

**DRAFT SECOND READING SPEECH**  
**HON ELISE ARCHER MP**  
*Justice and Related Legislation (Miscellaneous Amendments) Bill 2021*

\*check Hansard for delivery\*

Mr Speaker, I move that the Bill now be read a second time.

The Tasmanian Government is committed to ensuring that Tasmanians have access to an effective and efficient justice system. Consistent with that commitment this Bill proposes minor amendments to clarify or improve the operation of a number of Acts.

As Members will note, a number of these amendments were considered in March 2021 prior to the State election in May. This Bill is substantially the same, with a few more minor amendments that have subsequently been identified by the Department of Justice.

The Department of Justice has undertaken further stakeholder and public consultation on the expanded Bill, which was released for consultation on the Department's website.

I will now outline the reason behind each of the proposed changes.

**Amendments to the *Appeal Costs Fund Act 1968***

The Appeal Costs Fund is established under the *Appeal Costs Fund Act 1968* and its purpose is to assist in the payment of costs incurred by litigants through no fault of their own in certain circumstances, such as when decisions are upset on appeal or proceedings are rendered futile.

The Bill amends section 5(2) of the *Appeal Costs Fund 1968* to replace the words “(other than a complaint in respect of an indictable offence, including an indictable offence triable summarily by virtue of that Act)” with “(other than a conviction or order made in the Supreme Court)”.

This amendment will mean there is no distinction in fee payment between indictable offences, and indictable offences tried summarily and any other offence, other than a conviction or order made in the Supreme Court, and will support the efficiency of the Magistrate Court.

This amendment, requested by the Chief Justice, will allow the Court of Criminal Appeal to grant an indemnity certificate to a person who successfully appeals a conviction, except where the person has received legal aid within the meaning of the *Legal Aid Commission Act 1990* in relation to the appeal.

The Court of Criminal Appeal currently has the power to make an order for costs against the Crown under section 414 of the *Criminal Code Act 1924* (the Criminal Code), when an appeal against a conviction succeeds and the appellant does not have legal aid.

However, as a result of the decision of the Court of Criminal Appeal in *Templar v The Queen*, such orders for costs will not simply be made because the appellant succeeded in the appeal but rather, there needs to be an additional reason for making the order.

Indemnity certificates can currently be granted under section 10 of the *Appeal Costs Fund Act 1968* where an appeal is successful, but only if the appellant has not appealed in the lower court or the Supreme Court.

An indemnity certificate entitles the appellant to be paid from the Appeal Costs Fund an amount equal to the appellant's taxed costs of the appeal in respect of which the certificate was granted, and an amount equal to the costs incurred by the appellant in having those costs taxed, up to a maximum of \$300.

Granting an indemnity certificate would allow a successful appellant an additional reason for costs against the Crown, as the Court, in granting the indemnity certificate, has acknowledged that the appeal has succeeded.

The Bill amends section 10 of the Act to provide a power for the granting of an indemnity in criminal proceedings, but excludes appellants with legal aid from the Tasmania Legal Aid. This is consistent with an informal agreement between the Director of Public Prosecutions and Tasmania Legal Aid, whereby costs are not sought by or against a legally aided person.

#### **Amendments to the *Constitution Act 1934***

This amendment provides that the oath of allegiance taken by members of the Tasmanian Parliament is deemed to relate to the Sovereign and their heirs and successors, so that it is unnecessary for members to take the oath again when a new Sovereign is appointed.

Currently, section 30 of the *Constitution Act 1934* requires a Member of Parliament to take an oath of allegiance before they can act or vote in Parliament. The wording of the oath in the *Promissory Oaths Act 2015* refers to 'Her Majesty the Queen'.

The Bill seeks to address an ambiguity as to whether Members of Parliament need to retake the oath of allegiance on appointment of the Queen's successor. The amendment to section 30 reflects a similar clause in the New South Wales *Constitution Act 1902*.

#### **Amendments to the *Coroners Act 1995***

Section 59B was inserted into the *Coroners Act 1995* by the *Justice and Related Legislation (Miscellaneous Amendments) Act 2017* to allow a Coroner to order evidentiary material be rendered safe or inert, or destroyed or disposed of prior to conclusion or adjournment of an investigation.

The Bill repeals section 59B(2) and amends 59B(3) to allow the section to operate as originally intended by permitting the Coroner to dispose of evidentiary material on their own discretion upon application from the Commissioner of Police.

