JUSTICE LEGISLATION AMENDMENT BILL (NO 2) 2017

First Reading

Bill introduced on motion by M r Mark Speakman , read a first time and printed.

Second Reading

Mr MARK SPEAKMAN (Cronulla—Attorney General) (10:17): I move:

That this bill be now read a second time.

The Government is pleased to introduce the Justice Legislation Amendment Bill (No 2) 2017. The bill will update and improve the operation of the NSW justice system by improving the efficiency and operation of legislation affecting the courts and other Justice portfolio agencies. In addition, a number of amendments are made to legislation in the Premier's portfolio.

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 section 106, which will commence three months from the date of assent, and sections 118A and 124A of the Civil Procedure Act 2005, schedule 1.2 [2] and [3] which will amend the Civil and Administrative Tribunal Act 2013, and schedules 1.3 [6], 1.10 and 1.17 [2] which will make other consequential amendments which will commence upon proclamation, so affected agencies can prepare for implementation. Schedule 1 contains amending provisions which amend various Acts within the Justice portfolio and the Premier's portfolio.

Under section 33 of the Mental Health (Forensic Provisions) Act 1990, a magistrate can order that a defendant who appears to be mentally ill be taken to a mental health facility for the purpose of a mental health assessment. Practical difficulties arise under the current provisions where a person is refused bail at the time the magistrate makes an order under section 33. This is because mental health facilities cannot assess or detain remandees. Police officers must then detain the person in custody until such time as they can be brought before a court. Schedules 1.19 and 1.20 to the bill amend the Mental Health Act 2007 and the Mental Health (Forensic Provisions) Act 1990 to clarify and standardise bail status so that bail is dispensed with when an order is made for a person to undergo a mental health assessment under section 33 (1) (a), (1) (b), (1D) (a) or (1D) (b). These amendments complement amendments to the Bail Act 2013 in schedule 1.1.

When an order is made for a person to undergo a mental health assessment under section 33 (1) (b) or (1D) (b), the person must be returned to the court if they are assessed by the mental health facility as not being mentally ill. It is sometimes necessary for police officers to detain people overnight before they can be brought before the court at the first available opportunity. Schedule 1.1 items [1] and [2] amend the Bail Act 2013 to authorise police officers of or above the rank of sergeant to make bail decisions for persons assessed as not mentally ill at mental health facilities to avoid the need to return people to court for bail determinations. The amendments to the Bail Act 2013 implement recommendation 15 of the final review of the Bail Act 2013 by Judge Hatzistergos. If this amendment is passed, the Government will have implemented all recommendations of the interim and final Hatzistergos reviews.

Schedule 1.2 item [1] amends the definition of interlocutory decision in section 4 (1) of the Civil and Administrative Tribunal Act 2013 to include a decision made by the New South Wales Civil and Administrative Tribunal [NCAT] concerning the granting or refusal of leave for a person to

represent a party in proceedings. Schedule 1.2 items [4] and [5] amend the Civil and Administrative Tribunal Act 2013 to clarify the NCAT Appeal Panel's power to confirm a decision under appeal on grounds other than those relied upon at first instance in circumstances where the Appeal Panel would be exercising a function conferred on the NCAT at first instance. Schedule 1.2 item [6] amends schedule 6 of the Civil and Administrative Tribunal Act 2013 to provide that when two members constitute the NCAT's guardianship division, the two members must come from two of the three different categories of members currently provided for in clause 4 (1) of schedule 6.

