SENTENCE ADMINISTRATION AMENDMENT BILL 2017

Committee

Resumed from 13 March. The Deputy Chair of Committees (Hon Martin Aldridge) in the chair; Hon Sue Ellery (Leader of the House) in charge of the bill.

Clause 9: Part 5 Division 1A inserted —

Progress was reported on the following amendment moved by Hon Sue Ellery (Leader of the House) —

> Page 3, after line 23 — To insert —
>
> (aa) manslaughter; or

Hon SUE ELLERY: When we finished last night, I had moved the first amendment standing in my name on supplementary notice paper 2. I had drawn members' attention to the report of the Standing Committee on Legislation, in particular the paragraph set out on pages 50 and 51 with respect to the charge of manslaughter being captured by the bill that is before us today and the remarks of the committee, particularly at paragraph 6.69, which state —

> At least one of those in custody for manslaughter was charged with murder, but pleaded guilty to manslaughter. It is not uncommon in the criminal justice system for someone charged with the more serious offence to either plead guilty to the lesser one, or indeed to be found guilty of the lesser one following the hearing of the evidence regarding the circumstances of the offence. It seems to the Committee to be counter-intuitive that the prohibition on early release may apply to one offender and not another based on those circumstances—in either instance, a person is dead and the body remains missing, but the prisoner is expected to cooperate in order to be considered for parole in only one of those instances.

The effect of the amendment standing in my name is to give effect to recommendation 1.

The DEPUTY CHAIR: Just to clarify, the minister has moved her amendment to clause 9, as standing on supplementary notice paper 8 —

> To move —
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> Page 3, after line 23 — To insert —
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> (aa) manslaughter; or

Hon MICHAEL MISCHIN: I can indicate that the opposition will support the proposed amendment as it does embrace the principle behind the legislation, which is that those who have been guilty of homicide-related offences, when there is a deceased and the body of that deceased is not able to be located, will suffer the same consequences as those who are guilty of murder. However, I think the minister also recognises that it is a little short of the expectations of the secondary victims of homicide offences. The rhetoric regarding this bill until now has been focused around no body, no parole in respect of indeterminate sentences or life sentences. The example that the Attorney General has used when he was shadow and in his current manifestation is one Cameron Mansell. He will never get out. Unless he tells where the body of Mr Puddy is, he will never be out. There has been no mention to date that if this principle is applied to finite sentences, the most that people can hope for—the most comfort that secondary victims can hope for—is a delay of two years upon release.

I have no recollection of any of that being made clear in the past. Of course, if we are going down this track of legislating, I think it is quite appropriate that other homicide offences and, indeed, accessories after the fact and the like, are included within its operation, but it falls significantly short of what I think people had hoped for. Even with the increase in the penalty for manslaughter in the early years of the Barnett government to restore it to life imprisonment rather than a finite 20 years, I think it would be a pretty rare case indeed for someone found guilty of manslaughter to ever be sentenced to life imprisonment.

The opposition supports the proposed amendment, but also recognises that it is not going to offer as much comfort to people as the government led secondary victims to believe. There will be no never-be-released prospect; at most it will be a delay of up to two years. Of course, one has to balance that against the objectives of parole in any event, where part of the purpose of parole is to ease transition and to have supervision over people in the community. When people with a finite term are inevitably released when their sentence expires, there is a social advantage in them having the opportunity to be released under supervision to ensure that they are kept on the straight and narrow and to maintain their ability to abide by the rules, so we introduced a limited post-sentence supervision regime. I do not know whether this government is actually doing anything about it; it had some criticisms of it and promised that a replacement would be put in, but I have not seen any movement in that regard. It seems to me that there is

a risk in what is being proposed here, albeit that one objective will be met at the expense of others. Nevertheless, it is the government's bill. It is choosing to reduce these principles into writing and into a rigid framework. So be it. I hope that there will be no counterproductive element in this once the bill passes. The opposition supports the proposed amendment.

Hon AARON STONEHOUSE: I rise to signal my support for this amendment. It was my motion initially that referred the bill to the Standing Committee on Legislation. I am very glad that I did that. As the report of the Standing Committee on Legislation states quite clearly, manslaughter is a homicide offence in the Criminal Code. That was somehow overlooked in the bill, which again vindicates somewhat the decision that this place made to refer the bill to the Standing Committee on Legislation. It is included in Queensland and Victoria's equivalent so-called no body, no parole legislation and it makes sense that it is included in this bill. It would seem that the intent of this bill is to capture manslaughter as well, especially when many people who are convicted of manslaughter have not cooperated with police in locating the remains of their victim. I am more than happy to support this amendment and the other recommendations of the committee.

