DANGEROUS SEXUAL OFFENDERS LEGISLATION AMENDMENT BILL 2017

Second Reading

Resumed from an earlier stage of the sitting.

HON SUE ELLERY (South Metropolitan — Leader of the House) [5.09 pm] — in reply: Before the house dealt with other matters, I was talking about the reversal of the onus of proof. I made the point that the onus of establishing that an offender is an unacceptable risk remains on the Director of Public Prosecutions and that it is necessary to ensure the constitutional validity of the laws. Importantly, because the onus is on an 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. This is referred to as a Jones v Dunkel inference and generally applies when the onus of proving a particular matter rests with a party. Under the current law, a Jones v Dunkel inference could only ever be drawn against the DPP, not the offender. Consistent with this, no decisions of the Supreme Court under the DSO act appear to refer to Jones v Dunkel. The Dangerous Sexual Offenders Legislation Amendment Bill will change that.

I turn to the presumption against bail. This bill seeks to treat dangerous sexual offenders the same as those charged with homicide offences whereby there is a presumption against bail. However, like these offences, bail can still be granted in exceptional circumstances. The amendments on the supplementary notice paper to be moved by the opposition that thereby deny bail in all circumstances are unconstitutional and cannot be supported. Both Hon Michael Mischin and Hon Alison Xamon raised the issue of substantial versus full compliance with conditions of an order. The view was expressed that it should be full compliance by one of them and Hon Alison Xamon was of the view that full compliance is unreasonable and does not allow for incidental events that may impact an offender's ability to fulfil their orders. In drafting this bill and the amendments, the concerns raised by Hon Alison Xamon were taken into consideration and, accordingly, substantial compliance was included as opposed to full compliance. As the shadow Attorney General would know, when members come into government, they are afforded the full support and advice of various agencies. It is with this knowledge that this provision was included and not the amendments provided last year.

Hon Michael Mischin interjected.

Hon SUE ELLERY: I appreciate that much of the comment we heard yesterday, which went over many hours, was about the honourable member's disappointment in what he claimed were the expectations raised and the delivery of the bill. I am going to concentrate my remarks on the specifics of the bill before us.

When the matter of the Attorney General's ability to instruct the DPP was raised in the other place, the Attorney General sought advice from the DPP. It advised —

- The decision not to appeal by the DPP is a decision made by the State and precludes any further actions at a Ministerial level.
- The AG can only instruct under the act if this has not occurred.
- However the AG has full confidence in the DPP and their DSO team to ascertain its chances of success on appeal.

Regarding community notifications about suppressed details of released offenders, in every circumstance the release conditions of dangerous sexual offenders, including their residence and other details, are suppressed. As members would be aware, suppression orders are in place to enable effective management and supervision of these offenders in the community. Furthermore, to contravene a suppression order and release this information, even inadvertently, would be highly inappropriate, especially for the government to do so. The decision to release these particulars is subject to a court order and the legislation before the Legislative Council seeks to ameliorate community concerns through the amendments it will make to the dangerous sexual offenders regime.

Regarding the issue raised about the distinction between a warrant for arrest versus a summons to court and a suspected contravention of orders and mandatory detention, contravention proceedings refer to the proceedings under sections 21 to 24A of the DSO act in which an offender is brought before the Supreme Court on the basis of a reasonable suspicion that the offender is contravening, has contravened or is likely to contravene a supervision order. The standard structure of the onus throughout the bill is as follows: a court cannot make an order unless it is satisfied on the balance of probabilities that the offender will substantially comply with the standard conditions of the order. The onus of proof as to the matters described is on the offender. This consideration is included in the bill's amendments to section 23, which sets out the orders available to the court. To maintain the constitutional integrity of the legislation, the paramount consideration for orders is the need to ensure adequate protection of the community and that is maintained under section 23(2). Pending determination of the appropriate orders under section 23, interim orders can be made for detention in custody at section 24(A)(2)(b) or otherwise. Although the object of the entire act is the protection of the community and the threshold for proof is high when considering the

likelihood of an offender committing another serious sexual offence, the amendment that was proposed by the opposition and flagged in Hon Michael Mischin's commentary would allow for detention on a likely contravention of any condition of a supervision order without any consideration of community safety. I am advised that the provisions of the nature proposed in that amendment would almost certainly be constitutionally invalid.

