Second Reading

The Hon. JOHN HATZISTERGOS (Attorney General, Minister for Citizenship, Minister for Regulatory Reform, and Vice-President of the Executive Council) [5.49 p.m.]: I move:

That this bill be now read a second time.

The Government is pleased to introduce the Crimes (Serious Sex Offenders) Amendment Bill 2010. The bill amends the Crimes (Serious Sex Offenders) Act 2006 in response to recommendations made by the Sentencing Council and the recently completed statutory review of the Act. In April 2006 the Crimes (Serious Sex Offenders) Act 2006 came into force in New South Wales. This Act provided a new mechanism for the management of serious sex offenders who have completed their sentence, but who remain a serious risk to the community by providing for their extended supervision or continuing detention to ensure the safety and protection of the community and to encourage serious sex offenders to undertake rehabilitation. Briefly, continuing detention orders may be sought whilst an offender is in custody. Extended supervision orders may be sought when an offender is serving a sentence, even if the offender has recently been released to parole. However, before the court makes either order it must be established that there is a high degree of probability that the offender is likely to commit a further serious sex offence.

In 2009 the New South Wales Sentencing Council conducted a detailed examination of the Crimes (Serious Sex Offenders) Act 2006. This was due to a request from the then Attorney General in 2007 to conduct a review of the current penalties attached to sexual offences. As part of this review, the New South Wales Sentencing Council considered the use of alternative sentence regimes incorporating community protection, such as the schemes used in Canada, the United Kingdom and New Zealand; possible responses to address repeat offending committed by serious sexual offenders; and, in particular, whether second and subsequent serious sex offences should attract higher standard minimum and maximum penalties in order to help protect the community.

The New South Wales Sentencing Council, in its report released in July 2009 titled, "Penalties Relating to Sexual Assault Offences in New South Wales (Volume 3)", found that the scheme for the making of continuing detention orders and extended supervision orders as currently exist in New South Wales in relation to serious sex offenders provided an appropriate structure, in principle, for responding to the need to protect the community from such offenders. The New South Wales Sentencing Council noted that the Crimes (Serious Sex Offenders) Act 2006 provided a preferable model of responding to serious sex offenders than indefinite or disproportionate sentencing and that it occupied a proper place within the range of available strategies for protecting the community from serious sex offenders which it surveyed.

The New South Wales Sentencing Council made 24 recommendations in relation to the treatment and management of serious sex offenders. The Government indicated its immediate support for four of the legislative recommendations, whilst four others were referred to the statutory review of the Crimes (Serious Sex Offenders) Act 2006 which commenced in July 2009 and which was undertaken by the Department of Justice and Attorney General. The statutory review found that the policy objectives of the Act remained valid whilst also making numerous recommendations to improve the operation of the Act based on submissions received by stakeholders as part of the statutory review.

The bill implements the majority of the legislative recommendations made by the New South Wales Sentencing Council as well as the recommendations arising from the statutory review. Members of the House should be aware that, as at 1 September 2010, 27 offenders were the subject of extended supervision orders and two offenders were the subject of continuing detention orders under the Act. These figures demonstrate just how important this piece of legislation is in the treatment and management of serious sex offenders, and the consequent safety of our community.

I will now turn to the detail of the bill. Schedule 1 amends the Crimes (Serious Sex Offenders) Act 2006. The first item that requires explanation is item [3]. This item extends the definition of "serious sex offence" to include an offence that was not a serious sex offence at the time it was committed, but which was committed in such circumstances that it would be such an offence were it committed in those circumstances at the time an order is sought under the Act. The jurisdiction of the Act is enlivened when a person has a conviction for a serious sex offence in accordance with section 5 (1) of the Act. This includes an offence committed against an adult victim punishable by imprisonment for seven years or more in circumstances of aggravation. Prior to 1989 the Crimes Act 1900 did not contain aggravated versions of offences. A submission to the statutory review noted that, because of this, there are a number of serious sex offenders who may fall outside of the scope of the Act; that is, the Act's definition of "serious sex offence" covers specified serious criminal conduct if it was committed after 1989, but not if the same conduct was committed prior to 1989. The amendment to item [3] rectifies this anomaly.

