Legislative Assembly

28/06/2002

Crimes Legislation Amendment (Periodic And Home Detention) Bill

Hansard

Extract

Second Reading

Mr GAUDRY (Newcastle—Parliamentary Secretary), on behalf of Mr Amery [3.55 p.m.]: I move:

That this bill be now read a second time.

Schedule 1 to the bill amends the Crimes (Administration of Sentences) Act 1999, which is the principal Act that governs the administration of sentences by the Department of Corrective Services. A number of deficiencies in the Act have come to light with respect to the operation of the periodic detention scheme and the compliance of offenders with periodic detention orders. Schedule 2 to the bill amends the Crimes (Sentencing Procedure) Act 1999, which governs sentencing procedures including the procedure for sentencing to imprisonment by way of periodic detention and home detention those offenders who are eligible and suitable for these diversionary programs. The Government believes that the criteria for eligibility and suitability of offenders for periodic detention and home detention need to be tightened to protect the integrity of those schemes and thereby increase compliance with periodic detention orders and home detention orders.

I shall now outline the more important changes being made. Section 87 of the Crimes (Administration of Sentences) Act 1999 governs the granting of leave of absence to a periodic detainee. The Commissioner of Corrective Services may grant leave of absence to a detainee for health reasons, or on compassionate grounds, or on the ground that the offender is in custody, or for any reason the commissioner thinks fit, so that such leave becomes authorised leave. Existing section 87 (3) allows a periodic detainee to apply for leave of absence up to seven days after the beginning of a detention period. Existing section 87 (3) means, therefore, that a detainee's absence cannot be regarded as unauthorised until the lapse of seven days from the day on which the detainee failed to report for periodic detention. Consequently, there is at present a delay of at least seven days—and effectively 10 days for weekend detainees—between the day on which a detainee fails to report and the day on which the commissioner is able to apply to the Parole Board for revocation of the detainee's periodic detention order.

The amendment to section 87 will remove this delay by requiring a periodic detainee who is unable to report for a detention period to notify the Department of Corrective Services by phone advising their inability to attend before the detention period commences. The seven-day period to submit a written application will apply to only those detainees who first provide notification by phone—any detainee who does not make the telephone call before the beginning of a detention period may be regarded as absent without leave immediately. The written application must contain documentary evidence, such as a medical certificate, to justify the detainee's absence.

However, there may be instances when a periodic detainee cannot telephone in advance to advise their inability to attend a detention period. Existing section 93 already provides a safeguard by allowing a detainee to apply to the Parole Board for a direction that leave of absence be granted in respect of a detention period where the commissioner has previously refused it. Of course, the detainee needs to convince the Parole Board why it should make such a direction—and that will not change. As a further safeguard, new section 175 (1A) allows the Parole Board to rescind a revocation which results from unauthorised leave of absence if satisfied that it would be manifestly unjust not to rescind the revocation or if satisfied that the revocation was made on the basis of false, misleading or irrelevant information.

I shall give two examples of the kind of situations which may lead to the Parole Board exercising its powers under new section 175 (1A). First, if a detainee did not telephone because he was in hospital in a coma, and his periodic detention order was revoked for that unauthorised absence, the Parole Board could rescind that revocation on the "manifestly unjust" ground. Likewise, if a detainee did, in fact, telephone the Department of Corrective Services to advise of an unavoidable absence but the department attributed the telephone call to another detainee by the same or similar name and revoked the detainee's periodic detention order on the basis of that absence, the Parole Board could rescind that revocation because the information on which the revocation was based—namely, that the detainee had not telephoned—was false.

The amendment to section 163 (1B) makes it clear that if the Parole Board revokes a periodic detention order on health or compassionate grounds the board may only make such other orders as are sought by the commissioner and which the board considers appropriate. Only the commissioner can make such an application, though of course a periodic detainee may request that the commissioner do so in appropriate circumstances. New sections 163 (1C), 165 (3), 167 (6) and 168A (4) all apply where an offender who is subject to a periodic detention order or home detention order is subsequently sentenced to a term of full-time imprisonment which is yet to commence. These new sections provide that the Parole Board must revoke any existing periodic detention order or

home detention order, and must not rescind such a revocation order or reinstate a periodic detention order or home detention order that has previously been revoked in respect of such an offender.

