SENTENCING LEGISLATION AMENDMENT (PERSONS LINKED TO TERRORISM) BILL 2021

Committee

Resumed from an earlier stage of the sitting. The Deputy Chair of Committees (Hon Dr Brian Walker) in the chair; Hon Matthew Swinbourn (Parliamentary Secretary) in charge of the bill.

Clause 4: Section 4 amended —

Committee was interrupted after the clause had been partly considered.

Hon MATTHEW SWINBOURN: A lot has transpired in the last 40 minutes. If I recall correctly, we were dealing with the two people who we say would or could be subject to this bill.

Hon Nick Goiran: Does it apply to category 2 if he is currently a prisoner?

Hon MATTHEW SWINBOURN: I am just about to answer. I can confirm that he is not currently a prisoner.

Hon NICK GOIRAN: I thank the parliamentary secretary for that confirmation. Again, this is a helpful analysis, because it now identifies that, in actual fact, in Western Australia, as things currently stand, we do not have any category 1 or 2 prisoners; in other words, we do not have anyone currently in a Western Australian jail who, if this bill were to be passed immediately, would be subject to the provisions. That is not to say that that might not happen in the future, but it is useful to confirm that we do not currently have any category 1 or 2 prisoners. But I thank the parliamentary secretary for identifying those two individuals. Certainly in respect of the prospective category 2 individual, if he—I am assuming it is a "he"; I should not make such assumptions—or that individual is convicted and presumably receives a sentence involving a term of imprisonment, then they will be a category 2 prisoner, but interestingly, under the provisions of clause 4, which we are currently considering, they will be considered to be a prisoner with links to terrorism only if they are also the subject of a Commissioner of Police report. This is perhaps then a timely opportunity to revert to the question that I asked during the second reading debate, which was on the guidelines or the parameters in which the Commissioner of Police will utilise this discretion to issue a report. The parliamentary secretary indicated that that might be something we could consider during Committee of the Whole House. I ask for any information the parliamentary secretary might be able to provide to the chamber on that point.

The DEPUTY CHAIR (Hon Dr Brian Walker): Parliamentary secretary.

Hon MATTHEW SWINBOURN: Thank you, deputy chair, and congratulations on your promotion to leader of your party.

I am sorry for the delay in the answer. It is obviously not a straightforward point of view. In the first instance, I will take the member to clause 16 of the bill, and specifically proposed section 66F, which provides the additional release considerations. This proposed section, which is dealing with the police commissioner's report, states —

> In this Subdivision, a reference to the ***additional release considerations*** relating to a prisoner is a reference to the following considerations —
>
> (a) the degree of risk (having regard to any likelihood of the prisoner committing a terrorism offence if subject to an early release order and the likely nature and seriousness of any such offence) that the release of the prisoner would appear to present to the personal safety of people in the community or of any individual in the community;
>
> (b) if the prisoner has made statements or carried out activities that support, or advocate support for, terrorist acts—the nature and seriousness of the statements made or activities carried out;

I am not going to read every clause—I think it goes up to (g) and I am not sure they are all pertinent—but those are the provisions that would effectively guide the police commissioner in the matters to be taken into consideration in the report. Obviously, risk would be the primary driver.

This is not a question that the member has asked, but I am sure that he will get to it. On when the police commissioner's report might be prepared or provided, I am told that it can be started to be prepared at any time during the person's term of imprisonment, primarily on the basis of some impetus; for example, the person putting their name forward for a resocialisation program might be the impetus for preparing such a report. Obviously, in the time preceding the person's eligibility for parole and then consideration to be paroled, there will be an impetus to produce a report of this nature, if necessary.

The Western Australia Police Force has not yet developed internal policies and procedures because the bill has not passed, but internal policies and procedures will be developed in conjunction with its partners, which are the organisations that we spoke about before—the Australian Security Intelligence Organisation, the Australian Border Force, the Australian Federal Police and the like. The police will work with them.

As we already identified earlier today, we are not talking about a large body of work at this point in time given that we do not have any prisoners who will be subject to this law. Notwithstanding that, we are doing this, hopefully,

in the event that we never have to deal with these things, but we need to put this framework in place now. I hope that covers off what the member was looking for. As I said, the police will obviously work on precise operational guidelines in tandem with their partners.

