Courts and Other Legislation Further Amendment Bill 2012

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COURTS AND OTHER LEGISLATION FURTHER AMENDMENT BILL 2012

Second Reading

The Hon. DAVID CLARKE (Parliamentary Secretary) [6.20 p.m.], on behalf of the Hon. Michael Gallacher: I move:

That this bill be now read a second time.

I seek leave to have the second reading speech incorporated in *Hansard*.

Leave granted.

The Government is pleased to introduce the Courts and Other Legislation Further Amendment Bill 2012.

The purpose of the bill is to make miscellaneous amendments to legislation affecting the operation of the courts of New South Wales and other legislation administered by the Attorney General and Minister for Justice.

The bill is part of the Government's regular legislative review and monitoring program and will amend a number of Acts to improve the efficiency and operation of our courts, as well as the operation of agencies within the Department of Attorney General and Justice.

I will now outline each of the amendments in turn.

Anti-Discrimination Act 1977

Schedule 1.1 of the bill amends the Anti-Discrimination Act 1977 by repealing section 49ZYA (3). The purpose of the amendment is to clarify the definitions of a "relative" or an "associate" under the Act.

The Anti-Discrimination Act 1977 prohibits discrimination against a person on the basis of certain protected characteristics (These include race, sex, transgender, marital or domestic status, disability, homosexuality and age). The Act also prohibits discrimination against a "relative" or "associate" of a person with one or more of those protected characteristics.

The Act currently contains two definitions of the terms "relative" and "associate". There is a general definition at section 4 that applies to all of the protected characteristics and a specific definition at section 49ZYA (3) that applies only to the characteristic of age. These definitions are virtually identical, but the duplication of definitions is confusing.

For this reason, the bill repeals the specific definition at section 49ZYA (3). The general definitions of "relative" and "associate" at section 4 will continue to apply to all discrimination against a relative or an associate, including on the ground of age.

Births, Deaths and Marriages Registration Act 1995

The first proposed amendment to the Births, Deaths and Marriages Registration Act in schedule 1.2 of the bill is to replace references to a "memorandum" of adoption with a "record of adoption" in section 25 of that Act. This is for consistency with the terminology used in the rest of the Act and in the Adoption Act 2000.

The second amendment to the Births, Deaths and Marriages Registration Act is to empower the Registrar of Births, Deaths and Marriages to allow officers of law enforcement agencies to have access to applications to register a change of name.

Under section 46A of the Births, Deaths, and Marriages Registration Act, the Registrar of Births, Deaths and Marriages may permit access by law enforcement agencies, including the New South Wales Police Force, to entries in the Register regarding changes of name.

Under part 5 of the Births, Deaths, and Marriages Registration Act and the Child Protection (Offenders Registration) Act, certain classes of people, such as child sex offenders and former serious offenders, are restricted from changing

their name without the approval of the Commissioner of the New South Wales Police Force.

It is proposed to amend section 46A of the Births, Deaths, and Marriages Registration Act to clarify that the Registrar may provide information to the NSW Police Force about change of name applications before they are registered. This is so that if a restricted person applies to change their name the NSW Police Force has an opportunity to object to the registration prior to it occurring, rather than merely being notified of the registration after the fact.

Children (Community Service Orders) Act 1987 and Children (Detention Centres) Act 1987

Schedules 1.3 and 1.4 of the bill amend the Children (Community Service Orders) Act 1987 and Children (Detention Centres) Act 1987 to create an exemption from privacy legislation provisions which currently prevent Juvenile Justice from sharing certain information in relation to young people. This will assist the State Debt Recovery Office to identify Juvenile Justice clients with outstanding fines to offer them alternative payment options in relation to those fines.

The State Debt Recovery Office administers the administration and enforcement of fines and penalties on behalf of New South Wales. Young people in the Juvenile Justice system experience extra difficulties due to fines and penalties. There is no process to automatically put the fine of a young person on hold while they are in custody or on a community service order.

The non-disclosure provisions in section 28A of the Children (Community Service Orders) Act 1987 and section 370 of the Children (Detention Centres) Act 1987 currently prevent Juvenile Justice from advising the State Debt Recovery Office if a young person is in the care or custody of Juvenile Justice.

Permitting the State Debt Recovery Office to access and disclose information to Juvenile Justice about young offenders with outstanding fines and penalties will help increase participation in Work and Development Orders under section 99B of the Fines Act 1996. This will help reduce young people's problems with outstanding fines by allowing them to work off the value of a fine through unpaid work, training or counselling.