Item [5] amends sections 9 and 17 of the Act, which set out the test that the Supreme Court must apply when it is considering an application for an order under the Act. Currently sections 9 (2) and 17 (2) provide that the

Supreme Court may impose an extended supervision order or continuing detention order if it is satisfied to a high degree of probability that the offender is likely to commit a further serious sex offence if he or she is not kept under supervision. There has been considerable case law on the meaning of the word "likely" in this State and in Victoria, which used the same test in relation to a similar piece of legislation, the Victorian Serious Sex Offenders Monitoring Act 2005. The interpretation that is currently applied in New South Wales courts is that the word "likely" should be construed as meaning probable, in the sense of a high degree of probability, but not necessarily involving a degree of probability that is more than 50 percent. The authority for this interpretation is *Tillman v Attorney General (New South Wales)* [2007] New South Wales Court of Appeal 327, reported also at 70 *New South Wales Law Reports* 448 and 178 *Australian Criminal Reports* 133.

Subsequent legislative activity in Victoria, including the repeal of the Serious Sex Offenders Monitoring Act 2005 and the introduction of the Serious Sex Offenders (Detention and Supervision) Act 2009, has resulted in the introduction of an unacceptable risk test. In the second reading speech to the Serious Sex Offenders (Detention and Supervision) Act 2009 the Victorian Minister for Corrections, the Hon. Bob Cameron, noted that the new test invites courts to consider not only the risk of sexual reoffending of the particular offender but also the nature and gravity of the offences the offender may commit in the future.

As part of the statutory review of the Crimes (Serious Sex Offenders) Act 2006, many stakeholders acknowledged difficulties with the word "likely" and called for clarification. The statutory review also noted that recent decisions of the Supreme Court of New South Wales confirm that there is a need to clarify the use of the word "likely", and accordingly the requisite degree to which a court must be satisfied of risk before making an order. The statutory review recommended that one way of achieving this clarity was not to simply define the word "likely" but also to clarify the test that is being met; that is, to adopt the unacceptable risk test adopted in Victoria. It is noted that the equivalent Queensland piece of legislation, the Dangerous Prisoners (Sexual Offenders) Act 2003, contains a similar test and was upheld by the High Court in *Fardon v Attorney-General for the State of Queensland* [2004] High Court of Australia 46.

The statutory review of the New South Wales Act found that the arguments that preceded the change in Victoria were equally applicable to New South Wales. In addition, it was acknowledged that there was merit in the test in the Crimes (Serious Sex Offenders) Act 2006 being consistent with the tests used in Victoria and Queensland given that the schemes set up by each of the three States are similar in nature and are designed to achieve the same aim; that is, the protection of the community through the management of serious sex offenders. There are also advantages in having a cross-jurisdictional body of case law being developed. As such, item [5] amends the test to require the court to be satisfied that there is an unacceptable risk replacing the likelihood test with a test of unacceptable risk of the offender committing a serious sex offence if he or she is not kept under supervision.

Item [6] goes further to clarify the extent to which the court must be satisfied. It provides that the Supreme Court is not required to determine that the risk of a person committing a serious sex offence is more likely than not in order to determine that the person poses an unacceptable risk of committing a serious sex offence. Item [7] introduces a new requirement that must be considered by the Supreme Court when it is determining an application under the Act. This is any report prepared by Corrective Services New South Wales as to the extent to which the offender can reasonably and practicably be managed in the community. This amendment is in response to a recommendation made by the statutory review. It recognises that when determining the conditions that will be imposed under an extended supervision order it is appropriate for the court to have regard to what can reasonably and practicably be done for the offender.

Item [8] also introduces a requirement for the Supreme Court to consider the views of the sentencing court at the time the sentence of imprisonment was imposed on the offender when it is determining an application under the Act. What is meant by the sentencing court is defined in item [1] and includes the court by which the sentence was imposed and any court that heard an appeal in respect of that sentence. This amendment was recommended by the Sentencing Council, which noted that the observations of the sentencing judge were often based on the material presented at the time of sentence, which may include a presentence report and reports from psychiatrists or psychologists as to the factors behind the offending and the offender's rehabilitation prospects. In particular, the sentencing court's views on the offender's rehabilitation prospects and the need for community protection are not irrelevant considerations to the Supreme Court's consideration of whether an application should be granted.

