

HIGH RISK OFFENDERS BILL 2019

Committee

Resumed from 18 February. The Deputy Chair of Committees (Hon Dr Steve Thomas) in the chair; Hon Sue Ellery (Leader of the House) in charge of the bill.

Clause 15: Functions of Board —

Progress was reported after the clause had been partly considered.

Hon SUE ELLERY: Mr Deputy Chair, I am in the hands of the chamber. When we were on clause 11, Hon Nick Goiran asked for some information. I now have that information. Last night, we deferred debate on clause 11 on the basis that I did not have that information. I would suggest that the most logical thing to do now is that we go back to clause 11 and I provide this information, and we then proceed accordingly. That seems the most logical to me, because that is why we deferred.

The DEPUTY CHAIR: As I understand the motion to postpone, it was to postpone beyond clause 123. Therefore, there will be a procedural issue in jumping around too much.

Hon SUE ELLERY: If I may seek your advice, Mr Deputy Chair, this is at the heart of the debate. Therefore, I think it would be most helpful to the chamber if we dealt with clause 11.

The DEPUTY CHAIR: I will seek some advice on the motion that is required to get the chamber to where the minister is seeking to go. Minister, can I just check in advance? The chamber also postponed clause 14. Is it your proposal to deal with both clauses 11 and 14, or leave clause 14 still postponed?

Hon SUE ELLERY: It would be logical if we dealt with clause 11 and then clause 14, and then proceeded accordingly.

The DEPUTY CHAIR: I ask the minister to move that we postpone debate on clause 15.

Hon SUE ELLERY: I move —

That further consideration of the clause be postponed.

Hon MICHAEL MISCHIN: I would rather not go back to clause 11 at this point. I am happy to go back and deal with clause 14. We have been jumping from one clause to another for a variety of reasons. I say that because we do not know what information is about to be presented in respect of clause 11. It may or may not settle the matters that have been raised to the satisfaction of the chamber and the members who have posed those particular questions.

I also received yesterday an email from an advisory officer at the Office of the Attorney General offering assistance and advice on various matters. I have not formulated any particular areas at this time, although I did raise with that officer the scenarios that were put to the minister yesterday and to which I felt I had not received satisfactory responses that were clear enough to be able to be referable in the future, so I am awaiting a reply on that. The email also foreshadowed an amendment and the like. I do not know the outcome of that. Clause 11 is very important. It is fundamental to the powers in the bill. However, there are a lot of other things in the bill that we can get on with that are unaffected by clause 11. It would be nice to make some progress and get rid of part 2 of the bill as a discrete area before we have to worry about the mechanisms in the legislation and the powers that may or may not be present in the Attorney General and other authorities.

Hon SUE ELLERY: I am not going to argue about this. I thought that what I was proposing was logical and helpful, but if members do not want to proceed in that way, I am happy to proceed with where we are at, which is clause 15. I therefore withdraw the motion that further consideration of clause 15 be postponed.

Motion, by leave, withdrawn.

The DEPUTY CHAIR: The question before the chamber is that clause 15 do stand as printed.

Hon COLIN TINCKNELL: This may have been answered in part before—I am not sure. Clause 15, “Functions of Board”, refers in subclause (1)(c) to information sharing. Since this legislation seeks to address the issue of high-risk violent and sexual offenders, will there be a requirement for high-risk and violent offenders to be registered and recorded in much the same manner as sex offenders are registered and recorded?

The DEPUTY CHAIR: I make the quick point, honourable member, that we are on clause 15. I am struggling to make a link between the question that you have asked and clause 15.

Hon COLIN TINCKNELL: It is information sharing, in subclause (1)(c).

The DEPUTY CHAIR: You have asked a question about whether a set of rules will apply. It is a fairly broad brush. I will give the minister an opportunity if she wishes to answer it, but it might be more appropriate to find an alternative clause of the bill under which to ask that question.

Hon COLIN TINCKNELL: I am happy to do that.

The DEPUTY CHAIR: Have you finished your question, Hon Colin Tincknell?

Hon COLIN TINCKNELL: I do have a second part, but we will see how we go.

The DEPUTY CHAIR: We will allow the minister to attempt to reply to your first question.

