SENTENCE ADMINISTRATION AMENDMENT (MULTIPLE MURDERERS) BILL 2018

Committee

Resumed from an earlier stage of the sitting. The Deputy Chair of Committees (Hon Adele Farina) in the chair; Hon Sue Ellery (Leader of the House) in charge of the bill.

Clause 1: Short title —

Committee was interrupted after the clause had been partly considered.

Hon MICHAEL MISCHIN: Before we broke, I was asking about any constitutional legal impediment or risks to what the government has proposed in the bill. If I understand the minister correctly, the only one that the government is aware of is any consequence of imposing upon a sentence delivered by the court; hence it has selected this discretion to be available only after the delivery of the first review report. Is that correct?

Hon SUE ELLERY: Yes, that is the answer that I gave.

Hon MICHAEL MISCHIN: I take it that there is no constitutional or legal impediment to the government in due course expanding the operation of this legislation to murderers generally. Is that right or would an additional constitutional, legal impediment or risk be exposed by taking that course?

Hon SUE ELLERY: I think the first point that needs to be made is that consideration was not given specifically to expanding it beyond those that had been talked about in the election commitment. We have to start from that premise. Consideration was not given to that; therefore, particular advice was not requested on that. The advice I have is that the broader we make it, the higher the risk of a legal challenge as opposed to a constitutional challenge.

Hon MICHAEL MISCHIN: Why?

Hon SUE ELLERY: It reflects the numbers—the number we talked about before. We are talking about capturing a broader number of criminals who might take issue with that.

Hon MICHAEL MISCHIN: That is lessened because a very small number of prisoners will be targeted. As I understand the Leader of the House's comments earlier, there is little or no prospect of release of these prisoners anyway and, presumably, little or no prospect of a challenge.

Hon SUE ELLERY: The member has come at it, I guess, the back way. The starting position was the precise language used in the election commitment. That is where we started from. Advice was sought on how to mitigate any potential constitutional challenge. I have talked about that and advised the chamber about that already. The question was not put that drafters consider, or advice be sought in respect of, broadening the scope of the bill beyond mass murderers and serial killers—advice was not sought. But on the straight question of the probability based on the numbers, with a larger group of those who might feel aggrieved—in this case, criminals and murderers of other kinds—the risk of some kind of legal challenge is increased. I hasten to make the point that it is no more sophisticated than that. The starting point for the legislation was not about capturing the biggest group or capturing all murderers; it was about a very specific and narrow group.

Hon MICHAEL MISCHIN: With whom did the government consult in the course of drafting the bill or in formulating the decision to craft the bill to capture only the people whom it has captured?

Hon SUE ELLERY: In the preparation of the bill, consultation was undertaken with the State Solicitor's Office; the Chief Justice, the Honourable Mr Peter Quinlan, in his former role as Solicitor-General; His Honour Allan Fenbury; and the chairperson and senior advisers of the Prisoners Review Board. The proposal was subject to the Department of Justice's usual internal consultation process. It was circulated for consideration to the Director of Public Prosecutions, Parliamentary Counsel, the State Solicitor's Office and the Department of Treasury. Consultation also occurred with the Victim–offender Mediation Unit and the acting commissioner has advised that the office of the Commissioner for Victims of Crime supports the bill. I put that in the context that this was an election commitment. As I recall, it received considerable ventilation at the time that it was announced during the course of the election campaign.

The DEPUTY CHAIR (Hon Adele Farina): I take this opportunity to remind members that the policy of the bill was determined with the passing of the second reading of the bill. We now should be having consideration for the clauses within the policy that has already been accepted by the house.

Hon MICHAEL MISCHIN: I simply want to wind up this question of consultation or submissions. Have any submissions been received from, for example, the Law Society of Western Australia, the Western Australian Bar Association, the Criminal Lawyers' Association of Western Australia, Legal Aid WA, community legal centres or any victim support groups—anyone?

Hon SUE ELLERY: Not to the best information available to those advising me at the table.

Clause put and passed.

Clauses 2 and 3 put and passed.

Clause 4: Section 12A amended —

Hon MICHAEL MISCHIN: Clause 4 inserts, amongst other things, two additional proposed subsections into section 12A of the principal act, which provides that following the directions given by the Attorney General there is no periodic report that can be provided by the Prisoners Review Board.

We have been told that under this legislation, "life is life" and these people will never be released, yet earlier the Leader of the House told us that the discretion to remove the ability of the Prisoners Review Board to provide reports in accordance with its ordinarily statutory obligation is at the disposal of successive Attorneys General. How does that match up with the "life is life" claim that was made as part of the election commitment and the publicity for this bill? It is either "life is life" or "there is still the prospect of a report".

Hon SUE ELLERY: Putting in place a mechanism by which there is the capacity to reconsider—it is not an automatic decision about granting parole or otherwise—will ensure that a person does not become, if you like, lost in the system. It does not pre-empt what might happen; it just means that every six years, consideration will be given about whether it continues or not. It reflects that a different Attorney General might have a different point of view. It is essentially a check and balance to make sure that people do not become lost in the system.

