SECOND READING SPEECH

Justice and Related Legislation (Further Miscellaneous Amendments) Bill 2009

Mr Speaker, this Bill makes a number of amendments to the Sentencing Act based on recommendations made by the Tasmanian Law Reform Institute in its Final Report on Sentencing which was released in 2008.

The Bill also makes relatively minor changes to a number of Acts, mainly administered by the Attorney-General, based on suggestions of the Chief Justice, Director of Public Prosecutions, and other senior personnel to streamline and clarify the operation of the Justice system.

Because this is an omnibus Bill Mr Speaker, I shall go through the amendments to each Act in the order that they appear in the Bill.

Corrections Act 1997

A "victims register" is kept by the Victims Assistance Unit within the Department of Justice and victims who have asked to be placed on the register are provided with certain information about the relevant offender such as eligible release dates and any application for parole.

Currently, the *Corrections Act 1997* defines "victim", in respect of an offence, as a person who has suffered injury, loss or damage as a direct consequence of the offence; and a member of the immediate family of a deceased victim of the offence.

In the past persons have requested to be placed on the Victims Register in order to receive information about the offender but have not been eligible because they do not fall within the definition of "victim".

However, there may be valid reasons why a person wishes to be informed of the status of a prisoner, for example, a person who gave evidence against the prisoner at trial may feel vulnerable when the prisoner is released and wish to be informed of when this may occur.

Equally, a person who has suffered violence at the hands of a prisoner, but was not the "victim" of the offence for which the prisoner was imprisoned, may wish to be forewarned of the prisoner's imminent release.

The Bill inserts in the *Corrections Act* two new sections based on sections in the Queensland *Corrective Services Act* to expand the list of persons who may be included on the Register and to set out the information that may be released to persons on the Register.

The Register will be expanded to include persons who either provide the Secretary with documentary evidence of the prisoner's history of violence against the person or satisfy the Secretary that the person's life or physical safety could reasonably be expected to be endangered because of a connection between the person and the offence for which the prisoner was convicted for example, where the person was a witness at the trial.

The Register will be renamed as the Eligible Persons Register to reflect that not all persons on the expanded Register will qualify as a "victim".

The right to make submissions to the Parole Board or to the Forensic Tribunal regarding the release of the offender will continue to be restricted to victims.

In addition, section 72 of the Act is being amended to provide for a victim's parent or guardian to be notified or make submissions on the victim's behalf where the victim is under 18 or suffering from a mental incapacity.

Criminal Code Act 1924

There are two amendments to the appeal provisions in the Code.

The first is in relation to appeals against the decision of a trial judge to stay proceedings in a criminal matter.

At present the only right of appeal from a stay of proceedings is by way of special leave to appeal to the High Court of Australia under the

Commonwealth Constitution as the *Criminal Code* makes no provision for appeals of this nature to the Court of Criminal Appeal.

A decision to order a stay of proceedings obviously has major consequences for the prosecution and therefore an appeal will always be seriously considered where a stay is ordered.

The *Code* already provides for an appeal to the Court of Criminal Appeal against acquittal or against an order quashing an indictment.

As a stay of proceedings has a similar effect to acquittal or an order quashing an indictment there seems to be no logical reason why an appeal should not lie to the Court of Criminal Appeal in such a case.

An application for special leave to appeal to the High Court is a more expensive and time-consuming undertaking than an appeal to the Court of Criminal Appeal.

It is also not an efficient use of the Full Bench of the High Court for a matter to proceed to it directly from the decision of a single judge of a State Court without the salient points being considered and refined by the Court of Criminal Appeal.

All other Australian jurisdictions (except for Queensland) allow an appeal to their Court of Criminal Appeal against a stay of proceedings.

This Bill amends the Code to provide for an appeal to the Court of Criminal Appeal, by leave of the Court, against a stay of proceedings.

While this matter has been highlighted by the recent case against the suspended Police Commissioner, the proposed changes will have no impact on that case as the change will apply only to a stay of proceedings ordered after the new provision commences.

