Crimes Legislation Further Amendment Bill.

Second Reading

The Hon. TONY KELLY (Minister for Rural Affairs, Minister for Local Government, Minister for Emergency Services, and Minister Assisting the Minister for Natural Resources (Lands)) [4.48 p.m.]: I move:

That this bill be now read a second time.

The Government is pleased to introduce the Crimes Legislation Further Amendment Bill. The bill makes a number of miscellaneous amendments to the criminal law and procedure. These amendments are designed to improve the administration of the criminal justice system. The first amendment is contained in schedule 1 and amends section 43 of the Crimes Act 1900. This section provides the offence of exposing or abandoning a child under two.

The Minister for Community Services has been concerned that this offence does not provide protection to children who, although over two years old, are still very vulnerable. Accordingly, this offence has been extended to include all children under the age of seven years, which follows a similar provision in the Queensland criminal code. I can also flag that the Attorney General's Department and the Department of Community Services are currently examining child neglect laws with a view to modernising the offences and examining whether the provisions should be amended to better reflect current standards of child protection.

Schedule 2 enhances the powers of magistrates to accumulate sentences in the Local Court under section 58 of the Crimes (Sentencing Procedure) Act 1999. Section 58 currently prohibits a Local Court from imposing a sentence of imprisonment on a person who is serving two or more consecutive sentences of imprisonment or who is serving a sentence that, together with the proposed sentence, would exceed a total of three years. I seek leave to incorporate the balance of the second reading speech in *Hansard*.

Leave granted.

Item 1 amends section 58 to increase the length of accumulated sentences a Local Court magistrate can impose to 5 years and removes the restriction on the number of sentences that can be accumulated.

The impetus for this amendment was a submission from the Chief Magistrate that the restrictions contained in section 58 have prevented magistrates from imposing effective sentences on offenders for discrete offences in the Local Court. In addition to not being able to accumulate beyond 3 years, if the offender is already serving two consecutive sentences, for whatever length of time, the sentence imposed by a magistrate for a third offence cannot be consecutive and must be concurrent with the existing sentence.

Although an election may be made by the prosecution to have such matters dealt with in the District Court (where there are no statutory limitations on the power to accumulate sentences), if an election is not made, the magistrate's hands are tied.

The proposed new section 58 also supplements the exception to the limitation in cases involving assaults against correctional officers to now also include offences involving escape from lawful custody.

Extending the exception in section 58 (3) to sentences for escape from lawful custody also recognises the need for consecutive sentences to be imposed for this offence so as to ensure offenders are appropriately sentenced for this offence whether the matter is dealt with in the Local Court or District Court.

The *Criminal Appeal Act 1912* currently entitles a person to appeal to the Court of Criminal Appeal against a conviction or an order for costs made against the person in summary proceedings before the Supreme Court, the Land and Environment Court or the Court of Coal Mines Regulation.

The amendments contained in items [1] to [7] of Schedule 3 extend the right of appeal to any person whose application for an order for costs is dismissed, or in whose favour an inadequate order for costs is made. An appeal with respect to an inadequate order for costs will require the leave of the Court of Criminal Appeal. The amendments follow a recommendation made by the Court of Criminal Appeal in *Willtara Constructions Pty Ltd v Owen* in 1999.

In that case the Court of Criminal Appeal held that Willtara could not appeal against a dismissed costs order because the company had not been convicted of an offence and had not been ordered to pay costs. Sperling J noted that this situation had the potential to cause injustice and recommended an amendment to allow an appeal against the dismissal of an application for costs.

Item [8] of Schedule 3 gives effect to a Government election commitment to provide the Crown with new powers to appeal during the course of a trial when evidence is excluded by the trial judge that has the effect of "substantially weakening", but not necessarily "destroying" the Crown case.

