Crimes (Sentencing Procedure) Amendment (Standard Minimum Sentencing) Bill

Second Reading

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Second Reading

The Hon. CARMEL TEBBUTT (Minister for Community Services, Minister for Ageing, Minister for Disability Services, Minister for Juvenile Justice, and Minister Assisting the Premier on Youth) [9.22 p.m.]: I move:

That this bill be now read a second time.

I seek leave to have the second reading speech incorporated in *Hansard*.

Leave granted.

The Government is pleased to introduce the Crimes (Sentencing Procedure) Amendment (Standard Minimum Sentencing) Bill. On 4 September 2002 the Premier announced the release of a consultation draft of the bill for public debate. A number of well-considered and constructive submissions on the draft bill were submitted during the consultation period. All submissions have been closely considered by senior lawyers providing advice to me on the bill, including the Solicitor General and the Crown Advocate. I am pleased to say that a number of recommendations made in submissions on the consultation draft of the bill have been incorporated in the bill. I thank all those organisations and individuals who took the opportunity to make a submission.

At the outset I wish to make it perfectly clear that the scheme of sentencing being introduced by the Government today is not mandatory sentencing. The scheme being introduced by the Government today provides further guidance and structure to judicial discretion. These reforms are primarily aimed at promoting consistency and transparency in sentencing and also promoting public understanding of the sentencing process. By preserving judicial discretion we ensure that the criminal justice system is able to recognise and assess the facts of an individual case. This is the mark of a criminal justice system in a civilised society. By preserving judicial discretion we ensure that when, in an individual case, extenuating circumstances call for considerations of mercy, considerations of mercy may be given.

In great contrast, the mandatory sentencing scheme proposed by the Opposition is a system that imposes the same penalty on all offenders, no questions asked. What the Leader of the Opposition proposes is not justice. As I have said in the House before, what he proposes is sentencing delivered by a slot machine. The Leader of the Opposition peddles a legal system in which the facts of any case simply do not matter, where sentences will be decided more often behind closed doors by the prosecutors, and not in open court by a judge. He wants to make judicial discretion a crime. Studies have also shown that mandatory sentencing laws have a disproportionate effect on both young offenders and indigenous people.

The Leader of the Opposition insists on pursuing those shallow and sensationalist proposals in full knowledge that they go against the weight of well-respected and considered legal and sociological opinion both in Australia and around the world. A report from the Law Council of Australia in September 2001 concluded that mandatory sentencing laws imposed unacceptable restrictions on judicial discretion, were an ill-conceived means of addressing crime rates and have resulted in unjust sentences when applied in other jurisdictions. The Commonwealth Senate Legal and Constitutional References Committee recently stated:

> ... mandatory minimum sentencing is not appropriate in a modern democracy that values human rights, and it contravenes the Convention on the Rights of the Child.

These views are confirmed from numerous other international sources. The injustice that will flow from the Leader of the Opposition's proposals for mandatory sentencing is well demonstrated by taking some examples. Under the mandatory sentencing proposals of the Leader of the Opposition an offender with a long criminal record who cold-bloodedly plots and plans his crime will receive the same sentence as a young impetuous offender. The Leader of the Opposition proposes a system whereby the victim, subjected to prolonged physical or sexual abuse who finally snaps and turns on their abuser and kills them, or the loving elderly husband who assists in the mercy killing of his terminally ill wife will receive the same sentence as an armed robber who kills in cold-blood in the course of carrying out his evil crime. The potential for unjust and grotesque results is self-evident.

The Leader of the Opposition dishonestly seeks to suggest that obscene results will never occur in cases such as mercy killings because the offender will not be charged with murder, but with manslaughter. In making such a suggestion he once again demonstrates his complete ignorance of the operation and practise of the criminal law. If a person kills another with an intent to kill that person or to inflict grievous bodily harm upon that person, in almost every such case the person will be charged with murder. The battered wife who, after years of physical abuse at the

hands of her husband, is provoked into killing him, will in almost every case be charged with murder, not manslaughter. Under our system of criminal justice invariably it is left to a jury, not the prosecutor, to decide whether the killing was a reasonable response in the circumstances and whether provocation at law is established to reduce the charge from murder to manslaughter.

The law imposes very strict criteria that must be met before provocation is established. If the battered wife is unable to meet the strict legal test of provocation, she will be convicted of murder. Under the Leader of the Opposition's mandatory sentencing regime she will be sentenced to 15 years gaol and, in his words, "no questions asked", with absolutely no mitigation. The Leader of the Opposition proposes a system under which no offender will ever have an incentive to plead guilty. This will mean that there will be more trials and these trials will be longer, meaning additional costs to the criminal justice system. This will also mean that victims of crime will be unnecessarily subjected to the ordeal of testifying and being cross-examined at a trial.

The trauma for victims does not stop there. Under the Coalition's proposals there will be increased numbers of outright acquittals as a result of the reluctance of juries to convict. It has been the experience in other jurisdictions that juries, and indeed judicial officers, have been found regularly to nullify laws and penalties that seem to them to be unjust, thereby completely subverting mandatory sentencing laws. It will turn trials into games of all or nothing. The Leader of the Opposition states that his proposals would make sentencing more consistent. The truth is that mandatory sentencing does not promote greater consistency by abolishing judicial discretion; discretion is simply given to others outside the court and beyond the public view—namely, to prosecutors. That is to say, mandatory sentencing laws will lead to a less transparent criminal justice system.