The second amendment to the Code relates to procedural matters relating to appeals.

The Judges are concerned at the delays in appeal matters being finalised ready for hearing by the Court of Criminal Appeal, with the time

between lodging of an appeal and the matter being ready for hearing stretching out for over six to eight months.

To expedite the management of civil and criminal appeals, this Bill amends the *Criminal Code* to provide that the Associate Judge has the power to conduct directions hearings for appeals in the same manner as a judge but the Associate Judge will not have the power to make orders that impact on the liberty of a person, for example orders relating to bail.

The Chief Justice proposes to initiate new Rules and/or Practice Directions which, among other things, will provide for all appeals, once the notice of appeal has been lodged, to be referred by the Registrar for directions before the Associate Judge or a judge.

Criminal Law (Detention and Interrogation) Act 1995

A discrepancy has been identified between the process outlined in the *Criminal Law (Detention and Interrogation) Act 1995* and the process currently employed at Hobart and Launceston Reception Prisons.

Section 14 of the Act requires the Commissioner of Police to appoint one or more police officers as custody officers for each police station designated by the Commissioner for use for the purpose of detaining arrested persons.

Section 15 provides that a person arrested and taken into custody must be brought before a custody officer without delay and placed in the custody of the custody officer.

Section 16 sets out the duties of the custody officer in relation to a person in custody, including ensuring the detainee is treated in accordance with the Act and that custody records are kept.

Since Hobart and Launceston Reception Prisons adjoin designated police stations a procedure has developed whereby persons arrested are transferred to the custody of Tasmanian Prison Service correctional officers, to avoid the upkeep and administrative difficulties of maintaining

two different sets of cells overseen by two separate agencies in what is essentially the same building.

This Bill amends the relevant provisions of the Act to clarify that custody officers may transfer custody of detainees to the Tasmanian Prison Service at the Hobart and Launceston Reception Prisons and to set out the duties of the correctional officer in relation to detainees.

The current procedure will continue to apply in the situation where an arrested person is taken to a police station elsewhere in the State and remains in the charge of the (police) custody officer.

Justices Act 1959

There are 2 amendments to this Act.

Firstly, section 55(5) of the *Justices Act* deals with the period between first appearance before the Court of Petty Sessions on a complaint alleging an indictable offence and second appearance when the accused will generally be remanded to the Supreme Court for trial or sentencing.

After discussions between the Chief Justice, Chief Magistrate, Acting Commissioner of Police, Director of Public Prosecutions, Bar Association and others regarding the new committal processes which have now been in place for some twenty months it was agreed that the period between appearances should be reduced from 7 weeks to 4 weeks and that changes will be made to the Supreme Court's procedures to enable more time after the committal for police to provide witness statements and other material to the accused.

The Chief Justice asked that the period be adjusted as proposed and this Bill makes the requested amendment.

During the period between initial appearance and committal the prosecution provides the accused or the accused's counsel with copies of statements from the accused, the victim and other witnesses as well as other material but these become less necessary if the person subsequently pleads guilty.

The change should allow matters to proceed expeditiously and could reduce the workload of police as they will have earlier information on the defendant's plea and may not need to obtain and provide statements from all prospective witnesses.

The second change to the Act is the inclusion of a further crime as an offence which may be tried summarily.

Section 105 of the *Criminal Code Act 1924* provides that it is a crime for a person to do any act or make any omission with intent in any way whatever to obstruct, prevent, pervert or defeat the due course of justice or the administration of the law.

There is no similar summary offence although there are minor offences such as giving false names in some Acts.

A considerable proportion of the offenders charged with a crime under section 105 have provided a false name and address when detected committing a traffic offence.

The Director of Public Prosecutions has drawn attention to the fact that in many cases these offences are dealt with by way of a non-custodial sentence and has suggested that such offences be dealt with summarily, rather than tying up the resources of his office and the Supreme Court with Criminal Code prosecutions.

