

## **DRAFT SECOND READING SPEECH**

**HON. MICHAEL FERGUSON MP**

### ***Crimes (Miscellaneous Amendments) Bill 2016***

*\*check Hansard for delivery\**

Madam Speaker, this Bill makes a number of amendments to the *Criminal Code*, *Criminal Justice (Mental Impairment) Act 1999* and *Sentencing Act 1997*. The amendments result from requests by various stakeholders to clarify and improve the operation of the criminal law in Tasmania.

The Government is pleased to announce that one of the significant changes included in this Bill is an amendment to the *Sentencing Act 1997* that will extend the rights of victims of family violence to provide details of the effect of offences on them to all courts.

In Tasmania, the legal right of victims to provide details of the impact of a perpetrator's offending on them has been limited to matters that are heard in the Supreme Court. It is the case that the majority of family violence offenders are dealt with in the Magistrates Court where charges such as common assault and breach of family violence orders are heard routinely.

The Government is committed to holding perpetrators of family violence to account and strengthening the legislative responses to family violence. This amendment to the *Sentencing Act 1997* gives victims of family violence a legal right to provide victim impact statements to the sentencing court outlining the effects of the commission of the offence including injury, loss and damage suffered as a direct consequence of the offence.

Consistent with the Government's Family Violence Action Plan, we are giving victims of family violence a voice in the sentencing of family violence perpetrators.

I will now briefly outline the other significant amendments and the reasons behind each of the changes beginning with the amendments made to the Criminal Code.

#### **Criminal Code, Schedule 1**

##### **Amendment to section 185**

Section 185 of the Code provides for the crime of rape. Subsection (2) provides that committal proceedings in relation to the crime of rape must be conducted before a magistrate and in a closed court unless otherwise ordered. Committal proceedings are no longer utilised in the criminal trial processes. Previously the law provided for magistrates or justices to commit a person to trial after a preliminary hearing to see if prima facie there was enough evidence to support a case against the accused.

As members may recall in response to concerns about the time taken to dispose of indictable offences, and the use of committal proceedings as a tactical way to delay trials or intimidate witnesses, amendments were made in 2008 to the Criminal Code and Justices Act to refine the criminal procedure in relation to indictable matters and the use of committal proceedings.

One of those amendments was the removal of the right of a person accused of an indictable crime to examine witnesses prior to committal to the Supreme Court. This practice, known as electing committal proceedings, had caused significant delays in matters reaching the Supreme Court and being finally determined. It added to the stress for victims of serious crime, particularly victims of sexual abuse.

Currently, a person accused of an indictable crime appears to answer the charge in the Magistrates Court and on his or her plea of guilty or not guilty is automatically committed to the Supreme Court for sentence or trial as appropriate.

Where an accused person pleads not guilty, he or she may now make an application under section 331B of the Criminal Code to seek to question witnesses prior to trial by jury. Victims in sexual offence cases can only give evidence at preliminary proceedings in exceptional circumstances and the areas of questioning are strictly controlled by orders of the Supreme Court.

Preliminary proceedings are generally conducted before a justice of the peace, but section 185(2) has been interpreted to require a magistrate to hear preliminary proceedings in relation to rape cases even though rape victims are rarely questioned.

As a consequence of the previous amendments to committal proceedings, the existing section 185(2) is out-dated and no longer required to afford protections to rape victims.

This amendment will remove the requirement for magistrates to hear preliminary proceedings involving rape cases and will assist to expedite rape cases through the courts.

### **Amendment to section 248**

Section 248 provides for the crime of "Being found prepared for the commission of a crime" and is contained in Chapter XXVII of the Criminal Code. There are several ways in which a prosecution for this crime can be established including:

- being armed with a weapon with intent to commit a crime;
- possessing housebreaking implements;
- masking or blackening one's face with intent to commit a crime; and
- being in any place to which the Chapter applies with intent to commit a crime.

The places to which Chapter XXVII applies include:

- any building including buildings in the course of construction or partially demolished; and
- any conveyance including any vehicle, vessel, or aircraft.

The amendment is requested by the Director of Public Prosecutions and relates to commencing a prosecution on the basis of being in any place as identified above with intent to commit a crime.

The Director of Public Prosecutions observed that in theory a person could commit the crime in his or her home or vehicle without having done anything towards doing so or preparing to commit a crime in any way.

In effect, the existing section criminalises 'thought' rather than 'action'. There are significant difficulties in proving such a case against a person and generally a successful prosecution could not occur without a confession.

The difficulty with the operation of this provision has been recognised in the other Code jurisdictions with Queensland and Western Australia having recently removed similar provisions in their respective Criminal Codes. For those reasons, this Bill adopts the Director of Public Prosecutions' recommendation and repeals section 248(d).

