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CRIMES LEGISLATION AMENDMENT BILL 2012

Second Reading

The Hon. DAVID CLARKE (Parliamentary Secretary) [4.00 p.m.], on behalf of the Hon. Michael Gallacher: I move:

That this bill be now read a second time.

The Government is pleased to introduce the Crimes Legislation Amendment Bill 2012. The purpose of the bill is to make miscellaneous amendments to criminal legislation as part of the Government's regular legislative review and monitoring program. The bill amends a number of Acts to improve the efficiency and operation of the State's criminal laws. The bill also contains provisions to repeal certain legislation. I will now outline each of the amendments in turn. Item [1] of schedule 1 amends section 66F (7) (a) (ii) of the Crimes Act 1900 to remove the word "established" from the term "established de facto partner". Section 66F provides for the offence of engaging in sexual activity with a person with a cognitive impairment, and subsection 66F (7) (a) (ii) provides a defence where the accused was married to the person to whom the charge relates, or was a de facto partner of that person.

The term "de facto partner" has a specific statutory meaning under section 26C of the Interpretation Act 1987 and the word "established" is not necessary to convey that meaning. The amendment will not change the nature of the defence or what needs to be proved in order to establish it. Item [2] of schedule 1 amends the definition of "special care" in section 73 of the Crimes Act to include the de facto partner of a parent, guardian or foster parent. Section 73 provides for the offence of unlawful sexual intercourse where the victim is aged between 16 and 18 years and under the "special care" of the offender. The existing definition of "special care" in section 73 (3) (a) captures circumstances in which the accused is the step-parent, guardian or foster parent of the victim, or in certain professional relationships with the victim. The amendments contained in the bill will ensure that offenders who are the de facto partner of a parent, guardian or foster parent are also captured by the offence provision. Reform of this provision was suggested by the Supreme Court in the recent matter of *R v JAD* in which the court had to consider whether or not the definition of "special care" extends to de facto partners.

Item [3] of schedule 1 amends the offence of kidnapping in section 86 of the Crimes Act to include circumstances in which a person detains another, without their consent, with the intention of committing a serious indictable offence. "Serious indictable offence" is defined in section 4 of the Crimes Act to mean an indictable offence that is punishable by imprisonment for life or for a term of five years or more. At present section 86 criminalises detention of another with intent to hold them to ransom or to obtain any other advantage. Therefore, when a person detains another with intent to commit a particular offence other than obtaining a ransom that offence must be nominated as the "advantage" that the offender intended to obtain.

By adding the new intention subsection, it will enable the prosecuting authority to identify the specific offence the accused intended to commit without having to express it as an advantage. Further, the amendment will facilitate the offence of kidnapping being added to the definition of "serious sex offence" in the Crimes (Serious Sex Offenders) Act 2006. The new intent provision is intended to operate as an alternative form of charging, which means that the prosecution will not be obliged to proceed under the new subsection unless it considers it appropriate to do so in the circumstances.

Item [4] of schedule 1 clarifies the law relating to spousal immunity by explicitly abolishing any common law rule that prevents a person from being found guilty of an offence involving failing to disclose a crime committed by their husband, wife or de facto partner. The Crimes Act already contains provisions abolishing common law spousal immunity defences in relation to conspiracy between spouses, and a wife being accessory after the fact to a felony committed by her husband. The amendment contained in the bill will ensure consistency of treatment for similar offences.

The transitional provisions in the bill provide that the amendments to sections 73 and 86 will apply only to an offence committed, or alleged to have been committed, on or after the commencement of the provision. Further, the provision that abolishes the common law rule in relation to failing to disclose a crime will apply only when the offence involving the failure to disclose is committed, or alleged to have been committed, on or after the commencement of the provision. Items [1] to [6] of schedule 2 expand the definition of "sensitive evidence" in section 281B of the Criminal Procedure Act 1986 to capture an audio recording of a person committing an offence against another person, being the protected person, where the contents of the recording are obscene or indecent, or when providing a copy of the recording to another person without the protected person's consent would interfere with the protected person's privacy. Section 281B (1B) provides that an audio recording is not obscene or indecent merely because it includes obscene or indecent language.