This Bill amends Part VIII of the *Justices Act* so that an offence under section 105 of the Code can be dealt with summarily where the act or omission the subject of the complaint was made in relation to an offence under the *Traffic Act 1925, Vehicle and Traffic Act 1999* or the *Road Safety (Alcohol and Drugs) Act 1970*.

Because the provision of a false name in a traffic matter can range from a spur of the moment indiscretion that is corrected by the offender to a much more serious situation where the original lie is compounded deliberately, or where false information is given on numerous occasions, it will be a matter for the justices, with the agreement of the prosecution, to decide whether the option of a summary trial is offered

to the defendant, or whether the matter is serious enough to be dealt with by the Criminal Court.

Magistrates Court (Civil Division) Act 1992

When the small claims division of the Magistrates Court was established in 1989, the legislation prohibited an appeal from a decision in a small claims case.

In 2003 the original legislation was repealed, "small claims" were renamed "minor civil claims" and relevant provisions were made part of the *Magistrates Court (Civil Division) Act* with the general appeal rights applying to a minor civil claim.

The maximum amount that can be claimed as a minor civil claim is $5,000, lawyers do not generally appear for parties, rules of evidence may be dispensed with and the proceedings are conducted with as little formality and as expeditiously as possible.

Clearly the rationale behind the treating of minor civil claims in this way is to allow small disputes to be settled quickly in a "user-friendly" way without the parties incurring legal costs that might outweigh the amount claimed.

This rationale is subverted if one party then appeals over a relatively minor amount to the Supreme Court and in an extreme case to the Full Court, something that has occurred on two occasions since 1992.

There is a very real cost to the justice system when Supreme Court judges are required to spend time considering an appeal relating to matters worth less than $5,000.

This Bill amends the Act to restrict the grounds on which appeals are allowed from minor civil claims.

The appeals that will be allowed are on the grounds that the magistrate lacked jurisdiction or exceeded his or her jurisdiction or the party was denied natural justice.

At the suggestion of the Chief Justice the Bill also provides for leave to appeal on other grounds on application to a judge.

The Supreme Court has experience of at least one case in which the decision on a minor civil claim bound the outcome of a much larger civil claim and it is recognised that it may be in the public interest to permit appeals on other grounds in rare cases.

Mental Health Act 1996

The amendments to this Act are consequential on the amendments to the Victims Register under the *Corrections Act* as the Register is also used to notify victims of a forensic patient that the patient is being released.

Police Powers (Surveillance Devices) Act 2006

This Act commenced on 1 January 2009 and is based on national model legislation that was part of a package of anti-terrorism legislation that has been implemented by all Australian jurisdictions.

Sections 8 & 9 differ from the Model in that they permit a magistrate to issue a surveillance device warrant where the device is for use only within Tasmania.

The wording of section 8 (Who may issue) is currently misleading as it does not clearly link the magistrate's power to issue a warrant to the question of where the device is to be used.

The Bill amends section 8 to make it clear that the limitation on the power of a Magistrate to issue a warrant is whether the device will only be used in Tasmania.

Section 9 has also been clarified in this respect.

Residential Tenancy Amendment Act 1997

Section 17(4) of the Act defines "water consumption charge" as an amount levied on an owner of a property by a Council.

With the changes to the way in which water supply is now managed this definition is being amended to "an amount levied on an owner by a regulated entity, within the meaning of the Water and Sewerage Industry Act 2008" and the change is to commence on 1 July 2009 to ensure that property owners can continue to pass water consumption charges on to tenants.

The amendment is included at the request of the Department of Treasury and Finance as it is a consequential amendment that was overlooked in the legislative package of Water and Sewerage reforms.

Sentencing Act 1997

At the request of the Attorney-General in 2001, the Tasmanian Law Reform Institute began an examination of sentencing options.

