PRISONS AMENDMENT BILL 2020

Council's Amendments — Consideration in Detail

The following amendments made by the Council now considered —

No. 1

Page 4, line 23 — To insert after "**blood**" —

or other body

No. 2

Page 5, lines 6 and 7 — To delete the lines and substitute —

the purpose of having a blood or other body sample taken to test the sample for the presence of an infectious

No. 3

Page 5, line 11 — To delete "blood".

No.4

Page 5, line 13 — To delete "blood".

No. 5

Page 5, line 18 — To delete "blood sample; and" and substitute —

sample taken; and

No. 6

Page 5, line 24 — To delete "blood sample." and substitute —

sample taken.

No. 7

Page 5, after line 24 — To insert —

46B. Review of s. 46A

(1) The Inspector of Custodial Services must review compliance with, and the operation and effectiveness of, section 46A, and prepare a report based on the review, as soon as practicable after the 5th anniversary of the day on which the Prisons Amendment Act 2020 section 12 comes into operation.

(2) The Inspector of Custodial Services must furnish a copy of the report to the Minister as soon as practicable after it is prepared.

(3) The Minister must cause the report to be laid before each House of Parliament as soon as practicable after the Minister receives it, but not later than 12 months after the 5th anniversary.

Mr F.M. LOGAN — by leave: I move —

That the amendments made by the Council be agreed to.

These amendments, which were moved in the other place, all relate to COVID-19 issues. The bill that came before this house dealt with bloodborne viruses. As a result of further discussion at the departmental level and then with the State Solicitor's Office and, obviously, cabinet, it was decided that it was important that we take into account the COVID-19 situation that the state, the nation and the world faces and the possibility of COVID-19 getting into the prison system. Given that when the Legislative Assembly considered the bill, it dealt only with the taking of blood for the testing of bloodborne viruses, we believed it was appropriate to amend the bill whilst it was in the Legislative Council to be able to deal with the COVID-19 outbreak. As members know, the testing of people for COVID-19 is by way of a swab taken from both the back of the throat and the top of the nose. That is a different type of testing arrangement from the one that was in the bill when it was dealt with by the Legislative Assembly, so we had to amend it to not only include testing for COVID-19, but also change the way in which testing can be undertaken, as testing for COVID-19 requires the taking of bodily samples other than blood. That is what the amendments do that we are dealing with today. The amendments were moved by the government and approved by the Legislative Council.

Mr S.K. L'ESTRANGE: The opposition supports the amendments. Obviously, the intent of the original bill was to enable the safety of prison officers who work in our corrective services sector. This was a technicality—that the legislation was to do with the taking of blood to test for infectious diseases. What COVID-19 has alerted all of us to is that testing for infectious diseases is sometimes not just about taking blood; it can also be about taking

swabs of saliva, for example. The legislation needed to be corrected to enable that to happen. That is why we support the amendments.

Mr F.M. LOGAN: I now move that the amendment standing in my name, which is the amendment dealing with section —

Point of Order

Mr D.T. REDMAN: I just want to understand where we are at. I am wondering whether that collective just went through on the voices or whether I still have a chance to talk to the first list of amendments.

Mr F.M. Logan: No. Nothing has been put.

Mr D.T. REDMAN: It has not been put?

The ACTING SPEAKER (Ms L. Mettam): It is yet to be put, member.

Debate Resumed

Mr D.T. REDMAN: I did not want to interrupt the minister in the flow, but I was looking down and I thought, "Heck! It's gone through and I haven't got a chance to ask a question. It's gone through very quickly!"

Mr F.M. Logan: The reason why I moved on is that no-one said anything, so I thought we would move on.

Mr D.T. REDMAN: We are still in business. The shadow minister highlighted that the opposition supports these amendments. The Nationals WA, obviously, do as well. The government has made provisions to allow for the testing of COVID-19. As I understand it, there was a debate in the upper house on the mandatory nature of this bill. I did not read it in detail; I just got some feedback. The word "mandatory" is used in the clauses that we are amending now. The government has extended it to not be just the mandatory taking of a blood sample, but also other bodily samples, quite rightly. The point was made that practitioners may well be conflicted in their code of ethics about doing something against the will of a patient—that is, taking a blood sample or taking another sample—and whether it was enforceable to mandatorily take a sample from a prisoner, or whether there is some validity in the argument about the clash with the code of ethics that practitioners have, whether they be medical doctors, nurses or nurse practitioners. They may, in fact, not be able to exert a mandatory influence to get that test.

