Crimes Legislation Amendment Bill.

Second Reading

The Hon. JOHN HATZISTERGOS (Minister for Justice, and Minister Assisting the Premier on Citizenship) [3.30 p.m.]: I move:

That this bill be now read a second time.

The Government is pleased to introduce the Crimes Legislation Amendment Bill. The bill makes a number of miscellaneous amendments to the criminal law and procedure of New South Wales. The amendments are designed to improve the administration of the criminal justice system, and include: evidence in bail proceedings; child sexual assault proceedings; investigation powers; sentencing options and related procedure; criminal procedure, including appeals and sentencing procedure; and criminal proceedings affecting the mentally ill and cognitively impaired. Many of the amendments are self-explanatory and do not require further explanation. There are, however, some matters that are more complex and require more detailed explanation as to their intended effect. I will now deal with these matters.

Schedule 1 to the bill amends section 32 of the Bail Act to clarify that, in respect of evidence under that section, the court is not bound by the principles or rules of law governing the admission of evidence. This amendment does not affect the general power of a court to control the conduct of proceedings. Parties to the bail proceedings may tender evidence to assist the court in making a reasoned determination based on all available evidence that is trustworthy and credible. This resolves an apparent inconsistency with section 4 of the Evidence Act 1995, which broadly states that the Evidence Act applies in bail proceedings. This amendment clarifies that, for the purposes of section 32 of the Bail Act, the Evidence Act does not apply, unless, of course, the court directs.

The bill makes several important amendments to further protect children in New South Wales. Items [6] and [10] of schedule 6 amend the Crimes (Sentencing Procedure) Act 1999 to give effect to an election commitment. The amendments provide that a person convicted of a sexual offence against a child under 16 years of age, or sexual assault against any person, cannot be sentenced to imprisonment to be served by way of periodic detention. Appellate courts have consistently held that these offences are extremely serious, especially when they relate to children, and that such offences should normally merit full-time custodial sentences.

Periodic detention has been held by the courts to be a salutary punishment involving the continuous obligation of complying with an order week in and week out over a lengthy period of time. By its very nature, however, periodic detention has a strong element of leniency already built into it and it is outwardly less severe in its denunciation of the crime than full-time imprisonment. Periodic detention is an inappropriate punishment for these categories of offences, especially where child victims are involved. The amendment also provides that a person convicted of an offence relating to sexual intercourse committed against a person of any age cannot be sentenced to periodic detention.

Schedules 8 and 10 of the bill make certain important amendments to reform criminal proceedings in child sexual assault matters. These amendments have been advanced ahead of more comprehensive proposals for reforms in the area of child sexual assault in order to facilitate the smooth operation of the Pilot Child Sexual Assault Specialist Jurisdiction that the Government established in Western Sydney earlier this year. These reforms arise primarily from recommendations contained in the November 2002 report of the Legislative Council Standing Committee on Law and Justice on child sexual assault prosecutions. They are also consistent with practical experience gained since the commencement of the Pilot Child Sexual Assault Jurisdiction.

The first of these amendments exempts child complainants in sexual assault proceedings from giving evidence in committal hearings. Under the amendments made by items [1] and [2] of schedule 8, child complainants in sexual assault proceedings will be completely exempted from being subject to a direction by the court to attend to give oral evidence at committal. A "child complainant" will include a child who was under 16 years of age when the alleged offence was committed, and is under 18 years of age at the time the committal hearing proceeds. Giving evidence at committal hearings can be more distressing for children than giving evidence at trial as counsel may not be as restrained at committal where a jury is not present. This amendment will reduce the number of times a child is subject to cross-examination over the course of a sexual assault prosecution, thereby reducing the re-traumatisation associated with multiple court appearances.

Items [1] to [3] of schedule 10 relate to children giving evidence by way of audio-video prerecording. Section 11 of the Evidence (Children) Act 1997 provides that a recording of a child's initial investigative interview with the police

may be admitted as that child's evidence in chief. A disturbing practice has emerged, however, whereby the child complainant is observed via closed-circuit television, watching their own prerecorded interview by all parties present in the courtroom. This practice is not required by the Evidence (Children) Act 1997, nor is it consistent with the objects and purposes of the Act. Requiring the child to be observed while watching a recording of their initial disclosure to police may be unnecessarily stressful to the complainant. Further, the jury and the parties in the courtroom may misinterpret the behaviour displayed by the child while watching the recording. Arguably this also distracts the jury from the most important evidence being given on the prerecorded tape. Accordingly, items [1] to [3] of schedule 10 amend the Evidence (Children) Act 1997 to provide that the child is not to be viewed by the court while such a recording is being played.