Children's Court Act 1987

Schedule 1.5 of the bill amends the Children's Court Act 1987 to omit the requirement for the President of the Children's Court to oversee, in accordance with the rules, the courses of training to be attended by Children's Magistrates and prospective Children's Magistrates, as there are currently no rules relating to such training.

Section 16 of the Children's Court Act 1987 sets out the functions of the President of the Children's Court. Under section 16 (1) (g) these functions include "to oversee the training of Children's Magistrates and prospective Children's Magistrates in accordance with the rules".

The amendment will have no impact on the operation of the Children's Court and will not substantively change the functions exercised by the President of the Children's Court requested the amendment.

Civil Procedure Act 2005 and Civil Procedure Regulation 2012

Schedule 1.6 of the bill repeals Part 2A of the Civil Procedure Act 2005 and schedule 1.7 makes a consequential amendment to the Civil Procedure Regulation 2012.

Part 2A was inserted into the Civil Procedure Act in late 2010 but has never commenced. If operational, part 2A would have required parties to take "reasonable steps" to resolve or narrow issues in dispute before commencing court action from October 2011.

These provisions were not commenced due to concerns raised by a range of key stakeholders in early 2011, including parts of the legal profession, members of the judiciary and some industry associations, including those representing commercial debt collection agents.

In mid-2011 the Government postponed the commencement of part 2A for 18 months to allow for the evaluation of similar Commonwealth provisions that were introduced around the same time as part 2A.

At the time of the postponement, the Government made it clear that it wished to make an evidence-based decision about the efficacy of these types of provisions and whether they should apply to proceedings in the New South Wales courts.

The Commonwealth evaluation of the equivalent Federal provisions has only just started and the evaluation timetable is likely to be lengthy, with a report unlikely until sometime in 2014.

Accordingly, there is no reliable statistical data yet to assess the likely efficacy of part 2A and it is not appropriate for it to automatically commence in March 2013, which would be the case if this repeal did not proceed.

A number of local stakeholders have recently queried whether part 2A will commence. Given that the lead time between disputes arising and the commencement of court proceedings can often be several months, the legal profession is understandably anxious to know whether it should start advising its clients of the potential for part 2A to apply to their disputes.

Repealing these provisions now will provide greater certainty during the Commonwealth's evaluation period.

The Government remains open to the possibility of implementing reforms of this type in the future but is committed to

doing so in the knowledge that these sorts of reforms improve rather than hinder the process of resolving civil disputes in a way that is just, quick and cheap, as required by the statutory objectives of the Civil Procedure Act.

Court Security Act 2005

Schedule 1.8 of the bill amends section 9A of the Court Security Act 2005 to prohibit the unauthorised use of any device (including a smartphone or tablet) to transmit sounds, images or information forming part of court proceedings from a room or other place where a court is sitting to another place.

Section 9 of the Court Security Act 2005 currently states that a "person must not use a recording device to record sound or images (or both) in court premises". This prohibition is subject to certain exceptions such as where a judge expressly grants approval for the use of a recording device. The maximum penalty is 200 penalty units, imprisonment for 12 months (or both).

These amendments address recent security incidents in courts that have highlighted the fact that the existing legislation does not capture the capability of recent technology. It is currently an offence to record court proceedings under section 9 of the Court Security Act 2005. However, advances in technology undermine the policy behind this provision, as electronic devices can now transmit court proceedings without also recording them—for example, a person in court transmitting witness evidence by smartphone to another witness waiting outside the court who is yet to give evidence.

This can undermine the administration of justice and lead to a mistrial. The integrity of witness evidence is fundamental to our system of criminal justice. Therefore, these amendments prohibit unauthorised transmission of court proceedings.

However, it is important to preserve the principle of open justice. Journalists expect to use electronic devices ever more frequently to report on proceedings contemporaneously through new media, such as Twitter or "blogging", or through more old-fashioned technology such as texting.

While these circumstances are not expressly covered in the proposed statutory exceptions, there is a regulation-making power that will allow appropriate exemptions to cover these sorts of circumstances. My department has prepared a draft regulation, in consultation with stakeholders, which provides broad exemptions for journalists and lawyers. This means that the status quo policies of the individual courts on these matters will continue as before.

