

COURTS AND OTHER LEGISLATION AMENDMENT BILL 2012

14 August 2012 PROOF

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Bill introduced on motion by the Hon. Greg Smith, read a first time and printed.

Second Reading

Mr GREG SMITH (Epping—Attorney General, and Minister for Justice) [4.02 p.m.]: I move:

That this bill be now read a second time.

The Government is pleased to introduce the Courts and Other Legislation 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 and the operation of agencies within the Department of Attorney General and Justice.

I will now outline each of the amendments in turn. Schedule 1 to the bill amends the Bail Act 1978 to enable New South Wales court registries to electronically transfer bail forfeiture orders to the State Debt Recovery Office for enforcement. In New South Wales bail may be granted on condition that an accused person, or in some cases a third party, agrees to forfeit money if the accused fails to appear in court. If the accused does not appear the court may make an order forfeiting the money. Where that money remains unpaid the order is transferred to the State Debt Recovery Office so that it can be enforced. Changes that are currently being made to the New South Wales courts electronic case management system, JusticeLink, will soon enable these forfeited bail orders to be transferred to the State Debt Recovery Office electronically. However, the current wording of section 531 of the Bail Act 1978 states that court registries must send a number of documents relating to bail forfeiture orders to the State Debt Recovery Office manually.

Once JusticeLink is capable of transferring the order to the State Debt Recovery Office electronically there will be no need for the office to receive copies of those documents. Accordingly, this amendment would remove the requirement for the documents to be sent manually. Instead, copies of the documents would only need to be sent to the office when requested. This will make the process more efficient for both court registries and for the State Debt Recovery Office.

The bill contains a minor amendment to the Children (Protection and Parental Responsibility) Act 1997 which is designed to ensure consistency across New South Wales legislation. That Act aims to reduce juvenile crime and to assist young persons who may be at risk. However,

at the moment the definition of "carer" in the Act does not align with the equivalent definition in a related Act, the Children and Young Persons (Care and Protection) Act 1998. The definition of "carer" in section 3 of the Children (Protection and Parental Responsibility) Act provides that a carer is "any person who has the daily care and control of a child under out-of-home care arrangements made under the Children and Young Persons (Care and Protection) Act 1998". However, section 135 of the Children and Young Persons (Care and Protection) Act defines "out-of-home care" as "residential care and control", not "daily care and control". To avoid any possible confusion the Government would prefer these definitions to be the same. The bill therefore amends the definition of "carer" in section 3 of the Children (Protection and Parental Responsibility) Act so that it matched the definition in the Children and Young Persons (Care and Protection) Act.

The Chief Justice of New South Wales has drawn my attention to a gap in section 13 (1) (a) of the Civil Procedure Act 2005. This section enables the senior judicial officer of a court—for example, the Chief Justice—to delegate certain powers of a court to a registrar by instrument in writing. In the Supreme Court the powers of a registrar are conferred by section 121 of the Supreme Court Act 1970, which provides that an officer—meaning a registrar, taxing officer or other officer of the court—may exercise such powers as are conferred upon them by the Act, or by any other Act. Justice Pembroke considered this issue in *Peter James Spencer v Wayne Dennis Bamber*, where His Honour noted that section 13 (1) (a) of the Civil Procedure Act does not include some functions of the court that the current delegation purports to delegate to registrars. Justice Pembroke raised doubt regarding whether the delegation of functions under other Acts are authorised. Fortunately, any lack of authority is cured through section 121 (4) of the Supreme Court Act 1970, which preserves the effectiveness of an order or direction of an officer of the court, whether or not that order or direction is within the power of the officer.

However, for the sake of certainty this bill will amend section 13 (1) (a) of the Civil Procedure Act to make clear that a registrar may exercise any function of the court under any other Act or law in respect of which the court has jurisdiction, including any rules of court. Registrars in the Supreme Court make various orders and exercise such powers many times per week under the Chief Justice's delegation and no objections have been raised. It was always the intention that the delegation power referred to in section 13 of the Civil Procedure Act should enable the senior judicial officer to delegate a broad range of functions to officers of the court.

