Second Reading

The Hon. MICHAEL VEITCH (Parliamentary Secretary) [8.42 p.m.], on behalf of the Hon. John Hatzistergos: I move:

That this bill be now read a second time.

The Government is pleased to introduce the Crimes (Sentencing Procedure) Amendment Bill 2010. The bill gives effect to recommendations made by the Sentencing Council in its report on reduction in penalties at sentence and implements a system of aggregate sentencing to simplify sentencing for multiple offences. In 2008 the Sentencing Council was asked to advise on a number of matters relating to discounts on sentence, including the current principles and practices governing reductions in sentence, how factors leading to a discount on sentence are taken into account, and the effect of charge negotiations.

The council's final report was released for public consultation in November 2009. Following that consultation the Government agreed to implement all the recommendations of the council. The attached bill represents the 13 legislative recommendations made by the council. The two non-legislative recommendations relate to the information regularly provided by Corrective Services NSW to the judiciary for the purposes of sentencing and a formalised program to keep judicial officers informed of the types of facilities, programs and procedures that are available for the detention and management of adult and juvenile offenders. These recommendations will be progressed in consultation with the Judicial Commission.

The second part of the bill implements a form of aggregate sentencing to simplify sentencing for multiple offences. Currently when sentencing for multiple offences the sentencing court is required to set out in great detail the precise length, commencement and expiry dates of the non-parole and total periods of custody for each offence. This becomes a very complex exercise when some of those offences are to be served partly concurrently, which is done to ensure that the total period of imprisonment adequately reflects the criminality of the offender's conduct.

The reasons for setting out the precise details of each sentence are to ensure transparency, reflect criminality and ensure that victims get due recognition. This also makes it easier to adjust an overall sentence when one sentence is changed on appeal. Those principles remain important, but in order to simplify the sentencing process for the judiciary, and for the community's understanding of it, the Government has decided to remove the requirement to specify the precise detail of any overlap between the sentences by allowing it to set one overall sentence and one non-parole period, provided that the court first indicates the appropriate sentence that would have been given for each offence had it been sentenced individually. The amendments will allow the judge to approach sentencing for multiple offences in a simple way when appropriate and lead to a sentence which is simpler and more easily understood by all.

I turn now to the substantive amendments contained in the bill. Item 1 of schedule 1 provides that, when considering whether or not to release an offender on parole, the Parole Authority may take into account any assistance that the offender has provided to law enforcement authorities since they have been sentenced, which was not considered by the sentencing court at the time of sentence. While assistance that an offender provides, or promises to provide, before they are sentenced is often taken into account by a court when assessing whether to apply a discount to the offender's sentence, it is not possible to revisit the sentence if the offender subsequently comes forward and offers to provide assistance. The Sentencing Council felt that an appropriate way to encourage prisoners to provide assistance, notwithstanding the fact that they already have been sentenced, is to specify that such assistance, pending an assessment of its value and reliability, could be taken into account in determining whether to release the prisoner on parole. The amendment does not limit the issues that the Parole Authority can take into account in making its decision and merely recognises that such assistance may be a factor in the Parole Authority's assessment of the offender—for example, insofar as that may be relevant to an assessment of the offender's progress towards rehabilitation.

Item [1] of schedule 1.2 provides that the circumstances in which an offender pleaded guilty or indicated an intention to plead guilty are a matter to be taken into account by the court when passing sentence on the person. In considering this issue the council noted that there are a number of factors that are beyond the control of the accused in terms of entering a plea of guilty. Issues such as the number and type of charges entered on the indictment, or circumstances where the fitness of the offender to plead is at issue, may affect the decision to enter a plea to an appropriate charge. There are also circumstances in which an offer to plead guilty to a charge is initially rejected, but later accepted by the prosecution, or where the prosecution initially lays additional charges against the accused and at some later date indicates that it will amend the charge in the indictment to specify a more appropriate offence.

