SENTENCING LEGISLATION AMENDMENT BILL 2016

Introduction and First Reading

Bill introduced, on motion by **Hon Michael Mischin (Attorney General)**, and read a first time.

Second Reading

HON MICHAEL MISCHIN (North Metropolitan — Attorney General) [5.53 pm]: I move —

That the bill be now read a second time.

This bill consolidates a number of amendments to sentencing legislation. It implements a government election commitment to provide stricter supervision of certain serious and violent offenders, particularly those who commit family violence and arson offences; it implements amendments informed by the conclusions in the statutory review of the Sentencing Act 1995, in the course of which the views of key stakeholders, particularly judicial officers, were sought and obtained; and it seeks to respond to two issues raised as a result of Western Australian Court of Appeal decisions. Shortly stated, these amendments reflect the government's approach to dealing with offenders—a tougher approach towards the small number of offenders who commit serious violent offences, particularly in domestic or relationship circumstances, while at the same time offering the courts alternative sentencing dispositions for persons convicted of lower level offences.

Of particular note are some of the amendments arising from the statutory review of the Sentencing Act that have been directed to the government's commitment to reduce the level of over-representation of Aboriginal people in the criminal justice system. This over-representation is most marked in the mid to low range of offending, where some 88 per cent of offenders in the Magistrates Courts receive a fine. The concern for government is that in many cases this leads to a cycle of offending and convictions; fines; inability or unwillingness to pay the fines; entry into the fines enforcement system; and, potentially, imprisonment.

I propose to introduce the bill not in the order of components as drafted, but rather by dealing with those elements that will have the greatest impact on the state's criminal justice system first. Part 3 of the Sentencing Legislation Amendment Bill 2016 implements the government's election commitment to "introduce strict controls and GPS tracking of serious violent offenders, domestic violence offenders and serial arsonists". Part 3, division 2, introduces a new post-sentence supervision order. For the first time, a post-sentence supervision order will enable the supervision of seriously violent criminals beyond the completion of their sentence. The offences that determine a serious violent offender are outlined in clause 44 as a new schedule 4 to the Sentence Administration Act 2003 that includes the offences of manslaughter, unlawful assault causing death, grievous bodily harm, robbery, arson and a number of sexual offences. In addition to the listed offences, clause 20, which inserts a new section 97A into the Sentencing Act, enables the court to declare any indictable offence carrying a penalty of imprisonment to be a "serious violent offence" where the offence involved serious violence or resulted in serious harm or death, as defined in the section. In deciding whether to make such a declaration, the court must have regard to any history on the part of the offender of violent offending, the commission of the offences in a family or domestic relationship, or if the victim was aged less than 12 years old, as an aggravating factor. This can be done by the court of its own initiative or upon the application of the prosecution.

For eligible offenders, the chief executive officer of the Department of Corrective Services must give the Prisoners Review Board a report at least three months prior to the offender's term being completed, which addresses a number of considerations set out in the new part 5A of the Sentence Administration Act. Before the end of the prisoner's term, the Prisoners Review Board has the discretion to consider whether a post-sentence supervision order should be imposed. Once an offender has completed his or her sentence for an offence that was declared a serious violent offence at sentencing or for an offence listed in schedule 4, the offender will be identified by the Department of Corrective Services and the Prisoners Review Board will have the discretion to apply a post-sentence supervision order.

A post-sentence supervision order will apply for a period of two years. As outlined in proposed new sections 74F and 74G, a post-sentence supervision order will include a number of standard obligations and may include a number of additional requirements as the Prisoners Review Board thinks fit, including a direction that an offender wears a GPS tracking device. Post-sentence supervision orders are a precautionary measure the government is introducing to prevent violent re-offending and protect the community and victims from the risks that serious violent offenders may still present despite having finished their sentence. The orders will improve the safety of persons at risk and provide better protection for victims, and make it clear to offenders that any behaviour that threatens or harasses victims, or endangers the safety of the general community, will not be tolerated. Post-sentence supervision orders will not replace the existing legislative provisions in Western Australia that relate to dangerous sexual offenders. Sex offenders under sentence for a serious sexual

offence will continue to be considered for a continuing detention order or a supervision order under the Dangerous Sexual Offenders Act 2006.

On 5 December 2013, I tabled in Parliament a report of the statutory review of the Sentencing Act. The review sought the detailed views of judicial officers at all levels of jurisdiction, the Director of Public Prosecutions for Western Australia, the Legal Aid Commission, the Aboriginal Legal Service, the Victims of Crime Reference Group and various university law faculties. These views were synthesised into a package of sentencing reforms that I have introduced today in this bill. In the statement to Parliament in 2013, I made it clear that since 1995, and with some amendments along the way, the Sentencing Act introduced by the Liberal government in 1995 has served the state well for over 20 years, but, as with most human endeavour, there is always room for improvement, and part 4 of the bill I introduced today does that.