Hon MICHAEL MISCHIN: That is part of the pretence, is it not? The government has told us and the publicity is that these people should not be burdened with the trauma of being re-traumatised. Labor says that for certain types of prisoners life means life—they are not going to be released ever—yet it is telling us that, in fact, an Attorney General of the day could change their mind. I thought that that was part of the current Attorney General's rationale for this legislation, because a future Attorney General might come to a different decision from the one who is there now. Which is it? Does life mean life and these people will never be released, as has been claimed, or does it mean that because of the way that the legislation has been structured, they may still be released at some stage in the future if an Attorney General takes a different view?

Hon SUE ELLERY: Life may well mean life, and I suspect that it will for these people. However, I have made the point already—I preface my response by saying that I do not accept the use of pejorative language; I do not accept that there is a pretence going on here—that this is about ensuring that there is a check and balance when considering whether reconsideration of a case is required. I personally cannot imagine the circumstances in which that might happen; nevertheless, it is part of the legislation to ensure that people do not get lost in the system.

Hon MICHAEL MISCHIN: That is the pretence. The Labor Party told the public that life means life and, under "tough Labor", these laws mean that certain prisoners will stay in prison until they die. However, there is still a way out if the Attorney General of the day does not extend this bar to even the preparation of a report. We are meant to believe that that is a check and balance against people being lost in the system. However, there is no bar to a future Attorney General saying, "This heinous criminal has been put off for six years. That period is about to expire. There will be an awful lot of publicity about this one, and I as Attorney General could look weak if I even received a report from the Prisoners Review Board, because tough Mr Quigley took it off his desk for six years and said life means life", and therefore decide to extend that, not for any rational reason, but only because he wants to avoid that sort of publicity. That sort of absolute discretion is available to a future Attorney General, is it not?

Hon SUE ELLERY: The honourable member is making assumptions about the vagaries of future Attorneys General, which I am not in a position to comment on. I have responded to the provision that has been referred to.

The DEPUTY CHAIR: Perhaps the honourable member could rephrase the question, or move on.

Hon MICHAEL MISCHIN: The power would be available to a future Attorney General, under the way the bill is constructed, to simply say, "I don't like the look on that criminal's face" or "I think it would give me bad publicity" or "I want to show how tough I am on crime", and therefore extend the prohibition on the PRB providing a report. Yes or no?

Hon SUE ELLERY: I have tried to answer the question a number of times already. The discretion rests with the Attorney General. There is no backing away from that. This bill relies on a discretionary power to be exercised by the Attorney General.

Hon MICHAEL MISCHIN: So the answer is yes—a future Attorney General can exercise his or her discretion in that irrational and perverse fashion, because it is an absolute discretion. Correct?

Hon SUE ELLERY: I am not going to accept the pejorative language of the honourable member. I have said already, and it is clear in the legislation, that it is a discretionary power.

Hon MICHAEL MISCHIN: I think the minister has answered the question. The minister has told me that I cannot speculate about what future Attorneys General might do. How does this Attorney General expect that he will exercise a discretion to extend the prohibition period? The minister has told us that he will go and get stuff from the Prisoners Review Board, and that he will consult the victim mediation unit, which would presumably seek the views of victims and hence re-traumatise them. What criteria will the Attorney General consider would be relevant to a decision to extend the prohibition if he does not have a report?

Hon SUE ELLERY: I have already in my second reading reply outlined to the chamber the kind of protocol that the Attorney will use and the information that he will gather to assist him in making his decision. I cannot add any more detail than that.

Hon MICHAEL MISCHIN: The minister has told us the information that the Attorney General will gather. Is any of this protocol in writing anywhere so that we can see whether it is comprehensive and complete?

Hon SUE ELLERY: There is a written document, which details what I have already advised the house about how the Attorney General will seek information from a range of groups to assist him in making his decision. I do not have that with me now, but I would be happy to table it at a later date. There is no further written document. The description I gave in my reply to the second reading debate and which I have given in the last few minutes is the extent of the information I am able to provide.

Hon MICHAEL MISCHIN: I would appreciate a copy of that being tabled to see what is in it.

Hon Nick Goiran: When would you get it?

Hon MICHAEL MISCHIN: Tomorrow or today.

Hon Sue Ellery: We can try to get it in the next break, which is in half an hour.

Hon MICHAEL MISCHIN: I would appreciate that. There is one other thing that I am interested in. It is one thing to gather a whole pile of information from various sources, but the Sentence Administration Act currently provides the sort of information that the Prisoners Review Board is to report upon and gather, and the release considerations when making a recommendation for release on parole. That is all in section 5A, amongst other things. It includes any victim issues and things of that nature, the likelihood of re-offending, the likelihood of complying and all that sort of stuff, and victim submissions to the board. All of that material is gathered on a three–year rolling basis. Now, the Attorney General will be able to say, "Don't even bother to create a report. I'm not interested in seeing it for three years." In three years' time, the date for another report falls due. The Attorney General, not bound by the requirements of the act, will seek other sorts of information—perhaps an overlap from various sources—to assist in making the decision on whether to extend the prohibition. What will he be looking for to guide his discretion?

