

CHAPTER 2

Background to and overview of the Bill

2.1 The Law and Justice (Cross Border and Other Amendments) Bill 2009 (Bill) seeks to amend the *Service and Execution of Process Act 1992* and the *Evidence and Procedure (New Zealand) Act 1994*.

Service and Execution of Process Act

2.2 The *Service and Execution of Process Act 1992* (SEPA) established a cooperative scheme for the service and execution of process and the enforcement of judgments between States and Territories.¹ This Act, which itself replaced the original *Service and Execution of Process Act 1901*, is the principle legislation dealing with the interstate service of legal process and the enforcement (or execution) of court orders outside the State or Territory in which they are made.

2.3 As explained in the Bills Digest for the 1992 Act, the need for Commonwealth legislation in relation to the service and execution of legal process arose from the independent legal nature of the States and Territories. The legislation is necessary to enable persons (including law enforcement authorities) in one State or Territory to take legal proceedings against a person in another state or territory to enforce their legal rights or to enforce the criminal law.²

2.4 The original 1901 Act, which was amongst the first passed after Federation (Act No. 11) enabled a writ or other process commencing civil and criminal proceedings in State and Territory courts to be served throughout Australia.³ It also provided that other process in proceedings, including process to secure witnesses (e.g. subpoenas and summonses) could be served throughout Australia. It also established procedures for the execution of warrants for the apprehension of persons throughout

1 'Process' means the documents by which legal proceedings are commenced, or by which witnesses are brought before the court. 'Service' is the delivery of a writ, summons, subpoena, or other document relating to court proceedings. 'Execution' is the enforcement of a court order, such as a warrant for the apprehension of a person. Department of the Parliamentary Library, *Service and Execution of Process Bill 1992, Bills Digest*, 1992, p. 1.

2 Department of the Parliamentary Library, *Service and Execution of Process Bill 1992, Bills Digest*, 1992, p. 1.

3 The Hon. Peter Duncan MP, Parliamentary Secretary to the Attorney-General, Second Reading speech on the *Service and Execution of Process Bill 1992, House of Representatives Hansard*, 9 Nov 1992, p. 2941.

Australia and procedure by which orders given by a court in one State or Territory may be enforced in another State or Territory.⁴

2.5 The original Act was extensively updated by the 1992 Act, following a detailed and lengthy examination of the subject by the Australian Law Reform Commission. Major objectives of the 1992 reforms were to simplify procedures for the interstate service of process and enforcement of judgments and extend their application to tribunals exercising adjudicative functions.⁵

Evidence and Procedure (New Zealand) Act

2.6 This Act implements arrangements agreed with New Zealand to facilitate the obtaining of evidence in litigation involving Trans-Tasman elements. It provides:

- for service and enforcement in Australia and New Zealand of New Zealand and Australian subpoenas in all civil proceedings except family proceedings;
- for Australian and New Zealand Courts to take evidence from New Zealand and Australia by video link or telephone, in all proceedings; and
- special rules for judicial notice of New Zealand laws and for proof of New Zealand public and official documents in all proceedings.⁶

The Law and Justice (Cross Border and other Amendments) Bill

2.7 The objectives of the Bill are as follows:

- facilitate operation of a Cross Border Scheme (the Cross Border Justice Scheme) which is to be established by Western Australia, South Australia and the Northern Territory, and other similar cross border initiatives (Schedule 1);
- make amendments to SEPA to confirm the capacity of a prisoner to give evidence by audiovisual link before an interstate court, authority, tribunal or person (Schedule 2); and
- amend the *Evidence and Procedure (New Zealand) Act 1994* (EPNZ Act) to extend the cooperative scheme for the service of subpoenas between Australia and New Zealand to certain family proceedings (Schedule 3).

4 Department of the Parliamentary Library, *Service and Execution of Process Bill 1992, Bills Digest*, 1992, p. 1.

5 *Service and Execution of Process Bill 1992, Explanatory Memorandum*, p. 2.

6 *Evidence and Procedure (New Zealand) Bill 1994, Explanatory Memorandum*.

