

SENTENCING LEGISLATION AMENDMENT (PERSONS LINKED TO TERRORISM) BILL 2021

Committee

Resumed from 11 May. The Deputy Chair of Committees (Hon Steve Martin) in the chair; Hon Matthew Swinbourn (Parliamentary Secretary) in charge of the bill.

Clause 10: Section 14 amended —

Progress was reported after the clause had been partly considered.

Hon NICK GOIRAN: To assist the chamber, we are up to clause 10. Members may recall that clauses 9 and 10 deal with the resocialisation programs for prisoners. Clause 9 deals with those programs for what are referred to as schedule 3 prisoners and we are now dealing at clause 10 with the resocialisation programs for other prisoners.

While we are dealing with both these clauses in a cumulative fashion, members will note that at clause 10, the proposal is to insert after section 14(5) of the act new subsection (5A), which states —

The Board must not approve a programme for the purposes of subsection (5) in relation to a prisoner with links to terrorism who is subject to a Commissioner of Police report unless the Board, having regard to the report, is satisfied that the prisoner is suitable for inclusion in the programme.

The matter that really arises with these two clauses is one that intersects with the Sentencing Act as a whole; that is, what will happen in the event that the chairperson, who in this unique scenario is acting as the board, is unavailable or unfit or has a conflict? Will the provisions as they stand in the current act be suitable to allow, for example, the deputy to stand in the chairperson's place? I understood that that was going to be considered overnight.

Hon MATTHEW SWINBOURN: I thank the member for the recap. He is correct; some consideration has been given to the matters that were raised yesterday. I can confirm that, currently, the Sentence Administration Act 2003 does not provide a blanket delegation to allow all the functions of the chairperson of the board to be delegated to another person, essentially due to the special eligibility requirements for the position. For this reason, section 52 of the Interpretation Act 1984 will apply. Section 52 of the Interpretation Act allows for the making of acting appointments when a person is unable to perform the duties of the position for reasons including a conflict of interest, ill health, death or leave. The person appointed to act can do so for the purposes of the whole or part of the functions of the office. However, the person appointed must have the same qualifications as required under the principal act. This is the reason that the deputy chairs of the Prisoners Review Board are not assigned to the position of chair. If something has to happen particularly urgently or unexpectedly, noting that there are very limited circumstances that would require urgent consideration by the chairperson of the board, an urgent request would need to be made to the Governor in Executive Council to make that acting appointment.

Hon NICK GOIRAN: The urgency will not apply, at least not for the community. It might apply for the prisoner. The prisoner might think that things are urgent, but for the safety of the community, we need not be concerned about any urgency because the person would be incarcerated. The only possible decision that would be made about the prisoner by the board, whether that be the chairperson or the acting chairperson, would be whether the person is suitable for inclusion in a resocialisation program. I think that is a useful point of clarification.

Perhaps to round out this issue, have there been circumstances in the past in which the chair has been unavailable or unfit and there has been a necessity to appoint an acting chairperson?

Hon MATTHEW SWINBOURN: I cannot give the member a complete answer with every possible occasion when it may have happened, but the advisers recall an occasion when it happened when Robert Cock was the chair and he had fallen ill. A person was appointed as the acting chairperson while he was ill.

Clause put and passed.

Clauses 11 to 15 put and passed.

Clause 16: Part 5 Division 1B inserted —

Hon NICK GOIRAN: Clause 16 seeks to insert division 1B into part 5 of the Sentence Administration Act 2003. It is the substantive clause in part 2 of the bill before us. We have previously touched on the government's rationale for determining that only the chairperson will make decisions as the board about prisoners with links to terrorism. On what basis did the government form the additional release considerations and are the additional release considerations the same as those that will apply in other Australian jurisdictions? I draw the parliamentary secretary's attention to proposed section 66F.

Hon MATTHEW SWINBOURN: Essentially, I am advised that the working group gave consideration to and were guided by all the other jurisdictions, because we have the benefit of being last. We have not mirrored what they have done obviously, but we have had regard to it. I cannot give the member a direct answer about the single guide for that because it was an iterative process that the working group developed over time. Obviously, it had regard

to what the other jurisdictions had done, worked through that and the additional considerations that should be developed, and then came to the conclusion that is reflected in proposed section 66F.