The Institute made some 96 recommendations in relation to sentencing and related matters as Final Report No 11 on Sentencing in June 2008. Some of these recommendations were to make no change to current legislation.

The current *Sentencing Act 1997* (the Act) is working reasonably well and while there are changes which can enhance the Act in a number of ways none are critical to the operation of the Act.

All of the recommendations have been considered and this Bill is the first stage of implementation by starting with a number of the agreed recommendations.

Perhaps the most pressing issue raised in the Report and subsequently by the media is that of the imposition and enforcement of suspended terms of imprisonment.

In the hierarchy of sentencing options available to the courts, imprisonment is the most serious.

When a court determines that an offence and the circumstances in which it was committed were so serious that the only appropriate sentence to impose is that of imprisonment, the court may also order that part or the whole of that sentence be suspended and that the suspension be made subject to such conditions it considers necessary or expedient. No specific conditions are set out in the Act.

Under the Act courts can, and do, impose multiple orders when imposing suspended sentences as they combine the suspension with obligations to undertake community service or to be under the supervision of a probation officer. Any of those orders may be breached by the offender by means of further offending.

This amendment expands the order suspending a sentence to allow for the inclusion of community service and supervision. It also introduces a set of mandatory conditions to which all suspended sentences will be subject and a set of conditions which the court may impose in the exercise of its discretion.

The existing general power of the court to make an order suspending a sentence of imprisonment subject to such conditions as it "considers necessary or expedient" or make the order in conjunction with other orders, remains unchanged.

There will be four mandatory conditions.

They will be:

- that the offender not commit another offence punishable by imprisonment;
- that the offender report to a probation officer;
- that the offender remain in the State unless given permission to do otherwise; and
- that the offender give notice of change in residence or employment.

Those conditions already apply generally to non-custodial orders and so should sensibly apply to suspended sentences.

The courts often make a combination of orders when sentencing for the one offence, such as imposing a suspended sentence and non-custodial orders relating to probation and community service.

Each of the orders can be breached in different ways but each usually require good behaviour, no further offending and obedience of directions from probation officers.

Where probation or community service orders are made in addition to an order suspending a term of imprisonment, the effect of failing to comply with the probation or community service obligations is that the non-custodial order is breached - not the suspended sentence of imprisonment.

The amendments contained in this Bill are intended to underline the seriousness of suspended sentences and to provide that failure to comply with a general condition or a probation or community service obligation is a direct breach of a condition of a suspended sentence.

These amendments provide the courts with additional and alternative sentencing options and will not alter or detract from their present powers to make probation orders and community service orders.

From a practical point of view, combining aspects of other orders in a suspended sentence order would simplify the orders. This Bill amends the *Sentencing Act* to enable the court to impose a suspended sentence of imprisonment subject to a range of specific discretionary conditions including -

- that the offender be required to perform community service;
- that the offender be subject to the supervision of a probation officer; and
- that the offender be required to undertake a rehabilitation program.

If one of those conditions is imposed, the offender will also be made subject to other existing statutory obligations concerning the subject matter of the condition.

For example, where a suspended sentence is made subject to a community service obligation, specific provisions relating to community service orders will be taken to refer to the obligations so imposed and therefore apply as conditions of the suspended sentence.

This will give further weight to suspended sentences through attaching existing statutory obligations to suspended sentences and thereby creating a direct link between the sentence of imprisonment and those other obligations, rather than by making separate orders.

This Bill also introduces into the Act a presumption of activation of a suspended sentence based on a similar provision in the Sentencing Act of Victoria.

The effect of the presumption is that if an offender is sentenced to a term of imprisonment and the court suspends part or the whole of that sentence on the condition that the offender not commit another offence which might attract a term of imprisonment, it will be presumed that the sentence will be activated and the offender imprisoned, unless the offender can convince the court that this should not happen.

The court will retain the discretion to decide whether or not it would be unjust to activate a suspended sentence in view of any exceptional circumstances which have arisen since the order suspending the sentence was made.