Section 11 of the Court Security Act 2005 states that court security officers may require a person to surrender any thing that the security officer believes on reasonable grounds is a restricted item or offensive implement. A "restricted item" is defined as any prohibited weapon within the meaning of the Weapons Prohibition Act 1998, a firearm or imitation firearm within the meaning of the Firearms Act 1996, or any other type of knife. An "offensive implement" is defined as any thing made or adapted for use for causing injury or intended by the person to injure or menace a person or damage property. Recent security incidents at the Supreme Court have highlighted the fact that this section does not allow

security officers to prevent other potentially dangerous items entering the court.

This amendment inserts a regulation-making power into the Act that would permit regulations to be made allowing court security officers to require the temporary surrender of certain items. This amendment will ensure that members of the public, the judiciary and the legal community are adequately protected from harm while attending court. At the same time, the use of a regulation will ensure that court security officers can only require the surrender of a specific list of items that might pose a danger to safety. This will preserve the principle that the courts should be open and accessible to the public.

Schedule 4 to the bill contains an amendment to the Criminal Procedure Act 1986 to allow the Government to clarify in the regulations which Government agencies are required to pay filing fees. The practice of the courts has long been to collect fees from certain Government agencies that are not budget-dependent. For example, WorkCover has always paid filing fees in the Industrial Relations Commission in respect of work health and safety prosecutions. However, the Parliamentary Counsel's Office recently advised the Department of Attorney General and Justice that the Criminal Procedure Act 1986 could be interpreted to exempt some agencies from paying fees, contrary to this longstanding policy. This amendment will allow regulations to be made clarifying the Government's well-established policy. Such agencies have historically paid filing fees, meaning that the amendment clarifying the practice will have no financial impact on them.

The Courts Legislation Amendment Act 2010 amended, amongst other things, the District Court Act 1973 and the Local Court Act 2007 to allow a Chief Magistrate to also hold a commission as a District Court Judge. The amendments provided that a Chief Magistrate, if also holding office as a judge, must preserve any benefits held under the existing State public sector superannuation scheme and no longer contribute to it. Instead, under Section 13 of the District Court Act 1973 a Chief Magistrate, if also holding office as a judge, is entitled to a pension under the Judges Pension Act 1953. There has been a suggestion that section 13 could be interpreted to mean that a Chief Magistrate, if also appointed as a District Court judge, would be entitled to count the entire period of service as Chief Magistrate towards a judicial pension.

The 2010 legislative amendments were never intended to backdate the Chief Magistrates' entitlements to a judicial pension. If backdating were to be permitted, a Chief Magistrate could theoretically receive a pension without needing to serve the same qualifying periods of service required of other District Court judges. A Chief Magistrate should only be allowed to claim the benefits of one superannuation scheme at a time in relation to particular periods of service. This amendment will clarify that a Chief Magistrate cannot count time served as Chief Magistrate towards the requirements for a judicial pension. The current Chief Magistrate agrees with this position.

Under the Government Information (Public Access) Act 2009, when an agency decides to refuse a person access to information, the Information Commissioner can review this

decision. Some of the bases for refusing access are related to privacy, such as the fact that information is someone's personal information. In such cases, the Information Commissioner must consult with the Privacy Commissioner when conducting its review. At present, restrictions in the Act prevent the Information Commissioner from consulting effectively with the Privacy Commissioner because of limits to the Information Commissioner's ability to disclose information. This bill amends the Government Information (Public Access) Act 2009 to make clear that the Information Commissioner can disclose the necessary information to the Privacy Commissioner when consulting with the Privacy Commissioner for this purpose.

The Jury Amendment Act 2010 provides for jurors to be excluded from jury service on the basis of certain types of criminal history. It also provides for a new system of criminal record checks whereby the Sheriff can obtain from the Commissioner of Police information about the criminal records of potential jurors. This bill amends the Jury Amendment Act 2010 to clarify that the Sheriff can obtain from Roads and Maritime Services certain information that is necessary to determine who should be excluded from jury service. The bill amends the Land and Environment Court Act 1979 to provide that parties must seek the leave of the court to be represented by a lay advocate or agent. The amendments provide that, in determining whether to grant leave, the court is to consider whether the agent has provided information to clients as may be required by the court rules. The court is also to consider whether granting leave is in the best interests of the party.