The proposed amendment is not intended to change the nature of the court's consideration of the guilty plea; rather it simply confirms the existing practice of the court. It does not allow offenders to artificially excuse a plea

entered late. Clearly, the earlier a plea is entered, the greater are the savings for the justice system. Consistent with current case law, an explanation of the circumstances of a late plea may not result in any significant discount because the timing was so late that no utilitarian value was derived from it. While the council did not find it appropriate to recommend at this time any legislative proscription of processes that might encourage an early plea, it did recommend that the circumstances of the plea be taken into account in determining the utilitarian value of the plea, and this is reflected in the amendment.

Item [2] of schedule 1.2 inserts a new subsection which requires that any lesser penalty imposed as a result of a guilty plea will not be unreasonably disproportionate to the nature and circumstances of the offence. This reflects provisions elsewhere in the Act which ensure the reasonableness of discounts given. Item [3] of schedule 1.2 explicitly recognises a sentencing court's power to reduce penalties for facilitating the administration of justice. The Act currently provides for the court to impose a lesser penalty where the defence has made disclosure before the trial that facilitates the administration of justice. However, the council acknowledged that there is no point of difference between disclosure and cooperation pretrial and cooperation during the trial. As such, the latter will be included in the legislation as a basis upon which to impose a lesser penalty.

Cooperation may be in the form of admissions or disclosures in the course of the trial but may also encompass behaviour such as agreement to limit the facts in issue during a trial and hence reduce the number of witnesses required where the court is of the view that such behaviour is sufficient to justify a reduction of the sentence. I note that this provision will not result in defendants being penalised for the poor performance of their counsel; it merely provides the ability to reduce a penalty where the course of justice has been facilitated. Moreover, the amendment is not made to simply reward the defence where it has complied with mandated disclosure requirements; hence the court is provided with the discretion to impose a lesser penalty, which it may or may not exercise, having regard to the degree to which the defence has facilitated the administration of justice.

Items [4] and [5] of schedule 1.2 implement the recommendations of the Sentencing Council with respect to the relevant considerations when a court is determining any reduction in penalty because of assistance to law enforcement authorities provided by the offender.

The amendments remove consideration of the effect of the offence on the victim or their family and the likelihood that the offender will reoffend upon release. The council acknowledged that both factors are important in the sentencing task. However, they are not appropriately considered in terms of any reduction in penalty for assistance provided. The effect of the offence on the victim and their family is appropriately considered and forms part of the assessment of the objective criminality of the offending. It does not have relevance in assessing the value of any assistance the offender may have provided. Similarly, the likelihood of the offender committing further offences after release is properly taken into account when assessing the offender's prospects for rehabilitation, not in assessing the value of their assistance. The amendments do not reflect a diminution of the relevance of the impact of crime upon victims and their families; it merely clarifies that this issue should be given its full weight at the appropriate point in the sentencing task, rather than complicating an otherwise separate aspect of the sentencing process.

Item [6] of schedule 1.2 also relates to the consideration of imposing a lesser penalty as a result of assistance provided by the offender. Frequently an offender may promise assistance that will be given after sentencing takes place—for example by giving evidence at a later trial. This promise is appropriately considered when setting the sentence. However, where the offender reneges on the promise, appeal courts need to be able to deprive the person of the discount given for the future assistance when the person is to be re-sentenced. To facilitate this process the amendment will require the court to outline the extent to which the sentence has been reduced both for any assistance already given and separately for any assistance promised. This will significantly assist courts in revisiting the sentence should the promised assistance not be forthcoming.

Item [7] of schedule 1.2 completes reforms previously made by the Government which prevented the sentencing court taking into account as a mitigating factor in sentencing the fact that a person may become a registrable person or be subject to an order under child protection and serious sex offender legislation. The amendment in this bill will prevent the court taking into account the fact that a person may be prohibited from working with children as a consequence of their conviction. Such a prohibition is for the protection of the community and should not be considered an additional punishment on the offender, such as to mitigate any other penalty imposed.