Division 3, part 4 of the bill introduces a new alternative to a direct fine, which, as mentioned previously, is the preferred sanction of the Magistrates Court in over 88 per cent of the cases it deals with. Part 8A introduces a new concept of a suspended fine, such that a court can impose a fine and suspend it for a period of up to 24 months, after which, if the offender commits no further offences during the period of suspension, the fine will be discharged. From a policy perspective, new sections 60B, C, D and E ensure that, should the offender breach the period of suspension, the response does not escalate beyond the imposition of the original fine.

One of the important roles of the Commissioner for Victims of Crime, introduced by the Liberal–National government in 2013, is to ensure new legislation or amendments to existing laws always respect and, where possible, enhance the experiences of victims in the criminal justice process. The amendments contained in division 4, part 4 of this bill have been introduced on the recommendation of the commissioner in the performance of this role.

Clause 53 inserts a new section 23A into the Sentencing Act, and presents a significant broadening of the definition of a victim for the purposes of being able to make a victim impact statement. It also broadens the definition of "personal harm" to mean psychological or psychiatric harm in addition to bodily harm. These changes have been sought by victims and victim advocates for some time and the government has taken the initiative of including them in this bill. It is expected that these expanded definitions will form the basis of broader definitions in related legislation; for example, the Restraining Orders Act 1997.

Clause 55 reflects in legislation an arrangement that currently exists between the courts, the victim support services section of the Department of the Attorney General and the Prisoners Review Board. Essentially, this amendment will ensure that, in all cases, a copy of the victim impact statement will be given to the Prisoners Review Board. This process will assist in the current debate around the so-called "no body, no parole" principle, in that a secondary victim's submissions concerning the refusal of the offender to reveal the whereabouts of the deceased victim's body will directly be brought to the attention of the Prisoners Review Board.

Division 5, part 4 of the bill implements the government's clear intent to provide the courts with a greater range of sentencing dispositions, particularly for those offenders whose offences do not warrant imprisonment. The amendments enhance the current conditional release order and provide the court with the ability to impose a fine, but then immediately offer the offender attendance at a rehabilitation program or unpaid community work in lieu of paying the fine. The court will have the discretion to set no undertaking or a monetary undertaking or require the offender to deposit money with the court, essentially giving legislative reinforcement to what currently happens in practice. It is important to reiterate at this point, this enhanced conditional release order is not to be equated with the current community service component of a community based order or with the current work and development order under section 57A of the Sentencing Act. Both these have statutory compliance requirements, supervised by officers from the Department of Corrective Services. These enhanced conditional release orders are different.

As this measure will be a direct alternative to a fine, the involvement of the offender in any programs or work will be by agreement, and therefore voluntary. It is expected that the offender will be given contact details for a particular program or work location. The offender will also be given a logbook, where the required number of hours to be worked or attended will be signed off by the activity manager. The only requirement on the activity manager is to inform the court, using the logbook, whether the hours have been completed or, conversely, the time allowable for the hours to be completed has expired and the offender has not completed the required hours. It is hoped that some of the over 5 000 volunteer organisations, not-for-profit community organisations and local governments will become involved in the scheme. Accordingly, even though the state may not directly benefit from the fine revenue in these cases, the community will.

Finally, in relation to the outcome of the statutory review, division 6, part 4 implements a number of miscellaneous amendments. Clauses 61 and 62 make minor wording changes to terms such as "parole eligibility order", "written reasons" and "prescribed" and clause 63 makes minor changes to the periods for pre-sentence

reports. Clause 61(3) introduces another important policy initiative of government—that of, partially suspended imprisonment sentences. While much of the feedback from the stakeholders to the statutory review questioned the value of a suspended imprisonment sentence, the government intends to retain these provisions in the act. The concept of conditional suspended sentences was introduced in 2004 and has proved effective. The concept of partially suspended sentences which, of course, can be made conditional, fills a gap and allows the court to signal to the offender that a short period of immediate imprisonment is necessary while the balance can be suspended on conditions.

Clause 66 makes important changes to section 45 of the Sentencing Act to provide for additional considerations the court must take into account when making a spent conviction order for an offender subject to a pre-sentence order. Members' attention is drawn to clause 73 which amends section 86 of the Sentencing Act. This rather minor amendment reverses a change made by the then Labor government in 2004, which has essentially backfired, particularly in relation to incarceration rates of Aboriginal people. This clause returns the minimum sentence able to be imposed to three months, as it was when the Sentencing Act was introduced in 1995. The then Labor government had hoped that by increasing the minimum imprisonment sentence allowable under the act from three to six months, fewer people, particularly Aboriginal people, would be jailed. However, its impact on incarceration rates has been minimal at best and by 2006–07, when an evaluation was undertaken, "sentence creep" was apparent. All the 2004 amendment achieved was to jail the same number of people, but for longer.

