

**JUSTICE AND RELATED LEGISLATION (MISCELLANEOUS  
AMENDMENTS) BILL 2008**

**Second Reading**

- I move -

That the bill be now read the second time.

Mr Speaker, the purpose of this bill is to make minor amendments to various pieces of legislation, most of which are administered by the Attorney-General.

Several of these amendments have been suggested by the Chief Justice, Chief Magistrate, DPP and statutory authorities to streamline the operation of the Courts and authorities

Fatal Accidents Act 1934

Section 3 of the Fatal Accidents Act 1934 provides that 'members of the family' are entitled to benefit under the act. 'Spouse' and 'partner' are both 'members of the family' as defined in the act. Previously, the definition of 'partner' required that a partner cohabit with and be financially dependant on, the deceased.

It is anomalous that for a 'partner' to claim under the act the partner must cohabit with and be 'principally dependent ... for financial support' on the deceased, whereas a spouse, parent or child can claim even if they are not dependent at all on the deceased and did not cohabit with him or her.

The requirement to establish 'dependency' as a threshold question is also not vital, as the level of dependency is a matter to be taken into account at the time when an assessment is made under section 5 of the act. Under that section a determination is made of the proportion of the award that each claimant under the act is entitled to.

Section 3 has been amended to remove these requirements.

Section 10 of the act sets out matters to be taken into account by a court when assessing damages payable under the act. One of these matters is that if the deceased leaves an estate worth more than \$10 000 the excess may be taken into account when damages are assessed. This figure was set in 1955, and has not been reassessed since.

The provision means that if the deceased dies with even a very modest estate it could be offset against the claim for compensation even though insurance payments and superannuation benefits may not be taken into account.

The threshold \$10 000 would, in 1955, have purchased a significant dwelling or represented a sum which would have sustained the family members for some time (the

basic wage at that time was about \$1 000 per annum) and its exclusion from the calculation would have been significant in most cases.

If indexed on the basis of CPI movements from 1955, the figure would today be somewhere around \$110 000 but in the same period the cost of the average house has gone from well under \$10 000 to a figure in excess of \$250 000, so CPI may not be an appropriate measure.

This bill amends the act to make the threshold figure \$250 000, which will prevent a very modest estate, perhaps consisting mainly of a small house, from being taken into account in the assessment of damages.

Schedule 1 of the act is also repealed as it merely describes the pre-1934 acts the Fatal Accidents Act replaced.

#### Freedom of Information Act 1991

The Director of Public Prosecutions (DPP) has requested that this act be amended by the insertion of a provision exempting material held by the DPP in relation to the exercise of his functions. The Directors of Public Prosecutions in South Australia, Western Australia, New South Wales and Victoria have such an exemption under their equivalent legislation, as does the Australian Government Solicitor.

While many documents held by the DPP come under the category of law enforcement information or legal professional privilege, and as such are currently exempt under sections 28 or 29 of the act, there are other documents that do not clearly fall into these categories of exemption. An example is working notes made by a DPP lawyer to assist his or her consideration of the case. Release of such working documents would be detrimental to the operations of the DPP, as they would affect the ability of DPP lawyers to frankly commit their thoughts to paper. The DPP may also hold documents which in fact belong to other agencies but which are held by the DPP for the duration of legal proceedings. Such documents should be the subject of an FOI request to the relevant agency to which they belong.

Locally, the Ombudsman is exempt from the Freedom of Information Act 1991. Similarly to the Ombudsman, the DPP may be adversely affected in his ability to undertake his statutory functions and to continue to enjoy the co-operation of agencies if the DPP is not also exempted from the act. The amendments in the bill ensure that the DPP is exempted from the operation of the Freedom of Information Act 1991 in respect of material held in the exercise of his functions.

#### Civil Liability Act 2002

Section 28B of the Civil Liability Act provides for the award of damages for gratuitous services required by a person as a result of injuries to that person caused by the negligence of another person. ['gratuitous services' means services of a domestic or

nursing nature for which the person to whom they are provided does not pay or is not liable to pay'.

Under the Fatal Accidents Act 1934, if a person dies as the result of a negligent act, any cause of action the deceased person may have had can be initiated for the benefit of the members of the deceased's family. Damages are assessed on the basis of the loss suffered by the family members as a result of the negligently caused death. Awards of damages in such cases have frequently included a component for the loss of gratuitous services previously provided by the deceased to other family members.