Hon SUE ELLERY: I have already provided an answer to that question. I appreciate from the honourable member's demeanour that he does not find that satisfactory, but I have already provided an answer. This is a discretionary power. A deliberate decision has been made to not set out in the legislation what the member describes as criteria, or how one piece of information might be weighed against another. In taking that decision, it was determined that to get the balance right between all the things that need to be taken into account, we wanted to minimise the possible grounds that one of the prisoners encompassed by this legislation might be able to use to challenge the decision.

Hon MICHAEL MISCHIN: I understand that it is a discretionary power. As a rule, statutory discretions tend to have to be exercised in a rational fashion and not just at whim. In this case, the purpose of saying to the board that he does not want to see a report for three years is allegedly to protect against the re-traumatisation of the secondary victims. That is not going to change, unless the secondary victims have lost interest or have died and cannot make a submission. Apart from those considerations, is the number of adverse headlines that the minister is worried will affect his or her reputation a factor that could be taken into account in the exercise of discretion; and, if not, why not?

Hon SUE ELLERY: I am not sure that that is really a serious question. I am not able to provide the honourable member with anything more than I have already said.

Hon MICHAEL MISCHIN: I think the minister has answered the question, which is that it is an absolute discretion. If that is what exercises the mind and motivation of the Attorney General of the day, that is what he or she can do and there is no review of that. In any event, the Attorney General, even during that hiatus or prohibition period, can still seek a report from the board whenever he or she chooses to do so. Is that correct?

Hon SUE ELLERY: Yes.

Hon MICHAEL MISCHIN: I thank the minister. What is the purpose of that report?

Hon SUE ELLERY: Retaining section 12 negates the need to include special provisions for revocation of a direction. It allows the board to, effectively, report to the minister on any exceptional matters.

Hon MICHAEL MISCHIN: Are they exceptional matters as far as the board is concerned, or exceptional matters as far as the Attorney General is concerned? Is it the board's or Attorney General's decision to report under that provision?

Hon Sue Ellery: Honourable member, there are two provisions.

Hon MICHAEL MISCHIN: Okay.

Hon SUE ELLERY: The member may well be aware of this. Section 12 of the Sentence Administration Act states —

> (2) The Board must give the Minister a written report about a prisoner —
>
> (a) whenever it gets a written request to do so from the Minister; and
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> (b) whenever it considers it necessary to do so.

"It" being the board.

Hon MICHAEL MISCHIN: The minister has confirmed that notwithstanding the "talk to the hand" approach of the Attorney General to show that life means life, and "I am not interested in seeing a report on this prisoner because they are really nasty people and I don't want to re-traumatise victims", the board can nevertheless report when the Attorney General decides that he wants one and when the board decides that there are exceptional reasons to do so. In writing those reports, will the board have to seek the views of victims, as it now does under its statutory three-year review? Will it trouble victims in the course of preparing those reports that can be obtained at any time?

Hon SUE ELLERY: I cannot give the member a specific answer other than to say the process will be similar to the statutory report process. So the board may or may not the contact the victims; it will depend on the circumstances.

Hon MICHAEL MISCHIN: In short, the guarantee that victims will not be re-traumatised in anything under six years is not quite correct. In fact, under section 5C of the act—unless the minister wants to disabuse me of it—the board in performing its functions is to have regard to victim submissions. Section 5A involves as one of the release considerations some regard to victims if the prisoner is to be released, including any matters raised in submissions. The idea is that, although a report every three years is traumatising and stressful for secondary victims, and the Attorney General of the day, Attorney General Quigley, can show how tough he is and say, "Don't prepare a report for three years", delaying it for six years, he might change his mind, or the board might change its mind and decide that something exceptional has come about and seek a report and the victims, as part of the board doing its job, might be troubled to have their views understood and listened to, and become concerned that there is a very realistic prospect of these people being released in any event. That would be right, would it not?

Hon SUE ELLERY: If I take the pejorative language out of that commentary, the member is at liberty to draw his own conclusions, and I know that he will, and he will vote for the bill or he will not vote for the bill. The point I have already made in my second reading reply and at the table is that, although the intent is that the section 12 reporting mechanism will not be used during the period of a direction, the retention of the ability negates the need to include special provisions for revocation of a direction.

Hon MICHAEL MISCHIN: I understand all that. The Leader of the House has told us how the act works. I am trying to work out how it can work, and I think the leader has just confirmed that it can work in the way that I have outlined. It can be that the Attorney General will say that he does not need a report for six years, but then turn around the day after and ask for a report under the powers that he has available to him and, as a part of the board's function—the way it goes about its business—it would have to have regard to victim submissions and might seek, in order to do its job for the Attorney General, input from the very victims whom we are told will not be troubled if this provision comes into effect. Is that correct?

Hon Sue Ellery: I have already answered the question.

Hon MICHAEL MISCHIN: The Leader of the House keeps telling me she cannot, but I will take that as the answer—yes, it can.

Clause put and passed.

Clause 5 put and passed.

