

Sentencing (Amendment) Bill

EXPLANATORY MEMORANDUM

PART 1—PRELIMINARY

- Clause 1 sets out the main purposes of the Act.
- Clause 2 provides for the commencement of the various provisions of the Act.

PART 2—AMENDMENT OF SENTENCING ACT 1991

- Clause 3 provides that in Part 2, the **Sentencing Act 1991** is called the Principal Act.
- Clause 4 inserts a new sentencing guideline into the **Sentencing Act 1991** which is linked to the new right of appeal by the Director of Public Prosecutions (DPP) to the Court of Appeal provided for by Clause 24 of the Bill. Clause 4 requires the sentencing judge or magistrate to announce that the sentence is being reduced because of an undertaking given by the offender to assist law enforcement authorities in the future investigation or prosecution of an offence. The court must record the fact that the undertaking was made and its details. Any assistance which the offender has given to authorities prior to sentence should continue to be taken into account by the sentencing court where appropriate as part of its general sentencing discretion. The undertaking referred to in this clause relates to future assistance, which must be separately allowed for.

The new sub-section (2AC) clarifies that it is not intended that the court be required to state the precise amount of the reduction to the sentence.

- Clause 5 inserts hospital security orders into the hierarchy of sentencing orders in section 7 of the **Sentencing Act 1991**.
- Clause 6 Section 18 of the **Sentencing Act 1991** provides a regime for recognising the period of time of imprisonment already served under the sentence. However, no section 18 declaration is

possible where a court orders an offender to be detained pursuant to a hospital security order. This is because a hospital security order is not a sentence of imprisonment within the meaning of section 18. (See *R v Jolly*, [1994] VR 446).

Clause 6 amends the **Sentencing Act 1991** to enable time held in custody to be deducted from a hospital security order. Sub-clause (4) makes an equivalent amendment to section 35 of the Principal Act, which relates to such declarations in the case of young offenders.

Clause 7 amends the **Sentencing Act 1991** to ensure that in certain circumstances only a court can convert a fine into a community-based order.

Under the PERIN procedure (Penalty Enforcement by Registration of Infringement Notices), instead of issuing a summons to a person to appear in the Magistrates' Court to answer charges for certain types of regulatory offences, an infringement notice (on-the-spot-fine) may be issued. The PERIN procedure is set out in Schedule 7 to the **Magistrates' Court Act 1989** and applies to enforce unpaid infringement penalties under nominated Acts. Section 69 of the **Sentencing Act 1991** specifically excludes the fine enforcement sections of the Act from applying to PERIN matters.

However, where registration of an enforcement order has been revoked or a person has successfully appealed to the court against a refusal to revoke registration, the matter will be determined by a Magistrate hearing the case in open court. If the Magistrate finds the infringement offence proven, then sentencing will proceed pursuant to the **Sentencing Act 1991**. The fine enforcement provisions of that Act are then applicable, including the sections enabling conversion of the debt into a community-based order.

Clause 7 of the Bill amends sections 55 and 62 of the **Sentencing Act 1991** to provide that only a Magistrate can convert these types of fines into community-based orders. The amendments will allow the offender in such cases to apply under section 55 of the Principal Act to a Magistrate for a community-based order, an order that time be allowed for the payment of the fine, or an order that the fine be paid by instalments, or an order

for variation of the terms of an instalment order or an order confirming any order then in force. The enforcement procedures under section 62 have also been modified so that the consent procedures under sub-sections (1) and (7)(b) do not apply to these persons.

- Clause 8 Section 63(2) of the **Sentencing Act 1991** sets out a formula by which the number of hours of community work which a fine defaulter can be ordered to perform is calculated. The equation is 1 hour for each \$20, to a maximum of 500 hours.

This clause amends sections 55, 62 and 63 of the **Sentencing Act 1991** to provide that fines in excess of \$10 000 may only be partially converted into community work. The provision will enable only that part of the fine up to \$10 000 to be converted into unpaid community work in the usual manner.

- Clause 9 amends section 62 of the **Sentencing Act 1991** to enable warrants under sub-section (1) directed at the Sheriff to be issued electronically, instead of in paper form. It is not intended to invalidate the issue of such warrants in paper form, but rather to recognise that they can also be issued electronically.

Under the amendments, the warrant is issued by the proper officer signing a document containing certain particulars and causing those particulars to be transferred electronically to the Sheriff. A warrant issued in this fashion has the same effect as if it had been issued in paper form. In addition, it may not be amended, altered or varied after its issue.

