Full Day Hansard Transcript (Legislative Council, 15 October 2014, Proof)

Proof

Extract from NSW Legislative Council Hansard and Papers Wednesday, 15 October 2014 (Proof).

CRIMES LEGISLATION AMENDMENT BILL 2014

Second Reading

The Hon. DAVID CLARKE (Parliamentary Secretary) [9.41 p.m.], on behalf of the Hon. John Ajaka: I move:

That this bill be now read a second time.

I seek leave to have the second reading speech incorporated in *Hansard*.

Leave granted.

The Government is pleased to introduce the Crimes Legislation Amendment Bill 2014.

The purpose of the bill is to make miscellaneous amendments to criminal legislation, as part of the Government's regular legislative review and monitoring program. The bill amends a number of Acts to improve the efficiency and operation of the State's criminal laws.

I will now outline each of the amendments in turn.

Clause 1 of schedule 1 makes three amendments to the Crimes Act 1900.

Item [1] amends section 61HA of the Act to extend the statutory definition of consent to attempts to commit the offences specified. Section 61HA contains a statutory definition of consent for specified sexual assault offences. The definition requires a person to have reasonable grounds for their belief that another person consents to sexual intercourse with them.

Section 61 HA does not now apply to attempts to commit sexual assault offences. As a result, where attempts to commit those offences appear in the same indictment as the substantive offences, juries are given different directions as to the statutory and the common law definitions of consent. This anomaly was identified by the recent Statutory Review of the consent provisions in the Crimes Act and will be rectified by this amendment.

Item [2] of clause 1 also implements a recommendation of the Statutory Review of the consent provisions in the Crimes Act. Replacing the word "medical" with the word "health" in section 61HA (5) (c) ensures that the subsection applies to all health procedures, not just those carried out by medical practitioners.

Item [3] of clause 1 amends section 93FB of the Crimes Act to clarify and extend the existing offence of possessing a dangerous article in a public place to apply to flares or distress signals. This amendment was proposed by the NSW Police to address anti-social behaviour by some fans at sporting matches. The current definition of dangerous article may not capture night-time flares which do not emit smoke but instead burn with a very bright light capable of burning material and causing eye damage. The amendment will not affect the available defences where the flare is possessed for a lawful purpose or with a reasonable excuse.

Clause 1.2 of schedule 1 amends the Crimes (Domestic and Personal Violence) Act 2007 by introducing a regulation-making power to prescribe a form for applications for apprehended personal violence orders. Proceedings for apprehended domestic violence orders are not affected by this amendment.

This amendment implements a recommendation of the Interim Review of the Act which considered the issue of frivolous and vexatious APVOs. The new regulation-making power extends to allowing certain questions to be included on an APVO form to assist a Local Court Registrar in deciding whether or not to issue an APVO. Answers to the questions will help reveal whether or not the APVO is sought for legitimate reasons relating to fears held by the applicant. The APVO form may also contain a warning that penalties may apply for making a false statement and that the maximum penalty is 12 months imprisonment or 10 penalty units [under section 49A of the Act]. This will be a safeguard for those completing an application, and a deterrent against frivolous or vexatious applications.

Clause 1.3 of the bill inserts into the Crimes (Forensic Procedures) Act 2000 a retrospective savings provision clarifying that forensic procedures carried out by appropriately trained NSW Police Force

officers were carried out by "appropriately qualified persons" as defined by the Act. This amendment corrects a technical oversight relating to the written authorisation issued to NSW Police Force officers on completion of training in forensic procedures. The retrospective validation is limited to procedures carried out before 24 December 2013, when the technical oversight was corrected, and only applies to procedures carried out after completion of a training course.

Items [1] and [2] of clause 1.4 to schedule 1 amend section 53A of the Crimes (Sentencing Procedure) Act 1999. That section allows a court to impose an aggregate sentence when sentencing an offender for more than one offence. The section requires that the court indicate and record the sentence that would otherwise have been imposed for each offence.

The proposed amendment clarifies that a *written* record is to be made of the discrete sentences that would have been imposed had the court not set an aggregate sentence. Clearly recording indicative sentences is important for compiling sentencing statistics and allowing victims of crime, the community and any appeal court to understand how the aggregate sentence was arrived at.

Clause 1.5 of schedule 1 amends Rule 86 of the Criminal Appeal Rules to update a cross-reference in that section to the Crimes (Sentencing Procedure) Act 1990 which deals with guideline judgments on the application of the Attorney General.

Clause 1.6 amends the Criminal Procedure Act 1986 (CPA). Items [1] and [2] clarify that section 190 allows the Local Court to convict an accused in his or her absence, both at the first return date and at any subsequent mention date. This amendment reflects existing Local Court practice, as well as the Supreme Court decision of *Hammond v The Director of Public Prosecutions*.

