

## **SECOND READING SPEECH**

### **Justice and Related Legislation (Miscellaneous Amendments)** **Bill 2012**

Mr Speaker, over the course of the last few years, various stakeholders, including the Chief Justice, the Integrity Commission, the University and the Ombudsman have identified minor issues with a number of Acts.

In addition proposals have been made for changes to the law to enhance the operation of the justice system in this State.

This Bill contains amendments that will correct problems in or enhance existing legislation.

I will now outline the more significant changes that will be made to various Acts by this Bill.

#### ***Bail Act 1994***

In 2006 a new subsection 7(3A) was inserted in the *Bail Act 1994* to allow a Crown Law Officer to notify a person on bail in writing that the date on which the person was required to attend court had been postponed to a later date.

The amendment was intended to avoid the bailed person having to attend court solely for the Court to adjourn the matter because the prosecution was not ready to proceed.

The way in which the section was amended can be interpreted as allowing a Crown Law Officer to set a later date on only one occasion, notwithstanding that a matter may need to be adjourned more than once.

The amendment being inserted by this Bill makes it clear that a Crown Law Officer may notify a person in writing of a new appearance date more than once.

## ***Building and Construction Industry Security of Payment Act 2009***

The Bill amends the definition of “business day” under section 4 of this Act to clarify that for the purposes of the Act every half day or regional holiday is considered a full day state wide holiday and that the days between Christmas and New Year’s Day are not business days.

The change will ensure consistent interpretation of the phrase and avoid payments not being made or other actions not being taken within time limits because of a misunderstanding of what is classed as a business day.

Subsection 19(2) of the *Building and Construction Industry Security of Payment Act 2009* sets out two alternative periods within which a respondent must provide a payment schedule to a claimant, one of which is the payment period under the contract, and states that the respondent will become liable at the end of whichever period expires earlier.

The standard contract has a payment period of seven days. This period is considered to be insufficient and is the reason that 20 business days is provided in subsection 19(3) for residential home owners.

The Bill amends subsection 19(2) to ensure that the minimum period under that subsection is also 20 business days for residential home owners.

The Bill also amends section 20(1)(b) of the Act to ensure that the minimum payment period for residential home owners is 20 days.

## ***Civil Liability Act 2002***

It is proposed to make two amendments to this Act.

At common law, where an employer is held to be vicariously liable for the negligence of an employee, the employer can seek indemnity or contribution from that employee. This principle is known as the rule in *Lister v Romford Ice and Cold Storage*.

In practice, employers rarely claim indemnification from employees.

Since the introduction of the Commonwealth *Insurance Contracts Act 1984* an insurer's right to enforce the employer's right to indemnity has been abolished throughout Australia unless the employee is guilty of serious or wilful misconduct.

As most employers are insured the Commonwealth Act means claims can rarely be made against an employee.

Even if the Insurance Contracts Act does not apply some industrial awards provide that the employer must indemnify an employee.

Even if this were not the case an employer may be reluctant to seek indemnification because of potential industrial relations repercussions. However, there are isolated cases where an employer seeks indemnification, generally because the employer is uninsured or underinsured. This results in the unfair situation where only a very few employees may be targeted at the election of the employer.

This Bill inserts a provision into the Civil Liability Act to abolish an employer's right to indemnification except where the employee is guilty of serious and wilful misconduct.

This change will bring Tasmania into line with New South Wales, South Australia and the Northern Territory which have all made similar changes to the common law.

The second change will amend section 26 of the Civil Liability Act to include claims by dependents under the *Fatal Accidents Act 1934* in the cap on damages that may be awarded in respect of lost earning capacity.

Currently, the section 26 cap does not apply to such claims, which leads to the anomalous position that a dependent claiming on the death of a person could be awarded a higher amount for lost earning capacity than the deceased would had he or she survived but been incapacitated.

Only 1.4% of Australian workers earn more than 3 times average weekly earnings, and therefore such a cap does not affect a significant proportion of the population, and those affected could be expected to

be in a financial position to take out personal insurance for loss of income.

Queensland, South Australia, Western Australia and the Australian Capital Territory all cap lost earning capacity in dependency claims in the same way as a normal damages claim.

### ***Corrections Act 1997***

Section 87A of this Act provides that the Secretary of the Department of Justice must keep a register of persons eligible to receive information about a prisoner sentenced to a period of imprisonment for a violent or sexual offence (the Eligible Person's Register). The people on the register are usually the victims of the prisoner.

When section 87A was inserted in the Act in 2009 to clarify the operation of the Eligible Person's Register, it inadvertently failed to include references to certain categories of forensic patient as well as a prisoner.

Various sections of the *Mental Health Act 1996* require the notification of persons listed on the Eligible Person's Register of certain matters in respect of forensic patients.