The amendments in this bill will not commence until a date set by proclamation. The Regulations will commence on the same day.

Crimes (Appeal and Review) Act 2001

Schedule 1.9 of the bill amends section 59 (2) of the Crimes (Appeal and Review) Act 2001 to provide that the court may set aside an order and make such other order as it thinks just or dismiss an appeal in relation to section 56 (1) (e) of the Crimes (Appeal and Review) Act 2001.

Section 59 of the Crimes (Appeal and Review) Act 2001 concerns criminal appeal determinations in the Supreme Court. Currently section 59 (2) states that the court may determine an appeal against an order referred to in section 56 (1) (b), (c) or (d) or 57 (1) (b) or (c). However, it is silent on nine orders referred to in section 56 (1) (e) which refer to costs orders made by the Local Court against a prosecutor in summary proceedings. This seems to have been a legislative oversight, which was noted by the decision of Justice Simpson in the case of Morse v Al-Jubouri [2011] New South Wales SC 1330.

The Chief Justice proposed the amendment and the Chief Magistrate was consulted and agreed with the proposal.

Repeal of the Inebriates Act 1912

On 28 November 2011 the Government approved the statewide implementation of the Involuntary Drug and Alcohol Treatment Program under the Drug and Alcohol Treatment Act 2007. The Involuntary Drug and Alcohol Treatment Program offers a more effective, health-based approach to the treatment of substance dependence than the Inebriates Act 1912, which provides for the care, control and treatment of people with severe substance dependence, including involuntary detention for up to 12 months.

Since the commencement of the Involuntary Drug and Alcohol Treatment Program on 4 September 2012, the Inebriates Act no longer applies to adults. Only minors can still be detained under Inebriates Act court orders.

Schedule 1.13 of the bill repeals the Inebriates Act to avoid the potentially inequitable treatment of minors. Between 1999 and 2009 only two minors were admitted under Inebriate Court Orders. There are currently no children being held under inebriates orders in New South Wales.

The Involuntary Drug and Alcohol Treatment Program applies only to adults as it is not considered an appropriate intervention for minors.

Research indicates that the treatment of minors with substance misuse issues is better approached in terms of mental health, adolescent and family health, as well as developmental and educational concerns, rather than exclusively dealing with drug and alcohol use.

Due to the different manifestation of drug and alcohol problems in young people, treatment programs for young people

should be designed to address their complex needs.

Various specialist programs have been designed for young people with persistent drug and alcohol concerns, including group programs, counselling services and rehabilitation. These programs are voluntary, in suitable settings for minors, and are conducted by staff who have the skills to work with young people.

The Involuntary Drug and Alcohol Treatment Program is a move towards a more effective, health-based approach for people with severe substance dependence and it would be inequitable to leave only minors subject to the Inebriates Act.

Schedules 1.10 and 1.11 of the bill make consequential amendments to the Drug and Alcohol Treatment Act 2007 and the Drug and Alcohol Treatment Regulation 2012, which are required due to the repeal of the Inebriates Act.

Fines Act 1996

Schedule 1.12 amends the Fines Act 1996 to allow for the delegation of the power to approve organisations with which a person subject to a Work and Development Order may undertake activities to satisfy the Order.

The Work and Development Order scheme allows a person who:

• has a mental illness
• has an intellectual disability or cognitive impairment
• is homeless
• is experiencing acute economic hardship, or
• has a serious addiction to drugs, alcohol or volatile substances

to reduce their fine debt through activities, including volunteer work with an approved organisation.

At present, only the Director General of the Department of Attorney General and Justice can grant approval to these organisations. To improve the efficiency of the process, a power for the Director General to delegate this power of approval will be created.

Jury Amendment Act 2010

The Jury Amendment Act 2010, which has not yet commenced, will introduce a new system of eligibility for jury service. The aim of the amendment was to increase the pool of available jurors and to make juries more representative.

One of the changes that was to be made was to permit most Australian lawyers to serve as jurors, with some limited exceptions for people engaged in criminal practice and occupying certain public positions, such as the Ombudsman and the Director of Public Prosecutions. This would have meant that many people who are admitted as solicitors or who practise law could serve as jurors so long as they were not engaged in criminal law practice.

The Government does not support this position, and so schedule 1.14 of the bill includes amendments to retain the current position, that is, that people who are admitted as lawyers should not be able to serve as jurors.

