CRIMES (DOMESTIC AND PERSONAL VIOLENCE) AMENDMENT BILL 2013

Bill introduced on motion by Mr Greg Smith, read a first time and printed.

Second Reading

Mr GREG SMITH (Epping—Attorney General, and Minister for Justice) [4.37 p.m.]: I move:

That this bill be now read a second time.

The Government is pleased to introduce the Crimes (Domestic and Personal Violence) Amendment Bill 2013. The bill makes a number of amendments to the Crimes (Domestic and Personal Violence) Act 2007. The amendments in schedule 1 are aimed at improving outcomes for victims of domestic violence. The amendments will enable senior police officers to issue provisional apprehended domestic violence orders, expand police powers to give directions or detain a person for the purpose of serving a provisional apprehended domestic violence order on them, and provide a number of safeguards to that person.

The amendments in schedule 2 do not relate to domestic violence orders but to personal violence orders. The amendments make it an offence to make a false or misleading statement when applying for an apprehended personal violence order; provide that a review of a registrar's decision to refuse to accept an application notice for filing may be determined by a magistrate, not a court; provide for the referral to mediation of parties to interim apprehended personal violence orders; and create a presumption in favour of a referral to mediation unless the court is satisfied that there are good reasons not to do so.

In August 2012 the New South Wales Legislative Council Standing Committee on Social Issues published its report on domestic violence trends and issues in New South Wales. The committee recommended that the Government amend the Crimes (Domestic and Personal Violence) Act 2007 to allow police officers above the rank of sergeant to issue interim apprehended domestic violence orders. The committee also recommended that the Government amend the Act to provide police with a limited power to detain an individual for the purpose of service of the interim apprehended domestic violence order. The utility of police issued orders was also acknowledged in the report of the Australian Law Reform Commission and New South Wales Law Reform Commission on Family Violence—A National Legal Response published in 2010.

In November 2012 I launched the NSW Domestic Violence Justice Strategy. The strategy aims to ensure that after any incident of domestic violence the victim's safety is immediately improved, abusive behaviour is stopped and the perpetrator is held to account. The justice strategy has resulted from the work of my department, together with the NSW Police Force and other key justice and human service agencies. In February 2013 the Government announced that police would be able to issue provisional apprehended domestic violence orders in order to protect victims of domestic violence. The amendments in schedule 1 are an important step in the implementation of the Domestic Violence Justice Strategy.

The existing provisions require a police officer to apply to an authorised officer for a provisional apprehended domestic violence order. After the order has been made, police must then return to the scene of the incident to serve the order on the defendant. The scheme is intended to operate to ensure the immediate protection of domestic violence victims until the

matter can be heard in the Local Court. However, there are concerns with the current provision. Police have to leave the scene to apply for an order which may leave the victim vulnerable. There can also be difficulties in completing service on the defendant meaning the order is not immediately enforceable. In 2012 the Local Court made 23,917 final apprehended domestic violence orders. Approximately 26,000 applications for apprehended domestic violence orders are made each year. The vast majority of applications for apprehended domestic violence orders are made outside court hours. Approximately 80 per cent of all police applications to authorised officers for apprehended domestic violence orders are made between 4.00 p.m. and 9.00 a.m. and 94 per cent of those applications are granted.

The introduction of police issued apprehended domestic violence orders will help to improve community and family safety and increase protection for domestic violence victims. The amendments to the Act are designed to ensure that apprehended domestic violence orders are served and are enforceable as soon as possible after the incident. The proposed police issued orders scheme contains a number of safeguards for defendants to provisional apprehended domestic violence orders. First, only police officers who are a rank of sergeant or above are able to make a provisional apprehended domestic violence order. Secondly, a police issued order operates as an application for a final order so the application will be subject to judicial scrutiny before any final order is made. Thirdly, the amendments ensure the matter is heard as quickly as possible. Finally, the defendant may apply to the appropriate court for a variation or revocation of a police issued order.

Police powers to direct a person to remain at or go to a particular location or detain a person will be expanded. Providing the police a range of options for directing the defendant gives them the necessary flexibility to ensure service of the notice and, most importantly, by doing that, ensure the safety of victims. When an incident occurs at the home of the victim, these powers will enable the defendant to be directed away from the scene, allowing victims and their children to remain safely in their homes. The amendments in schedule 2 to apprehended personal violence orders were recommended by the interim review of frivolous and vexatious apprehended personal violence orders. These amendments will apply only when there is no domestic relationship between the protected person and the defendant.