Schedule 1.2 items [2] and [3] amend the Civil and Administrative Tribunal Act 2013, and schedules 1.3 item [6], 1.10 and 1.17 item [2] make consequential amendments to other courts legislation to enable parties to commence proceedings in the Local or District Court if NCAT does not have jurisdiction to resolve the dispute. In February 2017 the New South Wales Court of Appeal in the decision of *Burns v Corbett; Gaynor v Burns* [2017] New South Wales CA 3 found that NCAT does not have jurisdiction to determine disputes between New South Wales and interstate residents if the dispute involves an exercise of judicial power as distinct from an exercise of administrative power. The amendments will provide affected parties with a forum in which to resolve their dispute. If parties are unable to resolve their dispute through conciliation at NCAT, parties will have the option of commencing proceedings in the Local Court or District Court. The courts will have jurisdiction to hear the same matters and make the same orders that NCAT would otherwise have been able to make.

Unless parties substantially vary the nature of their claim, parties will not be exposed to additional fees to commence proceedings. Administrative processes will be streamlined to ensure that the impact on the parties is limited. The amendments will ensure that parties impacted by the Court of Appeal decision are not left without a forum to resolve their disputes. I have met with both the President of NCAT the Hon. Justice Robertson Wright, and the Chief Magistrate of the Local Court, His Honour Judge Henson, to discuss this proposed solution. I thank them for their input. The amendments to the Civil Procedure Act 2005 in schedule 1 of the bill will improve the efficiency of the debt recovery process while ensuring that the system continues to balance the interests of both debtors and creditors. These reforms originated from the Legal Affairs Committee's parliamentary inquiry into debt recovery in New South Wales and the statutory review of the Civil Procedure Act 2005. The Government has consulted extensively on these amendments, including with representatives from the debt collection, legal and banking sectors. The amendments were unanimously supported by those stakeholders.

Schedule 1.3 item [1] will align the definition of property that is protected from seizure under a writ for the levy of property with the Commonwealth Bankruptcy Act 1966. This will remove an incentive for debtors to declare bankruptcy to protect certain personal items created by existing discrepancies between the New South Wales and Commonwealth Acts. Two amendments will codify existing practices of the Sheriff's Office in the exercise of their seizure and sale powers: schedule 1.3 item [2] codifies the Sheriff's existing discretion to decline to seize property if the cost of seizure, storage or selling it would likely exceed the sale price; schedule 1.3 item [3] codifies the existing practice of the Sheriff to notify judgment debtors before a writ for levy of property is enforced; schedule 1.3 item [4] provides that a minimum amount must be left in a judgment debtor's bank account when a garnishee order for debt is executed, which will ensure that a judgment debtor is not left completely destitute due to the operation of a garnishee order. This protection already applies when a garnishee order is issued against wages or salary. Schedule 1.3 item [5] clarifies the Court's power to vary and suspend garnishee orders.

Section 60AA of the Crimes Act 1900 defines "law enforcement officer" for the purpose of division 8A, which sets out special offences with higher maximum penalties that can be charged

when law enforcement officers are assaulted or other actions are taken against them. Schedule 1.4 to the bill adds "officers of approved charitable organisations" under the Prevention of Cruelty to Animals Act 1979 to the definition of "law enforcement officer" in section 60AA. The RSPCA and Animal Welfare League are "approved charitable organisations", which means they have been approved by the Minister for Primary Industries to exercise law enforcement powers under the Prevention of Cruelty to Animals Act 1979 and regulation. The amendment means that special offences can be charged in relation to assaults and other actions against officers of the RSPCA and Animal Welfare League.

Currently, annulments of convictions or sentences are considered by the Local Court on application from the defence or prosecution. However, there have been instances where matters are determined in a defendant's absence due to an administrative error. Schedule 1.5 amends the Crimes (Appeal and Review) Act 2001 to enable the Local Court to annul a conviction or sentence on its own motion in the interests of justice. This eliminates the need for a defendant to make their own application in such circumstances. Schedule 1.6 items [2], [3] and [4] amend section 57 of the Crimes (Domestic and Personal Violence) Act 2007 to broaden the circumstances in which a court can hear and determine apprehended violence order proceedings in the absence of the defendant to include any subsequent mention of the proceedings. The amendment enhances the protection of victims of domestic and personal violence by enabling orders to be made as early as possible.