Where the audio quality of a prerecorded police tape is unclear, the prosecution may have to dispense with the tape as evidence and instead require the child to give evidence in chief. This may have a detrimental effect on the child and is inconsistent with the objectives of the Act. As there has been confusion regarding the use of transcripts in this context, item [4] of schedule 10 clarifies that a court may exercise its discretion to permit a transcript, or an edited version of that transcript, of the pre-recorded complaint to police, to be supplied to the jury to assist the jury in understanding that recording. This amendment is consistent with established practice with respect to other recorded evidence, such as police electronic recording of interviews with suspects.

Schedules 2 and 15 correct inconsistent penalties in child protection offences. Section 6 of the Child Protection (Prohibited Employment) Act 1998 sets out the offence of a prohibited person applying for, undertaking or remaining in child-related employment. Section 11G of the Summary Offences Act 1988 sets out a similar offence of loitering by convicted child sexual offenders near premises frequented by children. Despite their similarity, the penalties are not consistent. Schedules 2 and 15 correct this anomaly by providing for the same maximum penalty, namely two years imprisonment and/or 100 penalty units, for both offences.

Schedule 3 of the bill amends the Crimes Act. Items [4] and [5] of schedule 3 amend the Crimes Act 1900 to provide that the Governor or the Attorney General may refuse to deal with a petition to the Governor for a review of a conviction or sentence of the exercise of the Governor's pardoning power if the convicted person has not exercised a right of appeal or has withdrawn an appeal or allowed it to lapse. Similar provisions are inserted in relation to applications to the Supreme Court by items [6] and [7] of that schedule.

Schedule 4 of the bill amends the Crimes (Forensic Procedures) Act 2000 in two main respects. Items [1] and [2] of schedule 4 amend the Crimes (Forensic Procedures) Act 2000 so that police can exclude an interview friend of a suspect present under sections 54 or 55 if they believe on reasonable grounds that the interview friend may be a co-offender or involved in some other way in the commission of the alleged offence. Under the Crimes (Forensic Procedures) Amendment Act 2002, police were given the power to exclude an interview friend on these grounds in relation to section 10 of the Act. However, due to an omission, the powers were not amended in respect of sections 54 and 55. This amendment corrects that omission.

Items [3] to [6] of schedule 4 relate to the operation of the CrimTrac database. CrimTrac will enable the matching, on a national basis, of DNA profiles taken from crime scenes, suspects, known criminals, volunteers, missing persons and unidentified bodies. These amendments are necessary in order for New South Wales to participate in the national DNA database scheme by way of CrimTrac and are intended to facilitate the interjurisdictional exchange of DNA information under the Act. These amendments will allow New South Wales to disclose DNA database information to CrimTrac, which CrimTrac can then match against information received from other jurisdictions. If there is a match, CrimTrac will alert New South Wales and the other jurisdiction that there has been a match. New South Wales and the other jurisdiction are then able to negotiate directly whether to exchange information. These amendments will enable CrimTrac to function as an intermediary in the interjurisdictional exchange of DNA database information.

Schedule 5 amends the definition of "sentence" in the Crimes (Local Courts Appeal and Review) Act 2001, which is to commence on 7 July 2003, to ensure that appeals under that Act may be made in relation to non-association and place restriction orders under section 17A of the Crimes (Sentencing Procedure) Act 1999 in the same way as they can presently be made under the provisions of the Justices Act 1902, which is to be replaced by the 2001 Act.

Schedule 6 makes several amendments to the Crimes (Sentencing Procedure) Act. Item [1] of schedule 6 amends that Act to provide that a court cannot partially suspend a sentence. Section 12 of the Crimes (Sentencing Procedure) Act 1999 empowers a court to suspend a sentence and, during the term of the suspension, impose a good behaviour bond. The nature of the suspended sentence is that the sentence does not come into force unless the offender breaches the terms of a good behaviour bond, and the bond is revoked by the court. In *Regina v Gamgee,* 2001, NSWCCA 251, the Court of Criminal Appeal found that upon strict construction of section 12 of the Crimes (Sentencing Procedure) Act 1999 suspension of part of a term of imprisonment is permitted, such suspension being allowed to commence at a future date.