The community, media and Parliament have voiced concerns in the past that the apprehended personal violence order scheme is being abused. The purpose of the amendments is to deter frivolous and vexatious apprehended personal violence applications and to encourage the speedy resolution of appropriately initiated matters. The amendments strengthen the power of the court to refer matters to mediation to encourage parties to settle the dispute out of court. The interim review noted the high settlement rate of apprehended personal violence order matters that are mediated by the community justice centres. According to a community justice centres annual report, in 2011-2012 apprehended violence order matters had an 80 per cent settlement rate.

I will now outline each amendment in turn. Schedule 1 is limited to domestic violence orders. Item [5] of schedule 1 substitutes section 25 of the Act and will allow a police officer to apply to a senior police officer for a provisional apprehended domestic violence order. A police officer may apply to a senior police officer for an apprehended domestic violence order either on his or her own initiative or at the request of the protected person. An application may be made by telephone, facsimile or other communication device. The power to apply to an authorised officer is retained. Item [2] defines a senior police officer as a police officer of or above the rank of sergeant. This is consistent with the recommendations made by

the Legislative Council and ensures that only experienced police officers make these orders.

Item [7] inserts section 28A to allow the senior police officer to make a provisional order if satisfied that there are reasonable grounds for doing so. This is the same as the existing power of an authorised officer to issue an order. The section includes a safeguard to prohibit a police officer who is applying for the provisional order from being the police officer who makes the provisional order. Section 28A also requires the provisional order to set out the address or facsimile number of the local area commander of police at which the defendant may serve an application for variation or revocation of the order.

Like the existing provisions applicable to provisional orders made by authorised officers, a provisional order issued by a senior police officer is taken to be an application for a final order under the Act. Only courts have the power to make a final order and the application will be subject to judicial scrutiny before any final order is made. Item [8] amends section 29 of the Act to require the provisional order to contain a direction for the appearance of the defendant at a hearing of the application for a final order by an appropriate court on a specified date. The specified date must be the next date on which the matter can be listed on a domestic violence list at the appropriate court and a date that is not more than 28 days after making of the provisional order. This is to ensure that the matter is dealt with as soon as possible. It reflects the current provision applicable to provisional orders made by authorised officers but states that the matter should be listed on a domestic violence list.

The application must be listed at an appropriate court. This will always be a Local Court but this provision allows it to be listed at a place best suited to the circumstances of the matter. In most cases this will be the court that is closest to where the incident occurred. However, there may be some instances where the incident occurred while the parties were on holiday in another part of the State. In those cases the appropriate court will be a court near their usual residence. Items [1], [2], [3], [6] and [9] make consequential amendments to the Act. Item [13] inserts section 33A to allow a defendant to a police issued order to apply to the appropriate court to vary or revoke the order. This is included to ensure that orders issued by senior police officers may be reviewed by the court. The application to vary or revoke must be made to and heard by the appropriate court at which the final order is listed for hearing. For example, if the hearing is listed at Manly Local Court the variation should be heard at Manly Local Court. The application may be heard before the matter is listed for hearing.

An application to vary or revoke a police issued order can be made by a police officer only if a child is named as a protected person on the order. This is consistent with existing provisions that apply to the variation or revocation of interim or final court orders. Certain existing provisions will apply to the variation or revocation of a police issued order such as how an order may be varied, in what circumstances the order may be revoked, explanation of the order to the defendant and protected person, and service of the order. The existing requirement to notify the protected person of a variation or revocation application extends to a defendant's application under section 33A so that the protected person is aware of any application.

Proposed section 33A (4) requires the defendant to serve a notice of the application to revoke or vary the police issued order on the local area commander of police. As noted earlier, the address for service must be included on the provisional order. Proposed section 33A (5) allows the police officer who applied for the order or another police officer to appear at the hearing for revocation or variation. Item [4] inserts section 15 (3) and item [14] inserts

section 34A to address the situation where a senior police officer issues a provisional apprehended domestic violence order but the protected person and the defendant in the order are not in a domestic relationship.