The bill also contains an amendment at item [8] of schedule 1.2 which prevents the court taking into account as a mitigating factor in sentencing the consequences of any confiscation or forfeiture order imposed because of the offence. The council was of the view that these orders are imposed to deny offenders the fruits of their crimes and this action should not be considered to be extra curial punishment that might lead to a sentence discount. Item [9] of schedule 1.2 seeks to address a concern raised by prosecutors regarding procedural errors made when submitting a list of additional offences to be taken into account in sentencing. The amendment will ensure that when such errors are procedural only, the resulting sentence is not invalidated. The Sentencing Council originally recommended an amendment to section 33 of the Act, but the Government considers that, noting the procedural nature of the errors, this saving provision is better placed in section 32.

Item [10] seeks to put into place an additional procedural safeguard to ensure that the views of victims are taken into account in the course of charge negotiations. The council was of the view that the current guidelines issued by the Office of the Director of Public Prosecutions are appropriate in terms of ensuring that appropriate consultation takes place with victims and police officers in charge where a guilty plea is accepted or a list of additional charges is to be taken into account following charge negotiations. However, in the interests of transparency and accountability the council was of the view that the requirement to properly consult following charge negotiations should be the subject of formal certification to the court. Nothing in the new provision requires prosecutors to do anything other than that which they are ethically required to do, and should not have any impact on current practices with respect to charge negotiation.

The provision acknowledges that at times it may not be possible to consult with the victim—they may be unwilling to discuss the matter or their whereabouts may be unknown. The matter may proceed in such cases but only if the certificate provided to the court provides reasons for the failure to consult. The provisions also require that any statement of facts represents a fair and accurate account of the objective criminality of the offender having regard to the relevant and provable facts, and that any diversion from this be in accordance with the prosecution guidelines.

Item [11] of schedule 1.2 is a technical amendment regarding the order in which sentences are imposed for escape offences. Section 57 of the Act provides that any sentence imposed for an escape offence should be imposed consecutively with either a sentence yet to expire or a sentence being imposed in the same proceedings. However, there is some doubt as to whether the escape offence should be served before or after such sentences. The amendment makes it clear that the sentence for the escape offence should be served after any sentence imposed in the same proceedings. It should be noted at this point that escape offences and offences relating to assaults in correctional facilities imposed under section 56 of the Act may generally be excluded from aggregated sentences given under the provisions in schedule 2 to this bill. While there is no specific provision to prevent them being part of an aggregated sentence, it is likely that the recognition of the distinct criminality of such offences implied by the Act will mean that in most cases they will need to be separately acknowledged.

Schedule 1.3 includes amendments to the Crimes (Serious Sex Offenders) Act 2006. The Act currently allows the State to apply for an extended supervision or detention order in relation to offenders who have been convicted of serious sex offences and about whom there are grave fears that the offender may commit a further serious sex offence without further supervision or detention. However, the legislation is unclear as to whether such applications can be made where, for example, the offender served their serious sex offence sentence consecutively with a separate offence, and hence, whilst in prison, may not be serving the period for the serious sex offence at the end of their term. Clearly, where there has been one continuous period of imprisonment and where the State still has concerns regarding the propensity of the offender to commit a further serious sex offence the application should be able to be made irrespective of where the serious sex offence sentences fall in the continuum of the overall sentence.

Schedule 2 to the bill introduces a scheme of aggregate sentencing for multiple offences. As outlined earlier, these provisions are designed to remove some of the complexity currently involved in sentencing a person for multiple offences while retaining transparency around the objective criminality applying to each offence. Item [4] of schedule 2 amends section 44 of the Act to allow a court to simply set one non-parole period for an aggregate sentence of imprisonment. This will remove the current complexity of identifying the commencement and expiry dates of non-parole periods within an overall period of imprisonment, which ultimately adds little to anyone's understanding of the sentence, as inevitably there is a focus for both the offender and the community on the expiry of the last non-parole period and the earliest release date.