Hon Alison Xamon raised some queries about rehabilitation services in and outside of court. Psychological services provide a range of services for the assessment and management of people who are subject to dangerous sexual offender orders. Psychologists provide three main types of service: assessment, consultation and psychological interventions. It is quite difficult to break down the funding any further as services are provided to various cohorts of offenders at different times depending on demand and need. Regarding assessment services, there are risk assessment reports on prisoners being considered for dangerous sexual offender applications. Treatment and management plan reports assist the court with the identification of relevant supervision, management and intervention strategies for people who are subject to these proceedings. Treatment update reports are used to provide the court with information about an offender's treatment progress and other assessments are provided, as requested by the court, for example, regarding contravention hearings. Consultation services include: participation in regular risk management meetings with the community justice services and WA Police; provision of advice and support to community justice staff, police or prison staff as required to assist with the management of risk issues or offender behaviour; psychological case management of prisoners or offenders who are engaged in interventions; and delivery of training on managing high-risk and high needs offenders. Individual psychological counselling is given to address particular needs and contributions are made to the development and implementation of systemic interventions for offenders when necessary. Regarding contracted services for dangerous sexual offenders' supported accommodation, there are two contracts, each of some $445 699 a year. For the specialist re-entry link program, there is one contract for the value of $497 234 a year.

Hon Alison Xamon also raised a question about access to experts to prove the reverse onus. The majority of dangerous sexual offenders have legal representation, both at reviews and in cases of breach. Whether representation of a dangerous sexual offender would include arranging and funding expert reports for the dangerous sexual offender to assist in meeting the reverse onus of proof is a matter to be determined by the legal representative in each case.

Questions were asked about mandatory chemical castration. It is not included in this bill. The Supreme Court, in setting the conditions of a supervision order for a DSO, may order that the offender take anti-libidinal medication in accordance with the direction of the community corrections officer. If such an order is appropriate for the adequate protection of the community; the rehabilitation, care or treatment of the offender; or to ensure adequate protection of victims, regular blood tests are conducted to ensure that dangerous sexual offenders subject to such a condition do complying with it. Regarding consultation on the review versus consultation on the bill, parties consulted during the review were: the DPP; the Department of Corrective Services, as it was then; WA Police; and the Commissioner for Victims of Crime.

In preparing the bill before the house today, the following parties were consulted: the Director of Public Prosecutions; the Department of Justice, corrective services division; the Department of Justice, courts and tribunal services division; the Commissioner for Victims of Crime; the Solicitor-General; and the Chief Justice of Western Australia. In respect of the question about amendments that had previously been proposed by Hon Adele Farina, those amendments have not been included in the bill because the government is satisfied that the reverse of onus provisions in the bill will provide sufficient strength in the act to ensure that the Supreme Court will be satisfied that an offender will comply with the conditions of an order. In view of the bill's amendments, the GPS amendment would be an unnecessary restriction on judicial discretion.

There was a question about the degree of consultation, or lack thereof, with the Commissioner for Children and Young People. Although the Dangerous Sexual Offenders Act applies to juveniles, there are no juvenile dangerous sexual offenders at present. Targeted consultation on the bill was undertaken with key stakeholders. In respect of section 6 of the act regarding the Attorney General's powers and why there are no Attorney General appeals, the Solicitor-General provided advice to the Attorney General that he was not able to appeal the recent supervision orders made for certain DSOs. This is essentially because the DPP was already representing the state in those cases. This is contrary to the legal opinion that the Attorney General had previously held. As the Attorney General himself said in the other place, on 13 September —

> There is nothing to be embarrassed about in coming to a revised position on the law when more fully explained on current case law. The Solicitor-General, Mr Quinlan, SC, advises me that I cannot institute an appeal, and I am taking the Solicitor-General at his word. I have every faith in the Solicitor-General and I will abide by his advice.

