

SENTENCE ADMINISTRATION AMENDMENT BILL 2017

Second Reading

Resumed from 28 June.

HON AARON STONEHOUSE (South Metropolitan) [3.12 pm]: I received a briefing this morning on the Sentence Administration Amendment Bill 2017. From what I could gather, this bill merely mandates that the cooperation of a prisoner in locating the remains of a victim will be a consideration of the Prisoners Review Board—nothing more. It already is a consideration, so it will mandate something that is already happening. I had concerns going into this debate that there may be some perverse outcomes from this bill and that perhaps parties who do not know the location of a body, but who have cooperated as best they can, may have their parole delayed due to reasons beyond their control. However, I have been assured that will not be the case as the Prisoners Review Board still uses its discretion as to whether a prisoner has cooperated sufficiently with police to locate the remains of their victim. If there are no perverse outcomes and the Prisoners Review Board still has the final say, this bill really does nothing. It proposes to mandate that this will be a consideration when it is already the case, and also the Prisoners Review Board has the final say as to whether a prisoner has cooperated to its liking. Therefore, as this bill does nothing, I do not see it as any more than feel-good legislation.

I remind my fellow honourable members that we are a house of review and we are here to legislate, but it is not our job to pass laws and put them on the statute book if they have no practical effect—at least none that I can see. However, I am not a lawyer. I have looked at this bill in the time I have been given and there may be some unintended consequences. I do not have the time, the know-how or resources to foresee what those consequences may be; therefore, I feel it is my duty and the most responsible measure to put forward a motion to refer this bill to the Standing Committee on Legislation.

Discharge of Order and Referral to Standing Committee on Legislation — Motion

Hon AARON STONEHOUSE — without notice: I move —

- (1) That the Sentence Administration Amendment Bill 2017 be discharged and referred to the Standing Committee on Legislation for consideration and report by no later than Tuesday, 28 November 2017.
- (2) The committee has the power to inquire into and report on the policy of the bill.

HON MICHAEL MISCHIN (North Metropolitan — Deputy Leader of the Opposition) [3.16 pm]: The opposition supports the motion and I reserve any comments regarding the substance of the bill for my second reading response once we have the committee's report. In support of the motion I make the following points. This bill was introduced with the expression of some very high expectations: it would provide comfort to the secondary victims of homicides when victim's body had not been found or its whereabouts not disclosed to the authorities; and that the passage of this bill will achieve the aim of requiring the offender to disclose the whereabouts of his or her victim. A bill was introduced by the then opposition into the other place last year with similar fanfare. That bill did not even address the substance of, quote, "no body, no parole", or make any mention of that aim in the substance of what was then a private member's bill. The then government moved certain amendments to direct the Prisoners Review Board towards consideration of that particular question. At the time that the then government moved those amendments, it was roundly criticised by the then shadow Attorney General for that proposal, and the bill that he had introduced at that stage made no mention of no body, no parole, but spoke in broad terms of, I think, assistance for cooperation to the police. He claimed that that bill was in a form that was fit to be passed by this Parliament, and he grandstanded considerably on that point.

Now we have similar fanfare about the introduction of this bill, yet it is wholly different from the one that was introduced last year that was supposed to have been perfection itself. That alone requires some examination. But even a quick perusal of the bill raises a number of questions that the opposition considers worthy of consideration by a suitably dedicated committee of this place. For a start, the system in Western Australia for the consideration of parole for these sorts of offenders is wholly different from that in other jurisdictions. Whereas other jurisdictions may have a requirement to direct and restrain the discretion of a parole board to release an offender who might otherwise have complied with the board's requirements and be eligible for parole but to not release that offender because they have failed to cooperate in a particular way, such as revealing the whereabouts of their victim's remains, it is a decision for that board and that board alone. In Western Australia, that has always been a recommendation to the Attorney General of the day—one to be accepted or refused on its merits and accepted or refused by weighing up the Prisoners Review Board report and making a decision. Some might argue that it is a political decision, but so be it. The ultimate responsibility rested and currently rests with the Attorney General of the day. I, for one, am not aware of any Attorney General of this jurisdiction ever releasing an offender to parole in a case in which an offender has refused, in such a fundamental way, to assist the secondary victims of his or her

crime. As Hon Aaron Stonehouse pointed out, there is the question of whether this legislation achieves any material change to what is happening.

