Senate Legal and Constitutional Affairs Legislation Committee

Attorney-General's Department

Question date: 16 January 2024

Paul Scarr asked the following question:

I would find it very helpful if the AGD could respond to:

(a) The matters where the Law Council of Australia recommends that the Committee seeks clarification from the AGD and/or proposes some amendments (pages 9, 11, 12, 14 and 15 – they could respond to the other points as well but these are the main ones from my perspective); and

(b) The issues raised by the Celebrant Institute on pages 2 and 3.

The response to the question is as follows:

Question (a)

The Law Council of Australia's (LCA) submission to the Committee canvasses matters across the Attorney-General's Portfolio Miscellaneous Measures Bill 2023 (Bill). The following response deals with recommendations identified in Senator Scarr's question.

LCA Recommendation (page 9): That the Committee seek clarification from the AGD on the rationale underpinning the amendments in Schedule 1 to the Bill, given that delays in prosecuting criminal corporate crime are not dependent on jurisdiction.

Response:
The department refers the Committee to the Second Reading Speech of the Attorney-General, the Hon Mark Dreyfus KC MP, which sets out the rationale for the expansion of the criminal jurisdiction of the Federal Court of Australia (Federal Court):

> The [B]ill will confer jurisdiction on the Federal Court to hear and determine a range of indictable corporate criminal offences within the responsibility of the Australian Securities and Investments Commission. This is an important step in the development of the Federal Court's criminal jurisdiction, which was last significantly expanded in 2009 when jurisdiction was conferred in relation to indictable cartel offences [against the *Competition and Consumer Act 2010*]. The Federal Court has considerable expertise in civil, commercial and corporate matters, and is well positioned to deal with this expanded criminal jurisdiction.
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> This jurisdiction will operate concurrently with the existing jurisdiction of state and territory courts. This will enhance the overall capacity of Australia's court system and support the Australian Securities and Investments Commission to more efficiently

> prosecute corporate criminal conduct.[1]

The department notes, consistent with the Attorney-General's Second Reading Speech, that the primary objective of this measure is to ensure that responsibility for dealing with corporate criminal conduct can be shared across the Australian court system to support the Australian Securities and Investments Commission's (ASIC) prosecution of criminal misconduct, rather than address any specific litigation delays.

Notwithstanding, the department notes ASIC's submission to the Committee's inquiry, which sets out published caseload statistics to demonstrate its experience in prosecuting corporate criminal conduct.

LCA Recommendation (page 11): That the Committee seek clarification from the AGD as to how the Bill proposes to manage the existing constraints on the Federal Court's exercise of criminal jurisdiction.

Response:
The department refers the Committee to the Explanatory Memorandum, which sets out the relevant experience of the Federal Court:

> The Federal Court has considerable expertise in civil commercial and corporate matters and is well positioned to deal with matters under this corporate criminal jurisdiction. The Federal Court has existing criminal jurisdiction for cartel offences against the *Competition and Consumer Act 2010* (Competition and Consumer Act) In addition to the Federal Court's existing criminal jurisdiction, it already has jurisdiction to deal with a number of civil penalty provisions under the Acts being amended which share the same or similar elements to related criminal offences.[2]

Resourcing of federal courts, including judicial resourcing, is ultimately a matter for Government. However, the department notes that criminal matters are dealt with by the Federal Court's Federal Crime and Related Proceedings National Practice Area, to which 15 judges are currently assigned. Two of these, the Hon Justice Stewart Anderson and the Hon Justice Wendy Abraham, were appointed to support the expansion of the Federal Court's criminal jurisdiction that would be enabled by the Bill.

The department notes that many of the offences contained in the Bill share the same or similar elements to the existing civil jurisdiction of the Federal Court. For example, a person involved in a company's contravention of sections 254J or 254K of the *Corporations Act 2001* (requirements for redemption of redeemable preference shares):

- contravenes subsection 254L(2) of the Corporations Act, which is a civil penalty provision pursuant to section 1317E of the Corporations Act; and
- commits an indictable offence against subsection 254L(3) of the Corporations Act, providing the conduct is dishonest.

The Federal Court's existing civil jurisdiction includes the civil penalty provision under subsection 254L(2). The Bill will enable the Federal Court to hear and determine prosecutions of the equivalent indictable offence against subsection 254L(3).

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[1] Commonwealth, *Parliamentary Debates*, House of Representatives, 15 November 2023, 8149 (Mark Dreyfus KC, Attorney-General and Cabinet Secretary) ('2RS'). Technical amendments for clarity are detailed in square brackets.

[2] Explanatory Memorandum, Attorney-General's Portfolio Miscellaneous Measures Bill 2023 (Cth) 4 [5] ('EM'). Technical amendments for clarity are detailed in square brackets.