A question was asked about the time between reviews not being extended to every five years instead of every two, in line with amendments moved by the then opposition last year. The amendment from one to two years took effect in September 2016, and it is prudent to provide sufficient time to analyse the effectiveness of that new provision.

A question was asked about how many dangerous sexual offenders had been released since March 2017. I am advised that since 1 April, four dangerous sexual offenders have been released from detention orders onto supervision orders.

In respect of clause 14, Hon Alison Xamon asked why the bill provides the ability for the DPP to apply for a continuing detention order when a person is coming up for renewal of a supervision order. The honourable member had correctly indicated that the bill has the effect of allowing the DPP to apply for a continuing detention order or a further supervision order when an offender's current supervision order is due to expire. The addition of the ability to apply for a continuing detention order is to ensure that there is consistency throughout the legislation. The policy intention underpinning this amendment is to add the reverse onus of proof requirement for all cases in which the court has to consider a supervision order. As such, the option of a custody order under section 8(4A) has been introduced to cover cases in which the onus is not met. Having said that, it is unlikely that a detention order would be applied for, let alone granted, by a court when a supervision order has been working well. Proposed new section 8(4B) obliges the DPP to specify the type of order she or he will be seeking.

A question was asked about the efficacy of treatment assessed. The department has a dedicated branch that undertakes ongoing analysis and evaluation of the effectiveness of offender treatment programs. This includes short-term impact and long-term outcome evaluations of offender programs, as well as system and process evaluations for new initiatives. The branch also contributes to cross-jurisdiction evaluations, in coordination with other justice authorities.

I hope I have addressed all the issues that have been raised. If not, I am sure there will be an opportunity to cover them in Committee of the Whole, but I did my best to canvass all the issues raised in the second reading debate. I commend the bill to the house.

Question put and passed.

Bill read a second time.

Committee

The Deputy Chair of Committees (Hon Laurie Graham) in the chair; Hon Sue Ellery (Minister for Education and Training) in charge of the bill.

Clause 1: Short title —

Hon MICHAEL MISCHIN: I will start by saying that I appreciate that the minister is not the one who made the very large claims for this bill over the course of the last several months, is probably not the person who is responsible for the very large claims for Labor Party policy in this respect at the time of the election manifesto of January this year, and is only the proxy for the relevant minister now. But I have to say that I am disappointed in the minister's response to many of the matters that were raised during the second reading debate. That is because the government, when in opposition, was repeatedly, consistently and very vocally critical of the manner in which the legislation operated. It was critical of the then government's efforts to improve the legislation and it insisted that certain things it proposed were essential for strengthening the legislation and for guaranteeing the safety of the public.

Now we have had an admission that everything the former government said back then was correct and everything the former opposition said back then was wrong, and that the propositions that were put by a very loudmouthed shadow Attorney General were false. The now Attorney General answers that by saying, "Well, I've had another opinion; there's no harm in that." The criticisms he made of the former government, and the very personal criticisms he made of me and my professional judgement, are now being resiled from. He is now saying that I was right, but he does not have the spine to actually admit that he was wrong.

It will take a little bit of time to go through these elements so that I can put it quite plainly on the record that what the Labor Party put forward last year—which was the fuel for the now Attorney General to wax lyrical in the other place, criticising everyone for failing to take sufficient steps to protect the public by explaining why certain things he demanded be done could not be done—is apparently all going to be glibly passed over. The Attorney General is now saying, "Well, I'm in government now. I took some further advice. I've just changed my mind, so please forget about that. We're doing what we can."

This is very important. This bill purports to fix a problem that the last government neglected and had not done sufficient about. All the elements that were identified by the then shadow Attorney General as being concerns to the public that he planned to fix are now being glossed over. He and the McGowan Labor Party demanded, up to the last election, that offenders should have to prove that they will comply with every condition of their order, with no distinction between them in terms of seriousness of breaches or importance of conditions. That has now been qualified drastically. The demand that there be no bail if there is an alleged breach until the case is dealt with by the court has now been watered down. The government has said, "Sorry, we can't do what we promised; it's unconstitutional." They were the very weapons that were being used against the last government. This McGowan

Labor Party has bought its way into office using counterfeit currency on a number of occasions. This is an example of the tinsel that was dressed up as policy. The government is now trying to walk away from it and say, "We're doing what we can. This'll fix the problem." Let us see whether what is proposed will fix the problem that it banged on about for the last four years.