A forensic patient is a person subject to orders which require him or her to be detained in the secure mental health unit at Risdon but the person is not necessarily a prisoner sentenced to a term of imprisonment. The secure mental health unit is not part of the prison but is located beside the prison.

This Bill amends section 87A to allow the inclusion on the Register of victims of a forensic patient who is subject to a restriction order, or a supervision order if the forensic patient has been apprehended under section 31 of the *Criminal Justice (Mental Impairment) Act 1999*, and is being held in relation to a violent or sexual offence (which are the criteria for victims of other prisoners).

The Bill also makes consequential amendments to sections 72 and 87B.

### ***Criminal Justice (Mental Impairment) Act 1999***

The Bill amends section 10 of this Act to replace references to “committal hearing” with references to “preliminary proceeding” to reflect changes to the *Justices Act 1959* made in 2008.

### ***Evidence (Audio and Visual Links) Act 1999***

Currently this Act limits directions for taking evidence by audio link or audio-visual link to “participating states”, which by virtue of the Act and the *Acts Interpretation Act 1931* is limited to any state or territory of the Commonwealth of Australia.

The Chief Justice has requested that the Act be amended to permit evidence to be given by audio link or audio-visual link from overseas countries and this Bill makes the necessary amendments.

The giving of evidence by audio-visual link is now commonplace and any concerns about the processes of obtaining or accepting such evidence that may have resulted in the limitation of the Act to Australian jurisdictions when it commenced have now been allayed.

### ***Integrity Commission Act 2009***

Section 5(1) of this Act defines “Public Authority” but does not include the University of Tasmania, which has requested that it be included. This Bill makes the necessary amendment.

Section 11 of the *Integrity Commission Act 2009* requires the Integrity Commission to provide a report to Parliament for the twelve months to 31 October each year.

However, the Integrity Commission is also an Agency for the purposes of the *State Service Act 2000* and section 36 of that Act combined with section 27 of the *Financial Management and Audit Act 1990* requires an annual report to be prepared and tabled by the Commission for the period to 30 June each year.

This Bill amends section 11 to avoid the need to prepare two reports at different times covering different periods.

Section 62 deals with the constitution of an Integrity Tribunal and subsection 62(1)(b) requires that 1 or 2 members of the Board be members of a Tribunal in addition to the Chief Commissioner and leaves open-ended the number of “other person” members that may be appointed.

The Chief Commissioner of the Integrity Commission has recommended removal of the requirement to appoint up to two other Board members to avoid difficulties that may arise where Board members, having had earlier involvement in a matter as it progresses, cannot sit on a Tribunal. The Chief Commissioner also recommended that the number of members of an Integrity Tribunal be limited to three.

### ***Juries Act 2003***

Section 39(3)(a) of the Juries Act allows a court to discharge a juror before the commencement of a trial if the court is satisfied that the person is unable to consider the case impartially.

Generally this occurs when a juror seeks to be excused on the grounds that he or she is acquainted with the accused or a witness and therefore will be unable to consider the case impartially.

In addition, section 40(a) allows the court to discharge a juror during the trial if it appears to the court that the juror is not impartial.

The Chief Justice has requested that both sections be extended to provide for the discharge of a juror in a situation where there are reasonable grounds for suspecting that he or she may not be impartial.

For example, a juror may advise that he or she knows the accused or a witness but not seek to be excused. The fact that the juror is acquainted with a person involved in the case does not of itself establish that the juror is unable to consider the case impartially but it certainly gives grounds for suspecting that may be the case and is an obvious

situation where the juror should be discharged because of the risk to his or her impartiality.

This Bill amends both sections in line with the request of the Chief Justice.

Section 41(1) provides that “the court, at any time during a trial, in an emergency, may discharge a jury without giving a verdict if it is expedient to do so in the interests of justice.”

The Chief Justice has advised that while there may be a number of occasions where it may be expedient and in the interests of justice for a judge to discharge a jury, such occasions can rarely be classified as being “in an emergency”.

An example of such an occasion arose recently where the entire jury had been assembled and were waiting to be empanelled but there was uncertainty about whether the principal witness could be located.

The most efficient approach in these circumstances would have been to empanel the jury in the expectation that the witness would be located and the trial would commence but this approach could not be adopted since if the witness was not subsequently located it would not be permissible to discharge the jury as there was no emergency as required by the section.

This Bill amends section 41(1) to omit the words “in an emergency”.

### ***Legal Profession Act 2007***

Section 607 of this Act provides for the appointment of a person as secretary of the Board of Legal Education and requires the appointment to be subject to and in accordance with the State Service Act.

The position of secretary of the Board of Legal Education is an honorary position. Section 5 of the *State Service Act 2000* provides that the Act

does not apply to a person who is employed in an honorary capacity, thus creating an anomaly between the two Acts.

This Bill omits the words “Subject to and in accordance with the *State Service Act 2000*” from Section 607 to both remove the anomaly and to clarify that the position of secretary may be held by a person who is not employed under the State Service Act.