Schedule 1.6 items [5] and [6] amend section 75 of the Crimes (Domestic and Personal Violence) Act 2007 so that courts are able to vary existing apprehended violence orders in a broader range of cases. Currently, courts can vary existing orders only after a defendant pleads guilty to or is found guilty of a stalking/intimidation offence or a domestic violence offence. Under the proposal, courts will be able to vary existing orders in respect of other serious offences including attempted murder, sexual assault offences and child sex offences. Items [1] and [7] of schedule 1.6 amend section 84 of the Crimes (Domestic and Personal Violence) Act 2007 to allow a party to a non-local domestic violence order [DVO] to appeal against the variation or revocation of the order by the Local Court or the Children's Court or against a refusal by the Local Court or the Children's Court to vary or revoke the order.

Items [8] to [13] of schedule 1.6 extend the existing police direction and detention powers to circumstances where police are required to obtain a copy of a non-local domestic violence order [DVO] or to serve an interstate DVO. Item [8] introduces section 89B into the Crimes (Domestic and Personal Violence) Act 2007. It allows a police officer who has grounds to make an application for a provisional order against a person to direct a person for the purposes of ascertaining whether there is already a non-local DVO in force against the person or obtaining a copy of such an order or both. If the person fails or refuses to comply with the direction, a police officer may detain the person at the scene of the relevant incident or other place, or detain the person and take them to a police station. Item [9] extends the current direction and detention power for the purpose of serving a non-local DVO or a variation of a non-local DVO.

Items [10] and [12] expand the existing time limitation on the direction and detention powers contained in section 90A to apply to the new circumstances of ascertaining whether a non-local DVO is in force against the person or to obtain a copy of any such order or both. Items [11] and [13] extend the safeguards in section 90A to limit the amount of time a person can be detained for the purpose of serving a non-local DVO or variation. Since the introduction of the Crimes (Domestic and Personal Violence) Amendment (National Domestic Violence Orders Recognition) Act 2016, some of the States and Territories have introduced or amended their legislation that governs domestic and family violence protection orders. Items [2] to [10] of schedule 1.7 update the cross-references to the terminology and legislation of other States and Territories.

Item [12] of schedule 1.7 removes the restriction on a person issuing a provisional DVO when they are aware that another order is already in place. Police and authorised officers will be permitted to make provisional DVOs if they consider it necessary to protect the victim. Police and authorised officers will be able to make provisional DVOs in the same way as currently provided for in part 7 of the Crimes (Domestic and Personal Violence) Act. Item [1] omits the notes that refer to this limitation. Item [11] inserts a new subsection to clarify that a provisional order made by an authorised officer does not supersede a DVO made by a court of any jurisdiction that is made against the same defendant and for the protection of one or more of the same protected persons. This amendment is a departure from the model legislation but is consistent with amendments made by other jurisdictions.

Item [13] of schedule 1.7 provides that where police enforce a local DVO that has been revoked or varied as a result of action in another jurisdiction, anything done or omitted to be done is taken to be lawfully done or omitted if the police officer was not aware at the time that the local DVO had been revoked or varied, and the police officer acted in good faith on the basis of the information available to the police officer, and the thing would have been lawfully done or omitted if the local DVO had not been varied or revoked. For the purposes of this provision, a New South Wales DVO is taken to be varied or revoked if it is superseded by an interstate DVO made in another jurisdiction or a foreign order that is a registered foreign order in another jurisdiction or is varied or revoked in another jurisdiction and that variation or revocation is recognised in New South Wales

A police officer is taken to be acting in good faith on the basis of information available to them if they make reasonable inquiries on the apprehended violence order system within the NSW Police Force's web-based computerised operational policing system [WebCOPS] and proceed in reliance on the information in that database. Under section 35A of the Crimes (Sentencing Procedure) Act 1999, a certificate must be presented to a court when a plea is accepted to an additional charge. The current drafting suggests a certificate only needs to be filed when the accused entered a plea to a charge other than an offence they had originally been charged with. Schedule 1.8 amends section 35A of the Crimes (Sentencing Procedure) Act 1999 to require that a certificate must be presented to a court where a plea is accepted to any additional charge, including a backup charge, clarifying that victims are to be consulted before any plea to a lesser charge is accepted.