Mr F.M. LOGAN: I saw and listened to the debate about the issue of mandatory testing. We had that discussion in this house as well. When a prisoner puts up a struggle and refuses point blank to have a sample taken—whether it is the one that we are dealing with at the moment, which is for COVID-19, or for a blood-borne virus—that sample will not be taken, whether it is blood or another bodily sample. The prisoner will be charged for refusing to hand over a sample. Force will be used when they have agreed to provide a sample, the sample is being taken by a nurse or a medical practitioner, and the prisoner begins to move around. If the medical practitioner requests the prison officer to hold the person so that the sample can be taken, whether it is for COVID-19 or a blood-borne virus, that is exactly what would happen. Force would be used, but only for the purpose of taking that sample. If a violent rejection of the taking of either a COVID-19 sample or blood is put up, that would not be undertaken and the prisoner would be charged.

Mr D.T. REDMAN: Could the minister remind me of the consequence for being charged for not voluntarily giving a sample?

Mr F.M. LOGAN: I will remind the member of the penalties for a prisoner. It would be up to six months' additional incarceration—which is served commensurate with the existing sentence—or $6 000, or up to 28 days' solitary confinement.

Mr K.M. O'DONNELL: I, too, wish to ask a question regarding the bill's mandatory nature. We talk about it being mandatory for prisoners to undergo a blood test, but if a prison officer has come into direct contact with some bodily fluid, it says that the chief executive officer "may" direct that the prisoner undergo testing. The second reading speech states that the superintendent "will" direct the prisoner to undergo testing for infectious diseases. We talk about it being mandatory for the prisoner, but is it mandatory for the prison to direct the prisoner to do it? The prisoner has to do so if he is directed, but what if the chief executive officer says no, and the superintendent says no? Is there any recourse for the prison officer? How could he go about it? It could happen that the hierarchy—the two people mentioned, the chief executive officer and the superintendent—does not agree with the prisoner undergoing it. How can the prison officer get it done?

Mr F.M. LOGAN: Under the Prisons Act, in a prison, the superintendent is stated by law to run the prison. His or her word is the final word. In a case in which a prison officer has requested that a blood sample be taken—this is what the member is suggesting—and the superintendent rejects that for whatever reasons, that will be the end of it. Under the act, the superintendent runs the prison. His word is the final word.

Mr D.T. REDMAN: Just to clarify, I do not think we are dealing with amendment 7 yet, are we?

The ACTING SPEAKER: We are dealing with all the amendments en bloc.

Mr D.T. REDMAN: I do have a question then. Amendment 7 on the notice paper is —

> Page 5, after line 24 space — To insert —

There is effectively a whole proposed section that refers to a review. The first proposed subsection refers to the requirement for the Inspector of Custodial Services to review compliance with section 46A of the act and prepare a report on the review as soon as practicable after the fifth anniversary of the day on which this new act comes into operation.

The ACTING SPEAKER: Excuse me, member for Warren–Blackwood. I understand that the proposed section you are referring to is not in this bill. Minister, can you clarify that?

Mr F.M. Logan: It's the next one.

Mr D.T. REDMAN: That was the question I asked. So we will be picking that up soon.

The ACTING SPEAKER: Yes. My apologies. Minister, would you like to clarify?

Mr F.M. LOGAN: The member is getting ahead of himself.

The ACTING SPEAKER: Sorry, no. I think that that was my fault. I was talking about moving these en bloc.

Mr F.M. LOGAN: We are still yet to deal with these amendments en bloc, and then we will come to that.

Mr D.T. Redman: That's why I asked the question.

The ACTING SPEAKER: My apologies. The question is that amendments 1 to 7 be agreed to. All those in favour say aye. The ayes have it. That concludes consideration in detail.

Mr D.T. REDMAN: Madam Acting Speaker, I do not think that concludes consideration in detail; is that right?

Mr F.M. LOGAN: There are two amendments. We have just dealt with one en bloc. The next one is the second amendment that I am putting forward, which is the one that the member for Warren–Blackwood wants to talk to. It is proposed section 46B. I move that proposed section 46B be agreed to.

The ACTING SPEAKER: I can see where the confusion has been. Proposed section 46B is part of amendment 7, so it is correctly part of the block that we referred to earlier. Member for Warren–Blackwood, would you like to ask your question about proposed section 46B?

Mr D.T. REDMAN: Thank you, Madam Acting Speaker. Just to clarify, I am now talking to amendment 7 on the notice paper, which refers to the insertion of proposed section 46B. It is couched around a review of section 46A and the principles about how that review will be triggered.

I note that proposed section 46B(1) refers to the Inspector of Custodial Services as the reviewer and states —

> … must review compliance with, and the operation and effectiveness of, section 46A, and prepare a report based on that review, as soon as practicable after the 5th anniversary of the day on which the … *Act* … comes into operation.

