SENTENCING LEGISLATION AMENDMENT BILL 2016

Third Reading

MRS L.M. HARVEY (Scarborough — Minister for Police) [1.27 pm]: I move —

> That the bill be now read a third time.

MR J.R. QUIGLEY (Butler) [1.27 pm]: I am just looking at the clock. I think that time is wrong for third readings, is it not?

The DEPUTY SPEAKER: It is 30 minutes. I am sure that you just did not read it correctly!

Mr J.R. QUIGLEY: I thought the wrong time flashed up there.

Ms R. Saffioti: It did.

Mr J.R. QUIGLEY: It did?

The DEPUTY SPEAKER: It did.

Mr J.R. QUIGLEY: I got excited.

The DEPUTY SPEAKER: The Clerk very quickly amended the error and the time is correct. The time is now correct, member for Butler. Your time starts now.

Mr J.R. QUIGLEY: Thank you. I will give my abridged version—not the 55-minute version—the executive summary. I thank the member for West Swan.

The Sentencing Legislation Amendment Bill 2016 amends two acts—the Sentencing Act and the Sentence Administration Act. Firstly, it deals with amendments to the Sentence Administration Act. We have gone through a number of the early provisions of the bill and dealt with the clauses that amend the time periods within which the Prisoners Review Board must file a report to the minister concerning prisoners held at the Governor's pleasure. There was some discussion during the consideration in detail stage that, quite frankly, I do not follow. I did not follow it then and I am still at a loss to understand it now. The minister said that nothing at all changes, but she initially said except the schedule in section 12 of the act as it now stands, which has been removed and replaced in the amendment bill with schedule 3. Schedule 3 comprises a spreadsheet that sets out when the reviews must occur.

After some debate during consideration in detail—debate that the member for Forrestfield found repetitive, whereas I found it productive—the minister eventually conceded that in fact there was no schedule in section 12 of the act and that she was wrong. Section 12 of the act dealt with reports by the board to the minister about prisoners generally. The minister was then taken to section 12A, which will be amended by clause 7, and conceded that there was a table, not a schedule, in it that will now be repealed. In large part, the contents of that are replicated in the new schedule 3. The significance of this of course is to be found in the words that the Deputy Premier took us to in proposed section 12A(1). The amendment to section 12A(1) is in clause 7. It states —

> A report must be given under this section about a Schedule 3 prisoner regardless of whether or not a report has been given about the prisoner under section 12 …

There is some duplication there.

In the act as it now stands, prior to the passage of this bill, section 12(2)(c)—which is found in clause 6 of the bill before the chamber—provides that in respect of a prisoner who was defined in section 4(2)(d), which is a prisoner who is detained at the Governor's pleasure, the board must report on that prisoner annually to the minister. The very good reason for that was we do not want people lost in the system. We do not want them detained at the Governor's pleasure and not recorded as having an end date to their term and there is no continuous monitoring of their situation within prison. Section 12A provided that the first review—in the table that will be repealed—would be after one year and then every three years after that. How do I marry the requirements of section 12A, which in its table sets out that a person serving an indeterminate sentence would be first reviewed after one year and then at three-year intervals, with section 12(2)(c), which provided that the board must report on that prisoner every 12 months? The answer of course is to be found in section 12A(1); that is —

> A report must be given under this section about a Schedule 3 prisoner regardless of whether or not a report has been given about the prisoner under section 12 …

Even though there was the requirement in section 12A for a report at one year and then at three-year terms for an indeterminate prisoner, there was a mandatory requirement on the board to report every 12 months. That conflict was never resolved with the minister, as the gag was applied.

Proposed section 12B refers to the fact that there can be combined reports. If there has to be a section 12 report and a section 12A report, they do not have to be discrete reports; sensibly, they can be combined by the Prisoners Review Board when reporting to the minister.

The contentious part of this legislation is to be found in part 5A. We did not have the chance to go through part 5A in detail last night because quite early into the consideration in detail of part 5A—I think it was before the Deputy Speaker took the chair—I counted 12 proposed sections. It is a fairly complex part, although they are all listed as sections 74A to 74L. We did not have the opportunity to examine those in detail last night. However, as I mentioned in debate, I had the opportunity to discuss this with senior judges and senior Queen's Counsel at a conference that I attended the week before last at the MCG. It was a conference convened by the Australian Bar Association. It was addressed by both Hon George Brandis, QC, and Hon Malcolm Turnbull, the Prime Minister of Australia. Hon George Brandis opened the conference and spoke primarily on Indigenous rates of incarceration, which this bill has consequence for. I sat on a panel with a justice of the Supreme Court of Victoria. Senior judges and some of the most esteemed legal minds in this country were there—even the venerated Hon Tom Hughes, QC, who is still going and is still possessed of all mental faculty. It was by no measure a Labor gathering—some of the esteemed legal minds of Australia were there. Part 5A was received with derision by those with whom I discussed it. It was received with derision because part 5A restricts the movements of free citizens in Australia—free citizens who are not under sentence in Australia. It affects their liberties and the way that they might exercise their liberties and where they go in this great country of ours, not under judicial fiat, but by a pen-pusher bureaucrat who will make a recommendation to another branch of the executive to make post-sentence supervision orders.