Under section 5F (2) of the *Criminal Appeal Act 1912*, the Director of Public Prosecutions or the Attorney General may currently appeal to the Court of Criminal Appeal against an interlocutory judgment or order given or made in proceedings to which section 5F applies. The Court of Criminal Appeal has held that an evidentiary ruling by a trial judge that effectively excludes the entire Crown case is a judgment or order for the purposes of section 5F (2) of the Act because the ruling effectively stays the Crown case. However, a ruling excluding Crown evidence which *weakens but does not destroy* the Crown case has been held not to be a judgment or order, and is therefore not appellable under the existing section 5F (2).

This amendment amends the *Criminal Appeal Act* to allow the Crown to appeal against an evidentiary ruling which substantially weakens the Crown case. If an acquittal results from an erroneous evidentiary ruling, the Crown has no avenue of appeal against the acquittal. The Crown should therefore be able to test the correctness of such a ruling made during the trial, so that an accused may not derive the benefit of an acquittal secured as a result of an erroneous evidentiary ruling.
It is not desirable that criminal trials be unnecessarily disrupted for the purpose of appealing evidentiary rulings. It is therefore anticipated that the Crown would exercise this new appeal power only sparingly.

Item [9] is a consequential amendment.

Item [10] of Schedule 3 enables the Court of Criminal Appeal, where the rules of court so permit, to dispense with the requirement for a person who wishes to appeal or apply for leave to appeal to give the Court notice of intention or notice of intention to apply for leave to appeal. This is a minor procedural amendment that was requested by the Chief Justice to ensure that the Court may, in appropriate circumstances, hear an appeal even where the formal requirements of filing a notice have not been met.

Schedule 4 amends the *Criminal Procedure Act 1986*.

Section 314 of the *Criminal Procedure Act* gives media representatives the right to inspect certain documents relating to criminal proceedings, if they apply to the court registrar not later than two working days after the proceedings are finally disposed of.

To clear up some misunderstandings that arose on commencement of this provision earlier this year, section 314 is amended by items [2] to [5] of Schedule 4 to clarify that the right to inspect these documents exists from the time the proceedings commence until two working days after they are finally disposed of.

In addition, the amendments clarify that the right of inspection given by section 314 is in addition to—and does not limit—any other law under which a person is permitted to inspect such documents. For example, after the period of two working days has expired, media representatives may make an application to the registrar to inspect documents, and the pre-existing regime for non-party access to court documents, contained in the court rules, will apply.

The amendment to delete section 314(5), relating to the suppression of witnesses names and addresses, removes uncertainty and confusion about the right of the media to access this information. Adequate protection is provided in other legislative provisions, such as the *Victims Rights Act 1996*, and thus is adequately addressed by section 314(4).

Item [6] of Schedule 4 corrects a drafting oversight. Prior to the enactment of the *Crimes Amendment (Sexual Offences) Act 2003* offences under section 66C (1) of the *Crimes Act 1900* involving sexual intercourse with a child of or above the age of 14 years and under the age of 16 years were Table 1 offences under the *Criminal Procedure Act 1986*, and therefore could be heard summarily. Either the prosecution or the defendant can elect to have the matter dealt with on indictment.

The Act omitted section 66C and replaced it with a new section 66C, which created different subsections. The new section 66C (3) is the equivalent of the old section 66C (1). The failure to amend Table 1 at the time of the Age of Consent Bill was a drafting oversight and this amendment replaces the reference to section 66C (1) with section 66C (3).

Schedule 5 makes a minor change to section 7 of the *Firearms Act 1996* to create two separate offences for possession or use of an unauthorised firearm.

Currently section 7 conflates what are effectively two different offences into one, despite the considerable difference in the degree of criminality associated with those two offences. Namely, a maximum penalty of 14 years in relation to a prohibited firearm or pistol, which remains as section 7 of the Act, and a maximum penalty of 5 years in relation to other firearms, which is now section 7A of the Act.

This amendment clarifies and better defines those two offences and will enable the Judicial Commission and the Bureau of Crime Statistics and Research to better collect and publish sentencing statistics which more accurately reflect the circumstances of the particular case.