The trigger point is the fifth anniversary; a review must be completed as soon as practicable after that. It does not define how long after; it is just as soon as practicable. I am aware that for a range of reasons many some government reviews take a long time—sometimes more than 12 months. COVID-19 could cause significant interruption to government processes and could be one reason a review would take longer than it would otherwise take. Proposed subsection (3) states —

> The Minister must cause the report to be laid before each House of Parliament as soon as practicable after the Minister receives it, but not later than 12 months after the 5th anniversary.

The point has been made that under subsection (3) the minister will have a mandatory point in time by which a report will have to be laid before both houses of Parliament; that is, not later than 12 months after the fifth anniversary. Nothing in proposed subclause (1) gives any time frame for completing the review. It simply says "as soon as practicable after the 5th anniversary". The minister may well be caught between the mandatory requirement to lay a report on the table of both houses—a report that he does not have. I wonder whether the minister can give me an answer to those two points, which would seem to be in conflict somewhat, if for some reason the report is not furnished to the minister in a reasonable time.

Mr F.M. LOGAN: This is an interesting proposed section. It was not put in by the government; the Greens in the upper house, the Legislative Council, requested that it be put in. It requested that a review be put in. My advice to both the Greens and the Liberal Party in the upper house was that this clause was unnecessary on the grounds that the Inspector of Custodial Services under his act, as an independent inspector of the prison system, has the authority to look at anything at any time, and there was no necessity for a review of this nature because he is also under a legal obligation to report on prisons every three years and to table those reports in the house. Nevertheless, members in the Legislative Council wanted this type of wording to be put in the bill. We framed the wording so that the

Inspector of Custodial Services, who is the appropriate independent body to do this type of review, be requested to do that. That is the reason we have ended up with this wording.

I do take issue with what the member has pointed out. When proposed subsections (1) and (3) are read together, it makes obvious sense; that is, the review must be undertake on the fifth anniversary of the day on which section 12 of the Prisons Amendment Act 2020 comes into operation, as soon as practicable, and it must be laid before the house within 12 months. There is 12 months to do it.

Mr D.T. REDMAN: I think the minister has missed the point. The classic modus operandi of this minister is that he finds someone else to blame: "The Greens have brought this in, so don't blame me," he says. "This came in with that other mob and this is their words not mine." That is rubbish when you are the minister! He should not put himself aside from what he brings in here as an amendment.

I come to the point of the amendment. The minister has not answered the question. The first subsection of the amendment refers to the review being completed "as soon as practicable". The word "must" is not in there at all. There is no "must" have within 12 months in there. It says "as soon as practicable". History in government—I know what it is like; I was on that side as a minister at one time—is that sometimes governments struggle to get reviews out. Their timing does not necessarily fit in with the time frame that everyone would like. Yet proposed subsection (3) states —

> The Minister must cause the report to be laid before each House of Parliament as soon as practicable after the Minister receives, but not later than 12 months after the 5th anniversary.

There is a deadline for presenting the report—a deadline of no later than 12 months after the fifth anniversary—but the minister may not have a report to lay on the table. Really poor words are being used in this amendment, and they are in conflict. There cannot be a requirement to lay something on the table within 12 months of an act coming in when there may not be a report to lay on the table. This is in conflict. It is really poor wording. Can the minister stand now and give me confidence that these words are okay to go into an act of Parliament so that it can reach royal assent and play out and be effective when it becomes law?

Mr F.M. LOGAN: Jeez, member for Warren–Blackwood, you like to pick up on real non-entity things, don't you? But you—you in particular —

The ACTING SPEAKER: Through the Chair, minister.

Mr F.M. LOGAN: You, in particular, having been —

The ACTING SPEAKER: Minister, through the Chair.

Mr F.M. LOGAN: Thank you, Madam Acting Speaker. You being —

The ACTING SPEAKER: Excuse me, minister. Through the Chair.

Mr F.M. LOGAN: That member is a former minister for corrections and had responsibility for the Inspector of Custodial Services. You should know better. You have done this job!

The ACTING SPEAKER (Ms L. Mettam): I call you to order for the first time, minister. I asked that you go through the Chair, so can you please direct your comments my way.