Currently, section 15 provides that if an application is made for an apprehended domestic violence order and the protected person and defendant are not in a domestic relationship the application is treated as one for an apprehended personal violence order. However, because senior police officers do not have the power to issue an apprehended personal violence order, section 15 (3) is inserted expressly to exclude police issued orders. This means that where no domestic relationship exists between the protected person and the defendant a police issued order cannot be taken to be an application for an apprehended personal violence order.

Proposed section 34A goes on to provide that when the senior police officer has, in good faith, made a provisional order but no domestic relationship exists, the officer is not liable for anything done or not done in good faith by the police officer or other person pursuant to that order. Item [17] remakes the existing power in section 37 for the court or authorised officer to make a property recovery order in relation to interim or final apprehended domestic violence orders whether issued by the court, authorised officer or senior police officer. A police officer will also be able to apply for a property recovery order. Items [10], [11], [12], [15], [16] and [18] make consequential amendments to the Act.

Schedule 1 to the bill remakes and expands the existing provisions giving police the power to direct and detain a person for the purpose of serving a provisional order. A number of safeguards will be inserted which are not currently provided for by the Act. Item [19] replaces section 89 and inserts two separate powers for detention: one for the making and service of interim apprehended personal violence orders and one for the making and service of interim apprehended domestic violence orders.

Section 89 is amended to create a stand-alone police power in relation to personal violence orders. It maintains the existing provisions and provides that police may direct a person to either remain at the scene of an incident or at a place where the person is located for the purpose of serving an interim apprehended personal violence order, which is a provisional order. If the person fails to remain at the specified location the police officer may arrest and detain the person at the scene, other place, or take the person to the police station until the provisional order is made and served.

Proposed section 89A expands the types of direction a police officer may give to a person for the purpose of making and serving a provisional apprehended domestic violence order. The existing power to direct a person to remain at the scene can effectively force the victim to leave his or her home. The increase in the range of directions that police can give a person will provide police with the flexibility to respond to the specific circumstances. A police officer may direct a person to remain at a particular place or go to and remain at a police station or another place that has been agreed to by the person. A police officer may also direct a person to accompany a police officer to a police station or other place that has been agreed to or a place to receive medical attention.

If a person refuses or fails to comply with a direction, the police officer may detain the person at the particular place or at a police station. If a direction is given to accompany a police officer to the police station or other place the person may be detained in the police vehicle for so long as is necessary to transport the person to the police station or other place. Once the

person has arrived at the police station the person is released from detention but is still under a direction to remain at the police station until the provisional order is served. Before detaining a person for the purposes of transporting that person to the police station or other place a police officer may consider the need to ensure the safety of the protected person.

Proposed subsection (4) provides an inclusive list of things to be considered. It is drafted broadly to ensure that circumstances are properly taken into account. The considerations outlined in the Act include: the need to ensure the service of the order; removal of the defendant from the scene of the incident; prevention of substantial damage to property; and the circumstances of the defendant and any other relevant matter. The circumstances of the defendant may include the person's youth or advanced age, whether the person has a disability or cognitive impairment, whether the person is under the influence of alcohol or drugs, or whether there has been a history of victimisation of the person by the protected person.

The power to detain a person only for the purpose of serving an apprehended violence order or variation of such an order in section 90 (2) is being reframed by item [20] to allow a police officer who did not give the direction to detain the person. These powers have been expanded to ensure the police have the power to ensure the immediate safety of the victim and others who may be present. It will also ensure that delays associated with completing service of an order on a defendant are reduced. It is important to allow the police to diffuse a domestic violence incident as quickly as possible to prevent further incidents from occurring. Studies have shown that the prosecution of domestic violence abusers is a powerful strategy that protects victims and prevents future violence.

Similar powers exist in Victoria. A recent evaluation of that legislation indicated that the police removed approximately 90 per cent of defendants in domestic violence incidents and this had clear advantages in improving victim safety. Victorian police also noted that being taken back to the police station underscored the seriousness of the domestic violence order. Item [21] introduces a number of safeguards in respect of these extended police powers. It also gives police the power to search a person and requires certain records to be kept. Proposed section 90A sets a time limit on the period a person may be directed to remain at a place or detained. If the person has been directed to remain at a place he or she must stay there for as long as is reasonably necessary for the provisional order or a copy of the apprehended violence order to be made and served.