There are a number of other features in this bill. Much has been said about how the law will be plain; if an offender does not reveal the whereabouts of their victim's remains, they will stay in jail. If members look at the terms of the bill, they will see that that is not quite right; it does not require any timely disclosure. In fact, it leaves it open until after any appeal has been exhausted and even then, does not require an immediate disclosure at the exhaustion of all avenues of appeal and review. It leaves it open into the future. There is a real question of whether the expectations of secondary victims will be elevated beyond what the government can or is prepared to deliver.

Another issue arises. We are seeing a greater capacity for the courts to review decisions regarding parole. In my role as Attorney General, I had a number of cases in which people contested the decisions being made. I will not go into their mechanics and details, but a review by the Supreme Court was sought of recommendations to the Governor, declining to accept the Prisoners Review Board report and its recommendations, challenging the decision-making process. This legislation puts certain requirements in place and a real issue arises about whether instead of closing avenues of release, all it does is shift the responsibility to the courts and allow a greater level of scrutiny of the executive's decisions and the recommendations of the Prisoners Review Board—in other words, utterly defeating the alleged aims and objectives of this bill. Instead of granting greater certainty to secondary victims that if the whereabouts of their loved one has not been revealed, the prisoner will stay jail forever—as the Attorney General repeatedly said in media releases and in the other place—it will be quite the contrary. It will leave open greater uncertainty into the future.

A variety of issues in this legislation need to be examined and more will probably emerge. I would like to see some evidence of how many cases this legislation would make a difference to, and the history of the operation of the current system, including whether it is flawed and whether it has advantages that might be compromised by this bill, if it is put into law. How will the bill make a difference in the long run? Will the expectations of secondary victims be unreasonably raised and then be frustrated and confounded by what appears to be more of a public relations exercise than anything material?

The opposition supports the motion for a referral to the Standing Committee on Legislation and for an examination of the bill's policy and effectiveness. If it is found that legislation of this character is not only desirable but also essential to achieve the ends that have been advanced for it, then the committee may very well be able to offer some suggestions for its improvement and identify, firstly, then perhaps overcome any unintended and unexpected consequences of its passage. Given the significance placed on the legislation by the government, and the expectations of secondary victims raised by the talk that has been advanced in support of this measure, the opposition accepts that the government is entitled to raise the issue and to have it pursued, debated and determined, and perhaps to pass laws on it. We are anxious to see that it will not be an exercise in futility and will not create more problems than it purports to solve.

HON ALISON XAMON (North Metropolitan) [3.25 pm]: I rise on behalf of the Greens to also indicate that we support the Sentence Administration Amendment Bill 2017's referral to the Standing Committee on Legislation for consideration. The Greens also support an inquiry into the bill's policy. I was prepared to move a similar motion. The principal reason for that was I am yet to be convinced that the bill will achieve the outcomes it purports to achieve.

I recognise that this legislation is particularly emotive for many people within our community and that its purported intent has significant community support. The reason I say that is I think most people—certainly people in this place—feel an enormous amount of sympathy for the families of victims who have been murdered when the body of that person has not been found. I acknowledge that this is a horrible issue and I acknowledge the lifelong devastating impact it would have on families and loved ones—the people who have been left behind. The last thing anybody in this place wants to do is add to the pain of people who have lost loved ones. However, as has already been said, it is our obligation in this place to ensure that the legislation we seek to pass is good legislation; also, importantly, that it will have the effects it purports to; and that it has no unintended consequences. One of the concerns I have is that from the briefings I have received, I am yet to be assured that this legislation will achieve those outcomes. I am also very concerned that the impact of this legislation may serve to undermine the parole system, and undermine basic rights and the basic rule of law. It could also potentially have the impact of compounding injustices. I have not been provided with evidence to suggest that the bill before us will achieve its desired aims. I have not been provided with information regarding the bill's anticipated impact on the community more generally, or specifically on the safety of the community. I hope these sorts of issues will be teased out more comprehensively through our legislation committee.