The department further notes ASIC's submission to the Committee which identifies that the Federal Court has significant expertise in applying the legislation administered by ASIC.

In relation to the LCA's concerns regarding appeals in this proposed jurisdiction, the department notes that under subsection 30AA(1) of the *Federal Court Act 1976* (Federal Court Act), the Federal Court already has appellate jurisdiction for indictable offences—for example, for indictable primary proceedings before a single Judge of the Federal Court, and certain proceedings decided in State and Territory courts.

LCA Recommendation (page 12): That the offence categories in proposed subsection 67G(4) be reconsidered and, if retained, their inclusion be clearly justified in the Bill's Explanatory Memorandum.

Response:
The department refers the Committee to the Explanatory Memorandum, which sets out the rationale for the inclusion of offences against the *Criminal Code* in proposed subsection 67G(4) of the *Judiciary Act 1903* (Judiciary Act):

> [The Bill will] confer jurisdiction on the Federal Court to hear and determine a range of summary and indictable offences relating to entities and conduct against [certain] Acts, and the *Criminal Code*, within the regulatory remit of ASIC.[3]
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> New subsection 67G(4) will confer jurisdiction on the Federal Court to hear and determine prosecutions for indictable offences against the *Criminal Code* which are likely to be relied upon in prosecutions arising from investigations undertaken by ASIC.[4]

At the time that Schedule 1 of the Bill was released for public comment in October 2022 (then part of the Federal Court of Australia Amendment (Extending Criminal Jurisdiction and Other Measures) Bill), there was no limitation as to the institution of proceedings under the jurisdiction conferred by proposed subsection 67G(4) of the Judiciary Act. As then drafted, the provision would have allowed the prosecution of persons for the specified offences against the *Criminal Code* in circumstances other than corporate misconduct.

In response to feedback received, including from the LCA, proposed subsection 67G(5) of the Judiciary Act was inserted in the Bill. This provision provides that proceedings in the Federal Court for the specified indictable offences against the *Criminal Code* may only be instituted:

- by ASIC or a person authorised in writing by ASIC; or
- with the consent in writing of the Treasurer (as the Minister responsible for administering the *Australian Securities and Investments Commission Act 2001*) or a person authorised in writing by the Treasurer to give such consents.

LCA Recommendation (page 14): That the Bill and/or its explanatory materials include further matters that could guide the court's consideration about whether a transfer of proceedings would be in the interests of justice.

Response:
The department refers the Committee to the Explanatory Memorandum, which sets out matters relevant to the transfer provision:

[3] EM (n 2) 4 [4]. Technical amendments for clarity are detailed in square brackets.
[4] EM (n 2) 24 [39]. Technical amendments for clarity are detailed in square brackets.

> [T]he purpose of [new section 32AE of the Federal Court Act] is to enable proceedings to be moved across the Australian court system to the most appropriate forum and venue, having regard to the interests of justice, to support the effective and efficient administration of justice.
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> [T]he transfer scheme established by this provision is largely consistent with the transfer scheme established in relation to non-criminal proceedings by the *Jurisdiction of Courts (Cross-Vesting) Act 1987* (Cross-vesting Act).
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> There is no defined set of criteria for assessing the interests of justice. Rather, the court should assess the interests of justice on a case-by-case basis, having regard to all relevant circumstances.
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> [The provisions] are largely consistent with the test to be applied by a court considering whether to transfer a proceeding, other than a criminal proceeding, to another court under section 5 of the Cross-Vesting Act.[5]

Given that other transfer regimes in Commonwealth legislation, particularly the Cross-Vesting Act, do not specify the matters that should or must be considered by a court in assessing whether it would be in the interests of justice to transfer part or all of the proceedings, it would not be appropriate to include any exhaustive or non-exhaustive criteria in this Bill.

LCA Recommendation (page 14): That the accused be provided the right to make an application to transfer proceedings. Alternatively, justification should be included in the Bill's Explanatory Memorandum for the accused not being provided this right.

Response:
The department refers the Committee to the Statement of Compatibility with Human Rights in the Explanatory Memorandum, which sets out safeguards relating to the transfer provision:

> Whether considering to transfer on application by the prosecutor or on its own initiative, the principles of procedural fairness will require the court to provide the defendant an opportunity to be heard before any decision to transfer or not transfer is made. Further, the court must also have regard to the interests of justice in determining to transfer part of all of the proceedings. These requirements will ensure that the accused will be afforded a reasonable opportunity to present their case under conditions that do not disadvantage them as against the prosecutor.[6]

The department notes that, depending on the relevant rules of court, the accused may also have a right to make an interlocutory application requesting the court to exercise its powers to transfer proceedings on its own motion. As such, it is not necessary to provide for an express right of the accused to make an application to transfer part or all of the proceedings.