The existing definition of "sensitive evidence" in section 281B applies only to images. Concerns were raised by the Director of Public Prosecutions that an audio recording of the commission of an offence that is obscene or indecent would not be captured where there is no accompanying image. The reforms in the bill will ensure that such recordings are captured as "sensitive evidence" and are therefore subject to the restrictions on possession and dissemination required by the sensitive evidence regime. It was not considered appropriate to extend the definition to capture audio recordings made during the investigation period when such recordings relate to the evidence of vulnerable witnesses and are therefore captured by the specific regime for disclosure and dissemination of such evidence provided for in part 6 of the Criminal Procedure Act. The amendments made by this bill will provide added protection for sexual assault complainants by preventing the dissemination of material that may cause humiliation or further trauma to them. The transitional provisions in the bill provide that these reforms will apply to existing prosecutions.

Items [1] to [3] of schedule 3.1 amend sections 48 and 72 of the Crimes (Domestic and Personal Violence) Act 2007 to provide that an appointed guardian can apply for an apprehended violence order on behalf of a person subject to a guardianship order. These reforms were requested by the Office of the Public Guardian to enable its officers to make an application for apprehended violence orders on behalf of persons over whom they have guardianship. The reforms will not impact on the existing practice for matters involving a criminal allegation whereby a police officer will apply for an apprehended violence order on behalf of the alleged victim. Items [1] to [3] of schedule 3.2 contain amendments to sections 32 and 35A of the Crimes (Sentencing Procedure) Act 1999.

Section 32 permits a prosecutor in sentence proceedings to file in court a list of additional charges that the offender wants the court to take into account on sentencing for the principal offence. Section 35A requires prosecutors to file a certificate on sentence confirming that requisite consultation has taken place with victims and police officers in charge in relation to the filing of a list of additional charges or the preparation of an agreed statement of facts. At present these sections provide that a list of additional charges or a charge negotiation certificate can be filed only after it is signed by the Director of Public Prosecutions. The regulation presently provides a number of persons with a delegation to sign those documents on behalf of the director, including officers of the WorkCover Authority, the Department of Health and the NSW Police Force.

However, it is not appropriate that these persons sign documents on behalf of the director as his office generally has little or no oversight over their prosecutions. The bill therefore will amend sections 32 and 35A to provide that a list of additional charges or a charge negotiation certificate can be signed by the director or by a person or class of persons prescribed by the regulations. Schedule 3.3 to the bill contains consequential amendments to the Crimes (Sentencing Procedure) Regulation 2010 and includes the provision of a delegation to sign lists of additional charges for the chief executive officer of the New South Wales Food Authority. Item [1] of schedule 3.4 amends the definition of "serious sex offence" in section 5 (1) (b) of the Crimes (Serious Sex Offenders) Act 2006 to include the new kidnap offence of detain with intent to commit a serious indictable offence and the offences of being armed, disguised or entering premises with intent to commit an indictable offence.

Pursuant to the definition in section 5 (1) (b), these offences will be captured as "serious sex offences" only where they were committed with intent to commit offences in the nature of sexual assault and where the offence the offender intended to commit is punishable by seven years imprisonment or more. The transitional provisions provide that these amendments apply only in respect of offences committed on or after the commencement of the legislation. In relation to the section 114 offences, prosecuting authorities will now be on notice that they need to nominate the requisite sexual intent in the charge if they wish the offence to be captured within the definition of "serious sex offence". It is not proposed to include the offence of possessing implements without lawful excuse, also referred to in section 114, in the definition of "serious sex offence" at this stage. That offence has no element of intent and therefore cannot be readily captured within the definition.

Schedule 3.5 and 3.6 address the need for the Bureau of Crime Statistics and Research to obtain from police records warnings, cautions and youth conferences under the Young Offenders Act 1997. At present there are legal limitations on this exchange. The bureau needs this information in order to effectively monitor and research juvenile reoffending and there is a strong public interest in the bureau doing so. The amendments ensure that these records can be disclosed to the bureau for the purposes of its statistical and other research, subject to protections such as a requirement that any published data be de-identified. The bill will also retrospectively authorise the information exchange that has occurred to date, permitting the bureau to retain the information it has already collected in this manner. The schedule also updates the legislation to reflect the move of Juvenile

Justice staff from the Department of Human Services to the Department of Attorney General and Justice.