Clause 6: Part 2 Division 5 inserted —

Hon MICHAEL MISCHIN: I move —

> Page 4, lines 12 to 19 — To delete the lines and substitute —
>
> ***designated prisoner*** means a Schedule 3 prisoner who is serving a sentence for a relevant offence and who has been convicted of another relevant offence;

By way of explanation, proposed section 14B defines "designated prisoner" as a schedule 3 prisoner who is serving a sentence for a relevant offence and, in effect, has been convicted of two other relevant offences at some stage—that is, three convictions for murder or wilful murder—or has been convicted of two relevant offences on different days from the first. This is the point we had been discussing at some length, and of which Hon Martin Aldridge had made mention. Is there any legal reason why it must be two convictions on separate days, or is that decision made by government to narrow the scope of the operation of the bill?

Hon SUE ELLERY: We do not support the amendment; but also, it is outside the scope of the bill, in my view. I am going to ask for a ruling on whether that is the case. Very specifically, the intent of the amendment is to go beyond the two categories of criminals that were referred to in the election commitment; that is, mass murderers and serial killers. The amendment specifically refers to schedule 3. Schedule 3 contains a broader range of criminals than those two categories of criminals, so the amendment quite specifically is seeking to go beyond the scope of the bill. As expressed in the explanatory memorandum, under "Overview of the Bill", it states —

> The Bill establishes a scheme of Ministerial directions by which the Minister may direct that a 'designated prisoner', being a mass murderer or serial killer, must not be considered for parole or re-socialisation programme.

By referring to schedule 3, it encompasses a broader range of criminals than those designated prisoners as defined in the bill before us. At page 4, the explanatory memorandum states —

> Ministerial directions can only be made regarding mass murderers, being someone who has killed three or more people; and serial killers, being someone who has killed two or more people on different days.

Members will recall that in my second reading reply I outlined where the descriptions of those two categories came from. It is also reflected in the second reading speech. The amendment seeks to broaden the scope of the bill to include anyone who has murdered two or more people; prisoners who have killed two people on separate days fall within the definition of "serial killer" provided for in the bill. The issue in question then is whether the amendment proposed alters the definition of "designated prisoner". In developing the bill, the Attorney General considered the number of victims typically understood to fall within the concept of mass murderer, which at a minimum is three. The bill was drafted and introduced on that basis. Changing the definition will expand the scope of the bill. I have tried to outline why we are opposed to the amendment, because we deliberately cast this narrowly, but also that is the reason I believe the amendment is out of scope.

Several members interjected.

The DEPUTY CHAIR (Hon Adele Farina): Order, members! If I understand correctly, the minister has asked for a ruling.

Hon Sue Ellery: I have.

Hon Michael Mischin: Do I have the opportunity to speak to that?

The DEPUTY CHAIR: If you would like to, I will take your comments before I make my ruling.

Hon MICHAEL MISCHIN: I cannot agree with the minister that the amendment is outside the scope of the bill. The scope of the bill is in the short title—for what that is worth—which is "Sentence Administration Amendment (Multiple Murders) Act 2018". The definition of "multiple", unless the dictionary has changed, is more than one. The long title of the bill is broad enough to embrace this amendment. It is "A Bill for an Act to amend the *Sentence Administration Act 2003*".

The definition states —

> ***designated prisoner*** means a Schedule 3 prisoner —

That is precisely what I am proposing —

> who is serving a sentence for a relevant offence …

That is precisely what I am proposing. The "relevant offence" means exactly the same thing—murder or equivalent offence—in other jurisdictions. The only difference is that the designated prisoner committing a relevant offence is limited to two or more relevant offences at any time, or another relevant offence on a different day. No rational reason—there is no legal reason—has been advanced that requires "multiple" to be interpreted in that fashion. That is all the amendment is doing; it is not expanding. It is not intending to embrace any other schedule 3 murderers other than those who have committed relevant offences, but two of them at any time. That is plainly, in my submission, something that is embraced by the bill. It is not uncommon to change definitions in order to adjust their operation to make them more sensible or to expand slightly their operation. This amendment does not go anywhere near beyond the scope of the bill. I can understand the argument about the other amendments that

I advanced, and I have withdrawn them. I understood the temper of the chamber—that it is not interested in debating the amendments to expand it to include child murderers and specific types of murder. Here it is a question of how one counts "multiple". I am saying that it should mean two, not just two on different days. That cannot be outside the scope of the bill.

Ruling by Deputy Chair

The DEPUTY CHAIR (Hon Adele Farina): Members, I have been asked to make a ruling about whether Hon Michael Mischin's proposed amendment is outside the scope of the bill. The word "relevant" does not mean identical; rather, it means "to the purpose related to" and "bearing on the matter in hand". A provision is not relevant if it introduces new principles. There is no question that the proposed amendment will expand the scope of the bill. However, as the definition of "relevant offence" requires a murder or a similar offence under another jurisdiction, it is not in my view outside the scope of the bill, which refers to multiple murders. It clearly refers to a need for a conviction for a previous murder or similar offence and the current one, and more than one is multiple.