The amendments provide that leave may be granted subject to conditions and revoked at any time. Lay advocates and agents play an important role in the Land and Environment Court. The use of agents is an important vehicle for access to justice, as they often have expertise relevant to the determination of the issues in dispute. They provide a cost effective way for parties to access the justice system. However, there are currently no protections for consumers represented by agents in the Land and Environment Court. In contrast, when a solicitor represents a party protections are in place. For instance, lawyers must comply with the legal obligations contained in the Legal Profession Act 2004 and the Legal Profession Regulation 2005, as well as the professional obligations under the Revised Professional Conduct and Practice Rules 1995.

The proposal will enable a court to assess, from the outset of a case, whether an agent has complied with the court rules by providing necessary information to clients. That information might include whether the agent has advised the client of his or her fees, or that costs could be ordered against the client. The court can refuse leave at the outset of the case, impose conditions on the leave granted, or revoke leave that has been granted at a later stage. The benefits of allowing representation by agents must be balanced with both the need to protect litigants against inadequate representation or undue costs, as well as the need to ensure effective administration of justice. The Government believes that requiring leave for representation by agents strikes this balance.

The bill also amends the Land and Environment Court Act to provide that acting

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 a similar provision in relation to an acting judge whose period of appointment has expired. This bill will bring the provisions in relation to acting commissioners in line with those for acting judges. There are also similar provisions in relation to acting commissioners in the Industrial Relations Commission, and in relation to acting judges in the Supreme Court and the District Court, and acting magistrates in the Local Court.

The bill also contains an amendment to the Mining Act 1992 that is intended to clarify the jurisdiction of the Land and Environment Court in respect of questions or disputes arising from certain decisions made under the Mining Act. In April 2009 the jurisdiction of the Mining Warden was transferred to the Land and Environment Court. To this end, section 21C of the Land and Environment Court Act 1979 provides the court with jurisdiction to hear and dispose of civil proceedings arising under the Mining Act 1992 or the Petroleum (Onshore) Act 1991 in Class 8 of its jurisdiction. The court also has jurisdiction in relation to proceedings for certain offences under the Mining Act. However, some doubt has arisen as to the precise scope of the Land and Environment Court's jurisdiction in mining matters. A particular issue is whether on a technical reading of the legislation the court in fact has jurisdiction to hear and determine proceedings relating to a decision of the director general of the department determining an objection to the grant of a mining lease under clause 22 of schedule 1 of the Mining Act.

The practical effect of this uncertainty is that parties may be unable to commence certain mining matters in the Land and Environment Court, although the court otherwise has jurisdiction to hear and determine like proceedings. The alternative is that parties wishing for the Land and Environment Court to determine this type of proceeding would need to commence proceedings in the Supreme Court and then apply for the proceedings to be transferred to the Land and Environment Court under section 149B of the Civil Procedure Act 2005. This process would involve additional costs and delay resolution of the relevant dispute. The bill will amend the Mining Act to clarify the Land and Environment Court's jurisdiction in respect of such matters.

The Privacy and Personal Information Protection Act 1998 includes a regulation-making power to permit certain agencies to be declared part of other agencies. This allows the legislation to apply in a more practical manner. For example, it may be appropriate for closely related entities to share complaints handling and internal review functions. This bill includes an amendment to make clear that the declaration is to be made in respect of specified agency functions. Schedule 16 to the bill amends the Probate and Administration Act 1898 to provide that notice of an application for the grant or resealing of probate or letters of administration must be published in the manner prescribed by the court rules.

Currently, the Act requires that notices of intended application for a grant of probate or letters of administration must be published in a newspaper or newspapers as prescribed in the rules.

The Supreme Court of New South Wales is currently managing a project to develop an online publication facility for these notices. When the facility is ready the court rules will be revised to provide for mandatory online publication. The bill also deals with applications made by way of cross-claims by providing that notice of such applications must be published within the period prescribed by the court rules. Schedule 16 also clarifies that court rules for probate matters may be made under the Uniform Civil Procedure rules as well as the Supreme Court rules. I commend the bill to the House.

Debate adjourned on motion by Mr Paul Lynch and set down as an order of the day for a future day.