The section retains the requirement for a photographic or audio-visual record of the evidentiary material, and where practicable samples, to be taken before an order of the Coroner can be actioned. This amendment was requested by the Department of Police, Fire and Emergency Management (DPFEM) and is supported by the Magistrates Court.

#### **Amendments to the *Crime (Confiscation of Profits) Act 1993***

The Bill amends section 29(3) of the *Crime (Confiscation of Profits) Act 1993*. Part 3 of that Act provides for the Supreme Court to make restraining orders directing that property not be disposed of, where the defendant has been convicted of or has been or is about to be charged with a serious offence. Section 28(3) allows for the Supreme Court to make a restraining order on an application without notice, but only in 'an urgent case'. It has been identified that issues have arisen regarding the judicial interpretation of 'an urgent case'.

As such, the amendment removes the term 'in an urgent case' to ensure that the provision works as was intended. The restraining order process remains limited by other provisions within the Act, including the ability of the Court to direct the applicant to give or publish notice of the application 'to such persons, in such manner and within such time, as the court considers appropriate'. The amendment ensures the Tasmanian legislation is consistent with other jurisdictions.

#### Amendments to the *Criminal Code Act 1924*

The Bill amends section 401 of the Criminal Code. Section 401 provides a right of appeal for a person convicted before a court of trial and a right of appeal for the Attorney-General. The right of appeal for the Attorney-General includes a right to appeal "against the sentence."

Currently, the provision refers to specific orders (namely probation orders) under the *Sentencing Act 1997*. Under this Bill, this is amended to ensure the provision refers to all orders made under this Act. The Bill also removes the reference to 'probation orders', a term no longer used following the commencement of the *Sentencing Amendment Act 2016*.

The Chief Justice has also requested a power be included in the Criminal Code for the Supreme Court to stay or suspend the operation of sentencing orders of all types pending the hearing and determination of a criminal appeal, consistent with the powers of a Magistrate, under section 109(1)(c) of the *Justices Act 1959*, to "stay proceedings on the order or suspend the operation thereof *ab initio*" or 'from the beginning'. The Bill amends sections 415 and 418 of the Criminal Code to provide this power and allow it to apply to both the 'court' and a single judge.

#### Amendments to the *Dangerous Criminals and High Risk Offenders Act 2021*

The Bill address minor inadvertent drafting errors in the *Dangerous Criminals and High Risk Offenders Act 2021*, which has attained Royal Assent but is yet to be proclaimed.

The Bill amends the definition of 'relevant offender' in section 24 to clarify that it includes an offender serving a custodial sentence for an offence against a law of this State that is being served concurrently or cumulatively in relation to one or more of the other sentences of imprisonment referred to previously in the definition.

In the current Act, references to 'this State' were inadvertently omitted. The amendment brings the definition into line with another provision of the Act, so that the provision captures persons who have finished serving a sentence for a serious offence but remains in custody for another offence under Tasmanian or another jurisdiction's law being served cumulatively.

The Bill also replaces the references to 'consecutively' with the term 'cumulatively' in sections 24(c)(iii) and 32(2)(b)(iii). As 'consecutively' is not defined in the Act, the amendments will ensure the provision can operate as intended, which is to cover situations where further sentences are imposed and are to operate in addition to the first sentence.

#### Amendments to the *Evidence (Audio and Audio Visual Links) Act 1999*

The Bill amends section 6 of the *Evidence (Audio and Audio Visual Links) Act 1999* to broaden the use of audio link and audio visual links. The provision is currently limited to taking evidence or making submissions, however the potential application within the court system is much broader.

This has been demonstrated during the COVID-19 pandemic where the limited access to the Court has resulted in greater reliance on audio and audio visual methods to continue to meet the requirements of open justice. The proposed amendment will allow the use of audio link or audio visual link for any purpose the court directs.

#### **Amendment to the Evidence (Children and Special Witnesses) Act 2001**

The Bill amends section 3 of the *Evidence (Children and Special Witnesses) Act 2001* to include a reference to the crime of carjacking contrary to section 240A of the Criminal Code in the definition of 'affected child'.

Currently, if a child is a complainant in or a witness to a robbery, they are deemed by the Evidence (Children and Special Witnesses) Act to be an affected child and entitled to a number of special measures. However, if they are a complainant in or a witness to a carjacking, they are not able to access the special measures, despite the clear similarities between the crimes of robbery and carjacking.