Clause 74, which amends section 87 of the act, clarifies how time spent in custody on remand is dealt with by the courts, particularly in circumstances when the offender was on bail for some of the time on remand and/or when the offender may have spent time in custody on remand for another offence. Clause 75, which amends section 89 of the act, is important in its own right. It clarifies when an offender is sentenced to imprisonment and the court permits early release on parole, the date set by the court for eligibility for parole is the earliest date on which parole may be considered. I am grateful to a former Chief Judge of the District Court in pointing out this subtle, but important distinction. So to make it clear to both offenders and the public, when an offender reaches his or her parole eligibility date, there is to be no expectation that the offender will be released on that day—they will be eligible to be considered for release at the end of the period which the court has determined.

Clause 77 inserts a new division 6 into part 18 of the Sentencing Act and describes the functions of speciality courts. Although WA introduced the Drug Court concept in 2004, and subsequent governments have conducted trials of an Aboriginal Community Court in Kalgoorlie, and Family Violence Courts in the metropolitan area, they have all operated without specific legislation, particularly with regard to empowering the court to order the reappearance of the offender simply to check on compliance with a community order. The government sees these straightforward amendments to the Sentencing Act as futureproofing, as no doubt at some point new specialist courts for particular types of offenders will evolve and be implemented, at least on a trial and evaluation basis.

I now turn to amendments in part 4, division 2 and in part 2 of the bill that are required as a result of two Western Australian Court of Appeal decisions. Division 2 of part 4 inserts new sections 145A and I50AB into the Sentencing Act. While the necessity for these amendments have arisen from the Court of Appeal decision Gillespie v Western Australia [2013] WASCA 149, rather than the statutory review of the Sentencing Act itself, it nevertheless fulfils the government's intention to improve the operation of the act. They clarify that when a superior court, on a plea of guilty by the accused, is required to determine in proceedings under the Sentencing Act whether the offence was committed in circumstances of aggravation, that determination is one of fact to be decided by a judge alone, and not by verdict of a jury.

Amendments contained in part 2 of the bill are a consequence of the Western Australian Court of Appeal's decision in the case of Prisoners Review Board v Nathaniel Freeman [2010] WASCA 166, when the court found that the provisions relating to resocialisation program under section 13 of the Sentence Administration Act 2003 did not apply to prisoners sentenced before the commencement on 4 November 1996 of the Sentence Administration Act 1995, which, for convenience, I will term pre-1996 prisoners. At the end of 2015, this ruling affected some 41 prisoners serving life or indefinite sentences. As these prisoners may not access resocialisation programs, their likelihood of release is reduced, even if they meet all other considerations for release on parole.

The provisions in part 2 will ensure consistency in the manner in which resocialisation and release considerations are applied to prisoners serving various types of sentence as described in schedule 3—implemented by clause 15. The amendments will ensure equity by giving these prisoners access to the same resocialisation opportunities as like offenders sentenced after 4 November 1996 and will retrospectively validate any previous decisions based on resocialisation programs or reports in respect of pre-1996 long-term prisoners that purported to have been made pursuant to the Sentence Administration Act 2003. In addition, part 2 also makes a number of mechanical amendments to assist the Prisoners Review Board in meeting its reporting obligations. Clause 6, which amends section 12, allows the Prisoners Review Board to report on individual

prisoners of its own accord whenever it thinks fit, rather than whenever it considers that there are special circumstances for doing so.

Clause 7 amends section 12A and clause 8 inserts a new section 12B, which allows the Prisoners Review Board to combine the reviews of all sentences for an individual prisoner; that is, if a schedule 3 prisoner is serving more than one term of imprisonment at the Governor's pleasure, or an indefinite or life sentence, the Prisoners Review Board may provide one report in satisfaction of both sections 12 and 12A of the Sentence Administration Act. This is not only more efficient, but also reduces the administration created by the current reporting requirements without prejudicing the interests of the prisoner concerned. It will also ensure that offenders serving multiple sentences do not become entitled to more frequent reports than prisoners serving only one sentence. This approach will obviate the need for the Prisoners Review Board to undertake a review and report in circumstances the prisoner has another sentence that precludes his or her release.

This bill proposes to strike a balance in sentencing between protecting the community from serious violent offenders—often repeat offenders—and, in this, joins other government initiatives such as the recent Criminal Law Amendment (Home Burglary and Other Offences) Act 2015 aimed at achieving this goal and providing more sentencing options for the courts in dealing with the vast majority of cases that come before the courts that are generally of a much less serious nature and, in this state, involve an over-representation of Aboriginal people.

Pursuant to standing order 126(1), I advise that this bill is not a uniform legislation bill. It does not ratify or give effect to an intergovernmental or multilateral agreement to which the government of the state is a party; nor does this bill, by reason of its subject matter, introduce a uniform scheme or uniform laws throughout the commonwealth.

I commend the bill to the house and I table the explanatory memorandum.

[See paper 4520.]

Debate adjourned, pursuant to standing orders.

House adjourned at 6.14 pm