Further, superior courts have inherent powers to protect the administration of justice and prevent abuses of power. These powers would ensure that transfers do not occur in circumstances which would unfairly prejudice the accused.

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[5] EM (n 2) 29–30 [80]–[81], [84]–[85]. Technical amendments for clarity are detailed in square brackets.
[6] EM (n 2) 12 [22].

LCA Recommendation (page 14): That the prosecutors only be permitted to apply for a transfer of proceedings prior to committal for trial or sentence.

Response:
As noted in the response to the previous recommendation (immediately above):

- the court must have regard to the interests of justice when considering whether to transfer proceedings; and
- superior courts have inherent powers to protect the administration of justice and prevent abuses of power.

The department considers these will ensure that transfers do not occur in circumstances, including at a particular point in the proceedings, which would unfairly prejudice the accused.

LCA Recommendation (page 14): That guidance material be developed by relevant federal agencies, and made publicly available, about when a prosecutor should apply to transfer proceedings.

Response:
The management of prosecutions for the Commonwealth Government is the responsibility of the Commonwealth Director of Public Prosecutions (CDPP). The CDPP publishes and maintains the *Prosecution Policy of the Commonwealth* and other materials to guide decision-making in the prosecution process. As an independent entity, the appropriateness and development of any guidance relating to whether to transfer proceedings is a matter for the CDPP.

LCA Recommendation (page 15): That the differences between the current jury preparation process in Subdivision D of Part III of the Federal Court Act, and jury selection rules in each State and Territory, be examined in greater detail by the AGD and canvassed in the Bill's Explanatory Memorandum.

Response:
The department refers the Committee to the Explanatory Memorandum, which explains how the Bill deals with differences in Commonwealth, State and Territory laws relating to jury panel preparation:

> Subsection 23DU(4) will require a State/Territory jury official to apply all of the same processes they would apply when preparing a jury panel, and issuing summonses, for a trial on indictment of an offence in the Supreme Court of the relevant State or Territory. These processes may include establishing jury districts, preparing jury rolls, conducting enquiries in relation to potential jurors, and excusing jurors due to qualification or other matters. This provision provides certainty, validates procedures, and avoids the State/Territory jury official needing to apply different processes depending on the court for which they are preparing a jury panel.
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> [Section 23DV] will apply relevant State or Territory laws concerning qualification to service as a jury for a trial on indictment for an offence in the Supreme Court of the relevant State or Territory to the preparation and provision of a jury panel by a State/Territory jury official to the Sheriff. These laws are taken to have been modified as necessary to allow for such application, including that references to a court are

> taken to be references to the Federal Court. This provision will ensure the validity of potential jurors selected, and avoids the State/Territory jury official needing to apply different qualifications depending on the court for which they are preparing a jury panel.
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> [Section 23DW] will clarify, for the avoidance of doubt, that relevant State or Territory laws apply, modified as necessary to be effective, from when the Sheriff requests … the State/Territory jury official to prepare and provide a jury panel until the State/Territory jury official has provided the jury panel.[7]

As set out in the Explanatory Memorandum extracted above, the Bill contemplates that there may be variations in relevant laws and procedures between the Federal Court Act and relevant State and Territory laws. To address this, the Bill makes it clear that State and Territory laws and procedures will apply when a jury is being prepared and provided by a State/Territory jury official. This avoids officials needing to apply different rules and procedures.

Subdivisions DD and E of division 1A of part III of the Federal Court Act, which set out empanelment and other jury procedures, will then apply whether a jury panel is prepared by the Sheriff or provided by a State/Territory jury official.

As the Bill provides clarity as to the application of Commonwealth, State and Territory laws, the department is of the view that no further consideration of the differences is warranted.

LCA Recommendation (page 15): That the Bill and/or its explanatory materials provide more detailed specification of the criteria to be applied by the Sheriff in utilising the discretionary, hybrid jury preparation procedure proposed in Schedule 2.

Response:
The department refers the Committee to the Explanatory Memorandum, which clarifies the Sheriff's discretion:

> The Sheriff will … determine which approach for preparing a jury panel is adopted on a case-by-case basis.[8]

The Sheriff is best placed to determine which approach for preparing a jury panel is appropriate in the circumstances. Specifying detailed criteria to which the Sheriff must have regard when making their election could impact the efficiency and effectiveness of this measure.

Although the Sheriff will have discretion as to which approach is to be adopted, the Bill provides a number of safeguards:

- The Sheriff must, in writing to the Chief Executive Officer of the Federal Court, elect which approach is to be adopted, pursuant to new section 23DD of the Federal Court Act. This ensures certainty for the Federal Court in managing the proceedings before it.
- A request by the Sheriff to a State or Territory jury office to prepare and provide a jury panel may only be made with the consent of the relevant State or Territory. Therefore,

[7] EM (n 2) 46–48 [186], [191]–[192].
[8] EM (n 2) 34 [119]

it is not possible for the Sheriff to elect that a State or Territory jury official is to prepare and provide a jury panel for a particular jury trial unless the relevant State or Territory has consented to do so.