Before I go further with this I want to go back to comments made by the honourable Prime Minister of Australia and the honourable Attorney General of Australia two and a half weeks ago when they foreshadowed the introduction into the Australian Parliament of more anti-terrorism legislation, and, in particular, the post-sentence detention and—this is relevant to what the government is doing here—post-detention supervision of people convicted of terrorism offences. As we know from their explicit writings and utterances, the hatred of jihadists is so entrenched that even after a lengthy term of imprisonment their attitude has not changed. Whilst incarcerated it is well known that they seek, even from some of the most secure prisons on the east coast, to recruit fighters to leave these shores and join Islamic State of Iraq and Syria or Daesh in the Middle East. The Australian government quite sensibly said that if one of these jihadis gets a 10-year sentence, for example, and finishes his—these violent people are mainly male, but I think there is one woman—10-year sentence and is then to be released back into our community, we have no purchase on that person's future conduct. He can go about recruiting, planning, and, indeed, participating in further acts of terrorism. Having served the head sentence or the finite term, he is a free person. The Prime Minister and Hon George Brandis, in a proposition not too dissimilar to this—although it has not been through the Australian Parliament yet—seek to impose both post-sentence detention in cases where the person exhibits a real propensity to danger, or, in lesser cases, post-sentence supervision. Hon Malcolm Turnbull and Hon George Brandis, QC were at pains to reassure the public that this would be done in front of a judge, whether they are sitting in camera or not, because we cannot constrict a citizen's liberty without judicial fiat. Although that is where Magna Carta starts, it is not what precipitated the brawl between the barons and King John in 1215, resulting in the great charter. However, when they sat down to draw up what Lord Denning described as the greatest constitutional document in the history of the world, and upon which the founding fathers of America based their constitution in 1776, I think it was, it was about the freedom and liberty of the individual and that a person could not be detained without judicial warrant. Of course, that is what led to the controversy surrounding Guantanamo Bay. People were being detained without judicial warrant and as soon as they were brought onto American soil they could not be detained and their liberty could not be impeded or constrained without the order of a judge. The Congress would never accede to President Obama's policy to close Guantanamo Bay and bring these people onto American soil because they would then be able to access the American legal system.

The Labor opposition in essence agrees with part 5A. In fact, it was the Labor Party that first introduced into Western Australia the concept of post-sentence detention. It did that back in the government of Dr Geoff Gallop by introducing the Dangerous Sexual Offenders Act, which included a provision under which the Director of Public Prosecutions could make an application to the Supreme Court for a detention order or a supervision order by warrant of the court. That provision has been tested in the High Court and because of the judicial involvement, found to be constitutionally valid. Once a case goes to court, the rules of natural justice apply, but the Barnett government has thrown that to one side and said that with different-to-violent sex offenders we will have other offenders who are perhaps arguably less dangerous in the community than violent sex offenders. I say that because this legislation not only deals with murderers, but also an offence of attempting to light a bushfire that could cause injury, or offences under the Road Traffic Act such as dangerous driving causing death or grievous bodily harm. They could now be the subject of a continuing supervision order imposed

not by the judiciary but by the bureaucracy or operatives of the executive, and what can they do? For example, if the order is made, proposed section 74F states that they —

(a) must report to a community corrections centre within 72 hours after being released, or as otherwise directed by a CCO; and

(b) must notify a CCO of any change of address or place of employment within 2 clear working days after the change; and

(c) must comply with section 76.

Section 76 refers to offenders on supervision community correction orders, which are all imposed under warrant of the court and not by a bureaucrat. The obligation has been cast otherwise on three people. I agree that they are criminals and that they have served their head sentence and they are free. However, what is being imposed upon them is being imposed by a bureaucrat. Section 74G will concern the Court of Appeal in Western Australia and the High Court of Australia. It states that the bureaucrat can place upon the offender a requirement that the person, who is no longer a prisoner, cannot leave Western Australia without the permission of the bureaucrat down at the Department of the Attorney General.