- Clause 10 Section 86 of the **Sentencing Act 1991** enables the court to make orders against offenders compensating victims for loss, destruction or damage to property, or for their pain and suffering. These orders may be made upon application once the offender has been found guilty of the offence. Section 86(5)(b)(ii) sets out the persons who have standing to make these applications on behalf of the victim, being the DPP, the informant or a police prosecutor. Currently, the DPP only has standing to appear in the County and Supreme Courts.

Clause 10 amends section 86(5)(b)(ii) to enable the DPP to appear in compensation order applications in the Magistrates' Court as well as in the superior courts.

- Clause 11 corrects a cross-reference in the **Sentencing Act 1991**. See *R v Jolly*, [1991] VR 446.
- Clause 12 inserts a new maximum fine scale into the **Sentencing Act 1991** which has fewer levels than previously and which is now symmetrical with the scale of maximum imprisonment terms introduced by the **Sentencing and Other Acts (Amendment) Act 1997**. The ratio which the scale reflects is 10 penalty units for each month of imprisonment.
- Clause 13 makes amendments consequential upon the new penalty scale.
- Clause 14 amends the Act to provide that for level 2 offences, a fine may be imposed in addition to a term of imprisonment but not instead of imprisonment. A community-based order remains open to be imposed in relation to such offences where appropriate in all the circumstances.
- Clause 15 The **Sentencing and Other Acts (Amendment) Act 1997** prescribed maximum penalties for certain common law offences. This clause amends the **Sentencing Act 1991** to ensure that such common law offences will no longer have a maximum fine which is "at large". The calculation of the maximum fine applicable to the particular offence will be pursuant to the rules laid down in the **Sentencing Act 1991**. The amendments also ensure that community-based orders are available to be imposed in respect of common law offences.
- Clause 16 amends section 112(1) of the **Sentencing Act 1991**, which concerns the classification of offences as indictable or summary, to reflect the reduced scale of fine offences. Under the amended section 112(1), an offence (other than one in the **Crimes Act 1958** or the **Wrongs Act 1958**) described as being level 1, 2, 3, 4, 5 or 6 or as being punishable by level 1, 2, 3, 4, 5 or 6 imprisonment or fine or both is an indictable offence unless the contrary intention appears.
- Clause 17 amends section 113A(1) of the **Sentencing Act 1991** to clarify the effect of that provision. It provides that there is a "cap" on the sentencing power of a Magistrate of 2 years in respect of a summary offence. This operates despite an offence purporting to carry a maximum penalty higher than two years. Where prescribed maximum penalty is less than 2 years, then that lower

maximum penalty sets the outer limits of the Magistrate's sentencing power.

Clause 2(2) deems this section to have commenced operation on 1 September 1997, which is the date on which section 113A commenced operation.

- Clause 18 inserts a new section 113D into the **Sentencing Act 1991** to provide for an increased maximum fine for bodies corporate guilty of offences against the **Crimes Act 1958**. Unless the contrary intention appears, where the court has power to fine a body corporate, the maximum penalty which will be available to be imposed on the corporation will be five times that which would be available to be imposed on a natural person found guilty of the same offence committed at the same time. The intention is to override the general rule in the **Sentencing Act 1991** that would otherwise apply to determine the maximum penalty applicable for offences against the **Crimes Act 1958**.
- Clause 19 provides additional transitional provisions in relation to certain sections of the **Sentencing and Other Acts (Amendment) Act 1997**. Clause 2(2) deems this section to have commenced operation on 1 September 1997. The additional transitional sections clarify the application of the changes to the offences of Production of child pornography, Being found on board a piratical vessel, Going equipped for stealing and Obstructing the execution of a warrant. These offences each had their status as indictable, summary or indictable triable summarily altered by the **Sentencing and Other Acts (Amendment) Act 1997**.
- Clause 20 provides the transitional provisions for the amendments to the **Sentencing Act 1991** made by this Bill.
- Clause 21 amends Schedule 1 to the **Sentencing Act 1991**, where the offences triggering the operation of the serious offenders provisions are listed. By way of example, the preamble to Clause 1(a) of that Schedule has been amended to read "an offence against, or for which the penalty or the maximum or minimum penalty is fixed by, any of the following sections of the **Crimes Act 1958**". This clarifies that any common law offences whose penalties are prescribed in the relevant legislation are relevant to the operation of Part 2A of the **Sentencing Act 1991**.

Clause 2(2) deems this section to have commenced operation on 1 September 1997.