The amendments in schedule 5 are minor changes to be viewed in the context of the Government's commitment to significantly overhauling gun laws to improve safety in New South Wales.

Items [1] and [7] of Schedule 4 make consequential amendments to the *Criminal Procedure Act* as a result of these amendments.

Items [1] to [4] of Schedule 6 amend section 73 of the *Law Enforcement (Powers And Responsibilities) Act 2002* to allow a crime scene warrant obtained by telephone to be extended up to the same length of time as other warrants applied for in person, such as a search warrant.

The Act introduced new powers for police in relation to establishing crime scenes, enabling an officer to secure a crime scene for up to three hours after which time a warrant may be applied for either in person or by telephone.

Currently under the Act, the same rules in relation to warrant applications apply to all types of warrants. Under those rules, a telephone warrant may only last 24 hours, and may not be extended. The inability to extend a telephone warrant presents an unreasonable obstacle for police officers in relation to crime scenes.

Police cannot determine when a crime will occur and therefore cannot determine when or where a crime scene may need to be established. Accordingly, it is likely that more crime scene warrants will be applied for at night by telephone than the other types of warrants. This is unlike search warrants and notices to produce, where police may better plan when they may be executed, and which, in any case, must normally be executed in daytime.

It is in the interests of justice that police be permitted to secure a crime scene for the same maximum length of time that is available for other warrants, even where the crime scene warrant is originally applied for by telephone.
There is, however, a safeguard which will ensure appropriate use of crime scene powers: that is, that the extension can only be applied for in person. This will not present practical problems to police, as the court can hear an application for an extension of the 24 hour telephone crime scene warrant at any time.

Items [5] to [7] of Schedule 6 amend section 201 and delete section 202 and 203 of this Act. These amendments simplify and clarify when police officers must meet the safeguards set out under section 201.

Section 201 of the *Law Enforcement (Powers and Responsibilities) Act 2002* sets out safeguards requiring a police officer to

- identify him/herself as an officer,
- state his/her name, rank, and station,
- explain why a power is being used and
- warn that it may be an offence to fail to comply.

Sections 202 and 203 provide that in relation to arrest and search powers the safeguards need not be complied with if the police officer believes on reasonable grounds that it is not reasonably practicable to do so because of the seriousness and urgency of the circumstances.

Section 201 states that police can comply with this requirement before, during or after they have exercised the power if reasonably practicable.

The safeguard was intended to apply before the exercise of the power unless it is not reasonably practicable to do so, in which case the requirements should be complied with as soon as reasonably practicable after the power is exercised. Accordingly the bill is amended to reflect that intention.

Police are required without exception to comply with the safeguards in relation to certain powers, such as the move on powers. This has not been affected by this amendment.

Sections 202 and 203 are made superfluous by this recommendation and are deleted.

Schedule 7 amends section 32 of the *Mental Health (Criminal Procedure) Act 1990*. Section 32 provides an alternative method of disposing of criminal charges where a mentally or cognitively impaired defendant appears before the Local Court.

It is proposed to allow a form to be made under the regulations to clarify the duties and obligations of the person subject to section 32 orders.

A clear statement of the conditions of the discharge, and the recording of these orders on a prescribed form will facilitate enforcement of orders. For example, the form will require magistrates to specify the adjournment date, whether the person was required to attend court again and any requirements of the medical officers (for example) to report back to the court.

Such a form would

• assist to educate non-practitioners about their requirements in a complex area of law;
• facilitate the recording of conditions;
• engender consistency of orders; and
• assist an appeal court when reviewing a decision of a magistrate.

In conclusion, the bill contains a number of changes that are necessary for the continuing development of an efficient and equitable criminal justice system in New South Wales. This bill represents the Government's ongoing commitment to the review and improvement of the administration of justice in this State.

I commend the bill to the House.
