DANGEROUS SEXUAL OFFENDERS LEGISLATION AMENDMENT BILL 2017

Committee

Resumed from an earlier stage of the sitting. The Chair of Committees (Hon Simon O'Brien) in the chair; Hon Sue Ellery (Leader of the House) in charge of the bill.

Clause 16: Section 17 amended —

Progress was reported after the clause had been partly considered.

Hon MICHAEL MISCHIN: I will not go over what I have already said on this clause but I had identified a passage that was a repeat of other mantras that have been issued by the Australian Labor Party over the course of the last several years about how dangerous sex offender applications should be dealt with and that the Labor Party, if in office, would require dangerous sex offenders to satisfy the court that, on the balance of probabilities, they would comply with each and every condition stipulated by the Supreme Court as part of a community supervision order. In case there was any doubt about what was meant, a further passage emphasised that it would be up to an offender —

> … to satisfy the Court on the lower civil standard, that is, upon the balance of probabilities, that they can be trusted to obey all requirements and provisions of the Community Supervision Order.

However, clause 16 requires that an offender simply needs to satisfy the court on the balance of probabilities that they will substantially comply with the standard conditions of the order. That departs not only from the Australian Labor Party's manifesto issued in February this year, but also from Labor's previous utterances and, once again, the amendments that were moved in this place last year by the now Attorney General, which we were criticised for not accepting. They required compliance with each and every condition of an order before an offender could be released. I ask first why the clause has been diluted in this fashion and why it does not meet the repeated demands of the Labor Party to date. I note it has nothing to do with conventions on human rights. Secondly, I ask whether the government will accept the amendment that will fulfil its election commitment.

Hon SUE ELLERY: The government will not be supporting the amendment. The reason is not dissimilar to the reason I gave previously. The question of the constitutionality of such legislation is pertinent. Lessons have been learnt from the Queensland case that was before the High Court. The advice to us in government on how to best achieve the policy objective—which is about continuing detention in custody or supervision in the community of a dangerous sexual offender when their unconditional release from custody would present an unacceptable risk that they would commit a serious sexual offence—is that it is best done in a way that does not go beyond the constraints of constitutional law. The provisions set out in the bill before us meet that requirement. The formulation under the proposal requires the court to be satisfied, to a high degree of probability, that every condition of a supervision order will be met by the offender.

Hon Michael Mischin: No, it doesn't; that's the problem.

Hon SUE ELLERY: Sorry; that is what I thought. I thank the member; I thought I had read that out. The formulation of the test under the opposition's proposal requires a court to be satisfied, to a high degree of probability, that every condition of a supervision order will be met by the offender. Essentially, it could create a situation in which a court would almost never be able to make a supervision order. I take the member's point. I know the argument that the honourable member has put about the Labor Party's position last year. We are in government and the advice to us in government is that the best way to achieve the objective of keeping the community safe is in the terms of the bill before the chamber today.

The CHAIR: Hon Michael Mischin, at this stage, did you want to formally move your amendment?

Hon MICHAEL MISCHIN: I will, but I want to inquire about the constitutional aspect, which I am curious about. When the Attorney General was in opposition, he told us that firstly, the Attorney General has the power and should be able to appeal when the Director of Public Prosecutions does not, and that bail orders ought be denied until the hearing. He is now resiling from that. He said that an offender, before release, should satisfy the court that they will satisfy each and every condition of an order. He is now also resiling from that. Has the Attorney General accepted that he got it wrong on those three points?

Hon SUE ELLERY: We are kind of repeating ourselves here. I responded to this issue in my second reading response. I responded to it on numerous occasions when we debated clause 1 when the matter was last before the chamber. I responded to it in debate on the first amendment moved in the member's name. I have just responded to it again in debate on this amendment. I do not think I can add anything more about the point the member wants to make that this constitutes, from his point of view, a breach of promise or a broken promise because the Attorney General has taken a different position to that which he held as shadow Attorney General. We are in

government. Advice has been provided to us about the best and safest way, constitutionally, to achieve the objective of keeping the community safe from dangerous sexual offenders. Those provisions are set out in the bill before us. For those reasons, I am not able to agree to the member's proposed amendment.

Hon MICHAEL MISCHIN: All right. I will take that as an admission that the promises cannot be met.

Hon Sue Ellery: You take it however you want.