Hon NICK GOIRAN: Yesterday, during the consideration of clause 2, the parliamentary secretary indicated that the intention is that the bill will become operational and commence in totality three months after assent. I take it then that during those three months one of the things that will need to be prepared is the police procedure for the Commissioner of Police's report.

Hon Matthew Swinbourn: Yes.

Hon NICK GOIRAN: Why are only category 2 prisoners constrained in their definition by a discretionary Commissioner of Police's report and not category 1 prisoners?

Hon MATTHEW SWINBOURN: The answer to that question is that it relates to the seriousness of the offending of prisoners in categories 1 and 2. A category 1 prisoner will have been convicted of terrorism, whereas a category 2 prisoner is, for want of a better word, on the lower level side of things. I think we have identified as advocating for terrorism rather than engaging in a terrorist act. The category 1 prisoners have been convicted of such a serious offence in the first place that there is no need for an additional requirement for the Commissioner of Police's report fitting within a definition of a person linked to terrorism. Category 2 prisoners are on the much lower end of the scale. I do not want to diminish in any way the seriousness of what happens, but in all these criminal-type matters there is always a spectrum of behaviours. Therefore, it is deemed that it would have to be in conjunction with a Commissioner of Police's report. But, obviously, the Commissioner of Police and the related agencies have the information so that they can then deal with any of those category 2 prisoners as they see fit by generating that report.

A Commissioner of Police's report will still be produced in relation to category 1 prisoners because that is part of the consideration in terms of the presumption against parole; it is not that that person is a prerequisite for being included in the definition of a prisoner with links to terrorism. They have committed a terrorist act, for example, they are already considered to have links to terrorism and, therefore, we do not need that additional prerequisite.

Hon NICK GOIRAN: We are loosely referring here to the more serious category 1 prisoners and the still serious but less serious category 2 prisoners. Was this notion of category 1 and category 2 and separating them or categorising them in this sort of tiered structure something that was expressly agreed to by the other jurisdictions? Are we doing it in this fashion to be consistent with the other states? In other words, do the other states have this notion of a category 1 and category 2 prisoner?

Hon MATTHEW SWINBOURN: The answer is no; it was not expressly agreed to and hence there is not a uniform way it is dealt with across all jurisdictions.

Hon NICK GOIRAN: Further, the parliamentary secretary was loosely describing the category 1 prisoners as the more serious, and I acknowledge that was not in any way to diminish the seriousness of the offences that a category 2 prisoner will have been convicted or charged with. I share the parliamentary secretary's general observation or analysis that that seems to be the way in which the bill is structured and gives some explanation of the distinction between the two in terms of the levels of seriousness. But if we take, for a moment, the notion that a category 1 prisoner has committed a serious offence—that is the more serious of the two—again, it seems somewhat at odds with that important principle that we then allow some of those prisoners to escape capture from the definition of a "category 1 prisoner" simply because the confirmed control order or the interim control order was more than 10 years old. I raised that matter yesterday. I was going to ask the parliamentary secretary to provide some explanation of why would we do that in those circumstances, but I suspect that that will not take us much further; rather, has the government reconsidered this issue of the 10-year restriction overnight and whether it should be perhaps more open-ended, as I suspect might be the case in at least some other jurisdictions?

Hon MATTHEW SWINBOURN: Why is it only 10 years? Some consideration was given overnight to the points the member made yesterday, from a particular adviser who probably did not get much sleep contemplating some of the points the member made! I do not mean to be too glib about that; it is taken seriously.

Hon Nick Goiran: We've all got a job to do.

Hon MATTHEW SWINBOURN: Yes. The approach of 10 years was taken to be consistent with the equivalent provisions in the Bail Act 1982, which provides under section 3 that a "person linked to terrorism" means a person who is the subject of an interim control order or confirmed control order, or has been the subject of a confirmed control order within the last 10 years. There is consistency between bail and parole in respect of that issue. On some further analysis —

Hon Nick Goiran: That's the phase 1 reform that we dealt with previously.

Hon MATTHEW SWINBOURN: I think so, yes. In respect of the jurisdictions, it is apparently 50–50 between those that impose a time limit and those that are open-ended. South Australian, Victorian and Queensland legislation apply the presumption to current and former control orders. New South Wales, Tasmania and the commonwealth

restrict their presumption to current control orders, so those jurisdictions do not take into account historic control orders. There is a bit of variance to that, but I will make some general comments.