Hon ALISON XAMON: I indicate on behalf of the Greens that we will not be supporting this amendment. The reason for that is that the legislation as a whole is quite flawed. We will be opposing any further extension of the provisions.

Hon NICK GOIRAN: Can the Leader of the House indicate to the chamber why manslaughter was not originally incorporated in the bill?

Hon SUE ELLERY: I am not sure that it is anything more than the fact that the election commitment did not refer to manslaughter. Nevertheless, the government has listened to the committee and if the chamber so chooses to pass the amendment, it will include manslaughter.

Hon NICK GOIRAN: If the chamber agrees to the amendment, will this not delay the passage of the bill?

Hon SUE ELLERY: It will need to go back to the other house. It is anticipated—I am waiting with bated breath—that it will go to the other place.

Hon NICK GOIRAN: In the words of the Attorney General, those who are involved in delaying the bill are providing comfort to murderers and the like. Does that mean that the government is now in that same class?

Hon SUE ELLERY: That is a judgement that the member can make. This is the first week back for the Legislative Council. If we pass this bill before the end of Thursday—tomorrow—or if we pass it in the next hour and it goes to the other place, I am sure it will be passed by the other place this week.

Hon MICHAEL MISCHIN: On that note, I understand that the Attorney General was complaining today that the bill is being delayed in the Committee of the Whole here. It seems to me that one reason it is being delayed in committee rather than going through to the third reading is that there are government amendments. I wonder whether the Leader of the House has had the opportunity to discuss with her colleague the matters she undertook to discuss and to inform us about yesterday.

Hon SUE ELLERY: No. I am sorry; I have not. The member may be aware that I was otherwise occupied in the house this afternoon. I am sorry that I have not had the opportunity to do that. I find myself in an unusual position. The house made a decision to refer the bill to the Standing Committee on Legislation. The standing committee came up with some recommendations. We have accepted them entirely and exactly.

Hon Colin Holt: That's not unusual.

Hon SUE ELLERY: No, it is not unusual. That is what we have done. Everybody who has stood so far, with the exception of the Greens, has indicated that they are supporting the amendment. I am not sure there is much more I can add. The house determined that the standing committee should look at the bill. The standing committee made some recommendations. The government has accepted the recommendations. Here we are.

Hon Peter Collier: Your Attorney General doesn't help with his comments, I've got to say.

Hon SUE ELLERY: I have not had the opportunity to pass on the member's views. However, I undertook that I would do that, and I will. But what is before us right now are the recommendations made by the standing committee. There they are.

Hon MICHAEL MISCHIN: I have indicated that we will support the proposed amendment, but I have just one question: why is the offence of wilful murder not included amongst the homicide offences that are listed? Murder is included, but wilful murder is not.

Hon SUE ELLERY: I am advised that the Criminal Code defines "murder" as including the previous offence of "wilful murder".

Hon MICHAEL MISCHIN: Can the Leader of the House point it out so that we can be satisfied that the most serious offence in the criminal calendar before the distinction between "murder" and "wilful murder" was removed can tie in with this particular definition of a homicide offence? We are talking about manslaughter, infanticide—there are some specifics on what infanticide means—and murder, but can the Leader of the House satisfy us that there is a terminological link between the use of the word "murder" in proposed section 66A that runs through to the definition in the Criminal Code that will embrace the historical offence of wilful murder as well?

Hon SUE ELLERY: Under section 3(2) of appendix B of the Criminal Code, murder is deemed to include wilful murder.

Hon MICHAEL MISCHIN: Can the minister point to how that definition applies to the Sentence Administration Act?

Hon SUE ELLERY: It is not referred to in the Sentence Administration Act. We are relying on the definition that is in the code.

Hon MICHAEL MISCHIN: The minister is relying on that definition, but I want to be satisfied that there is no loophole here that will exclude those who have in the past been sentenced for wilful murder and fall under the parole regime specified in the Sentence Administration Act that will be excluded from the operation of this part, given that there is a specific definition in the code of a homicide offence to include murder, infanticide—as prescribed, and there are words to explain what infanticide means—and manslaughter. How does the Sentence Administration Act pick up the term "murder" as defined in the Criminal Code? If that can be shown, it would follow, but perhaps the minister can help us out there.