Schedule 1.9 [1] amends section 3 of the Criminal Procedure Act to correct a drafting error and confirm that kidnapping is a prescribed sexual offence only where the kidnapping includes the commission of or an intention to commit another prescribed sexual offence. The amendment in schedule 1.9 [2] relates to procedures for defendants who instead of attending court provide the court with a written notice of pleading. A person who receives a court attendance notice after being charged with a criminal offence is provided with a form providing them with the option to enter a plea in advance, rather than attending the Local Court on the appointed court date. The effect of a valid written notice of pleading is that the person is taken to have attended court on the appointed court date. This means if the person pleads guilty, he or she cannot later apply for their conviction to be annulled on the ground that they were absent.

Schedule 1.9 [3] amends the Criminal Procedure Act 1986 to provide that written notice of pleading is not required to be provided in a form prescribed by the Local Court. This addresses a disparity caused by requiring the prescribed form to be used. A written notice of a guilty plea that is not on the prescribed form is considered invalid. A person who provides an invalid notice can be convicted in their absence and is able to make an annulment application, because they are not taken to have appeared in court. By allowing the Local Court to accept a written notice of pleading that is not on the prescribed form, the amendment ensures consistent treatment for all people who enter pleas in advance. The prescribed form will continue to be provided with court attendance notices.

Schedule 1.11 of the bill amends schedule 1 to the Drug Misuse and Trafficking Act 1985 to permit compliant low-THC hemp seed food products. Schedule 1.11 [3] of the bill amends schedule 3 to the Act to validate previous amendments made to schedule 1 to the Act that may have been invalidly made by way of regulation. Section 44 of the Act enables schedule 1 to be amended by regulation for certain purposes. It has been assumed by successive governments, on the advice of the Parliamentary Counsel's Office, that this regulation-making power permitted the amendment of threshold quantities of drugs listed in schedule 1 and the introduction of exceptions from the operation of schedule 1. The Parliamentary Counsel now advises that seven regulations are likely outside of the regulation-making power in section 44 and are therefore invalidly made.

The regulations identified by Parliamentary Counsel are the Drug Misuse and Trafficking Amendment (Prohibited Substances) Regulation 2016; the Drug Misuse and Trafficking Amendment (Methylamphetamine) Regulation 2015; the Drug Misuse and Trafficking Amendment (Prohibited Drug) Regulation 2009; the Drug Misuse and Trafficking Amendment (Miscellaneous) Regulation 2003; the Drug Misuse and Trafficking Amendment (Prohibited Drugs) Regulation 2001; the Drug Misuse and Trafficking Amendment (Prohibited Plants and Drugs) Regulation 2000; and the Drug Misuse and Trafficking Amendment (Prohibited Drugs) Regulation 1999. These regulations were made by Governors on the advice of Executive councils constituted by former Labor governments as well as by the current Government. The validation will have effect from the day the amending regulations were made and will ensure that the law, as applied since that time by police, the legal profession, and the courts, will be affirmed.

Currently, the Christmas vacation dates of the Local Court are set by the Attorney General. This approach is inconsistent with that taken in the Supreme and District Courts where the relevant rules committees set vacation dates. Schedule 1.17 [1] amends the Local Court Act 2007 to provide the Local Court Rules Committee with a power to make rules setting Christmas vacations and providing for the hearing and disposal of proceedings during vacations. Schedule 1.12 makes a consequential amendment to the Evidence (Audio and Audio Visual Links) Act 1998 so that audio visual links can be used during vacations set by the Local Court Rules Committee. Schedule 1.13 repeals section 13A (2) of the Gaming and Liquor Administration Act 2007, which uses wording that is different from that found in section 63 of the Administrative Decisions Review Act 1997, which governs how the NSW Civil and Administrative Tribunal [NCAT] performs its functions.