We have explored the issue of control orders and the nature of them a little more today, but they are only for 12 months for someone who falls within the category of persons who, after ticking off all the elements, would have a control order imposed on them. Individuals who have had historic control orders imposed on them will continue to be monitored; they are not free from monitoring. In fact, they are probably very much different from, for example, prisoners who are on parole for non-terrorism offences. They have done their parole and their time is up, and at the end of that, they are free to go on with their lives. In this instance, these people will probably never fall within that category, and they will be watched and monitored. If the circumstances dictate the issuing of a new control order—remembering that it is the commonwealth government that makes that decision because it is its particular instrument—a new control order will be put in place.

I take the member's point about the whole risk, but it is not just left out there floating, for us to hope and pray that nothing will happen; agencies will continue to work. I might add—I will stand corrected by the police advisers—that there are probably circumstances in which control orders are not imposed for particular operational and strategic reasons, because imposing a control order on an individual will alert them to the fact that they are under surveillance or that they are being monitored, and it is not always the case that agencies would necessarily want them to be engaged, obviously in the interests of protecting the community. There is a whole range of complexities associated with that.

Hon NICK GOIRAN: I think the point the parliamentary secretary makes that I have most sympathy for is the one pertaining to consistency with bail reforms—that is, the phase 1 reforms that use a similar definition for the 10-year age of a historical control order. It therefore makes sense—and, indeed, would be appropriate—for us to maintain that consistency in this bill. If we were to change that to a position that, subject to further scrutiny and advice, I would say would be my preferred position—that is, no limitation on historical control orders—then we should do so in both pieces of legislation. Perhaps that is something that the government can consider in any subsequent reforms and reviews of the various statutes.

I turn now to the definition of "terrorism offence" under clause 4. That definition is set out across pages 4 and 5 of the bill. I draw the parliamentary secretary's attention specifically to paragraph (h) under the definition of "terrorism offence", which encompasses paragraphs (a) to (i). I specifically draw paragraph (h) to the parliamentary secretary's attention, the penultimate paragraph in the definition of "terrorism offence". It refers to —

> an offence under a written law or a law of the Commonwealth, another State, a Territory or another country, that substantially corresponds to an offence referred to in paragraph (a), (b), (c), (d), (e) or (g);

That is, of course, in reference to the provisions immediately above paragraph (h). Indeed, it includes all the paragraphs above, with the exception of paragraph (f). The parliamentary secretary will be aware that we are dealing with 38—2 of the bill; in 38—1, the definition included a reference to paragraph (f). Paragraph (h) now no longer makes reference to or links back to paragraph (f), whereas it did in 38—1. What is the basis for that change?

Hon MATTHEW SWINBOURN: I am advised that there was a drafting error and that it was not intended to include paragraph (f) in the first instance. That was corrected in the other place, and what is there now corresponds with the equivalent provision in the Bail Act.

Hon NICK GOIRAN: Can the parliamentary secretary explain that a little further? If we look at the provision below paragraph (h), paragraph (i), we see that it still retains a reference to paragraph (f). Why does paragraph (i) retain a reference to paragraph (f), when paragraph (i) is "an offence of attempting, inciting or conspiring to commit" such an offence, but it is removed from an offence that substantially corresponds with such an offence under the written law of another jurisdiction?

Hon MATTHEW SWINBOURN: It is a good question, and I can see why Hon Nick Goiran picked it up. Paragraph (f) of the definition of "terrorism offence" states —

> an offence against the *Crimes (Foreign Incursions and Recruitment) Act 1978* (Commonwealth) (repealed); …

It is a repealed act, whereas I do not believe, on the face of it, that any of the others are repealed acts. I am advised that the substance of what that act dealt with is now incorporated in some of the other commonwealth laws listed within the bill, so it is not necessary to have a reference to that in paragraph (h) because it is already covered. However, the reason to include it in paragraph (i) relates to any historic offences that might be charged against that act for when it was in force. Therefore, those elements of attempting, inciting or conspiring to commit would still be relevant, and that is why (f) is still listed there.