Schedule 4.3 repeals the Law Enforcement (Powers and Responsibilities) Amendment (Detained Person's Property) Act 2008, which never commenced. That Act included amendments to the Law Enforcement (Powers and Responsibilities) Act 2002 to remove the need for police to itemise the property seized from arrested persons and to allow police to store this property in a resealable property bag instead. The amendments were intended to reduce the time police have to spend itemising individual items of prisoner's property.

Commencement of the legislation was delayed to allow the NSW Police Force to complete a trial of the new procedures. The trial resulted in largely negative feedback from police. Whilst the bags did result in some efficiencies, these were outweighed by the practical difficulties police encountered with them, including their size, which rendered them unable to store large items of property. Both the NSW Police Force and Corrective Services NSW, which also participated in the trial, expressed concern that the absence of a written record of property made it difficult to account for the items seized from a person once they have been transferred into custody.

The legislation will now be repealed. Police will continue to use the present procedures for recording and storing prisoners' property which have been in place since the Law Enforcement Powers and Responsibilities Act was passed in 2002. Schedule 4.4 repeals the Sporting Venues (Offender Banning Orders) Act 2005, which commenced on 18 November 2005. Schedule 4.1 and 4.2 make amendments consequential to that repeal. The Sporting Venues (Offender Banning Orders) Act was intended to prevent violence and disorder at sporting events by establishing a sports banning orders regime in New South Wales. The Act provides for a court to make an order banning a person from attending or being near specific sporting venues where they have been found guilty of an offence involving violence and disorder at, or in connection with, a sporting event. The specific offences that can result in a ban are identified in section 3 of the Act and include offences involving actual or threatened violence.

In compliance with section 12 of the Act, a statutory review was conducted by the Department of Attorney General and Justice to establish whether the policy objectives of the Act remain valid and whether its terms remain appropriate for securing those objectives. The review received submissions from legal stakeholders and sporting bodies, including the Sydney Olympic Park Authority, Australian Rugby Union Limited and the Football Federation of Australia. Following inquiries with the NSW Police Force, the Office of the Director of Public Prosecutions and the courts the review could find no evidence of any banning orders having been made under the Act since it commenced. None of the sporting bodies that responded to the review had ever sought an order under the Act. Instead, sporting bodies advised that they use their own administrative systems for banning persons who commit offences at the events they manage. Those systems are generally enforced by way of conditions of entry that patrons must agree to when purchasing a ticket to a sporting event.

The review also noted that the National Rugby League [NRL] currently has a memorandum of understanding with the NSW Police Force with regard to enforcing its bans. That memorandum of understanding has been in place since July 2007, and as at July this year 34 bans had been issued by the NRL. Submissions to the review identified a number of drawbacks with the legislative regime that make it less effective for sporting bodies than their own administrative banning systems. Delay is one drawback as a ban under the Act can be issued only following a conviction, which may come months after the commission of the offence.

This contrasts with an administrative ban that a sporting body can issue instantly following unacceptable behaviour. Further, the Act does not have the flexibility or responsiveness of an administrative banning system, which can be easily altered by, for example, simply changing the conditions of entry to a particular event. A lack of similar legislative banning regimes in other Australian jurisdictions also means that national sporting bodies cannot rely on consistent legislative sanctions across jurisdictions. This contrasts with an administrative banning system that can be applied with national or even international consistency by sporting bodies.

The review considered whether the terms of the Act could be amended to make the legislative banning regime more responsive to the needs of sporting bodies and thereby increase its use. However, the review concluded that it would not be possible to amend the Act in such a way as to make it as effective for sporting bodies as their own systems. Preventing violence and disorder at sporting events remains a worthwhile objective. However, in the absence of any banning orders having been made, there is no evidence that the Act is contributing to that objective. On the contrary, it appears that the prevention of undesirable behaviour at sporting events is being addressed more effectively via the various banning systems instituted by sporting bodies themselves.

In the absence of evidence that it is likely to be used in the future, the only argument for retention of the Act is the deterrent effect of having it in place. However, the review noted that there is little evidence that the Act is having any deterrent effect. Again, it would appear that the sporting bodies' own banning systems and conditions of entry are far more likely to act as a deterrent to offending behaviour than the legislative regime. It was the conclusion of the review that there is no longer any demonstrated need for a legislative banning regime and in those circumstances it cannot be said that the Act is meeting its policy objectives. The bill therefore includes provisions to repeal the Act. I commend the bill to the House.