The longstanding practice has been that juries are composed of lay people. There are sound reasons for this.

There is a risk that lawyers' legal knowledge could place them in a position to unduly influence other jurors, especially given the lack of procedures for resolving disputes within the jury room.

It is the judge's role to provide legal guidance to the jury. There is a risk that given lawyers' legal knowledge, they could usurp the judge's role in providing that guidance. Such influence may not be overt; other jurors may simply tend to defer to a lawyer in the jury room or to turn to them for advice. In particular, there is a risk that a lawyer on a jury could adopt an interpretation of the law that conflicts with that of the judge. Non-expert lawyers could confuse jurors and unintentionally mislead them on the law.

Even the appearance of undue influence could discredit the jury system. The Government considers that these risks outweigh the potential benefits of having admitted lawyers serve as jurors.

Schedule 1.14 of the bill also includes amendments to retain the current position in relation to carers, so that full-time carers who live with the person they care for can claim an exemption "as of right". This will ensure that carers in this situation do not have to establish "good cause" as to why they should not have to serve on a jury. The Government does not consider that carers in this position should have to establish, for example, an inability to arrange alternative full-time care.

Finally, the bill also ensures that people who are subject to control orders or interim control orders under the Crimes (Criminal Organisations Control) Act 2012 are excluded from jury service.

Land and Environment Court Act 1979

Schedule 1.15 of the bill amends the Land and Environment Court Act to provide that Commissioners whose term of appointment has expired can complete or otherwise continue to deal with any matters relating to proceedings that have been heard, or partly heard, by the person before the expiration of that period.

The Land and Environment Court Act currently has similar provisions in relation to Acting Judges and part-time

Commissioners whose period of appointment has expired. This bill will bring the provisions in relation to 14 full-time Commissioners into line with those for Acting Judges and part-time Commissioners.

There are also similar provisions in place in other legislation, including in relation to Members and Acting Members of the Administrative Decisions Tribunal, Acting Members and Acting Judicial Members of the Industrial Relations Commission, Acting Judges of the Supreme Court and District Court and Acting Magistrates of the Local Court.

New South Wales Trustee and Guardian Act 2005

Schedule 1.16 of the bill amends section 13 (2) (a) of the New South Wales Trustee and Guardian Act 2009 to clarify that the New South Wales Trustee and Guardian cannot accept a trust under a deed of arrangement for the benefit of creditors.

Section 13 (2) (a) of the New South Wales Trustee and Guardian Act 2009 prevents the New South Wales Trustee and Guardian from accepting trusts under a deed of arrangement. It is based on section 12 (4) of the repealed Public Trustee Act 1913. However, paragraph (a) of subsection (2) of section 13 of the Act fails to include the phrase "for the benefit of creditors" which appeared in the previous legislation.

The New South Wales Trustee and Guardian raised concerns that the omission of the words "for the benefit of creditors" substantially alters the New South Wales Trustee and Guardian's capacity to accept appointments. It could be interpreted as meaning that the New South Wales Trustee and Guardian cannot accept appointment under any deed of arrangement, even one which is not intended as an agreement for the payment of creditors.

A deed of arrangement is a legal document that sets out an agreement between various parties. In insolvency and bankruptcy law, it refers specifically to an insolvent person and the arrangement that he or she enters into with creditors.

However, under trust law, a deed of arrangement also refers to an agreement between the estate beneficiaries calling on the executor or administrator to deal with that estate in a way which would otherwise constitute a breach of trust. So, for example, it is often referred to in respect of a deed by which a life tenant or remainderman disclaims or surrenders their interests.

It is therefore proposed that the words "for the benefit of creditors" be reinserted so that section 13 (2) (a) of the New South Wales Trustee and Guardian Act 2009 reflects section 12 (4) of the Public Trustee Act 1913.

Probate and Administration Act 1898

Schedule 1.17 of the bill amends the Probate and Administration Act 1898 to make several minor amendments, including to provide for certain minor matters to be approved rather than prescribed by the rules.

The need for these amendments was identified during the preparation of revised court rules under the Act. The Supreme Court supports the amendments and a working group of succession law experts consulted on the amendments indicated their support.

Schedule 1.18 of the bill makes minor amendments to standardise provisions about acting judicial officers, to update terminology, to omit references to the repealed Inebriates Act 1912 and to deal with other matters of a statute law revision nature.

I commend the bill to the House.