Committee Resumed

Hon MICHAEL MISCHIN: Thank you, Madam Deputy Chair. The question I have as part of this is: why have we chosen a particular formulation of multiple, being two on different days rather than two on one day? That seems to be unjust and it creates an anomaly. I can understand the government picking up an election commitment, but nowhere in its election commitment was there a limitation that they had to be on different days—two killings on different days. This is self-imposed limitation. I tried earlier in the piece to ascertain why the line was drawn where it has been drawn. The minister told us that there is no legal reason why and that it is not because of any constitutional reason. The only thing we have to look at in this is whether it affects the sentence. It has nothing to do with the counting exercise. As a matter of commonsense, I think the public would think it perverse and absurd to say that a person is a multiple murderer if they kill someone on Saturday and another person on Sunday, yet if the person killed two people on the same day, they are not a multiple murderer. It defies commonsense. The minister told us that, for some reason, it has been taken from some Federal Bureau of Investigation report that classifies things. There seems to be no explanation as to why that formula has been chosen when we have the discretion to define "designated prisoner" however we like. If it had not been outside the scope of the bill, we could define "designated prisoner" as someone who has killed children, someone who has killed a person in the course of family violence or however we like. It is a self-imposed limitation that has no rational explanation other than trying to narrow the scope of the bill artificially. It seems to me to be consistent to prevent a stupidity that will cause trauma and injustice to secondary victims who will be looking for comfort in this legislation—I understand that is what it is all about—simply because the government decided to refine its election commitment artificially.

Hon SUE ELLERY: The government will oppose the amendment. As I indicated in my second reading reply, the legislation was always intended to apply to mass murderers and serial killers. In developing the bill, the Attorney General considered the accepted definitions of each of these terms. The Federal Bureau of Investigation in the US defines "serial murder" as —

> The unlawful killing of two or more victims by the same offender(s), in separate events.

This definition was developed by experts from various professions, law enforcement clinicians, academia and researchers at the Serial Murder Symposium in 2005. This was amended in drafting to "different days" to ensure clarity and to reflect the cooling-off period that is evident between killings by serial killers. Definitions of mass murders or mass killings vary, with the number killed ranging from three to five. Ultimately, the definition was drawn from legislation in the US, the Investigative Assistance for Violent Crimes Act 2012, which provides —

> 'mass killings' means 3 or more killings in a single incident

Hon RICK MAZZA: I rise to say that I will support the amendment. I have listened to the debate very closely and I am yet to be convinced that if someone kills someone in the morning and then kills someone else in the afternoon, they are not a serial killer, yet if they kill someone in the afternoon and then someone the next morning, they are a serial killer. I just cannot rationalise that line of thought. I am still struggling to see how the reference to the FBI in the US is relevant. I will support the amendment simply because I am not convinced that the definition of "serial killer" having to be someone who has committed two murders over two separate days makes any rational sense in any way, shape or form.

Hon AARON STONEHOUSE: I am certainly not a fan of this bill as it is. I have concerns about the discretion that will be exercised in what seems like a rather arbitrary manner. To be clear, all we are talking about is delaying reporting for six years. We are not talking about preventing people from being released on parole. The Attorney General already has discretion in that circumstance. A lot of the people who are recommended for parole by the Prisoners Review Board never get parole. The amendment proposed here seems to be in line with the government's intent. I am unsure why the government would oppose it, because it seems as though it would

enhance the bill by removing a rather arbitrary definition of "serial killer". As has been pointed out, someone who commits two murders on the same day will not be considered a serial killer but someone who commits two murders on concurrent days will be.

Can the minister give me any idea how this amendment would counter or diminish the government's intent with this bill or would somehow cause complications for the implementation of the government's policy? I am trying to figure out whether the government has a genuine concern about changing the relevant offence proposed here or whether this is another case of the Attorney General digging in his heels when this place tries to amend and enhance his legislation. I am inclined not to support this amendment, but the arguments made by Hon Michael Mischin are very convincing and it seems that this would go some way to enhancing the bill and would align it more closely with the government's policy intent.

Hon SUE ELLERY: This amendment would broaden the category of people captured by this legislation. The legislation was crafted in a way to ensure that we used a definition that was understood and had been relied upon elsewhere. Although I noticed a bit of *CSI: Crime Scene Investigation* commentary going on, the FBI is a serious organisation. It is a world leader in this kind of work. We looked to the definitions that were relied upon by one of the most prestigious criminal investigation units in the world. Members may choose not to accept that. That is a call that they will need to make. But the effect of the amendment, which is the question asked by Hon Aaron Stonehouse, is that it will capture a broader range of people.

Hon MARTIN ALDRIDGE: Did the government consult with the FBI when drafting its election commitment?

Hon SUE ELLERY: I have already answered the question about who was consulted. I answered that probably about an hour ago and I might have even answered it before that as well.

Hon Nick Goiran: What was the answer?

Hon SUE ELLERY: The answer is no. I already provided this place with that answer.

