HIGH RISK OFFENDERS BILL 2019

Introduction and First Reading

Bill introduced, on motion by **Mr J.R. Quigley (Attorney General)**, and read a first time.

Explanatory memorandum presented by the Attorney General.

Second Reading

MR J.R. QUIGLEY (Butler — Attorney General) [12.29 pm]: I move —

That the bill be now read a second time.

This bill delivers on a McGowan government election commitment to establish a high-risk offenders board and extend the Supreme Court's ability to make a continuing detention order or supervision order to serious violent offenders in the same manner as the provisions contained in the Dangerous Sexual Offenders Act 2006. In doing so, this bill fully preserves the provisions that apply in respect of dangerous sexual offenders in the Dangerous Sexual Offenders Act.

It is prudent to point out that the provisions contained in this bill complement the existing provisions contained in part 14 of the Sentencing Act 1995, which allows a court to impose an indefinite sentence on an offender. They are complementary insofar as both have regard to the protection of the community from the risk of reoffending by the offender and are informed of this risk by psychological, psychiatric or medical reports relevant to the offender. As indefinite imprisonment is contained in the Sentencing Act, it can be imposed only during the sentencing process—that is, at the time of conviction. By contrast, the provisions of this bill are enlivened when the offender is nearing their earliest release date.

The bill introduces the term "high-risk offender" to expand the current cohort of offenders under the Dangerous Sexual Offenders Act to include offenders who commit serious violent offences and who present an unacceptable risk of reoffending in a like manner, if not subject to a continuing detention order or a supervision order. The term "high-risk offender" and the test for the Supreme Court to determine whether an offender is a high-risk offender appear in clauses 3 and 7 of the bill. The bill is not intended to change the test under the Dangerous Sexual Offenders Act for whether the court makes a continuing detention order or a supervision order. An application can be made for a continuing detention order or a supervision order in respect of a serious offender under custodial sentence. A person cannot be such an offender unless they have committed a serious offence.

Clauses 3 and 5 of this bill define the term "serious offence", including by reference to schedule 1. Schedule 1 comprises serious sexual offences and violent offences, the majority of which attract a maximum penalty of imprisonment for seven years or more. All serious sexual offences under the Dangerous Sexual Offenders Act and all offences contained in schedule 4 to the Sentence Administration Act for the purposes of a post-sentence supervision order are included in schedule 1 to the bill. Serious offences also include offences against the law of the commonwealth or any place outside Western Australia if the offender's acts or omission that constituted the offence under that law would have constituted a serious offence if they had occurred in Western Australia, as well as prescribed commonwealth offences. In addition, and to deliver on the government's election commitment of dealing with those offenders who use a firearm in the commission of an offence, a court has the power, courtesy of a consequential amendment to the Sentencing Act, to declare an offence as a serious offence for the purposes of this bill.

We will have a two-tiered high-risk offenders scheme. A unique feature of this bill is the establishment of a two-tiered scheme of post-sentence management to deal with high-risk offenders. This will be the first of its kind in Australia. Part 4 of this bill sets out the first tier, which provides the most stringent control of the highest risk offenders in order to protect the community through continuing detention orders and supervision orders—collectively referred to as restriction orders, as defined in clause 3—made by the Supreme Court. The provisions that govern continuing detention orders and supervision orders have been brought across from part 2, division 2, of the Dangerous Sexual Offenders Act, with the drafting of this bill removing some of the duplication that came about through various amendments to that act. Parts 4, 5, 6 and 7 of the bill contain the provisions that support the application process, disclosure of evidentiary material, the making of orders, amending of supervision orders, reviews of continuing detention, appeals and reports used to inform the court and, for the most part, are replicated from corresponding provisions in the Dangerous Sexual Offenders Act.

In summary, in the lead-up to the offender's earliest release date, which may be the date that they are eligible to be released on parole or the end of their term of imprisonment, they will be assessed, based on their risk profile. If the offender's risk profile warrants, the bill empowers the Attorney General to make an application to the Supreme Court for a restriction order. In practice, though, the Attorney General will authorise either the State Solicitor or the Director of Public Prosecutions to make an application or take proceedings under this bill in the name of the state.

The state has the burden to satisfy the Supreme Court, by acceptable and cogent evidence, and to a high degree of probability, that it is necessary to make an order for continuing detention or supervision to ensure adequate protection of the community against an unacceptable risk that the offender will commit a serious offence. A preliminary hearing in the Supreme Court will be held to decide whether the court is satisfied that there are reasonable grounds for believing that the court might find that the offender is a high-risk offender. Should the Supreme Court make such a finding, the court must order that the offender undergo examination by a psychiatrist and a qualified psychologist for the purpose of preparing reports to be considered by the court in deciding whether to make a restriction order. At the preliminary hearing, the court will also set a date for hearing the application, except in some cases in which the offender has been charged with a further offence that should be dealt with before the application is heard. To account for situations in which an offender may be released from their term of imprisonment prior to the application being decided, the Supreme Court may order that the offender be detained in custody for a stated period or, if the offender is not in custody, order that the offender be detained in custody for a stated period. When the Supreme Court comes to hear and decide the application, it must have regard to a number of matters outlined in clause 7(3) of the bill. If at this hearing, the Supreme Court decides that the offender is a high-risk offender, the court must make either a continuing detention order under clause 26(1) or a supervision order under clause 27(1).