Hon NICK GOIRAN: Under subdivision 2, “Early release orders in cases of prisoners with links to terrorism”, there are three categories of prisoners with links to terrorism. We have previously dealt with category 1 and category 2 prisoners, and, specifically, we have identified that currently in Western Australia there are no category 1 or category 2 prisoners, albeit there is one individual who would, if he were to be reimprisoned for any reason, at that point be considered a category 1 prisoner. There is also currently an individual before the courts who may well become a category 2 prisoner in the event that he is incarcerated. The third category of persons who can be considered prisoners with links to terrorism who would be captured by the early release orders outlined in this subdivision are prisoners who are subject to a Commissioner of Police report and the board as constituted by the chairperson alone is satisfied, having regard to the report, have made statements or carried out activities that support or advocate support for terrorist acts. Is there currently an intention by the Commissioner of Police to make such a report about an existing prisoner?

Hon MATTHEW SWINBOURN: The member can appreciate the sensitivities around this. I am advised that it is a possibility and that it is under consideration.

Hon NICK GOIRAN: Yes, I acknowledge that there are some sensitivities around this, and I certainly would not expect the government to disclose, for example, the name of such an individual at this time. I acknowledge that the parliamentary secretary has indicated that this subject is under consideration. The reason I ask is that we have previously identified that this bill, ultimately, will not come into full operational effect for another approximately three months. I would like to think that the bill will be passed today; I appreciate that after the luncheon adjournment we will have other urgent business to undertake, but I see no reason why we could not knock this off today. That being the case, in around three months’ time, this bill will have full operational effect. At the present time we do not have to be too concerned about urgency with regard to category 1 or 2 prisoners, but I have a mild concern about the third category. If the Commissioner of Police is actively concerned about people—we do not need to know the names of those individuals—because he is presumably of the view that they have made statements or carried out activities that support or advocate terrorist acts and, as such, might be under consideration for imminent release, I think that we would want to make this legislation operational as soon as possible, and maybe even expedite the three-month process. I do not know whether the parliamentary secretary is in a position to provide any further information about that, and I acknowledge that no names can be provided, but I invite any further elaboration, if any can be provided.

Hon MATTHEW SWINBOURN: I am advised that it is a long sentence, so in terms of the immediacy of the necessity, it is not outside the time frames we are dealing with. I am also advised that these matters could still be raised with the board—not as the chairperson, but in its current form—but it would not have the rigour of the system or the presumptions against that are currently contained in the act. Some of that information could be used in any event, but my understanding is that if we get this passed today—in good faith, I hope we do—it could be in place well before it needs to be used.

Hon NICK GOIRAN: That is comforting to hear and I commend those involved in that process. Proposed section 66G(1) provides for the making of early release orders and refers to making early release orders and the introduction of a presumption against an early release order for a prisoner with links to terrorism, unless the board is satisfied that there are exceptional reasons for why the prisoner should be released. I note that proposed section 66G(2) lists factors that the board must consider. Is the parliamentary secretary in a position to indicate to the chamber what is intended to be the type of exceptional reasons for why a prisoner should be released?

Hon MATTHEW SWINBOURN: I have an extensive answer that I will read out, and hopefully it will cover the lines of inquiry the member has here.

The exceptional reasonable test is a high legal threshold that a prisoner or young offender with links to terrorism must overcome to be granted early release. What constitutes exceptional reasons will depend on the facts of a particular case. The term is not defined in either the Sentence Administration Act 2003 or the Young Offenders Act 1994. Its meaning has developed through the common law. It is generally understood that a person will need to demonstrate reasons that are unusual, out of the ordinary or an exception to the general run of cases. In the case of persons with links to terrorism, the chairperson of the Prisoners Review Board or the Supervised Release Review Board will have absolute discretion to determine whether exceptional reasons apply in a particular matter. However, the relevant board is guided by the bill’s inclusion of additional release considerations in the case of a prisoner, or release considerations in the case of young offender, that must be considered when making a decision on whether to make an order for early release.