Hon MARTIN ALDRIDGE: I just did a quick search while we have been sitting here listening to all these interesting matters and I refer the minister to a manual titled "Serial Murder: Multi-Disciplinary Perspectives for Investigators" from the Behavioral Analysis Unit at the National Centre for the Analysis of Violent Crime, FBI, US Department of Justice. It defines—I am doing this from my computer—"mass murder" as "a number of murders (four or more) occurring during the same incident". The evidence that the minister provided to the Committee of the Whole just now is that the FBI defines a mass murder as three or more killings with no cooling-off period. Is the minister wrong or is the FBI wrong?

Sitting suspended from 6.00 to 7.00 pm

Hon SUE ELLERY: I want to reiterate that the government does not support the amendment. The government committed to taking what, on some measures, could be described as the extreme of suspending the parole consideration process only for serial killers and mass murderers. As I said, when considering the definition of "mass murder"—I said this in my reply to the second reading debate—the Attorney General said that there were various definitions, with the number of victims ranging from three to five. Hon Martin Aldridge is correct that the FBI has defined "mass murder" as involving four or more killings in a single incident; however, the government has drawn from the US legislative definition, which refers to three people, because we decided to use the number at the lowest end of the spectrum. We have not found a definition of "mass murder" that encompasses two or more killings.

The other point I ask the chamber to take into consideration is that if we pass this bill without amendment, it will receive royal assent next week. Under the commencement clause, the bill will take effect on the following day. One matter on which the Attorney General is preparing a ministerial direction is for the serial killer Peter Maloney, whose statutory review date is 15 December 2018. If the proposed amendment is supported, the bill will need to be returned to the Legislative Assembly and the Attorney General will not have the ability to suspend Maloney's consideration for parole. The victim's son wrote to the Attorney General about the bill. He said —

> … my mother was murdered in November 1979 by Peter John Maloney, in Esperance. He was convicted of wilful murder and sentenced to death, this was commuted to life in prison.
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> He was also convicted of manslaughter for the killing of Elizabeth Fountain the same year.
>
> …
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> I am deeply concerned that he will be able to be released into the community to live unsupervised, and to maybe, repeat his killing of innocent people, and devastating other families.
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> Thank you for this opportunity to express my feelings.

Catherine Birnie is due to be considered for release on parole on 2 March 2019.

Before we rose for dinner, Hon Martin Aldridge drew to our attention a particular definition that he had found on a quick search, probably via Google I dare suggest. In my second reading reply, I described the definition as being between three and five murders. As I have said in these comments, WA erred on the lower side of that range of figures. I urge the chamber not to support the amendment.

Hon MARTIN ALDRIDGE: Minister, we are not relying on a Federal Bureau of Investigation definition now; if I heard correctly, we are relying on some American statute. Could the minister identify that statute to the chamber?

Hon SUE ELLERY: The honourable member might have been out of the chamber on urgent parliamentary business, but I did refer to it in my second reading reply. I set out the work done by the FBI and the statute it relied upon. Section 455(d)(2)(A) of the United States Code, "Investigation of Certain Violent Acts, Shootings, and Mass Killings", refers to "3 or more killings in a single incident". In addition to that reference, I talked about other work of the FBI. I have not changed the references that I am relying on at all.

Hon MARTIN ALDRIDGE: The minister just mentioned the urgency of this bill passing because the Attorney General is preparing a direction in relation to Mr Peter Maloney—I think that is whom she mentioned. The advice I have been given is that his statutory review date is 15 December 2018. Could the minister confirm for me whether that is the date on which the review is due or the date on which the review must commence?

Hon SUE ELLERY: We will just check. I am sorry about the delay. The statutory review date is 15 December 2018. It is possible for it to present later, but the review date is 15 December.

Hon MARTIN ALDRIDGE: I take it that the report of the review is due on 15 December, which is only 10 days away. If the primary purpose of this bill is to avoid the re-traumatisation of victims, I would have thought that the parole review process would already be advanced. We are 10 days away from the review date. I would have thought that the opportunity has passed for Mr Peter Maloney. In fact, if there is not a report in draft form, it would be ready to send to the Attorney General. Could the minister explain to what extent secondary victims have already been exposed to a parole review process regarding the review of Mr Peter Maloney?

Hon SUE ELLERY: They will have already been consulted about this, but they are monitoring the situation closely. I understand that they are closely watching this debate. Part of what they are concerned about is the prospect that the person might be approved for parole. Part of the trauma for them right now is the uncertainty about what might happen to this person.

Hon MARTIN ALDRIDGE: This is my last question, because I know that other members want to ask about this. On that basis, I would assume that the Attorney General will have to give a direction within the next 10 days. This bill needs to pass, receive royal assent and be proclaimed and then a direction given within the next nine days. How can the Attorney General do that with Mr Peter Maloney if it is still unclear whether the protocol has been established? The minister committed to provide a draft copy of the protocol. How has the Attorney General satisfied himself that he has complied with his protocol to give himself appropriate information to inform himself that a direction is needed regarding Mr Peter Maloney, given that he has some 10 days remaining?