Key provisions of the Bill

Schedule 1 : Amendments relating to the cross border justice scheme

2.8 As explained in the Explanatory Memorandum, the Cross Border Justice Scheme is a joint initiative between Western Australia, South Australia and the Northern Territory, established under State and Territory legislation. This Scheme will initially apply in the border region known as the Ngaanyatjarra Pitjantjatjara Yankunytjatjara lands (NPY lands). These lands cover more than 476 000 square kilometres, and are situated where the borders of the two States and the NT meet.

2.9 The scheme will allow judicial officers, police and other officials working in the criminal justice system to deal with offenders from any of the participating jurisdictions, provided the offender has a connection with the region (for example, the alleged offence occurred in the region or the offender was arrested in the region).⁷

2.10 Schedule 1 of this Bill facilitates the establishment of the scheme by ensuring that SEPA will not override arrangements prescribed under the scheme where those arrangements would be inconsistent with arrangements under SEPA. The key provisions in the Bill that facilitate the establishment of the scheme provide that SEPA will not apply where the Cross Border Justice Scheme, or another scheme established under legislation prescribed under by regulations under the Act, would otherwise operate.

2.11 Schedule 1, Item 1 inserts a new definition of 'cross border laws' in subsection 3(1) for the purposes of the new subsection 8(3A) inserted by Item 2. The definition refers to the cross border laws of a participating jurisdiction, within the meaning of the *Cross-Border Justice Act 2008* of Western Australia. Section 7(1) of the Western Australian Act defines 'participating jurisdiction' as the State or 'another participating jurisdiction'. 'Another participating jurisdiction' is defined as South Australia and the Northern Territory. The definition also extends to the laws of a State, or provisions of a law of a State, prescribed by regulation. This is to enable application of the new subsection 8(3A) to similar cross border schemes set up between jurisdictions in the future.

2.12 Schedule 1, Item 2 inserts a new subsection 8(3A) to allow cross border laws to operate unaffected by SEPA. Cross border laws, as defined in the definition inserted by Item 1 above, will have primacy over the general scheme that would otherwise apply under SEPA, to the extent that they overlap. Accordingly, the cross border laws will operate alongside SEPA except where there is a direct inconsistency with SEPA. In these circumstances SEPA will be disapplied. The Explanatory Memorandum gives an example of how this is intended to operate:

For example, section 82 of SEPA provides that a person named in a warrant issued in another State may be apprehended by a police officer or Sheriff of

7 Explanatory Memorandum.

the State in which the person is found, or by the Australian Federal Police. Under the Cross Border Justice Scheme, a police officer will be able to arrest a person (who has a connection with the cross border region) under a warrant and under the laws of that officer's jurisdiction in any participating jurisdiction. The effect of subsection 8(3A) will be that a person named in a warrant issued in one State may be apprehended by a person authorised to apprehend the person under a cross border law, as well as by a person authorised to apprehend the person under SEPA.

2.13 The Explanatory Memorandum also provided an example of how the scheme will over-ride SEPA where inconsistencies arise:

For example, subsection 83(8) of SEPA requires a magistrate to order that a person produced under a warrant issued in another State be remanded on bail to appear in the place of issue of the warrant, or be taken to a specified place in the State of issue of the warrant. However, under the Cross Border Justice Scheme, appropriately appointed magistrates will have the power to deal with a matter in any of the participating jurisdictions, under the law of the place where the offence took place. As a result of s8(3A), where cross border laws would apply to allow a magistrate to hear a matter outside the jurisdiction in which the warrant was issued, subsection 83(8) of SEPA will not apply.

Schedule 2 – Amendments relating to taking evidence by audio or audiovisual link

2.14 Schedule 2 to the Bill will amend SEPA to make clear that, when subpoenaed to give evidence in interstate court or tribunal proceedings, persons in prison may give evidence by audio or video link with the approval of the Court.

2.15 State and Territory legislation already provides for prisoners to give evidence by audio or audiovisual link in proceedings in the jurisdiction of their imprisonment. However, while SEPA provides for interstate service of subpoenas and enables prisoners in one State or Territory to give evidence in another, there is currently no explicit provision under the Act for a prisoner to give evidence by audio or audio visual link in proceedings in another State or Territory.