I recognise that this bill seeks to implement a WA Labor election commitment and that it has come about as a result of campaigning. The no body, no parole legislation, as the Sentence Administration Amendment Bill has colloquially come to be known, is in response to those concerns. As I understand it, when considering whether

Extract from *Hansard*

[COUNCIL — Tuesday, 15 August 2017]

p2704b-2709a

Hon Aaron Stonehouse; Hon Michael Mischin; Hon Alison Xamon; Hon Rick Mazza; Hon Sue Ellery

a prisoner convicted of a murder or homicide-related offence should be granted an early release order, and when the location of the body is unknown, this bill will require that a recommendation be given that the prisoner not be released unless satisfied that the prisoner has cooperated with a member of WA Police to identify where a victim may be or where they were last known to be. It will apply to prisoners in custody for murder and murder-related offences. The bill's provisions apply to all relevant prisoners regardless of when they committed the offence; the bill is intended to be retrospective. I note that a murder-related offence refers to counselling or procuring the commission of murder, inciting another person to commit murder, becoming an accessory after the fact of murder or conspiring with another person to commit a murder at least insofar as these offences relate to the death of a person. As members are aware, a range of existing mechanisms allow the circumstances of individual cases to be taken into account, and that includes a prisoner's refusal or reluctance to give any information on the whereabouts of a victim. We also know that the courts may—they often do—consider issues of remorse and whether remorse has been demonstrated, the degree of cooperation that has been demonstrated and whether any assistance has been given to identify the location of a body when they are sentencing an offender to a term of imprisonment. These things are already taken into account by the courts and, just as importantly, the Prisoners Review Board is already required to take quite a comprehensive range of things into account when making a decision on whether it will issue an early release order. These exact issues are taken into account in those instances as well. Ultimately, a recommendation from the Prisoners Review Board about prisoners serving life or indefinite sentences goes to the Attorney General, who can choose to not accept that recommendation and not pass it on to the Governor. It strikes me that quite a considerable number of safeguards are already in place if it can be reasonably construed that somebody is wilfully not assisting the police, thereby not allowing the family and loved ones of the murder victim to know exactly what happened to that person.

I acknowledge also that in a number of cases—from what I was told in the briefing there are not many of these—prisoners choose to not reveal the location of a body. That is taken into account by the courts and by the Prisoners Review Board and I suggest that it will be taken into account by the Attorney General. In that sense, what is this legislation hoping to value-add other than to meet an election commitment? I am struggling to understand what that is going to be. These are exactly the sorts of issues that I hope will be unpicked by the Standing Committee on Legislation, especially if it looks at the policy of the bill to determine whether it will have the desired outcome.

Another concern involves those rare occasions—I am sure that they exist; I know they exist—when people find themselves erroneously jailed for a murder. It does happen. There is evidence that that has happened to some very high-profile individuals. Those people would never be able to reveal the location of a body because they did not commit a murder in the first place. This legislation effectively ensures that they can never be considered for parole even if there is doubt—even if the Attorney General has doubts—about whether that person should have been jailed in the first place. This bill will remove all discretion from the courts and the Prisoners Review Board, and it will remove the political discretion to ensure that innocent people, as rarely as it may happen, are not locked up indefinitely and the key thrown away.

Yet another concern is that this legislation, in effect, undermines the rule of law that it is a person's right to remain silent. That concept is enshrined; we understand in the western context in particular that people are afforded the key protection of the right to not incriminate themselves. At the moment, if it is the view of the courts, the Prisoners Review Board and indeed the relevant politician that that is not good enough, there is a remedy to address that, but otherwise that is a concerning potential outcome. I look forward to the opportunity discuss this in more detail during the second reading debate to see whether those unintended concerns will occur.

Before I take my seat, I am concerned about another outcome that potentially may be examined by the Standing Committee on Legislation. I refer to looking at the overall function of parole—why we have parole and options for parole in the first place. A significant concern that the Greens have about this legislation is how it has the potential to undermine our parole system. We have significant concerns about the impact of the bill on the purpose and function of the parole system. The parole system provides a mechanism to supervise and support the transition of prisoners back into the community. Importantly, it seeks to minimise their chances of reoffending. This is about community safety. The Sentence Administration Act 2003 provides that the safety of the community is the paramount consideration in decisions regarding the release of prisoners under the act. We know that the Prisoners Review Board may require that a parolee be supervised before granting conditional release. Prisoners often have to actively participate in treatment programs, attend counselling, actively seek employment—that is really important—participate in training or engage in other activities to facilitate re-entry into the community. Very importantly, the board may also recommend that a prisoner participate in a resocialisation program before finally being released. The Prisoners Review Board policy manual states —

The Board's power to impose conditions (or requirements as they are called under the act) to protect victims and facilitate the prisoner's rehabilitation is unfettered and is not limited to addressing only those

factors which relate to the current conviction. The purpose of parole is to protect the public (including the victim) and to facilitate rehabilitation of the prisoner.