Hon SUE ELLERY: While my advisers are finding some additional information, I can advise that part of the process involves an Executive Council meeting. I understand that that can be called at short notice specifically to deal with this matter. There have already been discussions about doing that. I am just going to see if I have any additional information. No proclamation is required. This legislation will come into effect on the day after royal assent, so that part of the process is possible. I am just seeing if I have further information that will be of assistance to the member. The nature of the protocol, which I have described already, is that the Attorney General is to consider the views of the victims, and they have already been expressed. The Attorney will have for his consideration the last statutory review, which he will take into account as well.

Hon SIMON O'BRIEN: I will save some of my observations until the third reading debate, because right now we are focused on the specific matter before the Chair. I find what has just been teased out in front of us breathtaking! I understand that we are somehow being remiss in even taking a few minutes to question this Sentence Administration Amendment (Multiple Murderers) Bill and that it is absolutely critical that we do not do anything except rubberstamp it. Heaven forbid if it be amended or delayed in any way from its ultimate implementation. The reason, apparently, is to cater for a murderer called Maloney, whose case for consideration, if I am using the right term, comes up on 15 December. If we do not rubberstamp this bill immediately and get it down to the Assembly by last week at the latest, let alone the idea of having an amendment go down to the Assembly, such as what is before us now, before February, the sky will fall in and we will be guilty of providing further trauma to the people associated with the victims of Maloney.

A couple of things need to be made clear. Firstly, I think I speak for everyone in my party and everyone in the chamber when I say that we have every sympathy for the heartache that those associated with Maloney's victims have had to endure from 1979 to the present—every sympathy in the world—and we do not want to

see them being subjected to that. However, in the present case, minister, if I have heard correctly, if the matter is coming up for review and a decision on 15 December, all those people who will be approached about giving victim impact statements, or whatever the testimony is called, have already been approached. They have already been through that, regrettably. That has already happened. Rushing this bill through unamended will not change that. If I am wrong in what I believe I have heard, I am sure I will stand corrected, but that is about the strength of it.

It is also the fact that successive Attorneys General have reviewed this character, Maloney, on previous occasions—I believe for almost 40 years—and they have declined to release him on every occasion. I do not know what recommendations went to those successive Attorneys General, but I think—again, I will stand corrected on this if I am wrong—the current Attorney General could also make his own decision about this matter on or after 15 December. It does not rely on this bill. This bill is about in future having a longer period before the reviews are conducted. I am sure the minister will correct me if what I am saying is not right, but it seems to me that a whole lot of debate is going on here that is being put about as something that it is not. I will save any further comments on that theme for another occasion.

What we need to be focusing on is what this debate should be about. If the government is dinkum about reducing the repeated stress on second-tier victims in future, it ought to extend this beyond the very narrow focus that it says was its election promise. Labor got into government and is now confronted with reality. I do not care about what claim members opposite made on the run, as though it has now somehow become holy writ because the Labor Party won a whole bunch of seats in a good year in the Assembly—that does not make it right. The amendment currently before the Chair would give a bit of regard for the associates and loved ones of victims of other horrendous murders as well. Why are they not entitled to the same consideration? I do not give a tinker's about what the Federal Bureau of Investigation or some court in America defines as a serial killer versus a mass murderer versus a multiple murderer or whatever. If the government insists on raising the subject and bringing forward legislation, I am just as concerned about the loved ones who have had to survive the murder of a single child in horrendous circumstances as I am about any other victim. That is why the amendment put forward by Hon Michael Mischin deserves serious contemplation, and a better form of contemplation than that which we have seen exhibited by the government so far.

Hon MICHAEL MISCHIN: The comments made by the Leader of the House representing the Attorney General raise more questions than they answer. We were told in the repeated media releases from the Attorney General that this bill was not urgent. Last year, he said that he was in no hurry to bring it in because the next prisoner who would fall within the ambit of the bill was not Maloney, but Birnie, and that would not happen until 2019—no hurry, no rush. Then the bill was introduced and suddenly we find out very late in the piece that the release of this prisoner Maloney depends on it. An element of emotional blackmail is involved in this. Suddenly it is now our responsibility to rush this legislation through because the Attorney General apparently wants to defer consideration of Maloney's case. We are told that the son of one of the victims is anxious about this. I accept all of that, but that is now a view that has been expressed and he has had to go through that process, all because this legislation has come in late. What makes him so certain that Maloney's release is going to be deferred for three years? Once the Attorney General receives this report and gives it his due consideration—if he can be bothered reading it and doing his job—he will assess the recommendation, if there is one. The advice that we received from advisers is that the Prisoners Review Board has never recommended release on parole for this man, and the Attorney General can look at the report and say, "I agree. I will not release Maloney because the board has recommended against it." If the board recommends his release, the Attorney General can say, "I don't agree with the board. I will advise the Governor accordingly and set out some reasons"—end of story, no problem. But no, it all seems to turn on him saying, "I don't even want to look at the report. Please don't give me one because then I've got to make a decision."

What makes this person who wrote this anguished letter so certain that the release of Maloney depends on our passing this bill and the Attorney General exercising his broad discretion to put it off? When was this letter received by the Attorney General? Why have we found out about it only now? Is that the basis for him to get this off his desk for three years and to not have to worry about it because it means he will not have to read the report now, or has he given some kind of assurance that we have not been told about that, without the law being changed, will compromise him? I do not get it. What is the problem? What makes this person who wrote this letter so sure that all of his problems are going to be solved by the passage of this bill and the Attorney General having the power to say, "I'm not going to consider this. I don't even want to see a report."? It is astonishing!