Hon NICK GOIRAN: I thank the parliamentary secretary. Look, that was a helpful explanation. I must say that it took until about halfway through the explanation for me to fully appreciate what was trying to be achieved there.

Hon Matthew Swinbourn interjected.

Hon NICK GOIRAN: That is no criticism of the explanation; it just required a moment's pause to properly understand it. I thank the parliamentary secretary for that. Consequently, I am pleased to say that I have no further questions on clause 4.

Clause put and passed.

Clauses 5 to 7 put and passed.

Clause 8: Section 12C inserted —

Hon NICK GOIRAN: As we move speedily to clause 8 of the bill, this clause deals with circumstances in which the chairperson of the board can decide whether a prisoner will participate in a resocialisation program. During the consideration of clause 1, we touched on the rationale for the government allowing only the chairperson to be the decision-maker, so I do not intend to re-agitate that issue. Is the parliamentary secretary in a position to outline to the house those decisions that will be taken in accordance with this bill by the board as a whole, those decisions that will be made by the chairperson only, and the third category is those decisions that will be made by the CEO?

Hon MATTHEW SWINBOURN: There is a bit here, member, so I will hopefully get it all right. It is probably better to start with the chairperson rather than the whole board, because the chairperson is really the key individual in this instance. The chairperson, as identified in the bill, will make decisions on their own in relation to a prisoner with links to terrorism who is being assessed where there is a Commissioner of Police report that contains intelligence information. However, this could also occur when a person is not already categorised as a person with links to terrorism but there is a police report that contains information that they could be or are connected to terrorism—that is, there is terrorism intelligence. That all pertains to the chairperson only. The chairperson will also decide whether an individual will be included in a resocialisation program, which I think proposed section 12C makes clear. In relation to the board as a whole, it will make decisions on all other matters that sit outside those things. Those are the three matters, essentially, that I identified in relation to the chairperson, and then the board has decision-making powers in relation to all other matters that would sit outside that. The board is not specially constituted to deal with terrorists; it is just the board.

Hon Nick Goiran: To be clear, the board as a whole will not make any decisions expressly under this bill; it will just continue to make its ordinary decisions. Will any decisions made by the board under this bill be always made by the chairperson only?

Hon MATTHEW SWINBOURN: Let me take some advice on that. The member is right in substance in one respect, but in form there are some provisions of this bill that deal with the board. How do I describe it? The process has been followed in relation to those things and there is no finding by the chairperson. The bill just deals with the fact that that has come to an end, and then the board resumes its continuing responsibility. Just as a matter of completeness, we cannot say yes or no to the proposition that the member put forward; it is simply that in effect the really operative parts of the bill relate to the chairperson and then the board is the residual part of that, depending on how the process flows out.

The final question the member asked relates to the decisions that the CEO might make. The CEO will not have a decision-making role under this legislation. The CEO will continue to have reporting obligations to the board and will continue to support the board in the performance of its functions but will not be in effect a decision-maker on the matters that the legislation will deal with.

Hon NICK GOIRAN: Clause 8 inserts at the beginning of part 2 division 4 of the act proposed section 12C, which will expressly state, at least insofar as this division is concerned—that is, part 2 division 4—that when the board doing something is mentioned, it is the chairperson only. To clarify the earlier point that the parliamentary secretary made, is it correct to say that insofar as the newly amended, or soon to be amended, Sentence Administration Act 2003 is concerned, the only time that the chairperson will act alone as the board is under part 2 division 4?

Hon MATTHEW SWINBOURN: The answer to the honourable member's question is no, that is not the case. If the honourable member looks at the blue bill, he will see that division 4 deals with programs for certain prisoners. I take the member to clause 18, "Part 5 Division 1B inserted", and proposed section 66K(2), which states —

> The Board, as constituted by the chairperson alone, must decide whether to release the prisoner in accordance with section 20.

There are a number of provisions under which the board will be constituted by only the chairperson, but I do not have a list of them for the honourable member. As I say, the correct answer to the member's question is no.