### ***Police Powers (Surveillance Devices) Act 2006 and Police Powers (Controlled Operations) Act 2006***

Section 42 of the *Police Powers (Surveillance Devices) Act 2006* and section 32 of the *Police Powers (Controlled Operations) Act 2006* require a report by the inspection entity by not later than 31 July in each year.

The nominated inspection entity is the Ombudsman, who also has reporting requirements in relation to the *Telecommunications (Interception) Tasmania Act 1999*.

The Ombudsman has requested that the reporting provisions be standardised across all three Acts. This Bill amends sections 42 and 32 respectively of the two Acts to require reporting not later than 3 months after the end of each financial year on results of inspections carried out in that year, thus making the provisions of both Acts consistent with that in the *Telecommunications (Interception) Tasmania Act 1999*.

### ***Public Interest Disclosures Act 2002***

In section 4 of this Act the list of bodies to which the Act applies does not include the University of Tasmania, which has requested that it be included. This Bill makes the necessary amendment.

### ***Right to Information Act 2009***

In section 3 of this Act the definition of “public authority” does not include the University of Tasmania, which has requested that it be included. This Bill makes the necessary amendment.



## ***Supreme Court Civil Procedure Act 1932***

In 2004 the jurisdiction of the Associate Judge was expanded and the nature of an appeal from a decision of the Associate Judge was changed so that an appeal would have to be based on the same grounds as an appeal from a single judge to the Full Court notwithstanding that all appeals from a decision of an Associate Judge were still made to a single judge.

The Chief Justice has now requested an amendment to the Act to provide that an appeal from a decision of an Associate Judge which finalises rights between the parties be made to the Full Court.

In all other Australian jurisdictions such appeals from a Master or an Associate Judge are direct to the Full Court.

This Bill makes this amendment and, to avoid any difficulties in determining whether a particular judgment is final or interlocutory, also amends section 197 of the Act to give the judges a power to make rules specifying which judgments will be regarded as final and which will not.

The Bill also makes a further consequential amendment by repealing section 191A (which currently allows a judge to remove a matter from the Associate Judge's list).

The Bill also amends section 197(1)(f) to reverse the inadvertent transposition of the phrase "hearing and determination" to "determination and hearing".

## ***Victims of Crime Assistance Act 1976***

Under the current section 7A of the above Act, an order made by a Criminal Injuries Compensation Commissioner directing an offender to pay the Crown the whole of any compensation awarded to a victim is enforceable through the civil processes of the Supreme Court as if the order was a judgment of that Court.

An order under section 7A may only be made when an award has been made to a victim and the person responsible for inflicting the injury is

convicted of an offence in respect of the criminal conduct that led to an application for an award being made.

The money to be paid under the order is, in effect, a reimbursement to the Crown for the compensation already paid to the victim.

In these circumstances the Government considers that it is appropriate for the Director, Monetary Penalties Enforcement Service to be able to enforce payment of the order, which is likely to improve the efficiency with which money is collected and will avoid the victim having to spend time and resources pursuing the matters through the courts.

This Bill amends section 7A to allow the Director, Monetary Penalties to enforce collection of any such order.

However, to ensure fairness to the offender new subsections are inserted in section 7A to require the making of a provisional order and to provide an opportunity for an offender to object to the making of a provisional order and, if such an objection is made, to be heard by the Commissioner on the matter.

A consequential amendment is also made to section 3 of the *Monetary Penalties Enforcement Act 2005* to bring orders under section 7A within the definition of “fine” for the purpose of that Act.

### **Replacement of phrase “Court of Requests” with “Magistrates Court (Civil Division)” in a number of Acts**

This Bill replaces the phrase “Court of Requests” with “Magistrates Court (Civil Division)” in various provisions in the following Acts:

*Appeal Costs Fund Act 1968;*

*Business Names Act 1962;*

*Consumer Affairs Act 1988;*

*Drains Act 1954;*

*Landlord and Tenant Act 1935;*

*Married Women’s Property Act 1935;*

*Supreme Court Civil Procedure Act 1932;*

*Workers Rehabilitation and Compensation Act 1932.*

**Repeal of out-dated statutory rules made under the *Trustee Act 1898***

At the request of the Department of Treasury and Finance this Bill also repeals out-dated statutory rules under the *Trustee Act*.

An amendment to the Act effective from 1998 removed the power to make statutory rules and also removed the power to revoke them by a statutory rule.

Prior to the 1998 amendment the Act required an order or proclamation to declare a specific body (for example a building society) as one in which deposits or loans might be made by trustees. Since 1998, section 6 of the Act expressly provides that “A trustee, unless expressly forbidden by the instrument creating the trust, may invest trust funds in any form of investment”. There is therefore no longer any need to retain orders and proclamations approving specific investment options.

Mr Speaker I commend the Bill to the House.