The current wording of section 28B suggests that damages for gratuitous services may only be awarded as described in that section. The amendment clarifies that nothing in section 28B prevents the award of damages under the Fatal Accidents Act 1934.

#### Community Protection (Offender Reporting) Act 2005

Under the Community Protection (Offender Reporting) Act 2005 a magistrate or a judge may make a reporting order requiring an offender to report regularly to Tasmania Police and update their personal details with police. The order is not part of the sentence imposed on the offender and the act itself does not contain any provisions that allow the person against whom the order is made to appeal against or seek a review of the order.

If an order is made by a Magistrate under the Community Protection (Offender Reporting) Act 2005 it may be reviewed under section 107 of the Justices Act 1959 which allows for the review of any orders made in the Court of Petty Sessions. In contrast, if the order is made by a Judge there is no right of appeal. The right of appeal in the Criminal Code only extends to findings of guilt and sentence and the order is not part of the sentence.

It is anomalous that there is presently a right of appeal against an order of a Magistrate but not the same order made by a judge. The bill amends the Community Protection (Offender Reporting) Act 2005 to insert a provision to allow an appeal to the Court of Criminal Appeal from a reporting order made under that act by a judge.

#### Anti Discrimination Act 1998

The act provides for a Tribunal to inquire into a complaint or review a decision of the Commissioner relating to exemptions, withdrawals, rejections and dismissals of complaints.

The Magistrates Court undertakes the registry function for the tribunal.

Currently the tribunal has no power to require the payment of fees for the filing of processes under the act. The Chief Magistrate has requested that the act be amended to allow for the collection of fees. Any fees set would not be so high as to restrict access to

justice but would ensure that potential litigants accept reasonable financial responsibility before seeking to access the tribunal.

The bill amends section 109 to allow regulations made under the act to provide for fees payable in respect of matters under this act.

#### Magistrates Court (Civil Division) Act 1992

Also in this bill is an amendment regarding the rule making powers of the Magistrates Court Rules Committee. As it stood, section 31A of the Magistrates Court (Civil Division) Act 1992 provided that 'The Court has the same powers in relation to the enforcement of its judgments and orders as the Supreme Court has in relation to the enforcement of its judgments and orders'.

While it is useful and appropriate for the Magistrates Court to be granted the same enforcement powers as the Supreme Court, there may be occasions where the Magistrates Court wishes to vary those rules to provide an enforcement process more suitable to that jurisdiction. As the act presently stands any variation or addition to the rules may be seen as conflicting with the Supreme Court Rules adopted by reference under section 31A.

Therefore section 31A is to be amended so that the Magistrates Rules Committee may make specific rules for use in enforcement proceedings. The powers currently granted by the section will operate as a default position where the Rules Committee has made no specific rules.

#### Health Complaints Act 1995

Section 15 of the Health Complaints Act 1995 provides for the appointment of conciliators and professional mentors. The Health Complaints Commissioner has requested a change to this section to allow investigators under the act to carry out conciliations, leading to a more efficient use of time and human resources.

As it stands, section 15(3) prohibits persons investigating complaints under Part 6 of the act from holding office as conciliator. This was inserted to avoid the situation where a conciliator might make use of information imparted confidentially in conciliation in a later investigation. However, by the use of proper case management in the Commissioner's office, this situation can be avoided to make sure a person does not carry out an investigation under Part 6 of the act in relation to a case which he or she has conciliated.

Allowing investigators to carry out conciliations will give them a better appreciation of the value of conciliation when assessing claims under the act, and will broaden their field of experience, as well as allowing cases to be resolved more quickly. This advances one of the major policy purposes behind the act, reducing medical negligence litigation.

This bill removes the impediment in section 15(3).

#### Criminal Code Act 1924

Section 12 of the Criminal Code Act 1924 allows the judges to make Rules of Court to govern the procedures of the Court. There is no specific power to make rules governing the procedure between the time a matter leaves the Magistrates Court and before an indictment is filed with the Supreme Court.

As the new procedures for dealing with committal of matters to the Supreme Court involves significant case management by the judges before the filing of an indictment it is considered appropriate to ensure that the Code gives them sufficient powers in that regard. The bill amends s.12 to include a power to make Rules of Court with respect to all matters of procedure and practice that the court is involved in, from the time the Court of Petty Sessions makes an order of committal for trial in the Supreme Court.