Item [3] of clause 1.6 requires the court to be satisfied that the accused person had reasonable notice of the first return or mention date before proceeding to conviction. This will safeguard against the conviction of defendants who may be genuinely unaware of the mention date. Annulment applications will still be available where an offender disputes an ex parte conviction.

Item [4] of clause 1.6 removes the requirement in section 282 of the Act that a court must obtain the consent of an accused to the summary disposal of the proceedings if a scientific examination certificate is tendered by the prosecution. This is redundant as the NSW Table offences scheme provides that questions of how an offence is dealt with are determined by the type of offence and not by the nature of evidence tendered.

Clause 1.7 amends the Drug Misuse and Trafficking Act to provide that section 25B offences are to be dealt with summarily. Section 25B makes it an offence to manufacture, produce, possess or supply a substance listed in schedule 9 of the Poisons List under section 8 of the Poisons and Therapeutic Goods Act 1966 (NSW). The level of criminality attaching to offences concerning schedule 9 substances reflects that concerning psychoactive drugs in part C of the Drug Misuse and Trafficking Act: both sets of offences carry a maximum penalty of two years imprisonment. Dealing with schedule 9 substances summarily will be consistent with offences relating to psychoactive substances.

The amendment will apply retrospectively to existing offences, including those that have already been committed to the District Court. Where an accused has not yet been arraigned on an indictment containing a section 258 offence, the District Court may remit the matter to the Local Court to be disposed of summarily, if the court considers it is in the interests of justice to do so.

Clause 1.8 of schedule 1 amends the Graffiti Control Act 2008 to extend the time within which a charge under the Act must be brought from six months to two years.

The primary objective of the Graffiti Control Act is to have all graffiti offences dealt with under one Act. Increasingly, offenders are recording graffiti offences using technology such as camera-enabled mobile phones. Records of offences may be discovered more than six months after they have been committed. Extending the time limit to two years will allow more of these offences to be charged under the Graffiti Control Act rather than as property damage under the Crimes Act. It will provide more graffiti offenders with an opportunity to participate in council clean-up schemes and graffiti education programs under the Act.

Clause 1.9 of schedule 1 introduces a new offence of unlawful re-entry on inclosed lands. The offence will apply to event venues, defined as that part of inclosed lands used for organised, ticketed events. The offence will apply where a person re-enters a certain venue following a direction (a "re-entry prohibition") to leave and not return.

The introduction of this offence responds to New South Wales Police concerns about people who repeatedly contravene directions to leave sporting and public entertainment venues. Some Acts and instruments allow higher penalties to be imposed for a repeat offence in respect of larger venues [for example the *Sydney Cricket and Sydney Football Stadium By-law 2009*]. These amendments are intended to apply an escalating penalty regime for repeat offenders in respect of other, similar, venues which may not have their own banning scheme, but who confront similar problems.

To apply, the re-entry prohibition must specify the organised sporting or public exhibition event the

prohibition applies to, its duration and the reason for the prohibition. The prohibition can apply to just the organised event at the venue from which the person was directed to leave, or to any other event, venue or organised event for which the authority giving the prohibition is responsible. An example would be where a spectator is directed to leave a sporting event and not return to all matches of that sporting code for the duration of the season. The prohibition however can only apply to a ticketed event, and only while that event is taking place. It cannot apply to the whole venue. The re-entry prohibition can be in the form of a formal banning notice under existing legislation.

The person must also be warned that it is an offence to contravene the prohibition. These requirements safeguard against the arbitrary or unfair issue of re-entry prohibitions, as does the inclusion of a defence of reasonable excuse.

The offence will carry a maximum penalty of 10 penalty units. Proposed subsection (6) of section 4AA provides that a person cannot be found guilty of this offence as well as another Act or instrument in respect of that re-entry.

Clause 1.10 of schedule 1 amends section 3 of the Telecommunications (Interception and Access) (New South Wales) Act 1987 to align the definition of "certifying officer" for the Police Integrity Commission, the Independent Commission against Corruption and the NSW Police Force with the corresponding definition in Commonwealth legislation.

Clause 1.11 of schedule 1 amends section 26ZI of the Terrorism (Police Powers) Act 2002 to clarify that the obligation not to disclose information obtained while monitoring communications between a detained person and their lawyer, extends to lawyers from whom a monitor seeks advice about the status of the monitored information. It will be an offence for a lawyer to disclose such. The proposed maximum penalty of five years imprisonment reflects the penalties applying to disclosure of information by monitors under subsection 26ZI (6). This amendment implements recommendations of both the NSW Ombudsman and the 2012 Statutory Review of the Act completed by the former Department of Attorney General and Justice.

I commend the bill to the House.