Hon NICK GOIRAN: In a sense that is helpful. It brings to my attention the question of why we simply do not say "the chairperson" rather than this somewhat confusing situation in which the word "board" means one thing at one stage in the statute and then something else in another. In other words, at one stage it means the whole of the board and at other stages it means the chairperson. Someone reading the Sentence Administration Act 2003 would

be wrong to automatically assume that every time they saw the words "the board" it actually means the board, when sometimes it will actually mean the chairperson. Why was a decision not taken to simply say "chairperson"?

Hon MATTHEW SWINBOURN: The entity that is mentioned often but never present, except for once at the Parliamentary Counsel's Office, obviously has drafted the bill in that particular way, and we would be only speculating why the wording used in proposed section 66K(2) is "The Board, as constituted by the chairperson alone". If the member looks at proposed section 66L(2), he will see it says the same thing, "the Board, as constituted by the chairperson". I am unable to take the member a lot further on the reasoning for why the bill was drafted that way for those provisions. The drafting instructions were given to have the chairperson alone making the decision, and then PCO presumably has made a decision that the most appropriate way to refer to that is the language that it has used. It is probably not a satisfactory answer, but unfortunately it is probably the best I can give.

Hon NICK GOIRAN: It may have something to do with the rest of the Sentence Administration Act, insofar as any powers or functions are given to the board—that is, the Prisoners Review Board. Nevertheless, putting that to one side, this identifies that in order for this legislation to work, someone will need to know the circumstances in which the board will need to be quorate in the ordinary sense and the circumstances in which it will be okay, and in fact mandatory, to provide information to only the chairperson. I think the parliamentary secretary indicated that at present he does not have a list of the types of matters for which that will be the case, but could that be provided at a later stage?

Hon MATTHEW SWINBOURN: Member, we do not have a list of that but I have been advised that it relates to anything to do with the resocialisation. Every single time there is a prospect of early release for, one, a person linked to terrorism, or two, when a Commissioner of Police report has been received outlining a connection to terrorism or intelligence in relation to that—sorry. An early release order is defined in section 4 of the Sentence Administration Act 2003 and is a parole order or a re-entry release order. A parole order authorises a person's release from prison. The person must consent to the conditions in the parole order before they are released. During a parole period, an offender is allowed to serve the remainder of their prison sentence in the community subject to conditions. In the case of a light sentence, the parole and supervision periods will be specified in the parole order. For all the other sentences, the parole and supervision periods will generally be the time remaining on the sentence on the date of the person's release from prison. A re-entry release order may be made as a precursor to release on parole or release to freedom. The re-entry release program aims to facilitate the successful re-entry of prisoners into the community and promote a constructive, self-supporting, law-abiding lifestyle in the community by the re-establishment of family and community ties, the development of re-entry skills, the development of social skills, the participation in educational or other personal development, the exposure to a period of normal employment, service to the community and participation in treatment programs or counselling where relevant. I hope that that information is of assistance to the member to provide some context.

Hon NICK GOIRAN: In Victoria, a terrorism risk assessment must be provided by a law enforcement or intelligence agency entity to provide input into an early release decision. Is that also the case in the bill before us?

Hon MATTHEW SWINBOURN: We are at a bit of a disadvantage because we are not completely au fait with the details of the report to which the member referred in the Victorian legislation to the degree that we can give him the assurance that one is equivalent to the other. Again, repeating what we have covered before, the Commissioner of Police report essentially contains the risk assessment related to terrorism issues. The report will contain why that view is formed by the Commissioner of Police and make reference to other agencies that we have already mentioned that the Western Australia Police Force work with.

In terms of what information might be put before the board, as a whole it can still consider other matters as well. This bill deals with the Commissioner of Police report, the confidentiality requirements and the chairperson sitting as the board by themselves. However, that is not the only information that could be and will be presented to the board as a whole. The board will still consider psychological elements and other associated risks to the community from the individual and things of that kind. That information will still be furnished to the board.

Clause put and passed.

Clause 9: Section 13 amended —

Hon NICK GOIRAN: It is not readily apparent but clause 9 deals with the resocialisation of schedule 3 prisoners.

Hon Matthew Swinbourn interjected.

Hon NICK GOIRAN: Yes. What criteria will the board use to determine whether or not a schedule 3 prisoner with links to terrorism and who is subject to a Commissioner of Police report is suitable for inclusion in a resocialisation program?