One of the things that was not addressed in the honourable minister's reply was the Attorney General's very trenchant comment—this cannot be dismissed on the basis that it was a year ago, before he could draw on the resources of government to come to a different view—that the release of the last dangerous sex offender would not have happened if not for the slack laws of the Liberal Party. I still do not know which part of that judgement would have been decided differently had there been in place either what the Labor Party proposed last year, but now resiles from, or what is now proposed. If what is proposed were in place now, it should have been introduced by the Labor Party before September, for a start. Second, if it were because we failed to agree to Labor's suggestions last year, it is saying that they would not have worked anyway because they were unconstitutional. I would like that explained in due course to see how this Attorney General can run wild in the public and deride the views of others both in the other chamber and in public. Now he is so cowardly that he cannot even admit that he was wrong. This is very important to the passage of these elements of the bill because I want to make it entirely clear. I want the Labor Party and Attorney General Quigley to understand that the next time a dangerous sexual offender is released I want to make sure that the Attorney General is in front of the cameras explaining why he has changed his tune and is singing from a different song sheet. It appears that four dangerous sexual offenders have been released—not just the two that received publicity—which the public has not been told about by the man who demanded that the government of the day ought to do these things.

I will get back to some of the propositions that were raised that were essential for community safety, yet have not been addressed. I also want to deal with some of the propositions that were essential to community safety and that were being put as recently as 12 months ago—indeed, as recently as about six months ago in the election manifesto—that will not be done under this bill. I want to hear in detail the explanations as to why. I do not want the glib palming off, "We've taken advice and this is unconstitutional." I want to hear the reasoning behind it. I want to expose the lies that have been told over the last four years to whip up community concern.

I will turn to the more general issue of the consultation that has taken place, but before we get to that, I ask the minister for the date of the cabinet submission that formed the basis of the drafting instructions to Parliamentary Counsel, approved by cabinet. I want to know when the proposal for this legislation went to cabinet.

Hon SUE ELLERY: I am not in a position to give the member that. In respect to the commentary that led up to the question, I note the member's views and I hear his affront at what he thinks happened. I am not able to give him any additional information about the issues that he takes objection to other than the information that I gave in my second reading reply. In respect to the question that the member just asked, I do not have that information.

Hon MICHAEL MISCHIN: Plainly, this will not be completed today, so the minister will have ample opportunity—overnight, if necessary, or until we resume again—to find that out. Having regard to the alleged urgency of this legislation and the claims that were made that the McGowan government has moved swiftly to fix this problem left over by the slack laws of the Liberal government and its inaction in that regard, I want to know how swiftly the McGowan government moved to have this bill drafted and introduced. That should not be difficult to ascertain. The minister may be able to help with how many drafts of this legislation there were before it received the endorsement of cabinet.

Hon SUE ELLERY: I am advised that there were six or seven drafts.

Hon MICHAEL MISCHIN: The minister may be able to answer this from her own recollection. A media report of 14 June this year claimed that the go-ahead had been given to draft legislation to address the problems in the dangerous sexual offender legislation raised by WA Labor in opposition. Can the minister tell me which problems this bill was meant to address? Was it all that stuff that Labor had raised in opposition about the fact that people who had been classified as dangerous sexual offenders were being released, or was it only some of the issues relating to dangerous sexual offenders? As I understand it, the outrage that was exploited by the Labor Party had to do with the fact that anyone classified as a dangerous sexual offender could possibly be released into the public under a supervision order rather than be detained. Will this bill stop dangerous sexual offenders being released?