Section 339A(f)(iii) of the Code allows a verdict of 'assault with intent to rob' as an alternative to an indictment of robbery, armed robbery, aggravated robbery or aggravated armed robbery. There is no longer a crime of 'assault with intent to rob'. This bill amends the act to remove this anomalous reference.

Section 368A of the Code provides that a defendant cannot not give evidence in support of an alibi in a trial without first having notified the DPP of the particulars of the alibi. Paragraph 368A(8)(a) defines the period within which they must notify the DPP after the defendant has been warned by the judge of the need to do so. In the past, this notification was given by the magistrate at the time of committal, but with the changes to the committals process brought by the Justices Amendment Act 2007, the warning is now given by a judge. However the start point for the period was not changed and requires notice to be given seven days after committal which, given the processes now adopted, could not be complied with. This bill amends s.368A(8)(a) to start the seven day prescribed period at the point the warning is given by the Court.

Several other very minor typographical errors are also corrected in this bill, in sections 1, 26A, and 328 of Schedule 1 of the Code.

#### Sentencing Act 1998

Section 27Y of the Sentencing Act 1998 provides for the expiry of Part 3A of the act dealing with the Court Mandated Drug Diversion program. It provides that no new orders under Part 3A can be made after 31 May 2008, or a later date prescribed before 31 May 2008, effectively allowing only one extension. A regulation extending the date to 31 July 2008 has already been made. It should be noted that the sunset clause only prevents the making of new orders and does not affect existing orders which could in some cases involve offenders being under supervision under the scheme for up to 18 months.

Since the making of the regulation for the short extension the Commonwealth has advised that funding will be available which will enable the scheme to run until at least the end of 2008 and possibly longer. To enable that and any further extension of the program it would be preferable for the act to allow for ongoing extensions of the final date should the necessary funding be available.

#### Judicial Review Act 2000

The Judicial Review Act 2000 allows for the review of 'a decision of an administrative character made under an enactment'. An opinion from the Solicitor-General suggests that certain decisions under the Coroners Act 1995 will fall into this category. An example is a decision by the Chief Magistrate to direct that a coroner hold an inquest (section 24(1)(h)).

A review under the act allows an inquiry into whether the 'rules of natural justice', including such matters as 'procedural fairness' were observed in the making of the decision. Procedural fairness often requires giving any person who may be affected by a decision an opportunity to be heard prior to the decision being made.

It would be wasteful and unnecessary to require the Chief Magistrate to consult with all interested parties before making a decision to direct that an inquest be held, and therefore this bill adds a decision under the Coroners Act 1995 to the list of decisions to which the Judicial Review Act 2000 does not apply.

Also, a recent case in the Supreme Court of Tasmania found that a decision of the Tasmanian Industrial Commission was of an administrative nature and therefore capable of review under this Act.

The Industrial Relations Act 1984 has been amended only last year to extend the appeal provisions under that act. As a matter of policy, it is undesirable for decisions of the Tasmanian Industrial Commission to be subject to the Judicial Review Act 2000 when the Industrial Relations Act 1984 provides an adequate avenue of appeal. The Tasmanian Industrial Commission has accordingly also been added to the list of decisions to which the Judicial Review Act 2000 does not apply.

#### Clarification of rulemaking powers

The Chief Justice has pointed out that some acts enabling the making of Rules of Court do not provide that the rules may be made by majority vote. Other acts that create a power to make Rules of Court provide specifically for a majority of judges to make the rules.

The Chief Justice has advised that the judges consider the power to make rules should at all times be able to be exercised by the majority of judges.

This bill amends the Administration and Probate Act 1935, Bills of Sale Act 1900, Civil Process Act 1870, Criminal Code Act 1924, Guardianship and Custody of Infants Act 1934, Juries Act 2003, Justices Act 1959, Landlord and Tenant Act 1935, Public Trustee Act 1930 and Trustee Act 1898 to clarify that in all cases under Tasmanian law rules of court may be made by a majority of judges.

Telecommunications (Interception) Tasmania Act 1999 and Terrorism (Preventative Detention) Act 2005. The bill amends the act to correct cross-references to Commonwealth acts which have been renumbered since the Tasmanian acts were drafted.