



New South Wales

# Justice Legislation Amendment Bill (No 2) 2017

## Explanatory note

This explanatory note relates to this Bill as introduced into Parliament.

## Overview of Bill

The object of this Bill is to make various amendments to the following Acts and Regulation within, or with provisions relating to matters within, the Justice portfolio:

- (a) the *Bail Act 2013*,
- (b) the *Civil and Administrative Tribunal Act 2013*,
- (c) the *Civil Procedure Act 2005*,
- (d) the *Crimes Act 1900*,
- (e) the *Crimes (Appeal and Review) Act 2001*,
- (f) the *Crimes (Domestic and Personal Violence) Act 2007*,
- (g) the *Crimes (Domestic and Personal Violence) Amendment (National Domestic Violence Orders Recognition) Act 2016*,
- (h) the *Crimes (Sentencing Procedure) Act 1999*,
- (i) the *Criminal Procedure Act 1986*,
- (j) the *District Court Act 1973*,
- (k) the *Drug Misuse and Trafficking Act 1985*,
- (l) the *Evidence (Audio and Audio Visual Links) Act 1998*,
- (m) the *Gaming and Liquor Administration Act 2007*,
- (n) the *Law Enforcement Conduct Commission Act 2016*,

- (o) the *Law Enforcement Conduct Commission Regulation 2017*,
- (p) the *Law Enforcement (Powers and Responsibilities) Act 2002*,
- (q) the *Local Court Act 2007*,
- (r) the *Members of Parliament Staff Act 2013*,
- (s) the *Mental Health Act 2007*,
- (t) the *Mental Health (Forensic Provisions) Act 1990*,
- (u) the *Oaths Act 1900*,
- (v) the *Police Act 1990*,
- (w) the *Strata Schemes Development Act 2015*,
- (x) the *Terrorism (Police Powers) Act 2002*.

## Outline of provisions

**Clause 1** sets out the name (also called the short title) of the proposed Act.

**Clause 2** provides for the commencement of the proposed Act on the date of assent to the proposed Act, with certain exceptions.

## Schedule 1 Amendment of legislation

**Schedule 1.1** amends the *Bail Act 2013*, and **Schedule 1.20** amends the *Mental Health (Forensic Provisions) Act 1990*, to provide that an accused person who has been sent to, and detained in, a mental health facility for assessment and found not to be a mentally ill person or mentally disordered person may be granted bail by a police officer at the mental health facility, and to clarify the bail status of such persons while at those facilities. **Schedule 1.19** makes a consequential amendment to the *Mental Health Act 2007*.

**Schedule 1.2** amends the *Civil and Administrative Tribunal Act 2013*:

- (a) to include a decision of the Tribunal to grant leave (or refuse to grant leave) for a person to represent a party to proceedings to be an interlocutory decision for the purposes of that Act, allowing any such party a right to appeal that decision, and
- (b) to provide that when the Tribunal is constituted by 2 members, each member must have certain qualifications, including that of an Australian lawyer, but must not have the same qualification as the other member, and
- (c) to confirm that the Appeal Panel may exercise all the functions that are conferred on the Tribunal when varying, or making a decision in substitution for, the Tribunal and may do so on grounds not relied upon by the Tribunal, and
- (d) to enable certain persons, with the leave of the Local Court or District Court, to commence proceedings in the Court for the determination of original applications and external appeals that the Tribunal cannot determine because they involve the exercise of federal diversity jurisdiction (that is, jurisdiction referred to in section 75 (iv) of the Commonwealth Constitution).

The amendments referred to in paragraph (d) are required to address the consequences of the decision of the NSW Court of Appeal in *Burns v Corbett; Gaynor v Burns* [2017] NSWCA 3 that the Civil and Administrative Tribunal cannot exercise federal diversity jurisdiction because it is not a court that is invested with such jurisdiction by the *Judiciary Act 1903* of the Commonwealth.