Hon MICHAEL MISCHIN: It flows from it, does it not, minister? When in government, it is different from what was promised before.

The minister mentioned that there is a constitutional bar. Why is there a constitutional bar to being able to ensure that someone will meet each and every condition?

Hon SUE ELLERY: The advice from the Solicitor-General is to the effect that the combined effect of the three changes, particularly the requirement of a high degree of satisfaction that the person would not commit even an insubstantial breach, would be vulnerable to a constitutional challenge.

Hon MICHAEL MISCHIN: So it looks like I was right all along last year, minister, and the now government's Attorney General was wrong. I was right and he was wrong, yet it did not stop him from continuing to promise that at the time of the election and criticising our government for being weak in this area. I will take that as an apology. Very well.

In those circumstances, I move —

> Page 9, lines 15 to 20 — To delete the lines and substitute —
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> (3) A court cannot make an order under subsection (1)(b) unless it is satisfied that the offender will comply with the conditions of the order.
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> (4) The offender has the onus of satisfying the court as described in subsection (3), and the court must be satisfied —
>
> (a) by acceptable and cogent evidence; and
>
> (b) to a high degree of probability.

I move that amendment to give the Labor Party the opportunity to do what it was frustrated in doing last year, which was essential for the safety of the community, and to fulfil its election commitment. I hope that the government will support my good faith offer to allow it to do what it set out to do earlier this year and has been arguing for for the last several years.

Amendment put and negatived.

Hon MICHAEL MISCHIN: I have one further question about the reversal of the onus of proof, as it is called, requiring the offender to satisfy the court on the balance of probabilities that he or she will substantially comply with the standard conditions of the order. I know that the formulation is different, but in terms of results, would that be materially different, given that the court needs to be satisfied as a paramount consideration that an offender can be dealt with satisfactorily in the community and in a manner that keeps the community safe, and does so on the basis of all the evidence? Will that not achieve the same result as the current formulation?

Hon SUE ELLERY: It is not the same; there is a difference. We might argue about the extent of the subtlety of the difference, but the onus of proof as to these matters is on the offender, and the court must be satisfied that each condition set out in proposed section 18(1)(a) through to (g) will be substantially complied with. The court does not have sufficient information before it from the Director of Public Prosecutions to be positively satisfied that an offender will meet the conditions as required. The offender will have to adduce the appropriate evidence. Importantly, because the onus is on the offender, if an offender chooses not to give evidence or adduce evidence, the court may in certain circumstances draw the inference that the evidence the offender would have given would not have assisted him or her. That is referred to as a Jones v Dunkel inference, and generally applies with the onus of proof of proving a particular matter resting with a party. Under the current law, a Jones v Dunkel inference—I am going to keep reading because I am not going to say something stupid about that—could only ever be drawn against the DPP, not the offender. Consistent with this, there does not appear to be any decision of the Supreme Court under the Dangerous Sexual Offenders Act referring to Jones v Dunkel. The Dangerous Sexual Offenders Legislation Amendment Bill 2017 will change that.

Hon MICHAEL MISCHIN: I understand what it claims it will do. Under the current provision, if the court is not satisfied that an offender will meet all the conditions essential in the court's view to be satisfied, the court simply will not release that person into the community. That is what the current act requires, is it not?

Hon SUE ELLERY: The provisions set out in the bill, with the description I just gave, essentially place more pressure—put more obligation, if you like—on the offender to adduce or provide evidence. That is important to

increase the opportunity for that evidence to be tested. As I said in answer just before, we might disagree about the level of subtlety about the difference, but it is about adding additional pressure to ensure that we give every opportunity to test the evidence to make an informed decision about the extent to which a risk is posed to the community if that person were to be released.

Hon MICHAEL MISCHIN: If the evidence before the court was such that the commitment or ability of the offender to comply with conditions and the paramount considerations was inadequate, the offender would not be released but would be held in custody. However, if on all the evidence there was sufficient evidence that the offender would comply, the court could achieve that necessary level of satisfaction. If there was some doubt about any of it, the court would not release the offender. It is still possible, is it not, that an offender will not go into evidence and give oral testimony, and yet all the evidence before the court can satisfy the court that the offender will meet those conditions? So there is no obligation, is there, even with the onus of proof being placed on the offender, that a court could not be satisfied on the balance of probabilities that the offender is one suitable for release?