Items [9] and [10] implement a recommendation made by the statutory review that the term of an extended supervision order be extended to account for any time that the order is suspended because the offender is in lawful custody. Item [11] codifies a condition that is currently already commonly imposed by the Supreme Court under section 11 of the Act as part of an extended supervision order. It specifies that the Supreme Court may impose a condition that the offender must permit any corrective services officer to access any computer or related equipment that is at the offender's residential address or in the possession of the offender.

As the viewing of child pornography material, now known as child abuse material, is already an offence, it is not necessary to specifically refer to the viewing of such material in the statutory condition. If a serious sex offender is found in possession of child abuse material then he or she will be liable to prosecution for that offence. Rather, item [11] is a broad forensic interrogation power that codifies that the offender's computer usage is an

appropriate behaviour to be monitored and that the offender must provide access to the relevant officers, such as through the provision of passwords, login details or user names, in order for this usage to be monitored. The auditing or forensic investigation of the offender's computer or related equipment would also be an appropriate condition for the Supreme Court to make if required.

Under section 11 the Supreme Court has a broad power to make "appropriate" conditions on an extended supervision order and the codification of this particular condition should not be seen as fettering this broad discretion. Indeed, the section makes it clear that the Supreme Court's power is specifically not limited by the statutory conditions, and further conditions as to the offender's computer usage may be imposed as they commonly are now. Item [12] prescribes that the power of the Supreme Court to vary an interim or extended supervision order under section 13, and an interim or continuing detention order under section 19, does not allow the order to be varied so that the period is greater than that otherwise permitted under this part. This amendment also has the effect of clarifying that the power under sections 13 and 19 to vary an order includes the power to extend it.

Item [13] amends section 14, which prescribes the criteria that must be met in order for the State to apply to the Supreme Court for a continuing detention order in relation to a sex offender. Currently it provides that an application can be made when the offender is in custody in a correctional centre whilst serving a sentence of imprisonment by way of full-time detention for a serious sex offence or for an offence of a sexual nature, or pursuant to an existing continuing detention order. Section 14A also allows an application for a continuing detention order to be made if an offender is found guilty of the offence of breaching an extended supervision order or interim supervision order whether or not the person is in custody.

The Sentencing Council noted in its report that there may be cases where a serious sex offender has practical difficulties in the continued compliance with a condition of the order in circumstances not amounting to a breach. An example of such a difficulty was that of a condition of an order requiring the offender to use psychiatric or anti-libidinal medication, which is having adverse side effects to the point where the offender cannot reasonably be expected to continue taking that medication, or where a prescribing medical practitioner decides to stop prescribing it. Stakeholders suggested to the Sentencing Council that in cases where there are practical difficulties in the continued compliance with a condition of an order there should be a provision allowing the matter to be taken back to the court for a variation or a rescission of the order and for its replacement by a continuing detention order or interim detention order to ensure that the community continues to be protected.

The Sentencing Council agreed and considered that in such circumstances the power to vary or revoke an extended supervision order under section 13 of the Act should also include, in the case of a revocation, an express power to substitute a continuing detention order or an interim detention order. The council noted that the criterion for intervention would rest upon the court being satisfied that, by reason of altered circumstances, adequate supervision would not be provided by allowing the offender to remain in the community subject to the extended supervision order.

Item [13] implements the Sentencing Council's recommendation, albeit in a different form; that is, under the new subsection (2), the State of New South Wales will now be able to apply for a continuing detention order against a person who is subject to an extended supervision order or an interim supervision order if, because of altered circumstances, adequate supervision of the person cannot be provided under an extended supervision order or an interim supervision order. Item [19] requires the Supreme Court to be satisfied that circumstances have altered since the making of the extended supervision order or interim supervision order and those altered circumstances mean that adequate supervision of the person cannot be provided under an extended supervision order or an interim supervision order. Subsection (2) has also been broadened to include the existing power to make an application for a continuing detention order where the person has been found guilty of breaching a supervision order.

In addition, the phrase "last six months of the of the offender's current custody", which is currently found in subsection (2), is replaced in the new subsection (2A) by the following: an "application may not be made more than six months before the end of the offender's total sentence or the expiry of the existing continuing detention order". This amendment clarifies that the phrase "last six months of the offender's current custody or supervision" refers to the final six months of the offender's head or total sentence, as was recommended by the Sentencing Council and confirmed in the statutory review. The new subsection (2B) allows an application under section (2) to be made at any time, that is, whether the offender is in custody or not. However, if the offender is serving a sentence of imprisonment by way of full-time detention, then an application may not be made more than six months before the end of the person's total sentence.