Hon SUE ELLERY: I think that what the honourable member is asking about is not in this bill but is in another piece of legislation. It is certainly not in this clause, which deals with the functions of the board. I think the member is talking about the register of offenders. I can give an undertaking to provide some further information when we next sit. The advisers will need to check that.

The DEPUTY CHAIR: Are you going to ask a second question on clause 15, Hon Colin Tincknell?

Hon COLIN TINCKNELL: That has been answered, thank you.

Hon NICK GOIRAN: Minister, yesterday we talked about the provision in clause 15 that the board has the function to develop best practice standards and guidelines for the performance by relevant agencies of their serious offender functions. Would that include best practice standards and guidelines for the Attorney General, the Director of Public Prosecutions and the State Solicitor with respect to any applications made under the legislation?

Hon SUE ELLERY: Each of the actors—if I can use the expression that the member described—is required to assess whether or not they take action in respect of applications, based on the provisions that are set out in the bill before us. I cannot imagine the board doing this, but if the board were to produce a guideline that was contrary to one of those actors considering the relevant matters under the bill, then in fact the relevant actor would not follow that guideline. If the guideline was of some assistance, the relevant actor might do that.

I take us back to where we were at one point last night. These elements in paragraphs (b), (c), (d) and (e) are in respect of whole agencies and a narrow, particular part of their function; that is, their serious offender function. The member is asking about the provisions that three specific identified officers need to follow, so we are talking about slightly different things.

Hon NICK GOIRAN: What are intended to be the serious offender functions for which the board will develop best practice standards and guidelines?

Hon SUE ELLERY: I take the member back to clause 3, which sets out the serious offender functions. Those are the functions that any guidelines developed under clause 15, “Functions of the board”, would apply to.

Hon NICK GOIRAN: At clause 3, the term “serious offender functions” means —

functions that are concerned with the assessment or management of serious offenders under custodial sentence or serious offenders under restriction;

These applications that would give certain individuals the power to make, under clause 11, are they considered to be a subset of an assessment or management of serious offenders?

Hon SUE ELLERY: The guidelines proposed that will be developed as one of the functions of the board may well be applied and may well be very useful to the informal committee that will deal with assessments. We talked about that last night and I provided information to the house about the assessment that will be performed by them. Separately, if you like, a legal assessment or a judgement will be made by either the Director of Public Prosecutions, the State Solicitor or the Attorney General, about whether they proceed to take a particular course of action. It is worth noting that neither the State Solicitor nor the DPP is a relevant agency for the purpose of the particular bit that we are talking about right now. This is about setting out an expectation of the board in respect to policies and procedures to those agencies that have the practical job of dealing with those serious offenders, because they have a particular bit of their relevant legislation that deals with that component, as opposed to making, essentially, a legal judgement about whether to proceed down the path to make an application to appeal et cetera.

Hon NICK GOIRAN: Is the minister ruling out making the Director of Public Prosecutions a designated body by the regulations as a relevant agency?

Hon SUE ELLERY: The short answer is that it would not be ruled out. But if we go back to the terms in clause 3, there are definitions of “relevant agency” and definitions of “supporting agency”. The DPP is listed as a supporting agency rather than a relevant agency. That is not to say at some point in the future a decision might be made that it is appropriate, but there is no intention or plan to do that.

Hon NICK GOIRAN: As I understand it, the supporting agencies will have some information-sharing responsibilities. We will see this information at clause 25, which is entitled “Disclosure of information between supporting agencies”. Why would the board not have any role to facilitate information sharing between supporting agencies, and why is clause 15 restricted to just relevant agencies?

Hon SUE ELLERY: Under part 2, clause 15 of the bill goes to the functions of the board, which are best practice research and policymaking but at a very high level. Part 3 of the bill—I think the member took us to clause 25—spells out the more practical implementation requirements of the supporting agencies around cooperation and sharing of information. One is at a very high level and the other is at a very practical level in how it is expected that the requirements of sharing information and cooperating, for example, will be implemented.