Hon MATTHEW SWINBOURN: I think the member's question was: how are schedule 3 prisoners considered suitable for inclusion into a resocialisation program? I will try to give an answer that will encapsulate an answer for the specific question. The Sentence Administration Act 2003 provides consideration for recommending a resocialisation

program for schedule 3 prisoners. In the case of a schedule 3 prisoner with links to terrorism and who is subject to a Commissioner of Police report, the Prisoners Review Board of Western Australia can only endorse a resocialisation program if the board, after having regard to the report, is satisfied that the prisoner is suitable for inclusion into the program. The presumption against early release orders for prisoners with links to terrorism does not apply to resocialisation programs. The Prisoners Review Board is only required to have further regard to a prisoner with links to terrorism if the person is subject to a Commissioner of Police report. It is important to note, however, that the Commissioner of Police report can be provided by the Commissioner of Police at any time—I think we covered that earlier—for the purposes of the Prisoners Review Board's consideration of resocialisation programs. A prisoner serving life or an indefinite sentence is initially considered by the Prisoners Review Board for inclusion in resocialisation programs two years prior to the prisoner's initial statutory review date. At this stage of the prisoner's sentence, the corrective services division of the department provides a comprehensive resocialisation program suitability assessment to the Prisoners Review Board and attaches all relevant reports, including prison reports, community corrections officers' reports, psychological risk assessment reports and treatment completion reports. Only the Attorney General and the Governor can approve the inclusion of a prisoner with a life or indefinite sentence in a resocialisation program following a recommendation by the board. If deemed suitable, the resocialisation program will involve the prisoner being placed in a minimum-security facility and undertaking resocialisation activities such as external prison activities, home leave and the prisoner employment program in the community. I think it is important to note that a number of discretionary factors will determine whether—I think we have mentioned this—a person is included in or eligible for a resocialisation program, and that the issue of risk in their involvement is an ongoing assessment, because some programs generally involve releasing the prisoner into the community, so there is always a constant assessment of that. It is not just at the point of them becoming eligible for release. I think that has probably answered the member's question.

Hon NICK GOIRAN: Yes. Are all category 1 and category 2 prisoners schedule 3 prisoners?

Hon MATTHEW SWINBOURN: The answer is no because being a schedule 3 prisoner relates to the prisoner's sentence. A schedule 3 prisoner is a prisoner who has received a life sentence or an indeterminate sentence or is being held at the Governor's pleasure—that is a strange term. I do not think a category 2 prisoner would fall into life because they are at the low end of the spectrum, but a category 1 prisoner could fall within schedule 3 because they were convicted of an offence that had life imprisonment as the punishment or those other factors that we talked about.

Hon NICK GOIRAN: I understand that only the chairperson will get to determine whether a schedule 3 prisoner would be able to access a resocialisation program. How will it work in the event that the chairperson is conflicted in any way? I think the parliamentary secretary mentioned yesterday that the board always consists of not only a chair, but also, I think, two deputy chairs. If a chairperson declares a conflict or for any reason is unavailable or is possibly unfit to fulfil their duties, will a deputy chair automatically be able to stand in in lieu of the chair?

Hon MATTHEW SWINBOURN: We are having trouble locating the answer at this time. Obviously, we will not complete the bill, so we will take that on notice and answer it tomorrow when we get back onto it. The reason is that it relates to the provisions under the existing act rather than being dealt with under the bill.

Hon Nick Goiran: That is no problem.

Clause put and passed.

Clause 10: Section 14 amended —

Hon NICK GOIRAN: I will telegraph to the parliamentary secretary the questioning for tomorrow on clause 10, which deals with the resocialisation for other prisoners. That probably will be the useful time to get that response because with regard to the deputy chairperson and the chair, I appreciate that the existing act will have some provisions, but when the act was put together, it was not contemplated that the chairperson would be acting alone. Therefore, it would be good to get an appreciation of how that would be dealt with, because clause 9 deals with the resocialisation of schedule 3 prisoners and now we are dealing with the resocialisation of other prisoners. If that response could be provided tomorrow in response to clauses 9 and 10 together, that would be useful.

Hon MATTHEW SWINBOURN: Yes, member, we will take that on notice overnight to deal with that.

Progress reported and leave granted to sit again, on motion by Hon Matthew Swinbourn (Parliamentary Secretary).