The new provisions simply allow a single non-parole period to be set, which will make it easier to identify the offender's earliest date of release. The provision also retains the existing requirement that the remainder of the term to be served after the non-parole period not exceed one-third of the non-parole period, unless there are special circumstances. In a situation where one or more of the offences to be included in an aggregate sentence of imprisonment has a standard non-parole period, items [13] to [15] of schedule 2 provide that that standard non-parole period should be identified by the sentencing court but still subsumed within the overall, single non-parole period set for the aggregate sentence. The court is required to outline the proportion of the non-parole period attributable to the standard non-parole period, without the need to specify an exact length or specific commencement and expiry dates. This reflects the process for setting the overall sentence, whereby a court is required to indicate the sentence that would have applied to each offence, and indicating the proportion it represents in the overall sentence.

Item [12] of schedule 2 sets out this new option of imposing an aggregate sentence for multiple offences. Previously the court was required to comply with all the requirements of the division, including setting commencement dates for every sentence imposed even if those sentences were to be imposed concurrently or partially concurrently. This led to the sentencing task becoming quite complex, and risked errors being made where commencement dates did not perfectly line up when sentences were to be served consecutively. The new provisions will effectively allow the court to choose to set one sentence for multiple offences, making the impact of the total sentence immediately clear.

However, it remains important for a number of reasons for there to be some indication given of the respective sentence that would have been imposed had each offence been dealt with directly. These reasons include: the transparency of the sentencing process, the comfort to victims accorded by an explicit recognition of the level of criminality involved in the specific crimes committed against them, the benefits in publicly recognising the particular aggravating and mitigating factors of an offence as required under the Act, and to assist appeal courts in resentencing offenders after successful appeals or in identifying where errors in the sentencing process may have occurred where such errors may have been "masked" by the aggregation of the sentence into a single term of imprisonment. As such, the new provisions require that the court is to give such an indication of the head sentence that would have been imposed, taking into account discounts and other factors, and each offence's relative weight in determining the overall sentence. What will not be required is the need to set the precise commencement and expiry dates of sentences that are to be served partially concurrently or consecutively. It need set only one non-parole period and one overall sentence and comply with the other requirements of the division with respect to that overall sentence.

The court will still retain discretion in setting the appropriate length of the overall sentence, taking into account the principle of totality. For the reasons outlined above, the indication with respect to each offence is intended to provide an adequate indication of the criminality attaching to each offence, but it should not be construed by courts as requiring them to give an indication that is so detailed that they are effectively sentencing the offender for each offence separately in any case. The court will also not be required to give an indication of the non-parole period that would have applied to each sentence except, as indicated earlier, when the offence is one to which a standard non-parole period applies. It should be sufficient to indicate what a total sentence for a particular offence would have been taking into account any discounts or other factors that might have applied.

Setting out the relative weight given to the offence in setting the aggregate sentence of imprisonment will give an indication of how the court arrives at the final sentence, taking into account the principle of totality, although again it is not intended that the precise degree of accumulation of the sentences will need to be spelt out. It must be emphasised that these amendments are not intended to alter the way offenders are sentenced in any substantial way, or to have any impact on the overall length of sentences. It is designed purely to simplify the process when setting sentences for multiple offences, such that the overall impact of the sentence is clear, as is the court's assessment of the offender's criminality with respect to each offence. The existing provisions of the Act will still apply to the overall sentence of imprisonment, for example, the requirement to provide information about the release date and the requirement to set a parole date if the overall sentence is three years or less. However, these requirements will apply simply to the aggregated sentence and not to the sentences for each and every offence for which the person is currently being sentenced.

At the request of the judiciary, these provisions have been drafted so that they are optional. It is recognised that the sentencing decisions that courts face are varied and complex. Should a court wish to sentence an offender convicted of multiple offences by setting individual sentences for each offence and setting out the degree of accumulation, commencement and expiry dates for each offence, that option will remain open to it. The provisions in this bill should make the sentencing task simpler whilst retaining transparency. Inevitably, there is a balance to be had between allowing judges the freedom to set sentences as they see fit and ensuring that sentences are delivered in a consistent fashion, and that the courts take account of those factors such as transparency and adequate reflection of the criminality of an offender that the community believes should be reflected in the sentencing process. This balancing task is a difficult and complex one and this bill should improve the operation of the Act for all users of the criminal justice system. I commend the bill to the House.