Decisions made by the Prisoners Review Board can have a really important impact on rehabilitation, how successfully the prisoner does on release and also if they happen to reoffend. I say this because I want to remind members, particularly if this is referred to the committee, that this legislation does not apply only to prisoners who have committed murder, but also to those who have been convicted of counselling or procuring the commission of murder, inciting another person to commit murder, become an accessory after the fact of murder, or conspiring with another person to commit a murder, at least as insofar as these offences relate to the death of a person.

I am very concerned that a series of potentially unintended consequences may arise as result of this legislation. Frankly, if a prisoner knows that they are not going to get parole, they have no incentive at all to undertake rehabilitative programs while they are in custody. If they are ultimately released, and they may well be, that will happen not only without parole supervision, but also without the benefit of having had any sort of rehabilitative treatment in custody. That is not good for the community or community safety. These sorts of things have the potential to have unforeseen consequences.

I want to say much more in my contribution to the second reading debate, but I will say that I want to see what might come out of any report that comes back from the committee, if the house agrees to refer this motion to the legislation committee. As I have said, I recognise that the Labor Party is attempting to fulfil an election commitment. I recognise that there is a great deal of sympathy within the community, particularly for the families of people who have lost loved ones who have been murdered, and it has been acknowledged that they have been murdered, or it is expected that they have been murdered, and who have never, ever been able to find their loved ones or definitively know what happened to their loved ones. I simply do not know how I would cope if I were in that situation and it was one of my children. I understand that and I have warned that very heavily when I have been considering this legislation. However, it is my job to put that to one side and to look at whether this legislation is likely to assist those families and achieve the outcomes that it says it will or whether it will potentially result in a range of unintended consequences, such as options removed for sensible parole or even those rare, but important, occasions when there may be even reasonable suspicion about whether someone really is guilty and discretion may want to be exercised for early release. The Greens will support the motion without notice for discharge and referral of this bill to the committee.

HON RICK MAZZA (Agricultural) [3.44 pm]: I rise also to support the motion moved by Hon Aaron Stonehouse that the Sentence Administration Amendment Bill 2017 be referred to the Standing Committee on Legislation to report on. I will not speak at length on the motion that has been put forward to refer to committee; I will save that for the second reading debate, save to say that I had a briefing this morning and at this time I am struggling to see how this bill will give comfort to those people who are proponents of the bill and who have family members whose body has not been found. The current system, as I see it, provides for a lot of these matters that have been raised by this bill. With the limited resources that my office has, I have not had a chance to fully get across this bill. Being able to refer it to committee, so that I will have a bit more of an idea about the policy behind this bill and the effect that it may have, should it pass, would be of great benefit. The Shooters, Fishers and Farmers Party will support the motion.

HON SUE ELLERY (South Metropolitan — Minister for Education and Training) [3.45 pm]: We will not be supporting the referral. I will be the only speaker and I want to explain the position I have been putting about why I need to take the default position of not supporting the referral. This was an unambiguous election commitment. In fact, before the house resumed early in May, the Premier indicated that the Sentence Administration Amendment Bill 2017 was one of the first bills that he wanted dealt with by the house and, in particular, he called on the opposition to support it. On 2 May, the Leader of the Opposition responded to the Premier's public comments about how this bill would be a priority and the Premier's request that the Liberals and Nationals support it. The Leader of the Opposition is reported to have said to ABC radio that he expected the bills to pass quickly. He is quoted as saying —

“If he —

“He” is referring to the Premier —

has a mandate and he has a soundly based mandate, even if we don't agree with some of the aspects of it, we will be supportive of it.”

I hope that ultimately that is the case and that is what the opposition is going to do.

Hon Michael Mischin: If the bill has got merit, we will.

Hon SUE ELLERY: Good.

Hon Michael Mischin: We're not going to rubberstamp things because your Premier says so.

Hon SUE ELLERY: I did not interrupt Hon Michael Mischin. I ask him to not interrupt me.