The Government's bill establishes a new sentencing scheme in new division 1A, part 4, of the Crimes (Sentencing Procedure) Act 1999—the principal Act—by setting standard non-parole periods for a number of specified serious offences set out in a table in the bill. Under the bill the court is to set the standard non-parole period as the non-parole period for the offence unless the court determines that there are reasons for setting a non-parole period that is longer or shorter than the standard non-parole period for the offence. The bill also constitutes a New South Wales Sentencing Council to advise the Attorney General in connection with sentencing matters. As I have said, the reforms in the bill are aimed primarily at promoting consistency and transparency in sentencing and promoting public understanding of the sentencing process.

A fair, just and equitable criminal justice system requires that sentences imposed on offenders be appropriate to the offence and the offender, that they protect the community and help rehabilitate offenders to prevent them from offending in the future. The imposition of a just sentence in the individual case requires the exercise of a complex judicial discretion. The sentencing of offenders is an extremely complex and sophisticated judicial exercise. The High Court has described the various purposes and the necessary complexity of the sentencing exercise in the following terms:

> The purposes of criminal punishment are various: protection of society, deterrence of the offender and of others who might be tempted to offend, retribution and reform. The purposes overlap and none of them can be considered in isolation from the others when determining what is an appropriate sentence in a particular case. They are guideposts to the appropriate sentence but sometimes they point in different directions.

That is a quote from the judgment in *Veen v The Queen (No. 2)* from page 465 of 164 Commonwealth Law Reports by Chief Justice Mason and Justices Brennan and Dawson and also from the judgement of Justice Toohey at page 476. By introducing a regime of standard non-parole periods for a specified number of serious offences the Government will ensure not only greater consistency in sentencing but also that proper regard is given to the community expectation that punishment is imposed that is commensurate with the gravity of the crime. In conjunction with this proposed legislation the Government will continue to support the use of guideline judgments given by the Court of Criminal Appeal. Guideline judgments are another extremely useful tool in achieving consistency in sentencing and in taking into account community expectations as to the appropriate penalty to be imposed. The legislative and constitutional validity of guideline judgments in New South Wales was recently affirmed by the Court of Criminal Appeal in *R v Whyte*, New South Wales Court of Criminal Appeal 2002, page 343.

The issuing of guideline judgments has had, with respect to a number of offences, a significant impact in achieving both increases in the penalties imposed by the courts as well as overall consistency in sentencing. In particular, guideline judgments with respect to the offences of armed robbery, dangerous driving causing death or grievous bodily harm, and break, enter and steal have had a very positive impact in these areas. It is proposed that the guideline judgments already promulgated by the Court of Criminal Appeal should continue to be used by the courts when sentencing for these offences. Guideline judgments will also continue to play an important role with respect to offences that are not part of the standard non-parole period scheme. For example, I recently filed applications in the Court of Criminal Appeal for guideline judgments with respect to the offence of assault police and also in relation to taking account of other offences in sentencing. The court is to hear those applications shortly. I have also filed an application for a guideline judgment with respect to the offence of driving with a high-range prescribed concentration of alcohol. A hearing date for that application is expected to be set shortly.

I will now consider in detail some of the bill's more important provisions. The bill inserts a new section 3A into the principal Act, which sets out the purposes for which a court may impose a sentence on an offender. These purposes are to ensure that the offender is adequately punished for the offence; to prevent crime by deterring the offender and other persons from committing similar offences; to protect the community from the offender; to promote the

rehabilitation of the offender; to make the offender accountable for his or her actions; to denounce the conduct of the offender; and to recognise the harm done to the victim of the crime and the community. The bill also recasts existing section 21A of the principal Act with a new section that sets out clearly identified and well-recognised aggravating and mitigating factors to be taken into account by sentencing courts in determining the appropriate sentence for an offence, if those circumstances are relevant and known to the court.

The court is also required to take into account any other objective or subjective factor that affects the relative seriousness of the offence. The requirement in proposed section 21A for a court to take into account aggravating and mitigating factors and other matters applies in sentencing for all offences, not just to offences that are subject to a standard non-parole period under proposed division 1A, part 4 of the principal Act. The identification of aggravating and mitigating factors in proposed subsections 21A (2) and (3) restate the application of such factors to the sentencing exercise as they presently apply at common law. This is made clear by proposed subsection 21A (1), which provides that the court is to take into account the aggravating and mitigating factors referred to in subsections (2) and (3) of section 21A "which are relevant and known to the court". For example, the aggravating factor under proposed subsection 21A (2) (d) that "the offender has a record of previous convictions" is to be taken into account if that factor is relevant to the sentencing exercise.

In the case of Veen (No. 2) in the High Court the majority stated how the antecedent criminal history of an offender can be relevant to sentencing. The majority stated that such a history can be relevant when it illuminates the moral culpability of the offender in the instant case or shows a dangerous propensity or a need to impose condign punishment to deter the offender and other offenders from committing similar offences. Proposed section 21A (4) provides that a sentencing court is not to have regard to any aggravating or mitigating factor specified in the section if it would be contrary to any Act or rule of law to do so. This provision makes it clear, for example, that a rule of law such as that expressed in *The Queen v De Simoni*, 1981, 147 Commonwealth Law Reports, page 383, is not affected. In the case of De Simoni the High Court held that a sentencing court may not take into account circumstances of aggravation that would have warranted a conviction for a more serious offence for which the offender was not charged. The De Simoni principle is further preserved by the operation of the concluding words of proposed section 21A (2).

