DRAFT SECOND READING SPEECH

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Justice and Related Legislation (Miscellaneous Amendments) Bill 2015

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Madam Speaker, this Bill makes minor amendments to twenty one Acts and one set of Regulations. The amendments result from requests by various stakeholders to clarify or improve the operation of particular Acts.

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

Section 29AB of the *Acts Interpretation Act 1931* is a generally applicable provision that defines what amounts to "service" of a document where the word is not otherwise defined.

Tasmania Police would like to trial electronic service of infringement notices to alleged offenders who agree to service in this manner. Electronic service will only take place after there has been a personal interaction between the issuer of a notice and an alleged offender and the latter advises that he or she would prefer to receive the notice electronically.

This Bill amends section 29AB to allow for electronic service in these circumstances. It also makes provision for a presumption of service if an infringement notice is sent electronically to an address or number provided for that purpose by the alleged offender.

The *Administration and Probate Act 1935* does not specify any age or residential qualifications for an administrator. This means that the Charter of Justice applies and requires an administrator to be a resident of Tasmania aged 21 years or over.

The Chief Justice requested an amendment to the Act to provide that persons who have attained 18 years, no matter where they may reside, may be granted letters of administration. This Bill makes that amendment.

The Chief Justice also requested the repeal of section 25 of the same Act, which requires every person granted letters of administration to enter a bond, on the basis that the bonds do not serve any real purpose as they simply repeat oaths already given by an administrator and add nothing to existing remedies available against an administrator. The *Report of the National Committee for Uniform Succession Laws to the Standing Committee of Attorneys General* also recommended the abolition of such bonds. This Bill makes the requested change.

Section 40 of the *Administration and Probate Act* contains the obsolete phrase "committee of his estate" which was the phrase used in the long ago repealed *Mental Health Act 1963* for the body appointed to manage the affairs of a person without legal capacity. This function is now performed by an administrator appointed under the *Guardianship and Administration Act 1997* and this Bill amends the reference in the

section accordingly. Section 14 is amended to replace "committee" with "administrator" for the same reason.

The *Appeal Costs Fund Act 1968* and *Appeal Costs Fund Regulations 2013* contain out-dated references to a "plaint". This is the word used under legislation repealed in 1997. The *Magistrates Court (Civil Division) Act 1992* uses the term "claim" and this Bill substitutes "claim" for "plaint" wherever it appears in the Act and Regulations.

Section 7(4) of the *Bail Act 1994* currently provides that "an order for bail may be made subject to such other conditions as the judicial officer thinks desirable in the interests of justice". This provision has been utilised by the Magistrates Court for the last seven years, under a program known as the Mental Health Diversion List, to impose "treatment" bail conditions on a person with a mental illness or a cognitive impairment who comes before the court. The types of bail conditions imposed may require the defendant to do certain things, such as take medication or attend a specific intervention program, in order to address mental health issues underlying a defendant's offending behaviour.

The Chief Magistrate has requested an amendment to the *Bail Act* to insert a provision to clarify and strengthen the statutory basis for making such bail conditions.

The use of bail conditions to require the defendant to be assessed for, or attend, appropriate intervention programs has been supported by all stakeholders and has been found to be effective in reducing re-offending and producing positive outcomes for offenders and other stakeholders. In 2010, the Diversion List was awarded an Australian Crime and Violence Prevention Award.

This Bill makes the requested change and confirms that assessment or attendance bail conditions may only be made with the consent of the defendant and that a condition to attend an intervention program may only be imposed if the defendant is eligible for the program and it is available at a suitable time and place.

The Department of Police and Emergency Management also requested the correction of an anomaly in sections 5(5C) and 10(2) of the *Bail Act*. These subsections provide for either the revocation of police bail or suspension of court bail on the arrest of a person for an alleged contravention or imminent contravention of a condition of bail.

The existing subsections make sense if the person arrested is taken before a court, as it will be a matter for the court to decide whether further bail will be granted and under what conditions.

However, the subsections create a problem where a person is arrested for an alleged contravention of a bail condition and after further investigation it becomes apparent that the person was not in breach, had a reasonable excuse or that the breach was minor and prosecution is not warranted. In these circumstances the arrestee would normally be released unconditionally without being required to attend court but the terms of the subsections means that the bail conditions have been suspended or revoked.

This Bill amends both subsections to insert the phrase "and taken before a justice" so that the suspension or revocation does not occur until that time and there will

therefore be no problem with the original terms of bail continuing if further investigation reveals that the person should be released without being taken before a justice.

The Bill amends the *Building and Construction Industry Security of Payment Act 2009* to update two references in the definitions section.

The Chief Justice has requested that the *Civil Liability Act 2002* be amended to abolish the common law torts of "maintenance" and "champerty" so that the uniform national Rules can be introduced in relation to litigation funders.

The common law torts of "maintenance" and "champerty" have been abolished in New South Wales, South Australia, Victoria and the Australian Capital Territory. The torts prevent a person providing financial support to another for the purpose of litigation, which for historical reasons was seen as undesirable.