Under the Act offenders are informed by the court at the time of sentencing of the effect of any conditions imposed and the consequences of breaching the order. Under these changes they will also need to be advised of the presumption that the suspended sentence will be activated if they commit a new offence.

The court is already required to tell the offender about the orders by s. 92 of the Sentencing Act and it is expected that this should make it very

clear to an offender that there are serious consequences of breaching any condition of a suspended sentence.

The amendments also streamline the breach provisions in the Act so that breaches of suspended sentences can be dealt with more expeditiously. Breach provisions of orders made under Parts 3, 4 and section 54A are also being amended to be the same as for breaches of suspended sentences.

An offender accused of breaching a condition of any of those orders will be brought back before the court to account for their actions.

The process for bringing the offender before the court will in all cases be by application, rather than by complaint.

Where the breach of a sentence condition is by way of further offending, the court will be able to deal with the breach promptly, while the offender is still before the court in relation to the new offence.

If a breach is by way of further offending, and the court dealing with the new offence is not the court which imposed the original suspended sentence or non-custodial order, the court will be able to place the offender on remand or bail the offender to appear in the appropriate court.

As I said previously the breach provisions of other Parts and sections of the Sentencing Act are also being amended to align them with the process proposed for suspended sentence breaches.

In the case of breaches of community service orders, probation and rehabilitation orders the police, DPP or probation officers will be able to apply to have the breach dealt with by the Court and if the offender has committed a new offence the court can deal with the breach on oral application while dealing with the sentencing on the new offence.

In the case of both CSOs and Probation the Act currently makes a breach of an order a summary offence in itself. This is in effect compounding the number of offences for which the offender might be

convicted and it is considered that dealing with the breach process by application rather than by complaint and summons will simplify procedures.

While the breach itself is in effect "decriminalised" some actions such as abusing or interfering with probation officers or CSO supervisors have been retained as summary offences which could in themselves activate the breach process.

As a final amendment to the *Sentencing Act* Section 68(1) provides that if a person is found guilty or convicted of an offence and the court finds that another person has suffered injury, loss, destruction or damage as a result of the offence the court may, or in some cases must, make a compensation order.

Section 68(9) provides that in determining the amount of loss, destruction or damage to property that a person has suffered as a result of an offence, the court is not bound by the rules of evidence and it may inform itself in any way it considers appropriate.

The word "injury" currently appears in the first subsection but not in the latter and this Bill amends subsection (9) to make these consistent.

Supreme Court Civil Procedure Act 1932

The Chief Justice has proposed that the Associate Judge be given the power to deal with procedural matters in the Court's appellate jurisdiction prior to the hearing and determination of a civil appeal. This change is similar to that detailed earlier in relation to appeals to the Court of Criminal Appeal.

It is proposed that section 197(1)(f) of the Act be amended so that the Associate Judge has the ability to exercise all the powers of the Court except for the hearing and determination of a listed matter.

My Speaker, I intend to move a minor amendment to clause 32 of the Bill, which amends section 27 of the *Sentencing Act,* to take into account a concern raised by the Chief Justice and Chief Magistrate in consultation.

The initial version of the Bill modelled this section on the equivalent Victorian provision.

However, the Chief Justice and Chief Magistrate both expressed concern that the Bill as initially drafted may have the unintended consequence of producing injustice in certain cases.

The Chief Magistrate pointed to the example of an offender subject to a suspended sentence for dishonesty who, at the end of a lengthy period of suspension, commits a first offence of exceeding .05 and faces the certainty of imprisonment, if there are no "exceptional circumstances".

The Chief Justice advised that the phrase "exceptional circumstances" had a very limited meaning and that the words after "unjust" should be omitted, otherwise there will be cases of offenders being required to serve sentences when it is unjust that they should do so for reasons other than exceptional circumstances.

The amendment removes the reference to "exceptional circumstances" so that the court will not make an order under subsection 4B if it is of the opinion that it would be unjust to do so.