### **Amendment to section 371**

Section 371 sets out when counsel in a criminal trial may address the jury and give closing statements.

At present, where an accused person does not have defence counsel and is unrepresented, the Crown is not permitted to give a closing address. The practical result is that the judge is required to sum up the Crown's case for the jury. The Chief Justice has expressed concern that this requirement for judges to address the Crown's case in detail may give the appearance of partiality or bias towards the Crown.

This amendment will allow Crown Counsel to give a closing address to the jury whether or not an accused person is represented.

### **Amendment to section 385**

Section 385(1) provides that an accused person must be asked by the court whether he or she has anything to say as to why sentence should not be passed on him or her after being found guilty or having pleaded guilty to a crime.

This part of the criminal trial is known as the *allocutus*. Its original purpose was to give the offender an opportunity to move to stop judgment on a point of law.

This requirement is out-dated and in practice, the *allocutus* merely marks the point at which defence counsel rises to address the Court as to sentence. Although, the question is asked it is never answered which is confusing and unnecessary.

This amendment removes the requirement for an accused person to be asked by a court official whether he has anything to say as to why sentence should not be passed upon him or her.

## **Amendment to Appendix A**

This amendment adds “carjacking” and “aggravated carjacking” to the list of crimes in Appendix A where an arrest may be made without a warrant if a police officer has reasonable grounds for believing that a person has committed either crime.

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

The Bill also makes a number of amendments to the *Criminal Justice (Mental Impairment) Act 1999*.

This Act provides for the procedures for dealing with persons who have committed crimes but who are not criminally responsible either because they are unfit to stand trial or they have been found not guilty of offences by reason of insanity.

Where a person is found not fit to stand trial or not guilty by reason of insanity the court may make a number of orders including treatment and supervision under the *Mental Health Act 2013*.

This Bill makes a number of consequential amendments resulting from the introduction of the new *Mental Health Act 2013* in order to clarify, streamline and improve the operation the Act.

Some of the other significant amendments to the *Criminal Justice (Mental Impairment) Act 1999* are outlined below.

### **Amendment to section 35**

The Bill allows the Court to have reference to one report from either the Chief Forensic Psychiatrist or a medical practitioner nominated by the Chief Forensic Psychiatrist and one report from another expert who need not be a medical practitioner.

This amendment was requested by the Department of Health and Human Services and will assist the courts by providing flexibility to allow for the receipt of information from experts such as clinical psychologists.

This amendment is particularly valuable in circumstances where the defendant has an intellectual disability rather than a mental illness and a clinical or forensic psychologist may provide appropriate information for the court to consider.

### **Insertion of section 35A**

The Bill inserts a new section 35A into the Act to allow the court to make an interim order in relation to people who have been either found not fit to stand trial or not guilty by reason of insanity and the court is considering the appropriate order to make under the Act.

The Act currently only allows for the making of final orders, but there are a number of matters that the court must take into account before making final orders. As a result,

there will often be a delay of some weeks between the finding and the making of orders following consideration of all the relevant information.

This amendment was requested by the Chief Justice and has been included in the Bill to provide flexibility to the court determining the matter to make interim orders while the matter is being finalised.

### **Insertion of section 36A**

The Bill inserts a new section 36A to provide for the circumstances in which the Magistrates Court is to refer a matter for consideration of forensic order to the Supreme Court for determination.

The Bill also clarifies the operation of the section in relation to matters involving fitness to stand trial as well as insanity.

### **Insertion of new section 21A**

The Bill rectifies an oversight in the Act by inserting enforcement provisions in relation to conditional release orders made under section 18 or section 21 of the Act.

Forensic orders are often not appropriate options for defendants who have an intellectual disability. In such cases, release on conditions may be appropriate orders for the court to consider but the absence of a mechanism to enforce the conditions imposed is problematic and means judicial officers rarely use the section.

### **Sentencing Act 1997**

Finally the Bill amends section 81A of the *Sentencing Act 1999* to introduce a legal right for victims of family violence offences and offences resulting in serious injury or death to provide a victim impact statement outlining the effects of the commission of the offence including injury, loss and damage suffered as a direct consequence of the offence.

The Bill also gives family members the right to provide similar victim impact statements where the offence has resulted in death such as causing death by negligence driving.

Many victims of violence feel aggrieved that they have limited right to put forward a statement outlining the effect of the crimes upon them where the perpetrator is dealt with in the Magistrates Court. This amendment allows the impact on victims of family violence offences and offences involving death and serious injury to be heard in both the summary and indictable jurisdictions.

Madam Speaker, these amendments to the criminal law and related legislation reflect modern community standards and have the capacity to support an efficient and effective criminal justice system in Tasmania.

I commend the Bill to the House.