We have heard the rationale for the definition of "multiple murderer"—conflicting definitions from the FBI and the minister. What do they matter? "Multiple murderer" means there was more than one murder. We do not draw necessarily on an FBI investigative behavioural psychology tool as to whom they consider to be a serial killer—someone who kills and then has a bit of a cooling-off period, like a door-to-door salesman–type thing,

and then gets stuck into someone else. We do not need that for the purpose of defining the victims who are supposed to get the benefit of this bill. We can define our own criteria. We can say that a "multiple murderer" is any person who kills more than one person. It does not matter. Apparently, the election commitment was "serial killer". I challenge the minister to point to where in the bill the words "serial killer" are used in any sense, let alone a technical one. I cannot find those words. The words "multiple murderer" appear in the title of the bill. Where do the words "serial killer" appear as a term of art? I may have missed it—if I have, please point it out. It is a nonsense.

The Attorney General made commitments when he was in opposition that "life will mean life". That will not be the case. He said also that he would give a direction that people would not be reported on for a period of time. That will not be the case either—people will still be reported on. The Attorney General also gave a commitment that serial and mass murderers in the broad sense, without any technical explanation, will be embraced by this bill. The Attorney General has now refined this bill so narrowly that the only people who will be protected by this bill are the victims of six killers, and to hell with all the other victims who are supposed to be protected by this noble reform of the law. We are told that 285 murderers will fall under this legislation if every schedule 3 murderer is included. The government is now saying to hell with the victims of those people. The government has found bits of law from the United States, or Kazakhstan or Outer Mongolia, to define a serial killer or multiple murderer in order to narrow down the bill as much as possible. The government is now saying that two murders is not multiple unless the murders occurred on separate days. I find that astonishing. This Attorney General blabbed and made very large promises and raised expectations yet again, and he is now trying to backtrack from them. The result is this bill.

I have moved the amendment standing in my name because at least it adds some commonsense. I understand that the Greens may be opposed to the principle of the bill. So be it. I understand that other members may also have concerns about the principle of the bill. So be it. However, it defies logic for the government to grab a law that applies in the United States in order to qualify an election commitment that was given in very broad and robust terms by the same man who is now trying to back out of it. I have moved the amendment so that at least something rational will come out of this.

Hon JACQUI BOYDELL: I have read the information from government and listened to the debate on this issue, and it appears to me that the government seems to have relied on Kate Moir and Evalyn Clow as the main drivers in drawing up this legislation. Did the government consult those two persons when it decided how to define "multiple murderer"? Did the government seek their opinion about whether, if one of their family members was killed at five to midnight on a Saturday and another at five past one on a Sunday, they would consider that not to be captured by this bill?

Hon SUE ELLERY: The honourable member may well have been out of the chamber on urgent parliamentary business, but this is the third time I have answered a question about who was consulted, and the list did not include the two people whom the member just named.

Hon JACQUI BOYDELL: I actually heard that in the minister's second reading reply. This amendment has only just been moved. I am wondering whether the government can understand the motive behind moving this amendment. I support the amendment, because it seems exceptionally sensible to me that a "multiple murderer" is a person who has murdered more than one person. It does not matter at what time of the day on any particular day the person committed that offence. I think the public and, indeed, secondary victims would have an expectation that "multiple murderer" would mean that they had killed more than one person. Given that those two people have been great advocates for the cause of this legislation, for which I applaud them, I would be interested in their view. That is why I asked the question. If the government considered such detail from the United States on what determines a serial killer or mass murderer, why did it not consult the two people whom the Attorney General seems to have quoted and used in his media statements?

Division

Amendment put and a division taken, the Deputy Chair (Hon Adele Farina) casting her vote with the noes, with the following result —

Ayes (14)

Hon Martin Aldridge	Hon Donna Faragher	Hon Simon O'Brien	Hon Colin Tincknell
Hon Jacqui Boydell	Hon Colin Holt	Hon Robin Scott	Hon Ken Baston *(Teller)*
Hon Jim Chown	Hon Rick Mazza	Hon Tjorn Sibma	
Hon Peter Collier	Hon Michael Mischin	Hon Charles Smith	

Noes (15)

Hon Robin Chapple	Hon Sue Ellery	Hon Alannah MacTiernan	Hon Darren West
Hon Tim Clifford	Hon Diane Evers	Hon Martin Pritchard	Hon Alison Xamon
Hon Alanna Clohesy	Hon Adele Farina	Hon Samantha Rowe	Hon Pierre Yang *(Teller)*
Hon Stephen Dawson	Hon Laurie Graham	Hon Aaron Stonehouse	

Pairs

Hon Dr Steve Thomas	Hon Matthew Swinbourn
Hon Colin de Grussa	Hon Dr Sally Talbot
Hon Nick Goiran	Hon Kyle McGinn

Amendment thus negatived.

Clause 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.