Hon SUE ELLERY: The question was put to parliamentary counsel in the drafting process and the advice provided was that murder, which is deemed to include wilful murder, is captured in the Sentence Administration Act. The question that the member asked was asked in the drafting process and the answer, as I gave previously, was that that satisfies the test.

Hon MICHAEL MISCHIN: Thank you. If the government is satisfied that there is no loophole here and assures us that that is satisfactory and that there is no technicality that might, in due course, to the anguish of secondary victims, turn out to be an issue of contention and exclude some people from the operation of this regime, I am prepared to accept it.

Hon NICK GOIRAN: I would just like to ask the minister whether the government considered the Victorian legislation before producing its own legislation.

Hon SUE ELLERY: I am advised that the answer is yes. I am advised that the regimes of all Australian jurisdictions that deal with this matter were considered.

Hon NICK GOIRAN: Obviously, minister, only the ones that were in force at the time that the government started drafting the legislation could have been considered. The government could not consider the ones that did not exist.

Hon Sue Ellery: Or when we ended drafting.

Hon NICK GOIRAN: But given that the Victorian legislation was assented to on 13 December 2016, and that the minister's government looked at it, is she aware that the Victorian legislation includes and captures manslaughter?

Hon SUE ELLERY: I am advised yes. I think that might be referred to in the committee report as well at paragraph 6.67.

Hon NICK GOIRAN: If the minister's government had the opportunity to look at the Victorian legislation, which includes manslaughter, but did not actually consider it, why was it not included in this bill?

Hon SUE ELLERY: I answered that same question from another member about 15 minutes ago, but I am happy to provide the member with the answer again. At the time that we were drafting the bill, the view was that we would stick with the terms of the election commitment that we had made. However, given the committee has made the recommendation, and bearing in mind the point the member made about the Victorian legislation, the amendment in my name is before members now in those terms.

Hon NICK GOIRAN: I will just finish on this point. It strikes me that there was no point in the government looking at the Victorian legislation. If the government looked at it and noticed that it included manslaughter but did not end up including in its legislation anyway, and then the matter went before the committee, which the government opposed, and then the committee recommended using it, and now the government has decided to include it, I do not know why it bothered to spend time looking at the Victorian legislation in the first place. If it is all about the Labor Party's commitment at the state election, just proceed with the drafting of the legislation. Why invest the time of some individual in the bureaucracy who would have opened up the Victorian legislation and said, "Look at that! There's manslaughter in there but that's not part of the WA Labor Party's platform, so we will ignore that"? Why look at the Victorian legislation? Just get on with it! It sounds like a bit of a delay tactic by

the Labor government. It spent time looking at the Victorian legislation for no particular purpose and then, when the government actually opened the book and saw the term "manslaughter", it ignored it anyway. It is only now, through gritted teeth, that the government has to bring in its own amendment to fix its legislation, thanks to the motion moved by Hon Aaron Stonehouse, which the government opposed. At the very least, it sounds very, very peculiar to me that the government could take this kind of approach to this serious legislation. Nevertheless, as my learned friend the shadow Attorney General said, we will support this amendment, which is word for word and comma for comma the same as that proposed by the committee.

Amendment put and passed.

Hon SUE ELLERY: There are a further two amendments to clause 9 in my name. I move —

> Page 5, after line 32 — To insert —
>
> (2A) The Board must, when deciding whether it is satisfied under subsection (1)(a), take into account any information the Board has about the prisoner's mental capacity to provide relevant information or evidence.

This relates to recommendation 2 in the Standing Committee on Legislation's report. I take members to pages 52 and 53. If I may be so bold, I will speak to both these amendments because they go to the same issue, which is taking into account a prisoner's mental capacity to provide information. The argument is developed in the committee's report at paragraph 6.76, which states —

> … evaluation of mental capacity as a release consideration, if it occurs, would take place later on in the PRB's evaluation processes, under the provisions of section 5A of the Act, and not as part of the initial 'gateway' considerations (if the Committee's hierarchy of considerations paragraph 6.34 is accepted). In other words, if the PRB takes the view that a prisoner has not satisfactorily cooperated with the police in locating the victim's remains, that will be the end of the PRB's dealings with that prisoner. The gateway has been firmly closed, and the section 5A release considerations (including, … the prisoner's mental capacity) will not be taken into account.