The amendment to section 163 (2) (a) makes it clear that if a periodic detainee has failed to report for three or more detention periods without authorised leave of absence, the Parole Board must revoke the detainee's periodic detention order on the application of the Commissioner of Corrective Services, regardless of whether the three unauthorised absences occur in one sentence or in consecutive sentences. New section 175 (1A) provides that the Parole Board cannot rescind a revocation order that it has made under section 163 (2) (a), that is, on the basis of three unauthorised absences.

For instance, a detainee serving two consecutive sentences of three months periodic detention who accrues two unauthorised absences during the first three months sentence must have his or her periodic detention order revoked in respect of the second sentence on the application of the commissioner after one more unauthorised absence—the slate is not wiped clean just because one sentence has been served. This requirement places such a detainee in the same position as a detainee serving just one sentence of six months periodic detention whose periodic detention order would be revoked if he or she were absent without authorisation on the same dates as the first-mentioned detainee. The Commissioner of Corrective Services has a discretion to apply to the Parole Board under section 163 (2) for revocation of a periodic detention order when the detainee concerned has accrued three unauthorised absences. New section 163 (2A) requires the commissioner to apply for revocation of a periodic detention order if the detainee concerned has accrued three consecutive unauthorised absences.

New section 163 (3A) restricts the power of the Parole Board to defer making a decision on the commissioner's application for revocation on the basis of three unauthorised absences. Under new section 163 (3A), the board will only be able to defer making a decision if it wishes to obtain further information such as verification of the reason for an application for leave which the commissioner has rejected. The Government believes that offenders who flout their periodic detention orders by failing to attend periodic detention should reap the consequences of their behaviour swiftly and surely. The amendments streamlining the revocation procedure for unauthorised absences and making revocation mandatory for three consecutive unauthorised absences promotes the integrity of the sentencing process by ensuring that offenders sentenced to periodic detention actually attend periodic detention as required by their sentence or suffer the consequences.

Those consequences are severe. Currently, if an offender's periodic detention order is revoked, unless he or she is eligible and found suitable for home detention the offender must serve all of the non-parole period of their sentence in full-time imprisonment. For instance, a detainee sentenced to two years imprisonment by way of periodic detention, with a non-parole period of 18 months, whose periodic detention order is revoked after six months must serve at least the remaining 12 months of the non-parole period in full-time imprisonment—not just the equivalent time that they would have been detained two days per week over the remaining 12 months. On the other hand, the Government believes that an offender who does suffer the consequence of failing to attend periodic detention by having a periodic detention order revoked should be able to learn a lesson from that experience and have a second chance to comply with the periodic detention order.

New section 164A is an important initiative which allows periodic detainees a second chance. This section allows the Parole Board to reinstate a periodic detention order that it has revoked if the offender concerned has since served at least three months full-time imprisonment and has been re-assessed as suitable for periodic detention. New section 164A reflects existing section 168A, which enables the Parole Board to reinstate a home detention order that it has revoked after the offender has served at least three months full-time imprisonment. Section 168A was inserted by the Crimes (Administration of Sentences) Amendment Act 2000. The New South Wales Law Society suggested at the time that the Parole Board should also be able to reinstate a previously revoked periodic detention order, and the Government agrees. In applying consistency to periodic detention orders and home detention orders, it is appropriate that the Parole Board have identical powers with respect to the revocation and reinstatement of periodic detention orders and home detention orders.

I wish to emphasise that under new section 164A reinstatement of a periodic detention order by the Parole Board will not be automatic. The detainee must apply for reinstatement and must again be assessed as suitable for periodic detention—and the assessment will address the reason the periodic detention order was revoked in the first place. If, for example, the revocation was based on unauthorised absences the assessment will consider whether the detainee's current circumstances make him or her more likely to attend than previously. The Parole Board will retain a discretion whether or not to reinstate a previously revoked periodic detention order, in the same way the board retains such a discretion under section 168A in respect of the reinstatement of a home detention order.

Section 168A has also been amended. As I have mentioned, section 168A currently allows the Parole Board to reinstate a revoked home detention order after the offender concerned has served three months full-time imprisonment. New section 168A (1A) provides that where a home detention order was made under section 165, which allows the Parole Board to make a home detention order in lieu of a revoked periodic detention order, and the board has subsequently also revoked the home detention order, the Parole Board may reinstate the original revoked periodic detention order rather than the subsequently revoked home detention order.