Proposed section 21A (5) makes it clear that the fact that a specified aggravating or mitigating factor is relevant and known to the court does not require the court to automatically increase or reduce the sentence. Not all subjective factors present in a particular case will automatically result in the reduction or increase of a sentence. For example, the courts have consistently held that issues of youth, mental disability or cultural background will not in every case lead to a reduction of a sentence by way of mitigation. It is a well-accepted principle of sentencing that in the case of youth, general deterrence and public denunciation usually play a subordinate role to the need to have regard to individual treatment aimed at rehabilitation. However, as the Court of Criminal Appeal recently reaffirmed in *Regina v AEM (Snr)*, *Regina v KEM*, *Regina v MM* (2002) New South Wales Court of Criminal Appeal Reports at page 58, there is a point at which the seriousness of the crime committed by a youth is of such a nature, is so great, that that principle must, in the public interest, give way.

As the High Court stated in the case of Veen (No. 2) the various purposes of punishment are guideposts to the appropriate sentence. These guideposts sometimes point in different directions. For example, the existence of a causal relationship between the commission of an offence and an offender's mental disability does not automatically produce the result that the offender will receive a lesser sentence. The presence of a mental disability in an offender may, in a particular case, be given little weight because of the overriding need to protect the community. This principle has been affirmed in a series of decisions of the Court of Criminal Appeal in New South Wales in *Regina v James Peter Engert* (1995) 84 Australian Criminal Reports at page 67, *Regina v Wright* (1997) 97 Australian Criminal Reports at page 48 and *Regina v Mitchell* (1999) 108 Australian Criminal Reports at page 85.

The bill replaces existing section 44 of the principal Act with a new section that requires the sentencing court to set a non-parole period for the sentence before setting the balance of the term of the sentence—that is, the period during which the offender may be released on parole. The balance of the term of the sentence must not exceed one-third of the non-parole period for the sentence, unless the court decides that there are special circumstances for it being more. Current section 44 requires the court to set the total sentence and then fix the non-parole period. The replacement of the existing section is a necessary consequence of the introduction of the scheme of standard non-parole sentencing. The effect of proposed section 44 is to maintain, by a different method of calculation, the existing presumptive ratio between the non-parole period of a sentence and the period during which the offender may be released on parole.

The bill inserts a new division 1A—sections 54A to 54D—into part 4 of the principal Act. The proposed division provides for standard non-parole periods for a number of serious offences listed in the table to the division. Proposed section 54A provides that the standard non-parole period for an offence is the non-parole period set out opposite the offence in the table. The offences specified in that table include murder, wounding with intent to do bodily harm or resist arrest, certain assault offences involving injury to police officers, certain sexual assault offences, sexual intercourse with a child under 10 years of age, certain robbery and break and enter offences, car-jacking, certain offences involving commercial quantities of prohibited drugs and unauthorised possession or use of a firearm.

The standard non-parole periods set out in the table to the bill have been set taking into account the seriousness of the offence, the maximum penalty for the offence and current sentencing trends for the offence as shown by sentencing statistics compiled by the Judicial Commission of New South Wales. The community expectation that an appropriate penalty will be imposed having regard to the objective seriousness of the offence has also been taken

into account in setting standard non-parole periods. The bill provides in section 54A (2) that the standard non-parole period for an offence represents the non-parole period for an offence in the middle of the range of objective seriousness for such an offence. The standard non-parole period provides a reference point or benchmark within the sentencing spectrum for offences that are above or below the middle of the range of objective seriousness for such an offence.

The concept of a sentencing spectrum is well known to sentencing judges and criminal law practitioners. The first important point of reference which must be considered in the sentencing exercise is the maximum penalty for an offence. The maximum penalty is said to be reserved for the "worst type of case falling within the relevant prohibition": *Regina v Tait and Bartley* (1979) 46 Federal Law Reports at page 386, the decision of Justices Brennan, Deane and Gallop at page 398. However, as the High Court observed in Veen (No. 2) at page 478, this does not mean that "a lesser penalty must be imposed if it be possible to envisage a worse case ...". At the other end of the sentencing spectrum lie cases which might be described as the least serious or trivial.

The new sentencing scheme proposed in the bill introduces a further important reference point, being a point in the middle of the range of objective seriousness for the particular offence. The identification of a further reference point within the sentencing spectrum will provide further guidance and structure to the exercise of the sentencing discretion. Every sentencing exercise necessarily involves the identification by the court of where the offence lies in the spectrum of objective seriousness. In *Ibbs v The Queen* (1987) 163 Criminal Law Reports at page 447 the High Court referred at pages 451 and 452 to the need for a sentencing judge to identify where in the spectrum of objective seriousness an offence lies. Chief Justice Spigelman recently restated this principle in *Thorneloe v Filipowski* (2001) 52 New South Wales Law Reports, page 60 at page 69. The Chief Justice referred again to the principle in the case of Whyte when his Honour stated:

> However, in this State the principle of proportionality identified in Veen v The Queen (1978-1979 143 CLR 458 esp at 490; Veen v The Queen [No.2] (1987-1988) 164 CLR 465 esp at 472-3, 476 has long been held to permit, indeed to require, that a sentence should be proportionate to the objective gravity of the offence. This necessarily requires a sentencing judge to consider, at some stage in the reasoning process, the sentence that is appropriate for the particular circumstances of the crime without reference to the subjective case of the particular offender.