The repeal of this section will ensure consistency in terminology relating to NCAT.

Schedule 1.14 amends the Law Enforcement (Conduct Commission) Act 2016 to make several minor amendments that are required to permit the inspector to perform his statutory functions. Schedule 1.14 [1] confers a similar express power to the New South Wales Ombudsman to delegate functions on the Law Enforcement Conduct Commission [LECC] Inspector. Schedule 1.14 [2] ensures that these two requirements relating to the appointment of the Inspector only apply if the Inspector is appointed on a full-time basis. Schedule 1.15 makes an amendment to the Law Enforcement Conduct Commission Regulation 2017, which will allow the Inspector to issue identity cards to staff.

Schedule 1.16 [1] amends the Law Enforcement (Powers and Responsibilities) Act 2002 to clarify that the NSW Police Force may make applications to dispose of seized goods which have been used as exhibits and are no longer needed, even if the goods are being held by third parties. The NSW Police Force can currently only make these applications in respect of goods stored on NSW Police Force premises. However, it is sometimes necessary for goods, such as vehicles, to be stored elsewhere. Schedule 1.16 [2] updates an erroneous reference to a provision of the Prevention of Cruelty to Animals Act 1979.

Schedule 1.18 amends the Members of Parliament Staff Act 2013 to allow a Presiding Officer to terminate the employment of a staff member if the staff member has engaged in misconduct, after consultation with the relevant member of Parliament. Currently, electorate staff are employed and dispensed with at will by the relevant member of Parliament. However, there may be circumstances in which a member of Parliament is not able or prepared to terminate the employment of a staff member who has engaged in misconduct. Pursuant to section 25 of the Members of Parliament Staff Act 2013, any liability incurred by a member of Parliament as the employer of electorate staff is taken to be the liability of the relevant Presiding Officer. The proposed amendments were requested by the former Presiding Officers and are supported by the current Presiding Officers.

Schedule 1.21 of the bill amends the Oaths Act 1900 to include a general power to provide that the Governor may administer any oath or affirmation undertaken by a person whose appointment to office is required to be made by order of the Governor. This will streamline procedural requirements for appointments to office where suitable. Schedule 1.22 amends the Police Act 1990 to expressly provide that the Commissioner of Police may administer the police oath of office, and that the police oath of office may also be administered by a person who can administer an oath of office under the Oaths Act 1900.

Schedule 1.23 addresses an inconsistency between section 181 (3) of the Strata Schemes Development Act 2015 and section 34 of the Land and Environment Court Act 1979. Section 181 (3) of the Strata Schemes Development Act 2015 requires the court to continue to hear proceedings whether or not parties reach an agreement at a conciliation conference. Conciliation conference is defined under section 181 (7) to mean a conciliation conference under section 34 of the Land and Environment Court Act. However, section 34 (3) of the Land and Environment Court Act states that the commissioner must dispose of the proceedings if an agreement is reached at a conciliation conference—that is, those disposals amount to a finalisation of the proceedings such that the court may not hear or continue to hear the proceedings. The proposed amendment will address this inconsistency, which is currently being addressed through administrative arrangements.

Schedule 1.24 amends the Terrorism (Police Powers) Act 2002 to change references from "request" to "require" in section 16, which gives police officers the power to obtain identification information from unknown persons. The word "require" more accurately describes police officers' powers under these provisions, as it is an offence for a person to fail to disclose their identity when directed to do so by a police officer. This bill will lead to a number of improvements and enhancements in the operation of New South Wales courts and law enforcement agencies, the civil justice system and the criminal justice system. I commend the bill to the House.

Debate adjourned.