2.16 Items 1 and 2 insert new definitions, defining 'audio link' and 'audiovisual link'. 15 subsequent items replace 'video link or telephone' with the new terminology.

2.17 Items 5, 13 and 21 will amend Parts of SEPA that deal with the service of subpoenas generally. To preserve the distinction between subpoenas that require a prisoner to attend a place (either inside or outside the prison, including within the State or Territory of their imprisonment) and subpoenas that do not, these items will clarify that the exclusion of subpoenas addressed to prisoners also applies to prisoners who are required to give evidence by audio or audiovisual link.

2.18 Items 8, 16 and 22 will amend Parts of SEPA that deal with the service of subpoenas addressed to persons in prison. These items will clarify that this division

and these subdivisions will also apply where a prisoner is required to attend a place (either inside or outside the prison, including within the State or Territory of their imprisonment) to give evidence by audio or audio visual link to comply with the subpoena.

2.19 Item 24 will amend paragraph 129(a) of SEPA. Currently paragraph 129(a) requires a custodian to assist a prisoner served with an interstate subpoena to comply with that subpoena if the prisoner need not attend before the court, an authority or tribunal that issued the subpoena. The amendment will clarify that the exception to the obligation also extends to circumstances where the prisoner would, for the purposes of complying with a subpoena, be required to appear or give evidence by audio or audiovisual link before the court, an authority or tribunal that issued the subpoena.

2.20 The intention is that subpoenas requiring a prisoner to attend a place (either inside or outside the prison, including within the State or Territory of their imprisonment) to give evidence by audio or audiovisual link will be dealt with under SEPA in the same way as subpoenas requiring a prisoner to attend before a court, an authority or tribunal.

Schedule 3 – Amendments relating to New Zealand

2.21 Item 1 inserts a new definition of 'excluded family proceedings' into the EPNZ Act. The purpose of this new definition is to exclude two categories of family proceedings from the expanded application of the Act. The effect of this new definition is that family proceedings will fall within the scope of the EPNZ Act except where those proceedings are proceedings in respect of applications made under the *Hague Convention on the Civil Aspects of International Child Abduction 1980* or relate to the status or property of a person who is not, or may not be able to, fully manage his or her affairs.

2.22 The Explanatory Memorandum explains that the continued exclusion from the scheme of proceedings relating to the Hague Convention is considered necessary as there is concern that the special regime established by the Convention, which aims to hear cases quickly, would be undermined if the arrangements established under the Trans-Tasman scheme applied to these proceedings. These proceedings are also specifically excluded under the equivalent New Zealand Act.

2.23 The definition also maintains the exclusion of proceedings relating to the status or property of a person who is not, or may not be able to, fully manage his or her affairs.

2.24 Item 2 repeals the definition of 'family proceedings' under the EPNZ Act as a consequence of amendments to sections 7 and 18 in items 3, 4 and 5.

2.25 Item 3 will amend Part 2 of the EPNZ Act, which deals with Australian subpoenas. Currently, section 7 provides that Part 2 applies to a subpoena issued in proceedings in a federal court or a court of a State or Territory specified under regulations other than a criminal or family proceeding. This item will amend Section 7

to expand the application of Part 2 to family proceedings other than 'excluded family proceedings'.

2.26 Item 4 is a consequential amendment to paragraph 7(b), as a result of item 3.

2.27 Item 5 will amend Part 3 of the EPNZ Act, which deals with New Zealand subpoenas. Consistent with the amendment to section 7, this item removes family proceedings, other than 'excluded family proceedings', from those proceedings excluded from the operation of the provisions in Part 3.

2.28 Item 6 provides that removal from the EPNZ Act of the general exclusion of family proceedings (other than 'excluded family proceedings') will apply to proceedings commenced on or after the commencement of this measure.

2.29 Item 7 is a technical amendment to subsection 25(3) of the EPNZ Act to correct a circular provision.