A continuing detention order is an order that provides for a high-risk offender to be detained in custody for an indefinite term for control, care or treatment. There are no changes to the operation or management of continuing detention orders in this bill. Part 5 of the bill ensures that continuing detention orders are reviewed at regular intervals and replicates the provisions of part 3 of the Dangerous Sexual Offenders Act.

A supervision order is an order that, when not in custody, requires a high-risk offender to be subject to conditions that the court considers appropriate for a period stated in the order. Matters such as the application process for a supervision order nearing expiry, applications to amend a supervision order and offences associated with the contravention of a supervision order have not changed. However, this bill proposes two minor amendments from the Dangerous Sexual Offenders Act to the provisions governing supervision orders, which I will now explain.

Firstly, clause 27(3) makes a minor adjustment to the time frame from when a supervision order comes into effect. Currently, under the Dangerous Sexual Offenders Act, a supervision order comes into effect from a stated date, but cannot be earlier than 21 days after the order is made. The amendment contained in this bill provides flexibility on that time frame. Although the default time frame is still 21 days, if the court is satisfied that the implementation of the order is practically feasible, the court may rule that the order may commence earlier than the 21-day time frame. This would come into effect only in situations in which representation is made to the court by those responsible for the management and supervision of the offender in the community, and would be influenced by factors such as availability of suitable accommodation.

Secondly, clauses 33 and 80 increase two penalties—the first for unlawfully interfering with the operation of an electronic monitoring device, and the second for contravening a supervision order. Currently, under the Dangerous Sexual Offenders Act, the penalties for these offences are imprisonment for 12 months and imprisonment for two years, respectively. In both cases, the penalties for these offences will be increased to be punishable by imprisonment for three years to reflect the serious nature of conduct that constitutes the commission of such offences.

Appeals: Part 6 of the bill is modelled on part 4 of the Dangerous Sexual Offenders Act, which provides for the state or the offender to appeal to the Court of Appeal against a decision of the Supreme Court, but now includes a provision to clarify that appeals lie from only final decisions of the court.

Tier 2: The second tier of this two-tiered scheme to deal with high-risk offenders comprises an initiative introduced by the former government, namely post-sentence supervision orders, contained in part 5A of the Sentence Administration Act. Those opposite may recall that I am on the record as having questioned the constitutional vulnerability of post-sentence supervision orders as they were introduced to the Parliament by the Barnett government in 2016. However, post-sentence supervision orders, when stripped of provisions that may result in constitutional vulnerability, serve a legitimate purpose for persons who are not at the highest risk of reoffending, but still present a significant risk of reoffending if not supervised beyond their term of imprisonment.

When I became Attorney General, I made it my duty to clarify these constitutional questions by seeking advice from the then Solicitor General of Western Australia, which has been heeded and reflected in this bill. Firstly, the government set about removing the vulnerability that arose as a result of the chairperson of the Prisoners Review Board, who, at the time, was a sitting judge in a court vested with federal jurisdiction—specifically, the District Court of Western Australia—being involved in executive decision-making. This is achieved by altering the eligibility criteria to appoint persons as the chair of the Prisoners Review Board, thereby removing this risk. In fact, upon the retirement of the chairman of the Prisoners Review Board, who was a sitting District Court judge, we appointed Hon Allan Fenbury, who is a retired senior judge of many years standing in the District Court. The risk arises because under the Australian Constitution, state courts are independent of, and not beholden to, the executive arm of government.

Secondly, the government removed what might have been regarded as a trespass by the executive, specifically by the powers given to the Prisoners Review Board under part 5A of the Sentence Administration Act, into the decisions of the court. This will be achieved by making it clear that a post-sentence supervision order cannot be for the purpose of punishment. Clause 108 of this bill removes requirements that an offender who is subject to a post-sentence supervision order undertake community corrections activities, seek or engage in gainful employment or in vocational training, or engage in gratuitous work for an approved organisation, each of which may be considered a punitive measure. To further reduce the risk of a post-sentence supervision order being construed as punitive, clause 107 of this bill provides the Prisoners Review Board with the ability to make an order for a period of between six months and two years, as opposed to the current fixed period of two years.

High Risk (Sexual and Violent) Offenders Board: Part 2 of this bill establishes the High Risk (Sexual and Violent) Offenders Board, which will ensure that agencies will work closely together when carrying out their serious offender functions. The board will consist of the heads of relevant agencies, or their nominees, with relevant agencies being those involved with the management and oversight of offenders who are subject to an order made under this bill. Examples of relevant agencies include the Department of Justice, the Western Australia Police Force, the Department of Communities and the Chief Psychiatrist of Western Australia, with the ability to designate any other public sector body in the regulations. Provisions contained in this bill also allow for the appointment of community members to the board, as is the case with the Prisoners Review Board. The board will be responsible for a number of important functions associated with high-risk offenders, including: to develop knowledge, understanding, skills and expertise in all aspects of the assessment and management of this cohort of offenders; to facilitate cooperation between, and the coordination of, relevant agencies, including to facilitate information-sharing; to develop best practice standards and guidelines for relevant agencies; and to advise relevant agencies on matters such as resourcing, service provision and training.

Part 3 of this bill contains provisions that emphasise the importance of cooperation between agencies that play a role in the management and oversight of offenders who are subject to an order under this bill, or those agencies that have information that may assist in the management and oversight of such offenders.

This bill delivers on the McGowan government’s election commitment to deal with those offenders for which the community expects the strongest response from the government and maintains our legacy to protect the Western Australian community, especially the most vulnerable, from sexual and violent offenders.

I commend the bill to the house.

Debate adjourned, on motion by **Ms L. Mettam**.