This principle was also enunciated by Justice Howie of the New South Wales Supreme Court in *R v Moon* (2000) New South Wales Court of Criminal Appeal Reports, page 534 at [67]-[68]. His Honour stated that after first having regard to the maximum penalty for the offence, a sentencing judge must then "consider where in the range of the conduct covered by the statutory offence, the particular criminal conduct committed by the offender falls". Proposed section 54B (2) provides that a court sentencing an offender to imprisonment for an offence set out in the table to the proposed division is to set the standard non-parole period as the non-parole period for the offence unless the court determines that there are reasons for setting a non-parole period which is longer or shorter than the standard non-parole period. Under proposed section 54B (3) the reasons for which the court may set a non-parole period longer or shorter than the standard non-parole period are only those matters referred to in proposed section 21A.

The court must make a record of its reasons for increasing or reducing the standard non-parole period, and must identify in the record of its reasons each factor to which it had regard—proposed section 54B (4). Under the bill the sentencing process remains one of synthesis of all the relevant factors in the circumstances of the case. The requirement for a court to identify each factor that it takes into account does not require the court to assign a numerical value to such a factor. That is, proposed section 54B does not require a court to adopt a mathematical or multi-staged approach to sentencing. Proposed section 54C requires a court that imposes a non-custodial sentence for an offence set out in the table to the proposed division to make a record of its reasons for doing so. The court must identify in the record of its reasons each mitigating factor that it took into account in coming to that decision.

Proposed section 54D provides that standard non-parole periods do not apply to the sentencing of an offender to imprisonment for life or for any other indeterminate period, or to detention under the Mental Health (Criminal Procedure) Act 1990. The Government recognises, however, that the question of the application of traditional sentencing principles to sentencing dispositions and detention under the Mental Health (Criminal Procedure) Act 1990 is a complex one. Accordingly, I have referred the question of whether the proposed standard non-parole period sentencing scheme should apply to sentencing dispositions and detention under that Act to the Mental Health (Criminal Procedure) Act Interdepartmental Committee, which is convened by the Criminal Law Review Division of my department.

Under proposed section 54D (2) standard non-parole periods do not apply if the offence for which the offender is sentenced is dealt with summarily. By way of consequential amendment, the bill excludes offences that are subject to standard non-parole periods from section 45 of the principal Act. That section enables a court sentencing an offender to imprisonment to decline to set a non-parole period. That is, the offender will serve the entire sentence in detention with no period of parole. The proposed amendment avoids the possibility that an offender sentenced under section 45 for an offence subject to a standard non-parole period would be subject to a shorter total sentence than an offender who was sentenced for the same offence under proposed section 44. The bill also inserts a new part 8B, sections 100I-100L, into the principal Act. The proposed part constitutes a New South Wales Sentencing Council.

The Sentencing Council is to have the following functions: advising and consulting with the Attorney General in relation to offences suitable for standard non-parole periods and their proposed length; advising and consulting with the Attorney General in relation to offences suitable for guideline judgments and the submissions to be made by the

Attorney General on an application for a guideline judgment; monitoring and reporting annually to the Attorney General on sentencing trends and practices, including the operation of standard non-parole periods and guideline judgments; and, at the request of the Attorney General, preparing research papers or reports on particular subjects in connection with sentencing.

The Sentencing Council is to consist of 10 members appointed by the Attorney General, of whom one is to be a retired judicial officer, one is to have expertise or experience in law enforcement, and three are to have expertise or experience in criminal law or sentencing—including one person who has expertise or experience in the area of prosecution and one person who has expertise or experience in the area of defence—one is to be a person who has expertise or experience in Aboriginal justice matters and four are to be persons representing the general community, of whom two are to have expertise or experience in matters associated with victims of crime.

The bill inserts a new schedule 1A into the principal Act. Proposed schedule 1A contains provisions relating to the membership and procedure of the Sentencing Council. The Government is confident that this new Sentencing Council will provide an invaluable opportunity for the wider community to make a major contribution to the development of sentencing law and practice in New South Wales. It is not proposed at this time to include "attempt" offences, other than "attempt murder" offences, within the standard non-parole sentencing scheme. However, I propose to refer the question of whether "attempt" offences should be included in the scheme to the Sentencing Council for its consideration when it is constituted.

A new section 106 of the principal Act requires the Attorney General to review the amendments proposed by the bill relating to standard non-parole periods as soon as possible after two years and to report the results of the review to Parliament. The bill inserts a new section 101A in the principal Act that provides that a failure to comply with a provision of the principal Act may be considered by an appeal court in any appeal against sentence even if the Act declares that the failure to comply does not invalidate the sentence. The proposed section ensures that the courts are not relieved of the obligation to comply with the principal Act with respect to standard non-parole periods or other matters, but protects the validity of any sentence until such time as the matter is considered by an appeal court.