The committee accepts some evidence from the department at paragraph 6.78, but notes that it is "arguable" that a police report would deal with mental capacity. Finding 13 is outlined, and a recommendation is made that the bill be amended in two places; these are the amendments in my name.

Hon MICHAEL MISCHIN: I need just a little more information about this to understand how it will operate. At the moment, as I think has been explained, the question of whether a prisoner has cooperated is a threshold or a gateway—however we term it—consideration. When a review date is imminent, the Prisoners Review Board will acquire information from a variety of sources in general terms and in the ordinary course but, in the case of these particular prisoners, it will be obliged to obtain information relating only to their cooperation, as I understood the minister's answers yesterday. If the board comes to the conclusion there has been no cooperation in the relevant sense, it does not have to go any further. It just provides a report to the Attorney General saying, "For a variety of reasons, there was no cooperation we are satisfied was sufficient" and that is the end of the story. In the ordinary course, as we clarified yesterday, the Prisoners Review Board would obtain reports from not only the police, but also prisons; psychologists; psychiatrists, if necessary; and those who have had dealings with the prisoner. It would then make its assessment of the prisoner's suitability for parole from a variety of sources. In this case, we are looking at just a police report that may or may not consider, in a sufficiently expert sense, the ability of the prisoner to provide the necessary cooperation.

I would like the minister to take us through what it is expected the Prisoners Review Board will use as a basis for its assessment, or will it rely prima facie on what the police proffer to the Prisoners Review Board? If the police say nothing about mental capacity to cooperate, there seems to be no point in the Prisoners Review Board having to inquire further because it does not need to; it is a threshold consideration. It may be that the police are wrong or just have not considered it, and there is no clue in the police report that the Attorney General can pick up on. Can the minister explain what the checks and balances will be, given the narrow consideration that is necessary for the Prisoners Review Board to decide whether to do any further work on the subject?

Hon SUE ELLERY: This provides me with a good opportunity to clarify something that we discussed last night regarding compulsory reports under section 12A. Although cooperation will need to be dealt with in the report, the reporting regime has not changed, so the requirement to give the Attorney General some information on the release considerations remains; there is no change. Regarding the matter the honourable member just raised, at the time of drafting, the thinking was that all the information that would be before the parole board would include information such as mental capacity, but having considered the committee's views, we think there are sound reasons to make it explicit in the bill before us that that will be taken into consideration.

Hon ALISON XAMON: I rise to indicate that I support this amendment to the legislation. It is one of the concerns that the Greens held. I am interested in getting a little bit more clarity about how it is intended to operate. I am

clear that we are talking about inserting within this legislation a new process, which is the establishment of a precondition, before the Prisoners Review Board can continue to make an assessment of whether there is the possibility of parole. As such, I am very clear that we are talking about a discrete process. Picking up on the questions that have been asked so far, I am curious also to know what the trigger will be by which a prisoner will be able to raise the issue of their capacity. I ask this because a prisoner may develop impaired cognitive capacity as a result of dementia or something that has emerged since they have been in prison—for example, in a bashing, a prisoner may sustain an acquired brain injury or another injury that means they will have a limited capacity. What will the process be as part of this new precondition by which they will have the opportunity to have a representative submit to the Prisoners Review Board that they have an impairment that should be subject to consideration? I certainly share the concerns that have been raised by Hon Michael Mischin that it is not the responsibility of the police, nor should they even necessarily be required to have the knowledge about whether an issue of an impairment has come about.

We have already identified that we are not talking about people who have been incarcerated under the Criminal Law (Mentally Impaired Accused) Act. We are talking about people who have been incarcerated through the normal course of events. We are, therefore, talking about people who have not previously been diagnosed and have subsequently been diagnosed, or who have developed a mental impairment during their time in prison. I understand that the purpose of this precondition is to try to provoke or encourage prisoners to cooperate for the purpose of revealing the whereabouts of their victim's body. However, we also know that a person who has lost capacity is clearly unable to comply with that condition. I would appreciate it if the minister could make clear to me the process by which prisoners without capacity will be able to have representation and put forward in a timely manner the issue of their capacity for the purpose of addressing the precondition.