Mr F.M. LOGAN: That member should know better. Why? Because he has done this job before. He knows, or should know—that is a reflection on how good he was at his job—that the Inspector of Custodial Services, as an independent inspector who reports to this house, can actually do an inquiry at any time he likes: six months after the legislation passes, 12 months after the legislation passes, three years after the legislation passes, five years after the legislation passes and 12 months after that. He can do it at any time he wishes. That was made clear to our colleagues in the upper house, who chose to ignore it; they wanted a review. The wording before us, member for Warren–Blackwood, was drafted by the State Solicitor's Office on the basis that those Greens and Liberal Party members in the upper house wanted a review put in. It is appropriate that the Inspector of Custodial Services does that review, for good reason. He has a legislative power to do that review. To come in here and to try to come up with hypothetical suggestions that the review may not be done within 12 months of the bill passing is just stupid and ridiculous, and reflects poorly on the member. He knows that the inspector could do the inspection either in line with this wording or independently from it. I am sure—I have great trust in the Inspector of Custodial Services—that he will comply with the legislation that is currently before the house and this amendment before the house. The review will be undertaken and it will be tabled.

Mr D.T. REDMAN: I think the minister is missing the point. I actually agree with the point he made about the Inspector of Custodial Services being able to do a review whenever he likes, absolutely. That is the whole idea of setting up that institution. It has been effective in doing that and it does hold ministers and governments to account. I have no problem with that. The point is that the minister has had carriage of this bill. It is the minister's bill. He has carriage of this bill on behalf of the Labor Party. It went through the upper house and had some amendments. The

minister is making the point that those amendments were drafted by Parliamentary Counsel—in fact he did not say that; he said that the State Solicitor's Office drafted the amendments. I am asking the minister to stand up in here and say that these amendments are valid. I am pointing out to the minister what appears to be a glaring error. It could well play out—the minister knows how it plays out in the circumstances which we find ourselves now with COVID-19—that that could hold up a whole range of government processes. I would be very surprised whether a bunch of reviews were not held up as a result of COVID-19, by whatever department has responsibility for doing reviews.

If the government requests us to cut it a bit of slack on the timing of something, the opposition would say yes because it is a valid request. The minister is saying I am stupid, no less, for suggesting that reviews might not be done within the formal compliance period. That is fundamentally wrong because it happens, and the minister knows it happens. We do not even need exceptional circumstances for that to happen; it actually happens. I have pointed that out to the minister and he has not given me a response. The amendments the minister is asking us to agree to, which he has carriage of irrespective of who put them up, seem to be in conflict. It may be possible. Let me ask a very clear question: is it possible that a review might not be completed before the 12-month mandatory period following the fifth anniversary of the implementation of this amendment? It is a very clear question. Is it possible that a review might not be done within 12 months of the fifth anniversary of this amendment coming into action?

The ACTING SPEAKER (Ms L. Mettam): Minister, through the Chair.

Mr F.M. LOGAN: I thank the Madam Acting Speaker.

"Perry Mason from Warren–Blackwood" can put up whatever he likes, but I am not here to answer hypothetical questions. The wording is as it is; it is quite clear. I have explained to the member, even though he should know himself, the role of the Office of the Inspector of Custodial Services and its powers. If the member has a problem with this wording, he should vote against it.

Mr D.T. REDMAN: This is really poor form because these changes have been brought in by the government under the guise of a COVID-19 response and, quite rightly, the opposition has been massively compliant with all the measures that the government has brought in. We have to be; we want the government to be successful in managing this issue. I am absolutely behind prison officers who find themselves in very, very difficult situations managing these issues. Rightly, the government is trying to put that in place, and I agree with the point, but, at the end of the day, the opposition holds the government to account and this minister is bringing legislation with errors in it. There appears to be an error in this amendment and I am not getting an adequate response from the minister because he is not going to the point I am trying to raise about this clause; that is, is it possible that a review might not be done within 12 months of the fifth anniversary of this amendment coming into play? Is that possible? My answer to that is yes, it is possible. Why is it possible? It happens on a fairly regular basis because agencies are busy and may not have scope to do that work. It is also possible because of externalities like COVID-19 that come into play and redirect agencies to respond to the challenges that we have. That is a very good reason for reviews not to happen. Right now, these clauses seem to be in conflict; we have a formal requirement for a report to be tabled in both houses of Parliament that might not be done within the time limit of one year after the fifth anniversary of the act coming into play.

The minister's response to my question has come up short and I think he has a responsibility to this house on a point of accountability to stand and say with confidence that these words, which he has brought to this chamber for us to agree to, are valid. The minister cannot lay it off on someone else and say the Greens wrote it. The minister said the State Solicitor's Office wrote it. I want the minister to tell me that these words are valid and the point I am making is wrong.

Mr F.M. LOGAN: I do not think there is any need to answer that. The member for Warren–Blackwood raised the question and then answered it himself. I do not even know why he asked the question in the first place. This is standard wording from Parliamentary Counsel. If the member does not like it, he can just vote against it.

Question put and passed; the Council's amendments agreed to.

The Council acquainted accordingly.