Hon SUE ELLERY: The member is correct. There is no obligation. This will provide, if you like, another lever to apply some pressure. Whether the person succumbs, if that is the correct word, to that pressure is entirely up to them. This will apply one more level of pressure—one more lever that can be pulled—to try to extract information to assist the court to determine the extent to which or otherwise the person constitutes an ongoing risk to the safety of the community.

Hon MICHAEL MISCHIN: I have two more questions on this clause. Firstly, would the minister then accept that there is no guarantee that any court would come to a different decision in any specific case that would be different from what a court would come to under the current law?

Hon SUE ELLERY: There is no iron-clad, rock-solid guarantee. However, as I have said, it provides an additional lever and an additional pressure point. It increases the likelihood that a decision will be made not to release the person because, based on an examination of their evidence, they pose an ongoing risk to the safety of the community.

Hon MICHAEL MISCHIN: My final question is about the offender DAL, who was released relatively recently, I think in early September. I quote the comments of the Attorney General when he was questioned about the release of this offender —

> Quizzed on the man's release, Mr Quigley said it had occurred "because his case was decided under the slack laws of the Liberal Party."
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> "The test used to be, could he be managed in the community," he said. "The new test will be, has he convinced the Supreme Court under his burden, his onus, that he will not commit another sex offence.

I have no doubt this has been analysed and looked at very carefully by the minister's advisers and the like. Can the minister help me by pointing out which parts of the decision of the Supreme Court would have been decided differently had these new laws been in place? Is there any part of that judgement that would have been influenced by this so-called reform?

Hon SUE ELLERY: I cannot take the member to a specific part of that judgement. I can say that if these laws had been in place, DAL may have given evidence that would have been able to be cross-examined, and that may have led to a different decision.

Hon Michael Mischin: May.

Hon SUE ELLERY: I have already answered the question about guarantees or no guarantees. I have made the point that this legislation provides an additional pressure point and an additional lever to be pulled to test the proposition about whether a dangerous sexual offender constitutes an ongoing risk to the community.

Hon MICHAEL MISCHIN: This is germane to the amendments in clause 16, which seeks to amend section 17 of the Dangerous Sexual Offenders Act. The government has argued that this is an important reform. The Attorney General has said that the reason that the offender DAL was released was because of the Liberal Party's slack laws, and that by reversing the onus of proof and requiring the court to be satisfied on the balance of probabilities that the offender could be managed adequately in the community, things would have been different—it is the Liberal Party's fault, apparently. The minister might like to ponder the judgement of the Supreme Court in The State of Western Australia v DAL [No 3] [2017] WASC 260. The judgement states at paragraph 96 —

> The State continued to hold 'enduring concerns'. However, the State properly acknowledged that the 'preponderance of the evidence tends to support the respondent's contention that he can be adequately managed on a supervision order despite his high risk of sexual reoffending'.

The preponderance of the evidence—after he had given evidence, or presented evidence—still led to the conclusion that he could be managed in the community. Would it have made any difference had there been

a reversal of the onus of roof and had he been required to prove on the balance of probabilities that he could meet the standard conditions, or would there have been no difference at all in the court's conclusion?

Hon SUE ELLERY: The critical issue here is that he did not give evidence.

Hon Michael Mischin: Whether or not he did does not matter.

Hon SUE ELLERY: His evidence was not able to be examined. Under the bill that is before us, he may give evidence, and that evidence will be examined, and that may result in a different outcome. We are hypothesising here. I have made the point several times that the policy of the bill is about providing an additional lever and an additional pressure point to test the extent to which the offender constitutes an ongoing risk to the safety of the community.

Hon MICHAEL MISCHIN: Whether or not he gave evidence is immaterial. The fact is that the preponderance of the evidence persuaded the judge that he could be managed. Regardless of whether there is a reversal of the onus of proof, the preponderance of the evidence still lay with the offender being properly managed. It seems that the Attorney General has shot his mouth off once again, without understanding what he is talking about. However, since the Attorney General has assured us that things will be different under these laws, we will wait and see. That is all that can be usefully explored with this great reform. It is disappointing that the government is not prepared to do what it promised the public it would do and now finds that it has over-reached itself yet again. This is another case of the government promising far more than it is capable of achieving—mandatory sentencing for drug traffickers was one, and the no body, no parole legislation will be another. We will see what other things the government has in store. I have nothing to contribute further in respect of this clause.