The bill also amends provisions of the principal Act and the Children (Criminal Proceedings) Act 1987 dealing with the suspension of a sentence of imprisonment. These amendments are consequential to the substitution of section 44 of the principal Act by the proposed Act. The bill also increases the maximum penalties for the offences of sexual intercourse with a child under 10 years of age, and attempted sexual intercourse with a child under 10 years of age—sections 66A and 66B of the Crimes Act 1900—from 20 years to 25 years imprisonment. These are abhorrent offences which call for the strongest denunciation by way of punishment. We must do all within our powers to protect young children from the evils perpetrated by sexual predators. The Government, therefore, believes that it is appropriate to increase the maximum penalties for these offences to reflect community values and expectations with respect to the protection of young children.

The Government further considers that it is appropriate to include the offence under section 66A in the standard non-parole sentencing scheme. That offence is, therefore, included in the table to the bill. A comprehensive review of child sexual assault legislation in New South Wales recently undertaken by the Criminal Law Review Division of my department revealed a number of inconsistencies and anomalies in maximum penalties for child sexual assault offences. For example, the offences of sexual intercourse and attempted sexual intercourse with a child under 10 years carry a maximum penalty of 20 years imprisonment. However, the offence of homosexual intercourse with a child under 10 years carries a maximum penalty of 25 years, whereas the offence of attempted homosexual intercourse with a child under 10 years carries a maximum penalty of only 14 years imprisonment.

The amendments to the Crimes Act 1900 proposed in the bill rationalise the maximum penalties for these offences by providing the same maximum penalty of 25 years imprisonment for sexual intercourse and attempted sexual intercourse with a child under 10 years regardless of whether the assault was homosexual in nature. In line with this rationalisation, the gender-specific and anachronistic offences of homosexual intercourse and attempted homosexual intercourse with a child under 10 years—sections 78H and 78I of the Crimes Act—will be repealed. This will mean that all sexual assault offences against children under 10 years of age will be brought under the same non-gender specific provisions. As I have said, the bill seeks to meet the community's legitimate expectation that the courts should impose sentences that are appropriate to the gravity of the offences. I commend the bill to the House.

The Hon. JAMES SAMIOS [9.23 p.m.]: I lead for the Opposition on this bill. The bill establishes a scheme of standard and minimum sentencing for a number of serious offences and constitutes a New South Wales Sentencing Council to advise the Minister in connection with sentencing matters. The reforms are aimed at promoting consistency and transparency in sentencing and promoting public understanding of sentencing. According to the overview of the bill in the explanatory note, the bill sets standard non-parole periods for a number of serious offences. A non-parole period is said to be a period of a sentence of imprisonment during which the offender must be detained and cannot be released on parole. Under the bill the sentencing court is to set the standard non-parole period as the non-parole period for an offence. Included in the proposed scheme, unless the court determines that there are reasons for setting a non-parole period that is longer or shorter than the standard non-parole period for an offence, the court must make a record of its reasons for doing so and must identify in the record of its reasons each factor to which it had regard.

The bill also specifies the purposes of sentencing and indicates specific aggravating and mitigating factors that a court is required to take into account when determining the appropriate sentence for offences generally. The bill also

reforms the law dealing with sexual assaults on children by, first, increasing the maximum penalty for sexual intercourse or attempted sexual intercourse with a child under the age of 10 from 20 to 25 years and, second, removing two redundant offences dealing with homosexual intercourse with a child under the age of 10. The Coalition will not oppose the second reading of the bill and supports the principle of minimum sentencing. However, it has grave concerns about new section 21A and the related provisions, and new section 54C. During the Committee stage I will move an amendment to delete these provisions.

The Coalition has a policy of minimum sentencing without discretion. However, the bill, which was introduced by the Government, indicates that the Government has a policy of minimum sentencing with discretion. New section 21A refers to the famous 13 mitigating factors. Paragraphs (a) to (m) detail the mitigating factors to be taken into account when determining the appropriate sentence for an offence. In essence, the section provides 13 mitigating factors that allow judges to reduce sentences below the standard minimum: excuse 1, the offending party did not cause substantial harm; excuse 2, did not plan the crime; excuse 3, was provoked; excuse 4, was acting under duress; excuse 5, is a first-time offender; excuse 6, is of good character; excuse 7, is unlikely to reoffend; excuse 8, may be rehabilitated; excuse 9, has said "Sorry"; excuse 10, did not realise they were doing wrong; excuse 11, pleads guilty; excuse 12, gives pre-trial disclosure of their defence; and, excuse 13, assists police in investigating crime.

The Coalition believes that those mitigating factors do not serve the interests of the public in providing for a minimum sentence. For that reason, we will move an amendment to delete the provision, together with the related sections of the legislation. The Opposition will also move an amendment in regard to proposed section 54C. The Coalition stands for minimum sentences without discretion, unlike the about-turn of the Government with its policy of pseudo-minimum sentences with discretion. The current system, which the Government intends to change, has a mechanism for discretion. The Government's bill merely continues the existing practice under the guise of minimum sentencing. The Opposition believes that its position on minimum sentences is acceptable to the general public.