Accordingly, the amendment addresses this apparent drafting oversight that occurred when the crime of carjacking was inserted into the Criminal Code in 2013.

#### **Amendment to the Forensic Procedures Act 2000**

The Bill amends the definition of 'serious offence' in section 3 of the *Forensic Procedures Act 2000* to include references to sections 22A and 27AA into the *Misuse of Drugs Act 2001* and section 38B of the *Police Offences Act 1935*. These summary offences were introduced in the *Justice Miscellaneous (Court Backlog and Related Matters) Act 2020*, which commenced on 1 July 2021.

Currently, as a result of the absence of references to these offences in the definition of 'serious offence', police will be able to use fingerprints, DNA and other relevant material to aid in the investigation and prosecution of the indictable version of these offences, but will be unable to use such evidence where they are tried summarily. The amendment will address this omission.

#### **Amendments to the Industrial Relations Act 1984**

The Bill amends the *Industrial Relations Act 1984* to address an inconsistency in appeal rights in relation to unfair dismissal cases. Under section 70 of the Act, there is a right of appeal in relation to orders made by the Commission under section 31(1) after a hearing in respect of the mode, terms or conditions of employment, or any termination of employment.

However, there is no right of appeal where an application for unfair dismissal has been dismissed without hearing. The Bill ensures there is an appeal process for such decisions made under the Act.

The Bill also enables the President or other presiding member sitting on the Full Bench of the Industrial Relations Commission to make procedural orders or directions to facilitate the hearing of an appeal. Currently, such orders or directions must be made by all members of the Full Bench. In amending section 71, the Bill removes the logistical issues and unnecessary delays in hearing appeals associated with the current process.

This Bill removes the two-step appeal process under section 72 of the *Industrial Relations Act 1984*. This process is no longer required as the *Judicial Review Act 2000* has simplified the procedures for a review of administrative decisions.

The Bill amends section 72 to allow a person who wishes to challenge a decision of the Full Bench in respect of an appeal to apply to the Supreme Court for review on the basis of an error of law.

### Amendments to the *Interstate Transfer (Community-based Sentences) Act 2009*

The Bill makes minor amendments to section 3 of the *Interstate Transfer (Community-based Sentences) Act 2009* to clarify an omission that community based sentences include community correction orders within the meaning of the *Sentencing Act 1997*, or a sentence imposed by a court of another State or a Territory that corresponds, or substantially corresponds, to a community correction order.

### Amendments to the *Justices Act 1959*

The Bill includes bringing forward three amendments to the *Justices Act 1959* that have been requested to assist the Magistrates Court to manage court administrative processes as part of the transition to the *Magistrates Court (Criminal and General Division) Act 2019*, which is expected to commence in late 2022.

The first amendment is to section 55 of the *Justices Act 1959*, which requires justices to adjourn proceedings after the first appearance for a period not exceeding four weeks where the defendant does not plead guilty to the offence charged or another offence.

The Magistrates Court has identified that this timeframe can result in cases unnecessarily returning before the Court multiple times if the requirements to proceed have not been met within the four week period.

The Bill amends section 55 of the *Justices Act 1959* to include a new subsection reflecting the wording of the not yet commenced section 107(6) of the *Magistrates Court (Criminal and General Division) Act 2019*, which establishes exemptions to the limit of four weeks where either the defendant elects, or the Magistrates Court determines, that the Magistrates Court will deal with the matter (rather than the Supreme Court).

The second amendment is to section 60 of the *Justices Act 1959*, which provides for the circumstances in which a justice must commit a defendant for sentencing or trial in the Supreme Court.

The *Justice Miscellaneous (Court Backlog and Related Matters) Act 2020* inserted a new subsection (4) to allow a justice not to commit the defendant to the Supreme Court on entry of a plea of not guilty, if the justice is satisfied that 'preliminary proceedings have commenced, or are about to commence'.

The Bill amends section 60(4) to clarify that a justice must be satisfied that preliminary proceedings have commenced or that a preliminary proceeding order is being, or will be, sought and granted. This is to ensure that the provision may be applied consistently and does not present an unnecessarily high threshold.

The third amendment is to section 74B of the *Justices Act 1959*, which currently provides that where a matter relating to a simple offence or breach of duty is not heard and determined on first appearance and the defendant is remanded in custody, the period of remand is not to exceed 28 clear days at any one time.