Where the person has been detained he or she may be detained until the provisional order or a copy of the apprehended violence order has been served, but for no longer than two hours. Reasonable travel time to the place or police station is excluded from the two-hour calculation, as in some remote areas the scene of the incident may be a considerable distance from the police station. Proposed section 90B states that once a person has been detained under sections 89, 89A or 90, he or she may be detained by any police officer. Proposed subsections (2) to (4) provide for the treatment of a person detained at particular places under the Act. The provisions are modelled on part 16 of the Law (Enforcement Powers and Responsibilities) Act 2002 relating to intoxicated persons. The amendments represent a balanced approach. The safeguards apply to the extent that they are reasonably practicable.

Where persons are to be detained in a vehicle they should be given an opportunity to make a call, for example, to arrange for someone to pick them up. However, if allowing the person to make a phone call will inflame the situation or delay the removal of the person from the

scene it may not be reasonably practicable to allow the person that opportunity. The provision that a police officer must provide necessary food, drink or blankets to a person detained at a police station or other place does not place a positive requirement on police to provide these things unless it is necessary to do so and reasonably practicable. It does, however, acknowledge that a person should not be denied a glass of water or a blanket if one is available. People will, of course, be treated humanely.

Proposed section 90C will allow the police to conduct an ordinary search of a person detained under part 11 of the Act. This is the same as the ordinary search power from the Law (Enforcement Powers and Responsibilities) Act 2002. Such a search may include requiring a person to remove his or her coat, gloves, shoes, socks and hat for the police to examine those items. The police may hold any personal belongings found on the person until the person is released from detention. Proposed section 90D requires the police to keep certain records in accordance with the regulation under the Act for a period of three years. These new powers will help to ensure the immediate safety of domestic violence victims in New South Wales. The Government will be monitoring the operation of these provisions closely to ensure that police are able to respond to domestic violence incidents effectively.

I now turn to the amendments made by schedule 2 in respect of apprehended personal violence orders. Item [1] of schedule 2 amends section 21 (1) of the Act to create a presumption in favour of mediation as recommended by the interim review. When considering whether to make a final order, the court is required to refer the parties to the application for mediation at the community justice centre unless there are good reasons not do so. Item [4] extends this presumption to when the court is considering making an interim order. These amendments have been framed to provide magistrates with a broad power and greater flexibility to refer matters to mediation and will ensure that magistrates turn their mind to whether mediation will assist in resolving the matter. Item [2] amends section 21 (2) to provide a non-exhaustive list of considerations for determining whether to refer the parties to mediation. Notably, it removes the prohibition on referring to mediation where one of those factors is present. Item [3] of schedule 2 provides that the presence of any one or more of those factors listed in section 21 (2) does not prevent a court from referring the matter to mediation.

The interim review considered that unwillingness to mediate should not render a matter unsuitable for mediation because research suggested that mediation had been positive even where the parties appeared unwilling initially. The review found that a history of violence should not prohibit a court from referring parties to mediation, but that it should be one of the factors to be considered. The review noted that there are some circumstances of lower level violence that did not affect the capacity of the parties to mediate. The decision to refer parties to mediation where there has been a history of violence should be made in light of the individual circumstances of the case.

Item [5] makes it an offence to make a false or misleading application for an apprehended personal violence order. The proposed offence carries a maximum penalty of 12 months or 10 penalty units or both. This is intended to deter people from making false or misleading applications in these matters. To establish the offence it must be proved that the person knew the statement was false or misleading in a material particular. Finally, item [6] amends section 53 (8) to allow a magistrate, in chambers, rather than in a court, to decide whether an application notice is to be accepted for filing where a registrar has refused to accept it. The review noted concerns that there is a disincentive for registrars to exercise their discretion to

refuse an application under section 53 of the Act because the applicant can nevertheless apply to the court for an application to be accepted. The amendment is being made to encourage registrars to exercise the discretion to refuse to accept an application notice where it is appropriate to do so. The provision is modelled on section 49 of the Criminal Procedure Act 1986 and the exercise of the magistrate's discretion under section 53 (8) is an administrative function to which a judicial mind is brought.

The Government is making amendments that respond to the different challenges and characteristics of domestic violence orders and personal violence orders. The amendments will ensure that the safety and protection of victims in domestic violence situations are at the forefront of the police response. The amendments will provide the court with greater flexibility in relation to personal violence orders to ensure that only appropriate matters are brought before the court. I commend the bill to the House.

Debate adjourned on motion by Mr Paul Lynch and set down as an order of the day for a future day.