The Opposition's policy stipulates that a sentence will not change and will be public knowledge. The result will be twofold: potential offenders will be deterred from committing crimes because mitigating circumstances will no longer mean that they receive a lenient sentence, and those who commit serious offences will go to gaol and be punished accordingly. The Opposition will move to delete new section 21A (3) and make related and ancillary amendments. We wish to delete Labor's 13 excuses, which vary from saying "sorry" to special pleading on grounds of character. It is simply a device by which the judge can ignore the set minimum sentence and give a lesser sentence. The 13 excuses make a mockery of the concept of minimum sentencing. The Coalition is determined to show up the Government for its hypocrisy.

Under proposed section 54C a judge does not have to impose a prison sentence, provided that reasons are given. In other words, a judge can allow a criminal to go free even for murder. The judge need only give reasons. However, it is a paradox because even if the judge does not give reasons, the sentence still stands, and the Coalition has obtained legal opinion to that effect. Under Labor's much flaunted standard minimum sentencing a criminal can be convicted of any crime, walk out of the court without any reason being given, and there is no redress. Subject to the Opposition moving those amendments in Committee, it does not oppose the bill.

The Hon. HELEN SHAM-HO [9.31 p.m.]: The Crimes (Sentencing Procedure) Amendment (Standard Minimum Sentencing) Bill was introduced by the Government in response to community concerns. The Opposition has sought to compete with the Government in responding to community concerns. Many members of the public believe that serious offenders are not receiving adequate punishment under existing sentencing practices. In my view, there is no doubt that people should have a say when it comes to the punishment of criminals as too often they are the victims of crime. Therefore, it is only fair that their expectations of justice are met. However, as honourable members would be aware, the bill has been introduced against the backdrop of a highly politicised law and order debate. Both the Government and the Opposition have announced their intention to crack down on crime. Each has formulated harsher methods with which to do so. From listening to the Hon. James Samios, there is no doubt that they are trying to outdo one another.

Given that reducing crime is such a serious issue, it is critical that this debate does not get out of hand. As members of Parliament we need to approach the matter rationally and responsibly. We must be sure to look for long-term solutions that address the deeper social causes of crime. Most important, we must not use community fears for political gain. In his second reading speech the Minister said that the reforms would give members of the judiciary greater guidance when sentencing offenders and will produce a higher level of consistency in terms of actual outcomes. The bill aims to ensure that the punishment meted out by the courts reflects the seriousness of the crime. The bill differs to some extent from the consultation draft, which was released in September for a month of public debate. During that time a range of well-informed submissions were made to the Government. Amongst them were representations from the Law Society of New South Wales and the New South Wales Bar Association. Nevertheless, the overall substance of the bill has not changed.

The major reforms to be introduced by this bill are as follows. First, the bill sets out in detail the purposes of sentencing. Some examples are punishment, prevention, deterrence and rehabilitation. This aspect of the bill is not contentious so I shall not refer to it. As I understand it, it codifies the existing common law in relation to the underlying aims of sentencing. More controversial is the bill's proposed system of standard minimum sentencing. The bill provides for 20 serious offences including, among other things, murder, sexual assault, certain drug-related crimes and acts involving injury to police. It also contains the murder of workers who are more vulnerable to violence because of the nature of their employment. This group consists of members of the police force, but also covers emergency service employees, teachers, health professionals and members of the judiciary, to name a few.

For the 20 offences that are listed, the bill provides a minimum non-parole period—in other words, a base-line term that the offender should serve in prison. For example, in the case of the murder of a person in this newly created category of special workers, the standard non-parole period that the bill applies is 25 years. I point out that the statistics from the judicial information research system show that the standard minimum sentences set out under the bill are significantly longer than current average sentences. For example, the present average non-parole period for murder of ordinary individuals—those not in this special category—is 14 years. The new standard term is set at 20 years. The current average for attempted murder is five years. The bill would lift that to 10 years. Sexual assault would be lifted from two years to seven years. Further, the bill sets out a range of aggravating and mitigating factors that the court may take into account in order to lengthen or reduce the standard minimum. It is this power to depart from the standard minimum sentence that sets the scheme apart from a mandatory sentencing scheme.

I believe that this is the difference between the Government and the Opposition. I will give some examples. If an offence were committed in company the judicial officer could extend the prison term beyond the standard minimum. I assume that the Government had in mind the recent public outrage over the spate of gang rapes that took place in Sydney in 2000 when it drafted this provision.

Another aggravating factor is a hate crime or if the crime involved gratuitous cruelty. I do not have a problem with any of the aggravating factors that are listed. As I see it, all are issues that increase the moral culpability of an offender and are a further affront to the community's sense of decency and stability. In my opinion, they certainly should have some bearing on a criminal's sentence. As I said, the bill also uses a range of mitigating circumstances that the court may take into account in order to reduce the standard minimum prison term. Examples include, amongst other things, if the judicial officer is of the opinion that an individual is not likely to reoffend or shows positive prospects of rehabilitation.