When a sentencing judge determines that a sentence is to be suspended then the whole sentence should be suspended. To order that an offender go into custody to serve a sentence after an initial period of suspension of

the sentence can cause considerable hardship to the offender. It also causes difficulties for the Department of Corrective Services in administering the sentence. Items [2] to [5] of schedule 6 amend the Crimes (Sentencing Procedure) Act 1999 in relation to sentence construction so that under section 59 of the Act a court may review all concurrent and consecutive sentences that are in excess of the sentence the subject of the appeal. The object of section 59 of the Crimes (Sentencing Procedure) Act 1999 is to enable an appellate court, when quashing or varying a sentence of imprisonment, to also vary the date of any consecutive sentence, being a sentence that is to commence at the expiration of the sentence—or non-parole period—of the sentence quashed or varied.

The power exists in order to ameliorate any injustice that may be occasioned to the successful appellant, so that they are not serving a term of imprisonment that was intended to run concurrently or partially concurrently with a sentence that has been subsequently quashed on appeal. This amendment is intended to overcome the difficulty that arose in the case of *Regina v O'Donohe*, Nos 1 and 2, 2001, NSWCCA 495. As currently drafted, the Act distinguishes between a consecutive and concurrent sentence, and as the court rightly noted, it cannot be said that the meaning of consecutive sentence can be extended to include concurrent sentence. Item [3] of schedule 7 amends section 7 (1A) of the Criminal Appeal Act 1912 to provide the Court of Criminal Appeal with the power to quash or vary sentences passed at trial not only in relation to matters where there is a single indictment, but also in relation to a number of other matters.

Schedule 8 makes several amendments to the Criminal Procedure Act. Items [3] to [7] of schedule 8 improve the efficiency of the court, and items [8] and [9] correct an inconsistency. Schedule 9 amends the Drug Court Act 1998 to allow the Drug Court to deal with a breach of a section 12 bond under the sentencing provisions of that Act. The options currently available to any court, including the Drug Court, when sentencing an offender for breach of bonds under section 12 of the Crimes (Sentencing Procedure) Act 1999 are limited to periodic detention, home detention or full-time imprisonment only. These amendments give the Drug Court the discretion to deal with breach of section 12 bond matters with the same range of sentencing options that are available for all other matters referred to the Drug Court under section 6 of the Drug Court Act. This will mean that the Drug Court no longer has to send these persons back to the original sentencing court because of its limited sentencing options. This has resulted in significant delays and, because the ballot system is clogging up, many people who would otherwise be suitable have been denied entry to the program. That is an oversight that should be rectified.

Finally, I turn to reform of criminal proceedings affecting people who are mentally ill or have an intellectual disability. Schedule 12 amends section 24 of Mental Health Act 1990, to clarify that a police officer may arrest a person and take the person to a hospital to be assessed for mental illness or mental disorder where the person appears to have attempted serious harm not only to themselves, but to another person. Items [1] to [5] of schedule 13 amend sections 31 and 33 of the Mental Health (Criminal Procedure) Act 1990 to clarify that in all bail proceedings in the Local Court, when a person appears before the court in relation to charges that may be triable summarily and who appears to be mentally ill, the court may order that the person be taken to a hospital for assessment. If, at the hospital, the person is not found to be mentally ill under the Mental Health Act 1990, the person is immediately brought back before the court and a bail determination is then made. If, however, the person is assessed to be mentally ill under the Mental Health Act, the person may be released into the care of the hospital, and unless the person is brought before a magistrate again within six months of the first appearance, then the charge is taken to be dismissed.

The amendment clarifies that authorised officers who preside over out-of-hours bail courts, such as the weekend bail court at Parramatta Local Court, may make such orders. This important provision will ensure that, at an early stage of contact with the criminal justice system, persons who are mentally ill and should instead be subject to care and treatment under the Mental Health Act are diverted into the health care system. Items [6] and [7] of schedule 13 amend section 39 of the Mental Health (Criminal Procedure) Act 1990 confirming court discretion, so that after a finding of not guilty by reason of mental illness and pending the court's final orders in relation to the person the court is empowered to order a person's detention or release on such terms and conditions as the court considers appropriate.

This amendment expressly overrides the case of *Regina v Stephens,* 1999, NSWSC 811, where Justice Levine held that the use of the word "detain" meant that the court must order the detention of the person in some form of secure custody, that is, either a gaol or a hospital. Hospital or detention in custody is usually inappropriate where the person has an intellectual disability, or has recovered from his or her mental illness at the time he or she appears before the court, and who presents no danger to the community. This amendment will give the court an alternative to ordering detention in a hospital or in custody, allowing a court to make orders, for example, in the same terms as bail conditions the person may have complied with for the duration of the trial. 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.