Let us say a prisoner who has served a 10-year head sentence for dangerous driving causing death—a three-year sentence—is released but his family has moved east. What is to stop him from moving out of this jurisdiction? A pencil-pusher's note that says, "You are required to stay here." When I say "pencil-pusher", I mean an arm of the executive, not the judiciary. Can members imagine what will happen? A person who has left prison will say, "Well, I'm going to go and see the kids. To heck with this!" He gets on a plane or, with his discharge money, purchases a bus ticket and goes to Sydney, crossing the border within that 72-hour period. He does not report to a community corrections officer. Does the government think it will be able to extradite him from another state? The extradition treaties require the government to prove that the person is reasonably suspected of committing an offence in Western Australia. The only thing the person has done is disobeyed an order of the executive. We would support this legislation if it contained the requirement that the CEO instruct the State Solicitor to seek the order by a court. As the minister has been at pains to point out, under section 115 of the Sentence Administration Act 2003, the Prisoners Review Board does not require natural justice. This can all be done behind the prisoner's back, without any transparency or any challenge to what is being put forward. The High Court will not accept that! The Court of Appeal will not accept that! I am confident in that. It is a sham.

The preconditions for making this order include that the person has committed a violent offence. That is contained in schedule 3. Proposed section 74B(b) states —

> the behaviour of the prisoner when in custody insofar as it may be relevant to determining how the prisoner is likely to behave if released;

Someone may put in an inaccurate or incomplete report about the prisoner. A fight might have occurred in the prison yard in which the prisoner was defending himself from an attack, but he may be put in for being involved in a violent incident in the prison yard and be recommended for a PSSO. He has no ability to challenge that report. This is a free person; this is not a prisoner. The bureaucrat makes this determination behind the free person's back. Proposed section 74B(d) states —

> the prisoner's performance when participating in a programme …

There might be a report about the prisoner's reluctance to participate. Half the prisoners have mental infirmities. The prisoner cannot make a submission and no-one can make a submission on their behalf. The proposed subparagraphs continue —

(e) the behaviour of the prisoner when subject to any PSSO made previously;

(f) the likelihood of the prisoner committing a serious violent offence when subject to a PSSO;

We are not talking about dangerous sex offenders. Predicting the future behaviour of a dangerous sex offender can be done with more confidence than predicting the future behaviour of a violent offender. I have reams of papers published by the Royal College of Psychiatrists in the United Kingdom and by criminologists in America. Everyone is trying to do this. How can future violent behaviour be predicted? Unless a serious chronic mental disorder has been diagnosed, it is very hard. The papers I have go through the theatre massacre in the United States in which a man went into the *The Dark Knight* movie with a submachine gun and sprayed the crowd. He was a university student. No-one could have predicted that he would behave in this way.

What is being said in this legislation is that the bureaucrats—the arm of the executive—can make these orders against a citizen who is no longer a prisoner and that this will be done without the rules of natural justice applying and without the citizen being able to access any of the reports or paperwork upon which the decision was made. Last night, in the middle of examining this matter in consideration in detail, the member for Bateman,

on the instructions of the Deputy Premier, badly disfigured democracy by shutting the debate down. The member for Bateman, acting as the puppet for the Deputy Premier, made sure that this part of the bill could not be properly examined in consideration in detail. I hope the member for Bateman is in the public gallery when this matter first comes before the Court of Appeal. He will not be able to gag them down in the Supreme Court Gardens. The Court of Appeal will look at this legislation most critically. Shame on the government that it broke its agreement with the opposition to allow this legislation to be properly debated last evening. Shame on it! It disfigured democracy! When members of the government started laughing when I became upset at what they were doing, they were not laughing at me, they were laughing in the face of the people of Western Australia and Australia who rely upon the Constitutions of Australia and Western Australia for good order and governance of our community. All the government had to do was what the Prime Minister of Australia has promised to do.

MS M.M. QUIRK (Girrawheen) [1.57 pm]: I was not intending to rise on the third reading of the Sentencing Legislation Amendment Bill 2016, but the events of last night mean that I feel compelled to do so. Clause 25, which is the real kernel of this legislation and which contains something like 20 subclauses, was gagged. After three or four questions from the member for Butler, the member for Bateman took it upon himself to gag further consideration in detail on an essential provision within the legislation. It was particularly important because the minister had failed, in her response to the second reading debate, to deal with a number of issues that are certainly crucial to how the regime of this legislation would operate. First of all, the minister was unable to advise the house of the impact of additional people imprisoned because of the extended prison sentences contained in the legislation. She was also unable to advise the house of the cost and impact on the prison system. I am somewhat amazed by that. Under a more financially prudent Labor government, we could not get a cabinet submission to cabinet unless we were able to indicate some level of detail about the cost involved in implementing the legislative changes, either before approval to print was given or approval even to draft. I found it somewhat concerning that that information was not readily available.

The second issue that I raised with the minister during the second reading debate, which she was not able to provide a decent answer to, related to some guarantee that the government would not fail to provide programs or training for transition to civilian life for prisoners during the currency of their actual prison term because it would be able to rely on the post-sentence supervision orders to provide that with the prisoner at a time when their sentence had, in fact, concluded. One of the reasons that parole is regularly refused is the lack of courses undertaken by prisoners. This to me is a green light to corrective services staff.

Debate interrupted, pursuant to standing orders.

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