PART 3—AMENDMENT OF THE CRIMES ACT 1958

- Clause 22 amends certain maximum penalties for offences against the **Crimes Act 1958** consequentially upon the new scale for fine offences. The actual value of the maximum fine prescribed for the offences has not altered, but the level description has been amended to accord with the new fine scale. Note, however, that under sub-clause (12), an offence against section 443A(3) has been made a summary offence. Clause 25(1) of the Bill provides that this amendment applies to a proceeding for an offence that is commenced after commencement of the provision, irrespective of when the offence is alleged to have been committed.
- Clause 23 amends section 321P(1)(a) of the **Crimes Act 1958** which sets out the maximum penalties for attempts. This table has been altered to accord with and reflect the new scale of fine offences.
- Clause 24 amends section 567A of the **Crimes Act 1958** to insert a new right of appeal into sub-section (1A). The new provision enables the DPP to appeal to the Court of Appeal against a reduced sentence imposed on an informer who fails wholly or partially to fulfil an undertaking given to assist authorities in the future investigation or prosecution of an offence. The DPP may bring such an appeal at any time, whether or not the offender's sentence has been fully served.

Under the amendments, the Court of Appeal will, if satisfied that the undertaking was wholly or partially breached, be able to re-sentence the offender and impose such sentence as it thinks fit. Whether the Court of Appeal will in fact increase the sentence will depend on an exercise of its discretion and on the individual circumstances of each case.

The Court of Appeal has full discretion upon re-sentencing and will be able to take into account all the individual circumstances of the case, including whether the offender might have had a reasonable excuse for failing to carry through on the promise.

The new right of appeal direct to the Court of Appeal is also available in respect of sentences for indictable offences which

were imposed in the Magistrates' Court. This recognises that informers might also be dealt with in the Magistrates' Court jurisdiction and will allow for a consistent approach in the determination of appeals under the new section 567A(1A) of the **Crimes Act 1958**.

Reference should be made to Clause 4 of the Bill which requires the sentencing judge or magistrate to announce that the sentence is being reduced because of an undertaking given by the offender to assist law enforcement authorities in the investigation or prosecution of an offence. The court must record the fact that the undertaking was made and its details. The court is not required to state the precise amount of the reduction it has made to the sentence.

Reference should also be made to clause 29, which inserts a new Subdivision 4 into Division 4 of Part 4 of the **Magistrates' Court Act 1989**. Division 4 deals with appeals against sentences passed in the Magistrates' Court. The new section 92A provides that nothing in Division 4 affects any right of the DPP under 567A(1A) of the **Crimes Act 1958** to appeal to the Court of Appeal in relation to an offence heard and determined summarily under section 53(1) of the **Magistrates' Court Act 1989**. This has the effect that the right of appeal under section 567(1A) of the **Crimes Act 1958** can be exercised even in circumstances where an appeal has occurred under the relevant provisions of the **Magistrates' Court Act 1989**.

Clause 25 provides the transitional provisions for the amendments to the **Crimes Act 1958** made by this Bill.

PART 4—AMENDMENT OF THE MAGISTRATES' COURT ACT 1989

Clause 26 amends the **Magistrates' Court Act 1989** to enable any other prescribed person or any other member of the prescribed class of persons to appear in court in certain breach proceedings.

The **Sentencing and Other Acts (Amendment) Act 1997** introduced uniform provisions for instituting breach proceedings relating to non-custodial orders under the Principal Act. Charges are filed by community corrections officers, who by doing so, become the informant in relation to that breaching

matter. The amendment recognises that the person who filed the charge may not be the person who appears to prosecute the matter.

Clause 27 amends section 53(1A) of the **Magistrates' Court Act 1989** to reflect the altered scale of maximum fine penalties. The provision will now read—

"(1A) In addition to the offences referred to in Schedule 4, sub-section (1) applies to an indictable offence under an Act if the Act describes the offence as being Level 5 or 6 or as being punishable by Level 5 or 6 imprisonment or fine or both".

Clause 28 amends section 69 and 73 of the **Magistrates' Court Act 1989** to enable certain warrants directed at the Sheriff to be issued electronically, instead of in paper form. It is not intended to invalidate the issue of these warrants in paper form, but rather to recognise that they can also be issued electronically.

Under the amendments, the warrant is issued by the proper officer signing a document containing certain particulars and causing those particulars to be transferred electronically to the Sheriff. A warrant issued in this fashion has the same effect as if it had been issued in paper form. In addition, it may not be amended, altered or varied after its issue.

Clause 29 inserts a new Subdivision 4 into Division 4 of Part 4 of the **Magistrates' Court Act 1989**. Division 4 deals with appeals against sentences passed in the Magistrates' Court. The new section 92A provides that nothing in Division 4 affects any right of the DPP under 567(1A) of the **Crimes Act 1958** to appeal to the Court of Appeal in relation to an offence heard and determined summarily under section 53(1) of the **Magistrates' Court Act 1989**. This has the effect that the right of appeal under section 567(1A) of the **Crimes Act 1958** can be exercised even in circumstances where an appeal has occurred under the relevant provisions of the **Magistrates' Court Act 1989**.