In my view, only one of the mitigating factors is contentious. New section 21A (3) (j) provides that an individual's sentence may be reduced if the court finds that "the offender was not fully aware of the consequences of his or her actions because of the offender's age or any disability". The difficulty I have is that it does not explicitly include the mental condition of an offender as a mitigating factor. As a former social worker and lawyer, I know that a significant proportion of crime is committed by people with psychological or intellectual impairments. For example, the Department of Corrective Services has reported that approximately 13 per cent of our inmate population has a mental disability. Moreover, sometimes offenders who are either intellectually impaired or mentally ill are conscious of the ramifications of their acts but still do not really realise that their behaviour is wrong. I do not understand why the bill does not expressly cover other mental problems.

Still on the subject of mitigating and aggravating circumstances, members of the crossbench were briefed by representatives of the New South Wales Bar Association this morning. I have also received correspondence from this group, including a copy of its submission to the Government in relation to the original consultation draft of the bill. The Bar Association has made it clear that it opposes this bill. It concedes that the Government's bill is the lesser of two evils when compared with the Opposition's proposed mandatory sentencing regime. I am dismayed at the Opposition's response to the Minister's second reading. It is ridiculous to suggest that there should be no mitigating factors in sentencing. Over and above that, the Bar Association pointed out that the actual operation of clause 21A, which is the main provision on aggravating and mitigating circumstances, is not clear. I agree with the Bar Association. Indeed, I think the point is that the circumstances are not broad enough; they do not include the common law principles.

I understand that the Hon. Peter Breen will move an amendment that will resolve the problem. It will ensure that judicial officers will be able to refer to common law principles when determining appropriate sentences. When a court varies the non-parole period, the bill provides that it must produce reasons for the variation. In particular, the court must list any aggravating or mitigating factors, or refer to any common law principle taken into account, when arriving at the different sentence. Again, while this is not contentious, it is largely unnecessary because members of the judiciary are already obliged to write reasons for their decisions. I was surprised to hear that the Opposition proposes to delete proposed section 54C, which states that the court must give reasons if a non-custodial sentence is imposed. I do not understand why the Opposition wants to delete that provision, because judicial officers are already supposed to give reasons for imposing certain sentences. I state categorically that I will not support the Opposition's amendment.

The bill proposes to establish a 10-member strong Sentencing Council charged with advising the Attorney General in relation to sentencing issues in this State. In particular, it will make recommendations as to what other offences might be suitable for standard minimum prison terms or guideline judgments. I see this as a good and innovative approach. The Sentencing Council will bring together a diverse panel of experts and lay people alike. It will comprise one retired judicial officer, one law enforcement expert, three authorities on criminal law or sentencing, one person with knowledge or experience in indigenous justice issues, and four persons representing the general community, two of whom are to have expertise or experience in matters associated with victims of crime.

By setting up an advisory entity that deliberately provides for community representation, the Government hopes to listen more to the concerns of ordinary people. That is a good thing. It is intended that the Sentencing Council will allow members of the public to have a greater say over what constitutes justice in our criminal law system. I hope that the Sentencing Council will keep members of the judiciary abreast of the community's views and values so that more appropriate sentences will be issued.

I also received correspondence from the New South Wales Law Society regarding this bill. As I said before, the criminal law committee made a detailed submission to the Attorney General on the consultation version of the bill. In

it, the Law Society criticised the new sentencing regime on the basis that it threatened judicial discretion and stood to undermine the independence of the courts. I agree with the Law Society. Furthermore, the Law Society pointed out that research both here and abroad demonstrated that by legislating away judicial discretion governments—and now Oppositions—have actually caused injustice rather than dispensed it. Moreover, studies have shown that this lifts administration costs.

Offenders are less likely to enter guilty pleas, electing instead to go to trial. This of course costs time and money, increases court delays and strains court resources. Ultimately, this is an economic burden that the community must bear. On 30 October I received another letter from the Law Society in which it made clear that the changes that have been made to the consultation draft have done little to address its concerns. Ultimately, the Law Society has maintained strong opposition to the standard sentencing scheme from the beginning. As I said before, the Bar Association also opposes the bill. I refer honourable members to an article written by Mr Stephen Odgers, SC, who is the chair of the Bar Association's criminal law committee. The article entitled "Sentencing debate has fallen victim to political expediency" was published in the *Sydney Morning Herald* on 26 September 2002.

In the article Mr Odgers pointed out that over the past 10 years courts have in fact steadily increased average sentences. Despite that trend, there has been no decrease in crime. For many of us, this merely confirms what we already know. As I have said so many times before in this House, complex problems require complex solutions. Simply imposing harsher sentences does little to address the diverse and deeply entrenched conditions that give rise to crime. Indeed, there is strong evidence that imprisonment worsens the problem by institutionalising and brutalising inmates. Mr Odgers also referred to research that found that when people understand the entire factual context of the case and the subjective features of the offender they often set shorter sentences than judges.

This is an important point. It goes to show that the public's frustration over recent sentencing outcomes stems largely from a lack of information. I note that the New South Wales Young Lawyers criminal law committee opposes the bill as well. They too argue that the reforms reflect a lack of faith in the judiciary. They also say that despite recognising rehabilitation as a purpose of sentencing, in reality the bill overwhelmingly favours punishment and deterrence. That is absolutely true. Both the Government and the Opposition are trying to outdo one another by favouring punishment and deterrence. I do not think punishment necessarily deters as indicated by the research. Indeed, the New South Wales Young Lawyers go even further to argue that the bill ignores other settled aims of sentencing, such as proportionality, totality, parity and mercy. As I said, I have grave reservations about this bill. The Hon. Peter Breen's amendment should improve the bill, and I foreshadow my support for the amendment. I do not support this bill, but I will not oppose it by causing a division.