Hon SUE ELLERY: I tried to tackle this in my second reading response. The policy objective that we were trying to achieve was continuing detention in custody or supervision in the community of a DSO if their unconditional release from custody would present an unacceptable risk that they would commit a serious sexual offence. We wanted to do so in a way that would not take us beyond the constraints of commonwealth constitutional law. The plan to fix the problem of offenders being released on bail too easily is the basis of the policy. The presumption against bail is very significant. It is a major amendment and equals the treatment of bail for murder.

Hon MICHAEL MISCHIN: I thank the Leader of the House, but she has not really addressed the point. What changes will address the problems in dangerous sex offender legislation raised by WA Labor in opposition, which were the reported comments of the Attorney General through a spokesperson? Is it simply the ease of being released on bail when charged with a breach, is it the ease of being released at all, or is it the fact that dangerous sex offenders, as defined in the act, are being released per se?

Hon SUE ELLERY: I appreciate that the honourable member wants to revisit what he sees as the discrepancy between the policy discussion that occurred before we were elected to government and the bill before the house. I have provided to the best of my ability the information that I am able to. I am not able to add anything to what I said in my response to the second reading debate or to the answer I have just given.

Hon MICHAEL MISCHIN: I thank the Leader of the House, but I am also addressing the policy statement made since the government was elected, which drew on the policy statements and the claims, assertions, complaints and allegations made over the previous four years. The issues were meant to be fixed by this government and were articulated in its law reform initiatives document back in January, upon which it relied in part to attract votes from the public, which, it assured us repeatedly, had cause for concern about this legislation. Has the Labor Party changed its position since it got into government?

Hon SUE ELLERY: I will make the point again: what we were trying to do once elected was meet the policy objectives that we had set out prior to being elected and to take cognisance of the need to ensure that those laws were constitutionally valid.

Hon MICHAEL MISCHIN: Perhaps the Leader of the House could point me to where in the law reform initiatives document it states anything about Labor changing the laws to achieve this so far as constitutionally valid.

Hon Sue Ellery: I have nothing further to add.

Hon MICHAEL MISCHIN: Is it reasonable to assume that very broad and bold claims were made in the document without sufficient thought about whether those plans and objectives were achievable?

Hon SUE ELLERY: I am really not in a position to add anything more and I am not in a position to enter into a debate about the intent of a policy document that I did not write. I am not sure that I can add anything further to the examination of the policy that the honourable member has referred to.

Hon MICHAEL MISCHIN: Is the Leader of the House able to say who did have input? Would Attorney General Quigley have had input to this document? He is the draftsperson of this bill. He is the sponsor of this bill. He initiated it. He was a great spokesman over the last several years about what ought to be done and how it should be done. Would he have had anything to do with this document or is the Leader of the House not able to even say that?

Hon SUE ELLERY: I am not sure how identifying whether I knew who may or may not have contributed to a policy document that the WA Labor Party took to the election gets us anywhere with the detail of the bill before us. I am not able to add anything to assist the honourable member with the policy document that he is referring to.

Hon MICHAEL MISCHIN: The Leader of the House will understand that I am trying to determine whether the policy that underpins this bill—we will see whether the provisions of the bill meet the policy—has changed since the McGowan Labor Party got into government. It went to the election with a particular set of objectives. It has claimed that all the problems—those problems have not been identified yet, but we will get to that—are the fault of the previous government and that this will fix them in some fashion. I am trying to narrow down what those problems were seen to be so that I can see whether this bill will actually achieve that end. I would like to help and make sure that this bill will do what the government hopes to achieve by it. I need to understand whether the policy basis for it at the start of government is any different from what it is now.

Hon SUE ELLERY: With absolute respect to the line of questioning being put by the honourable member, I am really not able to add anything further on the policy document that he is referring to.

Hon MICHAEL MISCHIN: We will get away from the policy document, as no-one seems to want to take responsibility. We will find out where it came from, although after we rise today, perhaps the Leader of the House can make herself able to assist.

I turn to a WAtoday article of 14 June, which states —

> Mark McGowan's cabinet has given the go ahead for legislation to be drafted which will strengthen WA's dangerous sex offender laws.
>
> A spokesperson for the Attorney General John Quigley told *WAtoday* on Wednesday cabinet had approved the drafting of legislation which was committed to before the state election.