Hon SUE ELLERY: I am advised that nothing will change in respect to the prisoner's representational rights or anything of that nature. The Prisoners Review Board can seek psychiatric advice and information from a range of sources. The prisoner will be able to make a presentation and provide material to the board. This is not about changing the rights of prisoners. It is about how the board satisfies itself of the conditions that we are seeking to add. That includes that the board has to satisfy itself that the prisoner has the mental capacity to cooperate. The board may rely on a range of information to satisfy itself that that is possible.

Hon MICHAEL MISCHIN: I thank the minister for that advice. I may be wrong about this, and I may have misunderstood what the minister said yesterday. Section 5A of the Sentence Administration Act lists a number of release considerations for people in custody. Those conditions are specific to the areas on which the board is required to focus. It includes a catch-all in the last paragraph that states —

> (k) any other consideration that is or may be relevant to whether the prisoner should be released.

Section 5A requires the board to focus on holistically assessing whether the prisoner is suitable for release, the paramount consideration being the safety and security of the community or any of its members. I understood from what was said yesterday that because the threshold consideration is cooperation with the police, not all those conditions would need to be looked at, certainly not to the degree to which the board would ordinarily do so. The board would look at that threshold consideration primarily. The board must get a police report. Proposed section 66C of the bill sets out what the police report is required to contain. It is focused on: the nature and extent of the prisoner's cooperation; the timeliness of the prisoner's cooperation; the truthfulness, completeness and reliability of any information or evidence provided by the prisoner; and the significance and usefulness of the prisoner's cooperation. That report makes no mention of mental capacity to provide relevant information or evidence. I will get to what that might mean in a moment. Therefore, it is not simply a matter of caution on the part of the government, because that sort of stuff would be found out necessarily and be reported on by the board in these cases. There are a lot of things that the board need not focus on when its threshold consideration is the question of cooperation or the lack thereof. It is not the sort of thing that ordinarily would be obtained in these specific cases. That is how I conclude it to be, anyway. If the minister takes a different view, I appreciate that, because I am trying to understand the way in which it is meant to operate. The Prisoners Review Board and others might be interested in due course, when they have to try to apply this legislation, to know how the government believes it will work. But there we are. This is not simply an inclusion from the point of view of being on the safe side. It is pretty fundamental that the police do not necessarily need to look at that in the manner in which proposed division 1A is structured. Therefore, it seems to me essential to include some reference to requiring the board to go further than looking just at the question of cooperation and to take mental capacity into account, because otherwise the board would see no reason to do that.

Proposed section 66B(1)(a) provides that in deciding the critical question of cooperation, the board needs to be satisfied that the prisoner has cooperated with a member of the police force in the identification of the location, or last known location, of the remains of the victim of the homicide offence. In coming to that satisfaction, the board has to take into account any information that the board has about the prisoner's mental capacity to provide relevant information or evidence. The first part refers to any information the board has. There is no apparent obligation on

the board to seek out information that it does not already have. The board is not looking at all the release considerations under section 5A of the Sentence Administration Act but is focusing specifically on cooperation, and it is required to take into account only the information that it has. Some of that information may come through in the police report. If we can advance it a bit further, proposed amendment 3/9 requires the Commissioner of Police to report simply on information that he has, to the extent known to him, about the mental capacity of the prisoner. It seems to me there is no obligation for the Commissioner of Police to make any inquiry that might be relevant to that. Indeed, we will get to the question of timeliness and other content of the Commissioner of Police's report. The Commissioner of Police's report might be based on out-of-date information. Unless the minister can point me to something that says that there is a current obligation on the part of the Commissioner of Police to find anything out, it seems to me the information available to him, which he might quite duly report on, might not be upgraded. He might be reporting on the failure to cooperate from 12 months before or longer. It may be that the prisoner's mental state has deteriorated since the last information came to him, but the Commissioner of Police would not be aware of it and he simply reports that to date the prisoner has not cooperated, and that when he was asked two years ago he told the police to get stuffed and said he was not going to do anything. I need some clarification of the obligations in order to delve further and find out. There is plainly one under section 5A now, because in doing its holistic report in time for a review date, the Prisoners Review Board would by implication have to gather information for a current report to the Attorney General. He is the one who needs to consider this stuff. But this material and the proposed amendments seem to refer to a status quo that does not require any further inquiry by the board, beyond information that the board has, and a requirement from the police report to provide the information the Commissioner of Police has access to, to the extent that the Commissioner of Police knows about these sorts of things. He has no obligation to find anything out. Perhaps the minister can clarify how that is meant to work. It may be that the amendment needs a tweak to make it more comprehensive.