**Schedule 1.3** amends the *Civil Procedure Act 2005*:

- (a) to provide that the Sheriff, in relation to enforcing a judgment debt against a judgment debtor:

- (i) is not to seize and sell any property that is excluded under the *Bankruptcy Act 1966* of the Commonwealth from being divisible amongst the creditors of a bankrupt person, and
  - (ii) may decide not to seize or sell goods if, in the opinion of the Sheriff, the cost of the seizure, storage or sale of the goods would likely exceed the sale price of the goods, and
  - (iii) is to notify a judgment debtor of any writ for the levy of property that applies to the judgment debtor before the writ is enforced, and
- (b) in relation to garnishee orders:
- (i) to provide that a garnishee order must not reduce the total account balance of a judgment debtor to less than \$447.70, which is an adjustable amount under Division 6 of Part 3 of the *Workers Compensation Act 1987*, and
  - (ii) to enable the court, at any time on the application by a judgment debtor, to vary or suspend the making of payments under a garnishee order, or order the total amount paid by the judgment debtor to be repaid, if the court is satisfied that it is appropriate to do so, and
- (c) to apply the Act to substituted proceedings under Part 3A (Diversity proceedings) of the *Civil and Administrative Tribunal Act 2013* (as inserted by Schedule 1.2) commenced in the Local Court instead of the Civil and Administrative Tribunal.

**Schedule 1.4** amends the *Crimes Act 1900* to include as a law enforcement officer for the purposes of that Act particular officers of an approved charitable organisation within the meaning of the *Prevention of Cruelty to Animals Act 1979*. The proposed amendment will mean certain offences in the *Crimes Act 1900* against law enforcement officers will apply to such officers.

**Schedule 1.5** amends the *Crimes (Appeal and Review) Act 2001* to allow the Local Court, on its own motion in the interest of justice, to annul a conviction or sentence made or imposed when the defendant was not in appearance in proceedings so as to deal with the matter afresh. This will ensure that any error of the Local Court, including the registrar of the Local Court, such as a failure to notify the correct court room to the defendant, will be rectified without the defendant having to appeal the decision.

**Schedule 1.6** amends the *Crimes (Domestic and Personal Violence) Act 2007*:

- (a) to give the court the discretion, if the defendant does not appear at the first return date or any subsequent mention of the proceedings, to proceed to hear and determine the matter on the first or subsequent day on which the matter is listed for mention, and
- (b) to broaden the range of offences that, if a person pleads guilty to, or is found guilty of, such an offence, the court may vary a final apprehended violence order or an interim court order for the purpose of providing greater protection for the person against whom the offence was committed, and
- (c) to make amendments relating to the commencement of the National Domestic Violence Order Scheme across Australia as follows:
  - (i) to enable an appeal to be made to the District Court against a variation or revocation of an interstate or New Zealand domestic violence order (a **non-local DVO**) that was done by the Local Court or the Children's Court, or against a refusal by the Court to vary or revoke the order,
  - (ii) to authorise a police officer, who has grounds to make an interim apprehended domestic violence order against a person as a result of a domestic violence incident, to detain the person for up to 2 hours for the purpose of ascertaining whether there is already a non-local DVO in force against the person and obtaining a copy of any such order,
  - (iii) to authorise a police officer who reasonably suspects a person is a defendant under a non-local DVO to detain the person for up to 2 hours for the purpose of serving a copy of the order, or a variation of the order, on the person.

**Schedule 1.7** amends the *Crimes (Domestic and Personal Violence) Amendment (National Domestic Violence Orders Recognition) Act 2016* in relation to the commencement of the National Domestic Violence Order Scheme across Australia as follows:

- (a) to remove a restriction on the making of provisional domestic violence orders so that a provisional order may be made by a person other than a court, even if there is an existing domestic violence order that applies to the same defendant and protected person,
- (b) to provide that any action taken by a police officer in good faith in enforcing a NSW domestic violence order that has been revoked or varied in another jurisdiction is lawful if the police officer was not aware at the time that the order had been revoked or varied,
- (c) to update outdated cross-references to legislation in other jurisdictions participating in the national scheme.

**Schedule 1.8** amends the *Crimes (Sentencing Procedure) Act 1999* to make it clear that a court must not take into account any other offence (other than the principal offence concerned), or statement of agreed facts, that was the subject of a charge negotiation, unless the prosecutor has filed a certificate with the court verifying that consultation with the victim and police officer in charge of the investigation has taken place.

**Schedule 1.9** amends the *Criminal Procedure Act 1986*:

- (a) to clarify that an offence under section 86 (Kidnapping) of the *Crimes Act 1900* is only a prescribed sexual offence for the purposes of the *Criminal Procedure Act 1986* in so far as the offence includes the commission of, or an intention to commit, another prescribed sexual offence, and
- (b) to enable the court to accept written pleas that are not in the prescribed form.