Hon NICK GOIRAN: Just finally on this issue, given that the clause, as currently constructed, does not make reference to supporting agencies, and we know that supporting agencies are going to have a role with regard to the disclosure of information and the cooperation between supporting and relevant agencies, would not clause 15(1)(c) be better read or drafted to say —

to facilitate information-sharing between relevant agencies —

And supporting agencies —

in relation to the performance of their serious offender functions;

Would that not be better—to borrow a phrase that has been used a few times in this debate—to futureproof the bill, in the event that the board can usefully facilitate information sharing involving supporting agencies, but then somebody comes along later and says, “Unfortunately, we cannot do that, because clause 15 restricts the functions of the board”? Is there any reason why we should not do that now?

Hon SUE ELLERY: There is a practical consequence to what the member is suggesting that perhaps he has not contemplated. If we were to add the supporting agencies, it would include agencies like the Office of the Director of Public Prosecutions. A board would then be setting a policy for an independent agency. The intent of the member’s questions is valid and sound and it comes from a sensible place, but there are consequences that would make it impossible and in contravention of other functions of those agencies.

Hon MICHAEL MISCHIN: I am having trouble understanding the point of this board. I have read the functions that are set out. They essentially turn on acquiring a certain level of expertise in the assessment and management of serious offenders, facilitating the exchange of information amongst various other agencies and advising relevant agencies on sourcing, service provision and training relevant to the performance of those agencies’ functions. But I cannot find anywhere a bald statement of the objectives of the board. I look to the policy statement back in 2017 and the substance of the board. The election commitment was to set up a board that assessed offenders in custody towards the end of their term and, if they are a potential menace, to ask the Director of Public Prosecutions to take action to have them declared and to have the Supreme Court deal with them in the same manner as dangerous sexual offenders. Despite the comment in the second reading speech, that is not what this board will do—quite the contrary in fact, so it is not a fulfilment of that election commitment. Nowhere do I see in part 2—it may be because I missed something somewhere else—an explanation of the point of the board and what it will be able to do that the Prisoners Review Board of Western Australia cannot and does not do to acquire expertise in the management of offenders generally and identify and manage those recidivists and the like. This board will not manage anything. It will simply get information together and distribute it. Also, I do not see anything in here about an objective for all of this other than to simply manage offenders either in custody or in the community. Is part of the remit of this board to seek out ways of rehabilitating serious offenders, because I do not see any mention of that anywhere here? There are objects in the legislation; that is true, but they are not tied to the operations of the board. Clause 8 simply states —

The objects of this Act are —

(a) to provide for the detention in custody or the supervision of persons —

Who are high-risk serious offenders —

... to ensure adequate protection of the community and of victims of serious offences; and

(b) to provide for continuing control, care or treatment of persons —

Who are high-risk serious offenders. That is the closest the bill comes to mentioning treatment for, rehabilitation of or some remedial work on these people. I cannot find anything in the functions to deal with that. I question whether there is any point to this board, given its composition and that the members will effectively duplicate what is currently in place under the Prisoners Review Board. What will it do that the Prisoners Review Board is not doing now or cannot be made to do within the current structure?

Hon SUE ELLERY: Essentially, we are back to a place we have been a couple of times during the course of this debate, which is the honourable member’s view that the content of this bill does not reconcile with the policy statement he has referred to. I cannot answer the question in any other way than I have answered it on numerous occasions in the course of this debate. The functions of the board are set out and are clear. The question is about what the Prisoners Review Board can do and what this board will be able to do. This board will deal with a particular and narrow group of offenders whose low numbers do not reflect the degree of chaos that they cause in the community. This is about applying a specialist function, if one likes, to this particular category of offenders. However, I cannot

help the honourable member with the essential question that he has about reconciling the policy document he has referred to with the content of the bill.

The DEPUTY CHAIR: I will take that on board as the member asks further questions.

Hon MICHAEL MISCHIN: I know that the minister cannot help me with that. I know that it means admitting that the bill will not do what she said it will do, but that is not the point of my question. I asked: what is it that this board that is being set up is going to do and will need to do that justifies having this board and cannot be accommodated within the current structure of the Prisoners Review Board with all the experience it has acquired since the early 1960s when it was first established under the then Offenders Probation and Parole Act?

Hon Sue Ellery: I have answered the question, Mr Deputy Chair.

Hon MICHAEL MISCHIN: The minister has not answered the question. She has fobbed it off.

The DEPUTY CHAIR: I give Hon Michael Mischin the call.

Hon MICHAEL MISCHIN: Minister, what does the Prisoners Review Board not do that this board is going to and needs to do?