Hon SUE ELLERY: To a certain extent we are revisiting part of an argument we had last night. The member will recall that the point I made last night was that the board knows the dates for the release, the board prepares, and will prepare and look at the information it needs to have before it, to examine the things it needs to examine. We are not asking the board or the police to go further. We are asking the board to consider whether the prisoner has cooperated. In looking at whether the prisoner has cooperated, the board needs to satisfy itself that the prisoner has the mental capacity to cooperate. Last night I set out to the chamber that in preparing for the relevant presentation about whether the prisoner ought be released—whether the board makes a release decision or takes a release action—the board will seek whatever information it thinks it needs to satisfy itself about that. That may include all the things I listed last night. It may well include reports from a whole range of organisations. By the time the board gets to the point that the honourable member was drawing attention to in the amendment—that it has any information it needs to rely on—it has proactively taken steps to gather the information it thinks it needs to make those decisions. If it thinks it needs more, that is what it does now and can and will do in the future.

Hon MICHAEL MISCHIN: I thank the minister. I have to say I am not quite as convinced because of the way it is framed. It refers in the present tense about the information it has. Let us take an example. Someone who has been imprisoned for a finite term is coming up to their first review at the conclusion of the earliest eligibility date for parole. Let us say it was for an offence of having been an accessory after the fact for which they received a penalty of 10 years' imprisonment. It is the eighth year, and so they have a possibility of a two-year parole period. The board is empowered to make its own decision on whether it will release the prisoner on parole. Ordinarily, it would take into account a raft of factors in section 5A and get reports for all those. In this case, it depends on whether or not it is satisfied about the threshold condition. The board gets information by way of making a written request under proposed section 66C(1) to the Commissioner of Police for a written report. The report has the things set out in proposed section 66C(3)(a) in relation to the prisoner's cooperation. Presumably, the report will state that the body is still missing and the police do not know where it is, as the starting point. Then the Commissioner of Police, apropos the prisoner's cooperation, sets out in brief the nature and extent: "We asked for some information and the prisoner said he can't remember". As to timeliness: "We asked him several years ago, and he hasn't come forward since". As to truthfulness completeness and reliability of information: "He didn't providing anything". As to the significance and usefulness of the prisoner's cooperation: "There wasn't much because he said he couldn't remember where he left the body", "No, we don't know where the remains are", and, "By the way, to the extent known to us, the prisoner has mental capacity to provide relevant information or evidence." There is nothing in there about timeliness of that information, there is nothing in there that requires the Commissioner of Police to make any assessment as to mental capacity—whatever that might mean—about whether the person has Alzheimer's or a short-term or long-term memory loss or some other condition. Nothing in there yet requires that, and because it is a decision of the board, it never gets to the Attorney General. No-one else sees it. It is the board's internal decision to say, "This person hasn't met the threshold. He stays in for another two years." Can the minister point me to anything under the proposed regime that requires the board to make any

further inquiry or requires the Commissioner of Police to provide anything more than he has at the date of the request for the report?

Hon SUE ELLERY: We canvassed this last night and I have repeated it again today. The board will prepare and seek whatever information it thinks it needs, including from the police and a range of other organisations if it thinks it needs psychiatric advice or psychological advice, or if it thinks it needs any other advice, in preparation. The board does not just turn up on the date without material having been prepared for its consideration. It will seek whatever information it thinks it needs. If it is not satisfied with the information provided to it and thinks it needs to seek further advice, that is what it will do. I am not sure I can answer the question in any other way than the way in which I already have.

Hon MICHAEL MISCHIN: I am sorry but the minister will have to do a bit better than that. As I say, she tells us what the board will do. We know what it is required to do under proposed section 66C(5) because it is required to prepare a report to the Attorney General, so, by implication, it has to have material that is current on that. But in making this particular decision, there is nothing in the way that these amendments are framed or in the way proposed section 66C is framed that says anything about the currency of that information or that provides an obligation to find out any of that information. The amendment quite specifically is "to the extent known to the Commissioner of Police, the prisoner's mental capacity". If the Commissioner of Police does not know and does not mention it or says, "As far as we're aware, last time we spoke to him, he seemed to be all right", that is the end of the story. Likewise with the proposed amendment to insert subsection (2A), it is about any information the board has. There is no requirement there that I can see for the board to look further into that or to gather the information. The minister said that the board will do certain things. They may very well just read their obligations strictly, particularly where there is no sense of review because the board is making a decision internally and does not provide a report to the Attorney General. I want to get some satisfaction here. If it means the minister has to get further advice on it or some tweaking needs to be done to fix this and make it clearer, I am happy to entertain that. But at the moment the minister is telling me the same thing over and again that this is what the board will do and she cannot tell me why.