Committed to before the state election! That gets back to the policy document, sadly. The article continues —

> "These changes will address the problems in dangerous sex offender legislation raised by WA Labor in opposition," the spokesperson said.

Again, what has been going on in the last several years? There were problems that apparently we had not addressed and could have addressed and things that we could have done but, because of my misunderstanding of the law, I did not do. It continues —

> The legislation is expected to be introduced this year.
>
> Under WA's dangerous sexual offender laws, the Supreme Court can order certain sexual offenders to be the subject of either a continuing detention order, or a stringent supervision order.

That is the law at the moment and the Leader of the House told us on several occasions during her second reading reply that that will be the regime afterwards. It then goes on to state —

> Measures to be included in the soon-to-be-drafted legislation will mean prisoners will have to "bear the burden" of satisfying the courts they will comply with any supervision order conditions.
>
> Removing the court's discretion to release an offender on bail during proceedings relating to a supervision order breach, until those proceedings conclude, will also be included.

Will this bill do either of those things?

Hon SUE ELLERY: It certainly does address both things. I think that the point the honourable member is trying to make is that he is personally affronted by the views expressed by the now Attorney General, the former shadow Attorney General, in the lead-up to the election, and as a result of that personal affront the bill before the house is in some way invalid or dishonest. I think that is the point the member is trying to make. I understand that. I hear his personal pain at the affront, but I am not sure I can take this matter any further in respect of the policy that was put by the Labor Party and the shadow Attorney General before the election. We have a bill before us that takes us forward in how dangerous sexual offenders are treated. I am ready, willing and able to discuss the detail of the bill before us. I really cannot go back to canvass the matters that I think the member wants me to canvass.

Hon MICHAEL MISCHIN: I thank the Leader of the House for her patronising attitude. I think it is probably about time I took offence at something now, because what I am asking the Leader of the House to do, rather than making it personal about this somehow being a personal affront and the like—yes, I am offended that I had a liar who is now the first law officer of this state —

The CHAIR: Order!

Hon Sue Ellery: You cannot use that language it is unparliamentary.

Hon MICHAEL MISCHIN: Okay, someone who was loose with the truth.

Withdrawal of Remark

The CHAIR: Before we replace the words, you will withdraw.

Hon MICHAEL MISCHIN: I withdraw.

The CHAIR: Let us just take that in order. Can the member resume his seat for a moment.

I want to take the temperature down for a moment. I will give members a moment to collect their thoughts while I point out that the question we are debating is whether clause 1 be agreed to. In contemplating that, of course, we are not revisiting the second reading debate. The house has a bill before it and the second reading speech discussed the scope and policy of the bill. That is what this house is aware of. Although it is legitimate in the context of the second reading debate to refer to other matters such as election undertakings and so on, we are perhaps a little more restricted when we come to the consideration of clause 1. Nonetheless, I have been following the debate closely and plenty of the material being canvassed is about the scope of the bill. Having said that, let us concentrate on the bill rather than the personalities.

Committee Resumed

Hon MICHAEL MISCHIN: I do withdraw that remark. Perhaps I could rephrase it. He is someone who is prepared to say one thing and be critical of others, but then resiles from that when it suits him. But I am concerned that the Leader of the House has turned this around as though it is something that is personal to me, rather than answering the question about how the policy of the bill, as announced in the second reading speech, differs from what was said when the drafting of the bill was announced only a matter of months before. That is why I am quoting this article from 14 June 2017 about what this bill was going to achieve. That gets back to why the government has changed its position on this and why it has not admitted as publicly as it announced on 14 June that it is doing less than what it felt it could do at the time. Instead, the government is trying to trumpet this bill as being the toughest law in Australia and making out that it is a great victory to do somewhat less than promised only a matter of months before. To try to turn that around as though somehow that is an unreasonable approach to take is frankly insulting. I ask again: does this bill achieve either of those measures or is it something less than that?

Hon SUE ELLERY: As much as I am enjoying every minute of this exchange, I am going to have to ask that progress be reported, because I have to leave at six o'clock.

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