In relation to a prisoner or young person, the board must have regard to, firstly, the degree of risk that the release of the person would appear to present to the personal safety of people in the community or of any individual in the community; the nature and seriousness of statements made or activities carried out in support of terrorist acts; if

sentenced for a terrorism offence or subject to an interim or confirmed control order relating to a terrorist offence, any remarks made by the court that are relevant to the risk to the community or individual safety; if the person was released and the nature and seriousness of the statements made or activities carried out in support of terrorist acts; the behaviour of the person whilst subject to the interim or confirmed control order; the behaviour of the person while in custody; whether the person, whilst in custody, has participated in programs or activities that address the person's risk of committing a terrorism offence; and whether the person is or was associated with one or more persons who have made statements or carried out activities that support or advocate support for terrorist acts, and the nature of the association. In the case of a young offender, the general principles of juvenile justice under section 7 of the Young Offenders Act apply, with the exception of principles provided within subsections 7(h) and (k), which provide that the detention of a young person in custody for an offence should be used as a last resort and is only to be used for as short a time as necessary, and that the offence should be dealt with in a time frame that is appropriate to the young person's sense of time.

In summary, exceptional reasons are obviously a high bar. It has not been dictated what they would necessarily be. We expect, of course, that the chairperson will be guided by the available case law with respect to what those terms have meant in the past. Given the mandatory considerations that are there, if those mandatory considerations are not satisfied, then exceptional reasons will not even come into play because the Parliament will dictate what the board must have regard to.

Hon NICK GOIRAN: Parliamentary secretary, the question that arises here is what I would describe as a “but for” test: but for exceptional reasons, the chairperson is not to release one of these people, whom I am going to describe as terrorists. I think the technical term is a person or prisoner with links to terrorism. Therefore, but for exceptional reasons, the chairperson will not allow the terrorist out of jail, and as a principle that seems a sound one. But it is then difficult to contemplate what would possibly be an exceptional reason that would justify the early release of this terrorist. As we have discussed in some earlier clauses, we are the last of the Australian jurisdictions to bring in phase 2 of the reforms. Is there any guidance that can be taken from the other jurisdictions? Have any of them, for example, released one of these persons linked to terrorism for exceptional reasons?

Hon MATTHEW SWINBOURN: On the member's question whether there is any guidance from other jurisdictions, we do not have any guidance from other jurisdictions and we do not know how they have dealt with any of the exceptional reasons. The member will appreciate that the nature of these provisions is such that they are not open in the same way that a decision of the court might be in a judgement, whereby we can follow reasonings. If there is information out there from other jurisdictions, we anticipate it would be the barest of information and, indeed, contextualised by numbers and things like that rather than explanations of their reasons and processes. As I indicated before, in the case of our chairperson, it will be within their discretion and no reasons will be published when they exercise that discretion because of the way we are dealing with this particular issue.

Hon NICK GOIRAN: At this time, could the parliamentary secretary confirm the difference between early release for what I would describe as an ordinary prisoner and early release for a person with links to terrorism? On the basis of the dialogue we have already had over the last couple of days, I take it that one of those differences is that an ordinary prisoner's—I use the word loosely—application for early release will be considered by the whole board, whereas the application for early release from a person with links to terrorism will be considered by only the chairperson. With respect to this type of person—that is, one who has links to terrorism—there is a presumption against their release unless there are exceptional reasons, and we just had an exchange on that. But will the remainder of the processes remain the same? For example, once the chairperson or the board makes a decision that an ordinary prisoner is, shall I say, eligible for release, are there any other agents or players in the decision-making process who will then make a final decision as to whether the person is released—for example, the Attorney General or the Governor, or both?

Hon MATTHEW SWINBOURN: I am conscious of the time. We have to report progress because the budget speech will follow and rudely interrupt our important work here! I am advised to think about it this way: when the chair receives a Commissioner of Police report about a prisoner, be that for a category 1 or 2 prisoner or the third category that we have identified, the chair will take over the whole process for parole. If they are dealing with a prisoner who has a fixed term, the chair will make the decision on whether that person is eligible or will be paroled. In relation to a lifer linked to terrorism, the chair will again take over that role and make the recommendation to the Attorney General for the decision to be made by the Governor. Therefore, the process for fixed-term prisoners and lifers will remain the same, but, essentially, the rest of the board will have no role with respect to a person once a Commissioner of Police report has been furnished to the chair.

Progress reported and leave granted to sit again at a later stage of the sitting, on motion by Hon Matthew Swinbourn.

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Sitting suspended from 1.00 to 2.00 pm