Hon SUE ELLERY: I do not think I can add anything further.

Amendment put and passed.

Hon SUE ELLERY: I move —

Page 6, after line 30 — To insert —

(v) to the extent known to the Commissioner of Police, the prisoner's mental capacity to provide relevant information or evidence;

When I introduced the previous amendment we have just passed, I outlined that the two were connected. The second is part of the first and the government has accepted the committee's recommendations. I have drawn the attention of the chamber to where the Standing Committee on Legislation sets out the reasons that two amendments needed to be moved.

Hon MICHAEL MISCHIN: I get back to the obligation to obtain any further evidence that might be critical to the Prisoners Review Board's assessment on this threshold issue. The board must, in accordance with proposed subsection (2A) when deciding it is satisfied under proposed section 66B(1)(a), take into account any information the board has about the prisoner's mental capacity to provide relevant information or evidence. That information or evidence is presumably that regarding the cooperation, location of the body et cetera. The closest we come to any need to obtain that information rather than simply rely on information that may have flowed into the PRB's transom is from the Commissioner of Police and a report that is required under proposed section 66C. All that this amendment will require, in addition to the other bits and pieces, is "to the extent known to the Commissioner of Police, the prisoner's mental capacity to provide relevant information or evidence;". So far so good, but I get back to it; it puts no obligation on the Commissioner of Police to find out anything at all, does it, minister?

Hon SUE ELLERY: The obligation is on the Prisoners Review Board to satisfy itself that it has all the information, including that provided by the Commissioner of Police, to make the decision it needs to make about whether the threshold test has been met and whether the prisoner has the mental capacity to meet that test, which is to cooperate or not to cooperate. The obligation is on the board. The board must on each occasion—proposed section 66C(1) starts with "On each occasion" they have to write to the Commissioner of Police and ask for a written report, so yes, it has to ask for that. We are adding the new words down the bottom that says the Commissioner of Police has to include information on mental capacity to the extent that the Commissioner of Police is aware of that. But that is not all the board has to rely on; the board can seek other information. We have had that conversation a few times now.

Hon MICHAEL MISCHIN: We have. The minister keeps telling us that the board has that obligation but she has not been able to point to where that obligation is to be found. At the moment, in dealing with the threshold

question, the key to it all under this regime is obtaining information by way of a report from the Commissioner of Police. Nothing more. The Commissioner of Police does not put on any inquiry other than to report what information he has. I know the minister will come back with the same answer, "I've been through all this; I can't help you anymore." It is hardly good enough. This involves matters of personal liberty and the best the minister can tell us is that the board will do certain things, but she cannot point to the obligation on the board to do any of these things but says it will all be okay on the day.

Will the minister entertain an amendment to the proposed amendment to delete the words at the commencement of proposed subparagraph (v) to delete the words, "to the extent known to the Commissioner of Police," I suppose would be strictly proper, so that, under proposed subsection (3), the report required from the Commissioner of Police must deal with each of the following matters in relation to the prisoner's cooperation, the nature and extent of the prisoner's cooperation, the timeliness of the prisoner's cooperation, the truthfulness, completeness and reliability of any information or evidence provided by the prisoner, the significance and usefulness of the prisoner's cooperation and the prisoner's mental capacity to provide relevant information or evidence? That would put some obligation on someone to go and get that information, rather than simply rely on what they may know and have had brought to their attention sometime in the past. With the way it is framed at the moment, the Commissioner of Police can come back and say, "I don't know anything about it at all, actually." Would the minister entertain an amendment to that effect?

Hon SUE ELLERY: No is the short answer. This is a qualified requirement of the police because "to the extent known" are very deliberate words. We know the Commissioner of Police is not a mental health professional. We know they do not have the resources to do that work; it is not their skill area. We qualified the obligation on the Commissioner of Police. However, it is the board's obligation to satisfy itself that the prisoner can cooperate and the board can do that by seeking advice from the relevant experts.

Progress reported and leave granted to sit again, pursuant to standing orders.