The Magistrates Court has identified that this requirement increases return appearances of cases and creates issues for administrative efficiency in the Court.

Section 31 of the *Magistrates Court (Criminal and General Division) Act 2019* replaces section 70 and section 74B of the *Justices Act 1959*, providing for adjournment procedures at any time during proceedings (not just for simple offences and breaches of duty).

These amendments simply bring forward the changes set to commence next year under the *Magistrates Court (Criminal and General Division) Act 2019*.

#### **Amendments to the Legal Aid Commission Act 1990 & others**

The Bill amends outdated references to the Legal Aid Commission (and similar names) to that of the Tasmania Legal Aid throughout a number of Tasmanian Acts and statutory Rules.

While the official name change took effect in 2020 as part of the Commissions' new Strategic Plan 2020-2023, the relevant legislative amendments were not identified or progressed at the time.

The Bill therefore addresses this omission, and also ensures that any commenced proceedings are not affected by the change of name throughout the affected Acts.

#### **Amendments to the Oaths Act 2001**

The Bill makes an amendment to section 12(2) of the *Oaths Act 2001* to reflect updated Commonwealth regulations. Under the current provision, a person is a Commissioner for Declarations if that person is authorised to practise as a member of a profession listed in a schedule to the Commonwealth *Statutory Declaration Regulations 1993*.

The amendments will update the provision to provide that a person is a Commissioner for Declarations if the person is a prescribed person under section 7 of the *Statutory Declarations Regulations 2018* of the Commonwealth; or a member of a group of persons declared by the Minister to be an occupational group for the purposes of that section.

#### **Amendments to the Police Offences Act 1935**

The Bill removes section 15CA(2) of the *Police Offences Act 1935*. The current provision allows the court to make an order for community service in accordance with Part 4 of the *Sentencing Act 1997*. This subsection is now redundant as it relates to community service orders which are no longer made under Part 4 of the *Sentencing Act 1997*.

#### **Amendments to the Promissory Oaths Act 2015**

The Bill updates the *Promissory Oaths Act 2015* to reflect legislative changes to the Justices of the Peace legislation. Section 9 of the Act makes reference to section 4 of the *Justices Act 1959*, which has been repealed. The Bill replaces these references with the current legislative provision which is section 5 of the *Justice of the Peace Act 2018*. The Bill also repeals subsections (5)-(9) of section 9 of the *Promissory Oaths Act 2015*.

These provisions have become redundant as they refer to oaths for appointed 'extra-territorial justices,' appointed under repealed provisions of the *Justices Act 1959* and there are no equivalent provisions under the *Justices of the Peace Act 2018*.

#### **Amendments to the Sex Industry Offences Act 2005**

This amendment updates the definition of 'sexually transmissible infection' (STI) in the *Sex Industry Offences Act 2005*.

The current definition refers to guidelines which are no longer applicable as they do not exist. The definition has been developed in consultation with the Department of Health and includes diseases that are commonly associated with transmission by sexual contact to assist in interpretation of section 12 of the Act.

Section 12 establishes requirements for both sex workers and clients to adopt safe sex practices while providing or receiving any sexual services that involve sexual intercourse, or any other activity with a similar or greater risk of acquiring or transmitting an STI.

The definition does not affect or impose any additional obligations in relation to the notification of STIs. The definition is only used for the purpose of section 12 of the Act under which the emphasis and focus is on safe sex practices to minimise the risk of transmission of STIs between sex workers and clients.

The definition also allows for other diseases to be added where they are identified as sexually transmissible.

It is important to note that following receipt of formal stakeholder feedback as part of the subsequent consultation on the Bill, further changes have been made to remove genital warts and herpes in the prescriptive list to address stakeholder feedback and concerns.

Mr Speak, in conclusion, the purpose of this Bill is to ensure legislation remains up-to-date and to correct minor errors that has become apparent after legislation has been operational for some time.

A number of such minor amendments have been identified in legislation administered by the Department of Justice as well as Acts administered by the Department of Premier and Cabinet and the Department of Police, Fire and Emergency Management.

Accordingly, this Bill makes minor amendments to 19 Acts and 3 statutory Rules.

The amendments arise from requests from various stakeholders to clarify or improve the operation of particular pieces of legislation. Those stakeholders, as well as the legal profession and the public, have informed and refined the development of these amendments through consultation. I wish to thank all stakeholders for their valuable input throughout this process.

Mr Speaker, I commend the Bill to the House.