are "drug trafficking offences" for the purpose of the Act. This amendment will address a drafting oversight in relation to section 23A and ensure consistency with the other offences.

Schedule 1.8[2] amends the Criminal Assets Recovery Act 1990 to enable the Supreme Court, at any time when a restraining order is in force under Part 2 of that Act, to order NSW Trustee and Guardian to take control of some or all of the interests in property that are interests to which the restraining order applies.

Currently, the Act allows the Supreme Court to make a restraining order preventing the disposal of the property of a person suspected of engaging in a serious crime related activity. Section 10B(2) of the Act provides that the Supreme Court may, when making a restraining order, order the NSW Trustee and Guardian to take control of some or all of the interest in property that are interests to which the restraining order applies.

The amendment will address the situation where it may not be necessary for NSW Trustee and Guardian to take control of property at the time a restraining order is made, but circumstances may arise requiring an order to be made at a later time. This amendment will allow the Court to exercise this power after the restraining order is made, and is consistent with other orders of a similar nature that can be made at a later time.

Criminal Procedure Act 1986

Schedules 1.9[1] and [2] amend the Criminal Procedure Act 1986 to clarify that a child witness is entitled to give evidence at a pre-recorded hearing if they are aged under 16 years at the date of committal. This amendment implements recommendations of the Child Sexual Offence Evidence Pilot Implementation Monitoring Group and will ensure a consistent approach to determining eligibility for inclusion in the Child Sexual Assault Evidence Pilot.

The Child Sexual Assault Evidence Pilot delivers on an election commitment to pilot the pre-recording of children's evidence and Children's Champions to support child victims of sexual assault giving evidence in criminal proceedings. The Pilot also implements recommendations from the NSW Ombudsman and the Parliamentary Joint Select Committee on Sentencing Child Sexual Assault Offenders.

The amendment will clarify the relevant point in proceedings for determining whether a child is presumptively eligible for pre-recorded hearing under the Pilot. It will provide a greater degree of certainty for child complainants and witnesses, and so promote the broader purpose of the Pilot which is to reduce the trauma of criminal proceedings for children in sexual assault matters.

Mental Health (Forensic Provisions) Act 1990

Schedule 1.10 amends the Mental Health (Forensic Provisions) Act 1990 to update old terminology to align with current understandings of cognitive impairment and ensure that people with cognitive impairment can be diverted into assessment, treatment and support.

Section 32 of the Act allows magistrates to divert people with cognitive and mental health impairments from the criminal justice system. The amendment makes it clear that this power is not limited to developmental disabilities and includes other forms of cognitive impairment.

This amendment will support a two-year pilot of the Cognitive Impairment Diversion Program commencing later this year. The program is aimed at people with cognitive impairment who appear before the Local Court for early low level offending.

The Program will provide a pathway for people assessed as having a cognitive impairment, who need supports related to their disability.

Surveillance Devices Act 2007

Schedule 1.11 amends the Surveillance Devices Act 2007 to update provisions relating to the service of documents and notices under that Act. The amendment will modernise the Surveillance Devices Act by allowing service by electronic means.

Schedule 1.12 amends the Terrorism (Police Powers) Act 2002 to update provisions relating to the conduct of personal searches by a police officer authorised to search a person under that Act in order to align those provisions with similar provisions under Part 4 of the Law Enforcement (Powers and Responsibilities) Act 2002. This will ensure consistency in language used in relation to personal searches across closely aligned pieces of legislation.

I commend the bill to the House.

Debate interrupted.