Question (b)

The submission from the Celebrant Institute focuses on schedule 3 of the Bill, which includes proposed amendments to the *Marriage Act 1961* (Marriage Act). The following response deals with recommendations identified in Senator Scarr's question.

Celebrant Institute Recommendation: Identity requirements – Schedule 3, Part 5 (page 2):
The Celebrant Institute supports the proposed reordering of the current subsection relating to identity requirements to clarify that a Commonwealth statutory declaration is only sufficient evidence where it is impracticable for a party to obtain an official certificate or extract **and** the party does not hold a current passport.

The Celebrant Institute proposes further amendments to section 42(1)(b)(i) on approved identity documents to read "an official certificate of birth" rather than "an official certificate, or an official extract of an entry in an official register, showing the date and place of birth of the party." The Celebrant Institute also seeks clarification of whether a party should be required to obtain a passport where it is impracticable for them to obtain a birth certificate, rather than being able to produce a statutory declaration regarding their date and place of birth.

Response:
The Australian Government is committed to supporting accessibility for marrying couples, including identifying future opportunities for reform.

The amendments proposed by the Celebrant Institute require broader consultation and analysis, including to assess the potential impacts on First Nations People and refugees/other vulnerable groups, who may not have ready access to an official certificate of birth to evidence their identity. This would include consideration of the costs associated with any mandatory requirement to obtain a passport for marriage purposes, as well as engagement with State and Territory Registries of Births, Deaths and Marriages.

The department will work through existing channels for ongoing engagement with Commonwealth-registered marriage celebrants to consider the Celebrant Institute's proposals, including biannual meetings between the department and the Celebrant Associations and Networks.

Celebrant Institute Recommendation: Celebrant to meet separately in person with each party before the marriage – Schedule 3, Part 6 (page 3):
The Celebrant Institute does not support an amendment in the Bill which requires that celebrants meet separately and in-person with each party before a marriage is solemnised. The Celebrant Institute questions whether this is necessary to establish valid consent, and notes that there is no guidance in the legislation about the duration, timing or approach that should be taken to such a meeting. The Celebrant Institute also expresses concern that this may be culturally inappropriate in some instances, and that other measures, such as education for celebrants, may be more effective in 'achieving higher rates of real consent.'

Response:
The Explanatory Memorandum to the Bill sets out that meeting separately with each party to

the marriage before the marriage is solemnised is intended to provide an additional safeguard where the Notice of Intended Marriage (NOIM) is remotely witnessed, or witnessed by an authorised person who is not an authorised celebrant, such as a Justice of the Peace. The purpose of the meeting is to ensure that each party is freely and voluntarily consenting to the marriage – reinforcing that real consent is a cornerstone of the Marriage Act. The proposed measure recognises that a celebrant may be meeting the parties for the first time on the day of the marriage. This additional measure is considered warranted in light of the increase in remote witnessing of NOIMs since this has been permitted, which the Bill seeks to extend.

The duration, timing and approach to a separate meeting with each party to a marriage is at the discretion of the marriage celebrant, and while there will not be a mandatory approach, the department will work with celebrants to develop guidance on options for inclusion in the Guidelines to support celebrants to comply with this obligation.

In regards to cultural considerations, the requirement is only for a celebrant to meet with each party to a marriage 'separately'. There is no requirement to meet alone with a party. Accordingly, the proposed measure is achievable in a culturally appropriate context and in line with the preferences of the party. The need for separate conversations with each party (where necessary), to confirm that a party is consenting or capable of consenting to marriage has been a long-standing principle in the *Guidelines on the Marriage Act 1961 for Authorised Celebrants* (the Guidelines).[9] The Bill incorporates this long-standing principle from the Guidelines on the face of the legislation.

Education for celebrants is critical to ensuring individuals are freely and voluntarily entering into marriages. The proposed measure, for a pre-solemnisation separate meeting, is part of a suite of measures to ensure parties to a marriage provide real consent, which includes ongoing education and training for marriage celebrants.

In their submission to this inquiry, the LCA welcomed this pre-solemnisation measure, and more broadly, supported Government efforts to ensure valid consent to marriages, noting – with concern – that forced marriages continue to occur in Australia. The LCA further noted the measure should be accompanied with appropriate guidance through updates to the Guidelines. The department, in consultation with celebrant associations, has been progressing a review of the Guidelines. If the Bill is passed, the Guidelines will be updated to provide further guidance to authorised celebrants to assist them to comply with these obligations.

[9] See: Part 8.5 'The consent of the parties is not real consent' and Part 8.6 'How can a celebrant assess whether a person's consent is real?'.