Hon SUE ELLERY: I get that the honourable member does not like my answers; I pick up the vibe pretty clearly. However, I have answered the question. I have indicated that we are talking about a specialist group of offenders. He might not like the answer, but I have answered the question.

The DEPUTY CHAIR: If that is the answer that is required, we will have to move to a different line of questioning.

Hon MICHAEL MISCHIN: I accept that the government has no answers to these things, so I will ask this: what will the relationship of this board be to the Prisoners Review Board? Can the minister tell us anything about that?

Hon SUE ELLERY: The Prisoners Review Board deals with matters under the Sentence Administration Act. The board that we are now talking about, the functions of which are set out in clause 15, will deal with broader, higher level issues. It may well be that the work of the board outlined in the bill before us today will inform the work of the Prisoners Review Board. It might in fact inform the work of the Mentally Impaired Accused Review Board. There will be no formal relationship between the two.

Hon MICHAEL MISCHIN: This is pretty fundamental. This was a big election commitment, but we will leave aside the question of whether this reflects that election commitment. The minister has told us that there will still be a Prisoners Review Board, which will deal with all the functions under the Sentence Administration Act and will presumably still be responsible for the management and monitoring of these offenders. Would that be correct, minister?

Hon SUE ELLERY: The Prisoners Review Board, as I said, will be responsible for the management of prisoners under the Sentence Administration Act. This board, the functions of which are set out in clause 15, will be responsible for the high-level policy matters that will apply to high-risk serious offenders.

Hon MICHAEL MISCHIN: We have a Prisoners Review Board that deals with prisoners generally and is currently responsible for managing prisoners of all shapes, sizes, categories and the like who are out in the community. Here we will set up a new board that will not identify potential candidates for high-risk offender status; will not instruct or ask the Director of Public Prosecutions or anyone else to take action to have these people declared, if they are candidates, as high-risk serious offenders; will not manage offenders; may inform the Prisoners Review Board from time to time, as it sees fit, of high-level policy and stuff; will not take any enforcement action; and will not manage or monitor any prisoners or offenders who are in the community. Would that be a fair summary, minister?

Hon SUE ELLERY: Deputy Chair, I have lost count of how many times we have described what the board will do and what the informal committee that will manage assessment will do, so I am not going to accept the language used and the characterisation of the respective functions made by the honourable member. That is his conclusion to draw. On numerous occasions now I have provided the chamber with information about the functions of the board and the role and operation of the informal committee.

Hon MICHAEL MISCHIN: Is it fair to say that the whole point of this board is to ensure that agencies work closely together in carrying out their functions for serious offenders? Is that basically what it is all about?

Hon SUE ELLERY: That may be how the member chooses to describe it. The functions of the board are clearly set out in clause 15 of the bill before us. The board will do what is currently absent from the system—that is, oversee the overall process relating to high-risk offenders. That will ensure integrated service provision, because it is critical for those offenders who are designated as being at the highest risk, and that there are no gaps in necessary services. That is the information that I have provided to the chamber on a number of occasions.

Hon MICHAEL MISCHIN: It is not how I choose to describe it; it is how the minister described it in her second reading speech —

Part 2 of this bill delivers on the McGowan government's election commitment to establish the High Risk (Sexual and Violent) Offenders Board, which will ensure that agencies work closely together when carrying out their serious offender functions.

Then she told us who will be on the board. That is about the closest we have come to understanding the point of it. If the minister cannot help us any further than that, so be it. We will have a board and it will, at a high level, acquire some information and coordinate things. I have no further questions.

Clause put and passed.

Clause 16 put and passed.

Clause 17: Membership of Board —

Hon NICK GOIRAN: What is the maximum number of community members intended under clause 17(1)(c)?

Hon SUE ELLERY: There is no maximum number.

Hon NICK GOIRAN: I know that there is no maximum number; that is self-evident.

Hon Sue Ellery: Why did you ask the question, then?

Hon NICK GOIRAN: My question was: what is the intended maximum number? How many community members is the government intending to appoint?

Hon SUE ELLERY: I cannot give the honourable member a precise answer because a final policy position has not been settled on. It might be two; it might be more. It is anticipated that community members will be sessional members, so, to a certain extent, it might depend on their availability. That is the thinking at the moment. I do not want to say anything that would not be correct, because a final position has not been landed on.