Some members may at first consider that new section 168 (1A) gives an offender too many chances. After all, the new section will mean that an offender may breach a periodic detention order and a home detention order and still have the original periodic detention order reinstated. I wish to make it clear that, firstly, such a scenario will happen only rarely. Secondly, the offender concerned will have served at least three months full-time imprisonment before reinstatement can be considered. Thirdly, and most importantly, such an offender will return to periodic detention only after the Parole Board, an independent statutory authority chaired by a retired judge, has carefully considered all relevant reports and has decided that the offender should return to periodic detention, the original

sentence considered most appropriate by the sentencing court.

Members should also bear in mind that in some instances home detention orders are revoked not because of a breach by the detainee, but because one or more of the detainee's co-residents withdraws their consent for the detainee to reside with them, and the detainee is unable to find alternative accommodation suitable for the home detention scheme. In these circumstances it would be unjust if the only alternative was to send the offender to full-time imprisonment. Section 165 has itself been redrafted to clarify that the term "remainder of the sentence to which the periodic detention order relates" includes the non-parole period of a sentence in some circumstances but excludes the non-parole period of a sentence in other circumstances.

New section 165AA has been inserted to replace existing section 165 (3), which states that the Parole Board may "stay the execution of the offender's sentence" when the board refers the offender for assessment for home detention. New section 165AA provides that the Parole Board may make a temporary release order with respect to an offender whose periodic detention order it has revoked pending its decision whether or not to make a home detention order. The new section states that a temporary release order extends an offender's sentence—and the non-parole period of the sentence, if applicable—by the period for which the offender is absent from custody pursuant to the temporary release order and, in the case of an offender for whom a warrant of imprisonment is issued under section 181, by the period between the issue of the warrant and the offender being taken into custody. Section 181 has been amended consequent to new section 165AA.

I now turn to proposed amendments to the Crimes (Sentencing Procedure) Act 1999. The Department of Corrective Services has advised me that in recent years there has been a significant shift in the type of offender being sentenced to imprisonment by way of periodic detention. There is now a significant "gaol culture" within periodic detention centres due to the sometimes lengthy periods of full-time custody many detainees have previously served. The Government believes that periodic detention is not an appropriate sentence for hardened criminals, and that the periodic detention scheme can be improved if unsuitable offenders are excluded from it.

New section 65A of the Crimes (Sentencing Procedure) Act 1999 provides that an offender who has previously served full-time imprisonment for more than six months is not eligible for periodic detention. Section 66 of the Crimes (Sentencing Procedure) Act 1999 sets out factors of which a court must be satisfied before making a periodic detention order. Similarly, section 78 sets out factors of which a court must be satisfied before making a home detention order. To assist it in considering these factors, a court obtains an assessment report from the Probation and Parole Service on the suitability of the offender concerned for periodic detention or home detention, as the case may be. The Department of Corrective Services informs me that all assessment reports for periodic detention and home detention contain a statement that the offender is assessed as either suitable, or not suitable, for periodic detention or home detention, as the case may be.

The amendments to section 66 and 78 provide that when a court deals with an offender contrary to the Probation and Parole Service's assessment report the court must indicate to the offender its reasons for departing from the assessment report and must also make a formal record of those reasons. For instance, if the assessment report states that an offender is not suitable for periodic detention but the court nevertheless sentences the offender to imprisonment by way of periodic detention, then the court must give reasons for doing so. Thus, while judicial officers will retain their existing powers in the sentencing process, they will have to give reasons for proceeding contrary to an assessment report. The requirement to give reasons regarding an offender's suitability for a sentencing outcome will enhance the transparency of the sentencing process.

New section 80 (1A) emphasises that home detention is not to be used as a sentencing option when an offender might appropriately be dealt with by way of periodic detention. Thus, where a court refers an offender for assessment by the Probation and Parole Service as to suitability for both periodic detention and home detention, the assessment as to suitability for periodic detention is to be completed first and, if the offender is found to be suitable for periodic detention, no assessment as to suitability for home detention is to be completed. The amendment to section 80 (1A) effectively recognises the principle stated in section 4 (2) of the former Home Detention Act 1996. That section states:

> It is not the object of this Act to divert to home detention offenders who might be appropriately dealt with by way of periodic detention or by a non-custodial form of sentence.

I commend the bill to the House.