Items [15], [18] and [21] are consequential amendments. Item [17] requires the Supreme Court to have regard to the level of an offender's compliance with any interim supervision order when determining an application for a continuing detention order. Item [20] omits a provision that deals with the interaction of parole orders and orders under the Crimes (Serious Sex Offenders) Act 2006, which will be included in the Crimes (Administration of Sentences) Act 1999 by schedule 2.

Item [22] provides that, on the making of a continuing detention order in respect of a person, any interim

supervision order or extended supervision order in respect of the person expires and ceases to have effect. It also provides that on the making of an interim detention order in respect of a person, any interim supervision order or extended supervision order in respect of the person is suspended and ceases to have effect until such time as the interim detention order expires. This section clarifies what is to occur in situations where the Supreme Court replaces an extended supervision order or interim supervision order with a continuing detention order.

Item [23] is a consequential amendment. Item [24] is an important reform which will allow victims of the offender to make a statement in relation to an application under the Act. This reform was recommended by the NSW Sentencing Council, which considered that there would be merit in allowing victims' views to be considered by the court, particularly in circumstances where they might be aware of events not known to the authorities of relevance to any ongoing danger to themselves or other members of the community. In recognition that some victims may not want to be made aware of such an application, only victims who are recorded on the Victim's Register in respect of the offender and who are a victim of an offence committed by the offender for which the offender is currently serving, or most recently served, a sentence of imprisonment will be notified.

Under subsection (2) the statement may contain the person's views about the order and any conditions to which the order may be subject, or any other matters prescribed by the regulations. The provision of such a statement is optional, and under subsection (5) the victim may amend or withdraw the statement. Under subsection (6) provision is made for the victim to have a say in whether or not the statement is disclosed to the offender.

Item [25] provides, in section 25A, for proceedings for an offence under the Act to be dealt with summarily before the Local Court, and in the case of an offence under section 12, which is the offence of breaching an interim or extended supervision order, these matters will now be capable of being prosecuted in the Supreme Court in its summary jurisdiction. This was recommended by the statutory review, which noted that such a power may be useful in circumstances where the State is of the view that the breach, if proven, is of such a serious nature that it will also be seeking the revocation of the order and be making an application for a continuing detention order. In these circumstances the breach proceedings could proceed in the Supreme Court and the matters could be dealt with concurrently, although it is noted that the amendments to the Act made by item [13] now mean that an application for a continuing detention order in such circumstances is not necessarily contingent on proving the breach.

Item [25] creates a new section 25B. This section enables the Supreme Court to make an extended supervision order in respect of a person at the same time that it makes a continuing detention order in respect of the person. The extended supervision order will commence at the end of the continuing detention order. This amendment was recommended by the New South Wales Sentencing Council and provides an alternative to the State being required to make a separate application for an extended supervision order upon the expiry of a continuing detention order, and would not be dependent on the need for any separate assessment by the court. The Sentencing Council made this recommendation as it was of the view that it would help to encourage offenders to complete sex offender treatment programs whilst in custody whilst also providing appropriate external controls on the offender's return to the community, including participation in a maintenance program.

Item [27] provides for a further review of the Act to be undertaken by the Attorney General three years after the commencement of the proposed Act. This is as per the recommendation of the Sentencing Council, which was endorsed by the statutory review. Schedule 2 amends the Crimes (Administration of Sentences) Act 1999 in relation to the interaction of parole orders and orders under the Crimes (Serious Sex Offenders) Act 2006. Dealing with serious sex offenders living in the community is one of the most challenging issues facing governments today. New South Wales is one of several jurisdictions that has chosen to respond to the need to protect the community from such offenders by introducing a legislative scheme for the making of continuing detention orders and extended supervision orders under the New South Wales Crimes (Serious Sex Offenders) Act 2006.

The New South Wales Sentencing Council and the statutory review of the Act have confirmed that this piece of legislation provides an appropriate and effective means of protecting the community from these offenders. The reforms that this bill makes to the principal Act will ensure that this State's serious sex offender regime continues to meet its objectives. I commend the bill to the House.