Hon NICK GOIRAN: Has there been consideration in government about the desired number of members of the board, not the number of community members, because the minister has just endeavoured to answer that? What I am driving at is that these boards have to be workable, so we cannot have a board of 100 people, obviously. What is the desired number altogether?

Hon SUE ELLERY: The honourable member is absolutely right; it is important that the board is workable, so making sure that it is not too big such that it becomes dysfunctional is a live consideration in the number of board members. In the same way that no final position has been reached on the number of community members, there is no final position on the total number of board members. The point that the honourable member has made is a live consideration in getting to the point of making that decision.

Hon NICK GOIRAN: In debate on an earlier clause, the minister reconfirmed the undertaking that was given by the Attorney General in the other place to include the Commissioner for Victims of Crime as a member of the board. As I recall, she indicated during that earlier debate that parliamentary counsel is working on the best way—I am paraphrasing my recollection of the debate—to achieve that. What is the status of that consultation?

Hon SUE ELLERY: I am advised that it has been determined that the matter will be dealt with by regulations and that they are in the process of being drafted. I do not know whether it is accurate to say that. They are being developed. I do not know whether there is an actual draft yet, but they are in the process of being developed.

Hon NICK GOIRAN: Is it the case that the way in which the commissioner will get on the board at clause 17 is because the regulations will somehow capture the commissioner one way or another as a relevant agency?

Hon SUE ELLERY: That is correct.

Hon MICHAEL MISCHIN: How many members from different categories are there currently on the Prisoners Review Board?

Hon SUE ELLERY: I am conscious that it is about five minutes before I need to report progress. I do not have a list here so I will take that on notice.

Hon MICHAEL MISCHIN: I would appreciate that. I want to see whether any of those officers would also be on this board or whether there is an essential overlap, in which case we are looking at the same board with two different manifestations. Again, it gets back to what this board can contribute that the current structure does not. In any event, as I see it, the government is looking to have at least five people on this board, having regard for the definitions in clause 3 of the bill for each of those different agencies, the Chief Psychiatrist, which makes six, and any number of community members. We will come to those in a moment. Why is there a need for community members as opposed to particular types of specialists given that the functions of this board do not involve management, supervision or monitoring, but the development of learning in respect of the assessment and management of a small cohort of offenders—not just offenders generally and how we classify and assess them, but only serious offenders—and otherwise facilitate information sharing somehow between other agencies? What

is the point of a community member unless they have high-level expertise that can contribute to that process? Unlike the Prisoners Review Board, which may comprise community members who can contribute a community point of view as a sort of touchstone of community expectation to the release, management and conditions to be hedged around offenders, here we are looking at a rarefied thing where there is no management of offenders and no decisions being made about specific offenders.

Hon SUE ELLERY: There are a couple of reasons. In a kind of broader community interest argument, if you like, I made the point earlier that these offenders, small though in number, create havoc in our community and the community is interested in making sure that the policy framework that applies to them is sound. But also—this is set out in the provisions of clause 18, which is the next clause that we will consider—there is indeed expertise outside the public sector that the board would find useful to give consideration to as well. Some of those areas of expertise are set out in the provisions of clause 18, which we will get to in due course.

Clause put and passed.

Clause 18: Community members of Board —

Hon NICK GOIRAN: Will the Attorney General publicly advertise for community members on this board?

Hon SUE ELLERY: I cannot give an undertaken that they will publicly advertise for community members. That may be, but no decision has been made one way or the other. There are specific areas set out in clause 18 that go to particular kinds of knowledge that community members may bring. As to the process of capturing, if you like, that kind of expertise, no decision has been made on the actual process. Public advertising has not been ruled out, but there is no decision about whether that will happen.

Hon NICK GOIRAN: Can the board operate without any community members?

Hon SUE ELLERY: I am advised, yes, it can.

Hon NICK GOIRAN: What remuneration and allowance is expected to be set for the community members under clause 18(3)?

Hon SUE ELLERY: The normal process, honourable member—I am not advised that there is any intention to do anything other than the normal process—is that cabinet would make a decision on that based on the advice of the Public Sector Commissioner.

Progress reported and leave granted to sit again, on motion by Hon Sue Ellery (Leader of the House).