The other conversations that happened prior to Parliament resuming were with a range of people who have been elected into this place, including the crossbenchers. Those communications, and indeed their public statements, were very much about how they respected the mandate and the election commitments made by the new government. If I had known of the intention to move the referral, I could have checked with the Attorney General and I may have been standing here making a one-word response—namely, that I agree to the referral. However, I have not had the opportunity to confer with the Attorney General because I did not know that this was going to be raised. Given, I guess, commitments about respecting mandate and election commitments, it would have been helpful if I had known that the crossbenchers in particular were going to move the motion. However, I recognise what the numbers of the house will be.

I just make the point that a referral to a committee is a serious issue. It is a narrow debate that ought to be about why this bill needs to go to a committee and why the normal process by which the house deals with a bill—that is, second reading debate speeches and an interrogation of the detail of the bill in the Committee of the Whole process—could not have addressed any of the issues that people might have with the bill. That is an important thing to remember for future debates. Members need to put an argument, not about concerns that members might have about the bill, but why the house, in its normal process, would not be able to satisfy those concerns and why the bill needs to go to a committee. That is normally the way that the debate is conducted. Members would need to put a pretty strong argument.

Hon Michael Mischin: Will you take an interjection on that because I'd like to clarify something?

Hon SUE ELLERY: No, I am not going to take an interjection. I am trying to deal with this as quickly as I can.

Hon Michael Mischin interjected.

The ACTING PRESIDENT (Hon Martin Aldridge): Order! The Leader of the House has the call and she has suggested that she is not taking interjections.

Hon SUE ELLERY: I respect the way in which the debate has been conducted, which is why I am the only one from the government side who will contribute so as not to drag it out. I make the point that the policy of the bill is about elevating one consideration of the relevant conditions to be tested by the Prisoners Review Board above others. That is essentially the policy of the bill. The point made about what the bill already does is quite right, but this is about an elevation of one particular element of it. It is not about interfering with the sentencing provisions; it is about the decisions made by the Prisoners Review Board. I listened intently and I have not heard any reason why there was a view that the process of the house would not be satisfactory. I understand that people have said —

Hon Nick Goiran: I just gave you one and you didn't respond.

Hon SUE ELLERY: Hon Nick Goiran did not stand and make a contribution; I am responding to those who made a contribution to the debate. I did not hear an argument put for why the bill needs to go to a committee over and above the normal processes of the house. Nevertheless, although I will oppose the referral, I appreciate the numbers of the house, and if that is the will of the house, that is the will of the house. I know the Standing Committee on Legislation is a very thoughtful and considered committee, and will do its very best with the Sentence Administration Amendment Bill 2017 when it comes before it. Having made those comments, the government will oppose the referral. I think we can all do better at communication, but I respect the will of the house.

Division

Question put and a division taken, the Acting President (Hon Martin Aldridge) casting his vote with the ayes, with the following result —

Extract from *Hansard*
[COUNCIL — Tuesday, 15 August 2017]
p2704b-2709a

Hon Aaron Stonehouse; Hon Michael Mischin; Hon Alison Xamon; Hon Rick Mazza; Hon Sue Ellery

Ayes (21)

Hon Martin Aldridge
Hon Robin Chapple
Hon Jim Chown
Hon Tim Clifford
Hon Peter Collier
Hon Colin de Grussa

Hon Diane Evers
Hon Donna Faragher
Hon Nick Goiran
Hon Colin Holt
Hon Rick Mazza
Hon Michael Mischin

Hon Simon O'Brien
Hon Robin Scott
Hon Tjorn Sibma
Hon Charles Smith
Hon Aaron Stonehouse
Hon Dr Steve Thomas

Hon Colin Tincknell
Hon Alison Xamon
Hon Ken Baston (*Teller*)

Noes (12)

Hon Alanna Clohesy
Hon Stephen Dawson
Hon Sue Ellery

Hon Adele Farina
Hon Laurie Graham
Hon Alannah MacTiernan

Hon Kyle McGinn
Hon Samantha Rowe
Hon Matthew Swinbourn

Hon Dr Sally Talbot
Hon Darren West
Hon Martin Pritchard (*Teller*)

Pair

Hon Jacqui Boydell

Hon Pierre Yang

Question thus passed.