A Committee of the Council of Chief Justices working towards standardising the rules of practice and procedure in all the Australian Superior Courts, wishes to introduce standard rules in relation to litigation funders.

Litigation funders are companies which provide the funding towards the cost of civil cases in return for a proportion of the damages recovered and are often used in class actions where few of the individual plaintiffs would otherwise be in a position to fund the action. Professional funders of litigation are common in other Australian jurisdictions.

The Law Council of Australia supports the availability of litigation funding, with appropriate safeguards (the proposed Rules of Court being standardised by a Committee of the Council of Chief Justices), on the basis that it improves access to justice.

This Bill makes the requested amendments to the *Civil Liability Act.*

The Magistrates Court has identified that section 5 of the *Debtors Act 1888* requires an amendment to increase the maximum penalty that can be imposed on a debtor who fails to attend or produce documents as required by the Court.

This Bill increases the maximum penalty from the current 0.2 of a penalty unit ($30.80) to 10 penalty units ($1540). The court will maintain its discretion to determine the appropriate level of penalty to be imposed in each case.

Section 20 of the *Environmental Management and Pollution Control Act 1994* defines the persons who are authorised officers for the purposes of the Act. These include the Director of Environment Management and Pollution Control (EMPC), officers and employees of the State Service appointed by the Director and Police Officers. Section 21 provides that council officers may be appointed by a council to have the powers specified under the Act as applying to council officers.

Section 92 sets out the powers of authorised officers and council officers, with subsection (1)(i) providing that these officers, including the police, may seize or issue seizure orders in respect of anything that the officer reasonably suspects has been used in, or may constitute evidence of, a contravention of this Act.

However, section 94, which sets out the provisions relating to seizure, does not include reference to seizures made by authorised officers who are Police Officers. Because of this, if a court subsequently orders the forfeiture of the seized object, it can only be forfeited to the Director of EMPC and not to the Commissioner of Police, a result which is administratively burdensome and impractical.

This Bill amends section 94 to include references to seizures by authorised officers who are police officers and to provide that the Commissioner of Police is the focal point through which the provisions of the section are implemented. Moneys generated as the result of a seized item being forfeited to the Commissioner by an order of the court will be paid into the Environment Protection Fund in the same way as proceeds from the sale of items forfeited to the Director.

Under section 25 of the *Health Complaints Act 1995* the Health Complaints Commissioner is required to assess a complaint within 45 days of receipt before dismissing it, referring it to conciliation or investigating it. There is a power in the section to extend this time by a further 45 days.

Difficulties arise where the Commissioner is required to seek a response from a third party, such as a health service provider or seek a determination from the Australian Health Practitioner Regulation Agency before finalising the assessment of the complaint. Compliance with the statutory time frame can be impossible for the Commissioner and has led to an argument being put that the non-compliance means that the complaint has lapsed.

The Commissioner has powers to require the provision of information (section 26) and there is a penalty for non-compliance (section 70) so the Commissioner can take steps to enforce timely provision of information. In some instances, however, there is a genuine reason for a delay in provision of information and the Commissioner may choose not to take enforcement action as the delay is clearly unavoidable. To ensure that the unavoidable delay of a third party does not lead to a claim that the complaint has lapsed, this Bill allows the Commissioner to extend time when he or she judges it to be appropriate.

The *Integrity Commission Act 2009* provides that an investigator (section 53) or an inquiry officer (section 75) may apply for a warrant under the *Police Powers (Surveillance Devices) Act 2006* as though it were a law enforcement agency under that Act.

Sections 53 and 75 also provide that records of any surveillance be inspected by applying Division 3 of Part 5 of the *Police Powers (Surveillance Devices) Act 2006* to the Commission. However, the sections do not incorporate the reporting and record keeping requirements of the *Police Powers Act*. It would appear to be a drafting error that the records be inspected despite the Commission having no statutory requirement to keep specific records. It is recommended that sections 53 and 75 of the *Integrity Commission Act* be amended so that Division 2 (Reporting and record-keeping) of Part 5 applies to require the Integrity Commission to keep records as if it were a law enforcement agency.

The Magistrates have requested an amendment to the *Justices Act 1959* to clarify that a defendant who is in custody may appear at formal proceedings, such as remand or adjournment, by audio or audio-visual link from the prison.

This Bill makes that amendment but also makes it clear that the provision will only apply in a situation where the defendant will not be giving evidence or making a submission. The right of a defendant to give evidence or make a submission by audio-visual link will continue to be governed by section 6 of the *Evidence (Audio and Audio-Visual Links) Act 1999.*

The *Occupational Licensing Act 2005* was amended some years ago to repeal most of the infringement notice provisions to ensure consistency with the *Monetary Penalties Enforcement Act 2005.* However, the definition of "specified person", which was used in the repealed provisions, was not omitted. This has caused an anomaly as the phrase is used in a different context elsewhere in the Act. This Bill removes the definition of "specified person" from section 3.