**Schedule 1.10** amends the *District Court Act 1973* to ensure that the jurisdictional limit of the District Court applies to substituted proceedings under Part 3A (Diversity proceedings) of the *Civil and Administrative Tribunal Act 2013* (as inserted by Schedule 1.2) commenced in the Court instead of the Civil and Administrative Tribunal.

**Schedule 1.11** amends the *Drug Misuse and Trafficking Act 1985*:

- (a) to provide exceptions to certain offences under that Act as a result of an amendment to the Australia New Zealand Food Standards Code that allows hemp seeds, or certain products made from hemp seeds, with a low concentration of tetrahydrocannabinols to be used in food, and
- (b) to ensure that any amendment to Schedule 1 to that Act by a regulation made before the commencement of the proposed amendment is taken to be, and always to have been, validly made.

**Schedule 1.13** amends the *Gaming and Liquor Administration Act 2007* to enable any administrative review by the Civil and Administrative Tribunal of certain decisions of the Independent Liquor and Gaming Authority to be by way of a new hearing rather than a rehearing.

**Schedule 1.14** amends the *Law Enforcement Conduct Commission Act 2016*:

- (a) to enable the Inspector of the Law Enforcement Conduct Commission (the *Inspector*) to delegate certain functions of the Inspector to members of staff of the Inspector, other than that power of delegation and certain reporting functions, and
- (b) to remove certain restrictions on the office of the Inspector, but only if the Inspector holds office on a part-time basis.

**Schedule 1.15** amends the *Law Enforcement Conduct Commission Regulation 2017* to enable the Inspector to issue identity cards to any member of staff of the Inspector.

**Schedule 1.16** amends the *Law Enforcement (Powers and Responsibilities) Act 2002*:

- (a) to extend references to property that is in the custody of the police to include any property that is held by a person on behalf of the police, allowing orders under that Act for the disposal or return of property to extend to property held by a third party, and
- (b) to correct a reference to a search warrant under the *Prevention of Cruelty to Animals Act 1979*.

**Schedule 1.17** amends the *Local Court Act 2007*:

- (a) to allow the Local Court Rule Committee to make rules with respect to the vacations and holidays of the Court and the hearing and disposal of proceedings during any such vacations or holidays, and
- (b) to ensure that the jurisdictional limit of the Local Court in its General Division applies to substituted proceedings under Part 3A (Diversity proceedings) of the *Civil and Administrative Tribunal Act 2013* (as inserted by Schedule 1.2) commenced in the Court instead of the Civil and Administrative Tribunal.

**Schedule 1.12** makes an amendment to the *Evidence (Audio and Audio Visual Links) Act 1998* that is consequential on the amendment referred to in paragraph (a).

**Schedule 1.18** amends the *Members of Parliament Staff Act 2013* to enable the President of the Legislative Council or the Speaker of the Legislative Assembly to terminate the employment of a staff member of a member of Parliament for misconduct or to suspend any such staff member from duty until any allegation of misconduct or any serious criminal charge relating to the staff member has been dealt with. Before terminating or suspending the employment of the staff member, the proposed amendments require the President or Speaker to consult the member of Parliament who employed the staff member.

**Schedule 1.21** amends the *Oaths Act 1900* to enable an oath or affirmation to be administered by, or made before, the Governor if the appointment of a person by the Governor requires the person to take an oath or make an affirmation.

**Schedule 1.22** amends the *Police Act 1990* to enable an oath or affirmation taken by persons exercising police functions to be administered by or made before the Commissioner of Police or any other person authorised to administer an official oath under the *Oaths Act 1900*.

**Schedule 1.23** amends the *Strata Schemes Development Act 2015* to enable the Land and Environment Court under Part 10 of that Act to hear, or continue to hear, proceedings even if agreement has been reached, despite section 34 (3) (a) of the *Land and Environment Court Act 1979*.

**Schedule 1.24** amends the *Terrorism (Police Powers) Act 2002* to update provisions relating to the power of a police officer to obtain disclosure of a person's identify in order to align those provisions with similar provisions under the *Law Enforcement (Powers and Responsibilities) Act 2002*.