Clause put and passed.

Clause 17: Section 20 amended —

Hon MICHAEL MISCHIN: I move —

Page 10, lines 6 and 7 — To delete "substantially comply with the standard conditions" and substitute —

comply with the conditions

This amendment seeks to do what the Labor Party attempted to do last year, and what it promised the public over the last several years, and also before the last election and since that time, that it would do.

Hon SUE ELLERY: For the reasons I have outlined previously, the government will not be supporting this amendment.

Amendment put and negatived.

Clause put and passed.

Clause 18: Section 21 amended —

Hon MICHAEL MISCHIN: I move —

Page 10, after line 27 — To insert —

(4) At the end of section 21 insert:

(6) Despite anything in the *Bail Act 1982*, a person who is arrested under a warrant issued under subsection (2) in respect of a suspected contravention must not be granted bail but must be detained in custody until brought before the Supreme Court.

This amendment will have effect of requiring what the Labor Party has promised—that is, that a person who is arrested for a breach or suspected contravention must not be granted bail and must be detained in custody until such time as the court deals with that breach. I have covered on several occasions what the Labor Party attempted last year and insisted was necessary to provide for community safety, and what it has promised and reaffirmed since the election.

Hon SUE ELLERY: Under section 21, the warrant directs a member of the police force to arrest the offender and bring the offender before the Supreme Court for consideration of orders under the act. This offender is thus in custody until they appear before the court. The question of bail does not arise in this context, so bail is not applicable. For that reason, the government will not be supporting the amendment.

Amendment put and negatived.

The CHAIR: I would appreciate it if more members could exercise their vote when I put the question.

Clause put and passed.

Clause 19: Section 22 replaced —

Hon MICHAEL MISCHIN: As I have pointed out, the remaining proposed amendments reflect what was proposed and insisted on by the Labor Party when it was in opposition last year in dealing with amendments. They were argued for by the Labor Party for years. The last government was criticised for not accepting and adopting them; hence endangering the public. They reflect what was in the Labor Party's election manifesto before the election in February and have been repeated since by the Attorney General. From my examination of the remaining proposed amendments, it is apparent that the government will not support them. It is also apparent that some of the amendments interrelate with amendments that have already been moved but lost. My perception is that that is the case, but the minister may want to take the advice of her advisers. It seems to me that even if these were now passed, they would be orphans that may cause greater harm to the legislation than they would solve because they are consequential amendments and they interrelate with earlier clauses. In the circumstances, it would be a waste of the chamber's time if I pursued these.

I emphasise that I think it is very disappointing that the current Attorney General, after being so vocal over the years, so unmeasured in his comments and exploiting public fears, should now, without even having the courage to admit he was wrong, resile from what he had been attempting to achieve all that time. It was what formed the basis of the Labor Party's dangerous sexual offender reforms in its law and order reform package that had been argued before the election and, indeed, repeated on occasions since the election and as a promise of what would be done once it had a chance to reform the legislation. In those circumstances, I will not be pursuing those amendments.

Clause put and passed.

Clause 20: Section 23 amended —

The CHAIR: In the form of an amendment on the supplementary notice paper is a proposition that Hon Michael Mischin may wish to move. It is basically to oppose the entire clause with a view to replacing it with a new clause 20. In the first instance, the question is that clause 20 stand as printed.

Hon MICHAEL MISCHIN: I do not propose to move any further amendments that are listed on the supplementary notice paper. That includes the opposition to the clause. We do not necessarily agree with the government's policy in that regard. However, because of the defeat of the other propositions that would underpin any further amendments, there seems to be no need to waste the chamber's time fighting a losing battle on this. To simply oppose certain clauses that would then undermine the schema in the act and make it more difficult to work with if they were to pass seems pointless.

The CHAIR: That deals with our supplementary notice paper.

Clause put and passed.

Clauses 21 to 23 put and passed.

Title put and passed.

Report

Bill reported, without amendment, and the report adopted.

Third Reading

Bill read a third time, on motion by **Hon Sue Ellery (Leader of the House)**, and passed.

The PRESIDENT: I will leave the chair until the ringing of the bells.

Sitting suspended from 5.49 to 5.51 pm