Section 16A of the *Ombudsman Act 1978* provides for the referral of matters for investigation to the Ombudsman from the Integrity Commission. This puts the Integrity Commission on the same footing in this respect as Parliament and the Governor, the other two entities that can refer matters to the Ombudsman.

While the referral power is understandable in respect of entities involved in the governance of the State, it is incongruous that one statutory integrity entity has the power to direct another. This is particularly so when there is ample provision for referral of matters between the Integrity Commission and Ombudsman. Sections 35(1)(c) and 38(1)(c) of the *Integrity Commission Act 2009* and section 12(1) of the *Ombudsman Act 1978* provide for matters to be referred to the Ombudsman by the Integrity Commission but preserve the Ombudsman's discretion and jurisdictional autonomy.

This Bill deletes section 16A. The Board of the Integrity Commission does not oppose the amendment.

The *Powers of Attorney Act 2000* was amended in 2013 to insert a new section 32AH on the effect of ademptions of testamentary gifts by an attorney under an enduring power of attorney. However, the new provision did not provide for a time within which an application was to be made to the Supreme Court.

This Bill inserts a time limit. A further amendment in the Bill provides for the Court to have discretion to extend that time period if it considers it necessary.

Section 60 of the *Public Interest Disclosures Act 2002* requires each public body to establish procedures to be followed in relation to disclosures and investigations. The procedures are to comply with any published guidelines and standards. Subsection (3) further requires every public body to submit its procedures to the Ombudsman for approval and to resubmit the procedures every three years. Given that the definition of "public body" is wide, this would require the Ombudsman to approve hundreds of procedures, which in any event are required to comply with published guidelines. The subsection is currently more honoured in the breach than in the observance.

The Ombudsman has requested that the subsection be limited to only large public bodies, such as Agencies, Councils, GBEs and state-owned companies, and this Bill makes that amendment.

The definitions of "infringement notice" and "prescribed record" in the *Records of Offences Act 1981* require amendment to reflect the increasing number of infringement notices under a variety of Acts that are issued and the application of the *Monetary Penalties Enforcement Act 2005.* The Bill makes the necessary amendments.

The Bill amends section 6 of the *Right to Information Act 2009* to include the Parole Board in the list of persons or bodies to whom the Act does not apply, except in relation to administrative matters.

Section 23 of the *Search Warrants Act 1997* contains an out of date legislative reference to the repealed *Criminal Process (Identification and Search Procedures) Act 1976*. This Bill updates the reference to the current *Forensic Procedures Act 2000*.

The *Surrogacy Act 2012* contains reference to an "approved form" but does not stipulate by whom the form must be approved. The Bill inserts a definition to provide that an "approved form" is approved by the Chief Magistrate.

The *Testators Family Maintenance Act 1912* allows the specified family members of a deceased person to make a claim for a share of the deceased's estate. Section 3A sets out the family members who may claim and includes the deceased's children. A stepchild is included in the definition of child in section 2. However, the Supreme Court has interpreted stepchild to be a child of a person who is married to the deceased at the time of his or her death. On the death of the natural parent of the child the step-relationship ceases and the stepchild is not eligible to make a claim under the legislation even if the child has always been treated as part of the family.

This can lead to unfairness, as in the following scenario which is based on an actual case. Mary was born out of wedlock but within months of her birth her mother married Edward, who was not Mary's natural father. Edward brought Mary up as his own child (there were no other children of the marriage) and remained married to her mother for 40 years until her mother's death. Mary cared for Edward in his old age. When he died 15 years after her mother she was an invalid pensioner. Edward left an estate of $700,000 which went to his sister on intestacy. Mary had no rights to seek a share of the estate, despite her close relationship with Edward as she ceased to be a stepchild on the death of her mother.

The Law Society has asked that the *Testators Family Maintenance Act 1912* be amended so that the definition of stepchild includes a child whose parent was married to, or in a significant relationship with, the deceased at the time of the natural parent's death. This will allow a stepchild to make a claim under the Act even if the stepchild's natural parent died before the deceased. Whether or not such a claim will be successful will then be a matter for the court. Similar provisions exist in Victoria, New South Wales, Queensland, and to a lesser extent, Western Australia.

The Bill makes the requested change and also removes from the definition the requirement that the child of a person's spouse must have been a child of a former marriage or significant relationship as the stepchild's natural parent may have been single.

The Bill inserts a new provision to clarify that the changed definition of "stepchild" will only apply to claims against an estate where the deceased person died after the amendment took effect.

In addition, the Law Society has requested an amendment to subsection 2(2) to correct an apparent anomaly which suggests that an illegitimate child would only fall within the definition of "child" if the deceased person had never been married. The subsection in question is outdated as the *Status of Children Act 1974* gives illegitimate children the same rights as all children. This Bill therefore deletes the subsection.

Section 8 of the *Victims of Crime Assistance Act 1976*, which restricts publicity about proceedings, makes reference only to traditional forms of media. This Bill amends that section to include electronic forms of publication to ensure that the restriction on publicity is meaningful in the modern era.

I commend the Bill to the House.