The Hon. IAN COHEN [9.47 p.m.]: The Greens strongly oppose the Crimes (Sentencing Procedure) Amendment (Standard Minimum Sentencing) Bill, which establishes a scheme of standard minimum sentencing. The Greens are opposed to any legislation that seeks to curb or influence judicial discretion. Judges will feel compelled to hand down the minimum sentence, even though, looking at all the circumstances of the case and the mitigating circumstances, he or she may be of the view that a lesser penalty is warranted. This bill will again lead to increased imprisonment rates, with no corresponding reduction in crime rates. Incarceration rates continue to soar under the policies of the Carr Government.

There were 6,407 inmates in 1995, when I was elected, but by 30 June 2001 there were 7,750, and that number is expected to increase to more than 8,200 for the 2002-03 financial year. The cost of holding a prisoner in gaol can be as high as $64,486, compared with $3,150 per year for community-based options. The Government is spending more than $500 million a year on maintaining prisons, which is about $80 a year for every man, woman and child in New South Wales. This figure does not include the capital cost of building extra prisons to accommodate the ever-expanding population of prisoners. The millions of dollars spent on incarcerating individuals would be much better spent on programs that reduce crime, such as early intervention programs and education and social support programs.

This bill is well on the way to mandatory sentencing-that most despicable, discredited unjust and discriminatory sentencing regime that operates in parts of Australia. While mandatory sentencing continues to operate in Western Australia, it has been wound back in the Northern Territory since the Labor Party was elected to govern there. When it was operating in the Northern Territory, mandatory sentencing led to some inhumane, cruel and frankly bizarre results. The most tragic case is that of James Wurramarrba, known as Johnno, who hanged himself a couple of days short of completing a 28-day sentence imposed for stealing stationery worth about $50. This sad young man should never have been in detention. Since his death it has emerged that he was coming off drugs and petrol. He suffered chronic headaches and was angry, lonely, moody, sometimes violent, and complained of hearing voices. He had suggested that he was mad and once threatened to kill himself.

Another case is that of an Aboriginal mother of three who walked into a flat through an open door, took food from a table in the flat and went outside and fed her children on the footpath. She was sent to gaol and her children stayed with her family. Other cases include that of a 29-year-old homeless man who stole a towel and was sentenced to 12 months in prison. It came to light during sentencing that he was cold and had used the towel to keep himself warm at night. A 22-year-old man stole biscuits and cordial and received 12 months, a 16 year old was sentenced to 28 days for receiving a bottle of stolen spring water worth $1; an 18-year-old woman got 28 days for receiving two litres of stolen petrol; and a 30-year-old man who stole two cartons of eggs was sentenced to 14 days imprisonment.

When it was operating, the Northern Territory legislation did not reduce crime rates whatsoever. Australian Bureau of Statistics figures show that in 1997, robbery and property offences fell by almost 500 cases, but when mandatory sentencing was introduced in 1998 they rose, with an 8.8 per cent increase in offences involving unlawful entry with intent, which includes burglary and break and enter offences. The same occurred in Western Australia, where the

number of property offences rose after the introduction of mandatory sentencing.

Rather than introduce minimum sentencing and mandatory sentencing, the Government could show leadership and implement a policy flagged by the New South Wales Bureau of Crime Statistics and Research [BOCSAR], which examined the idea of abolishing all prison sentences of six months or less and replacing them with non-custodial penalties such as fines, community service orders and home detention. Ross Gittins of the *Sydney Morning Herald* reported on this idea on 30 October in the following terms:

> Each of these punishments would be a lot cheaper than incarceration. The dearest of them—home detention—costs about $60 a day.
>
> The study—by Bronwyn Lind and Simon Eyland—found that most of the prisoners serving sentences of six months or less were in for less-serious offences, such as theft, minor assault or a driving or traffic offence.
>
> More than 20% of them were Aborigines or Torres Strait Islanders, even though such people make up only 2% of the overall population.
>
> It found that abolishing short sentences would reduce the number of admissions to prison by 40%—from about 150 a week to 90. And this would reduce the size of the prison population by about 10%

The Greens would support such an initiative. This bill is a comprehensive failure in its supposed attempts to improve the delivery of justice. It fails on every count. It will undermine the judicial system, fail perpetrators of crime and victims alike, and most importantly it will fail the community at large. The purpose of having magistrates and judges decide on sentencing is to ensure that each case is considered on its merits. This is a basic concept—and our criminal justice system is built around it. To undermine this aspect of our legal system is to fundamentally misunderstand what it endeavours to achieve. The Greens are strongly opposed to this bill on that basis. Many groups are opposed to this bill, and that demonstrates how ill-conceived it is. The Law Society, for example, has opposed this bill on the basis that it will undermine the traditional sentencing function of the court.

The Government claims that it will further the delivery of justice by increasing consistency in sentencing and the length of maximum sentences. Justice is not about consistency in sentencing for particular crimes. It is about the consideration of circumstances and ensuring that the punishment fits the crime. The measure of a civilised society is the way in which our society treats its most vulnerable. Often the most vulnerable members of our community are those who commit offences. In New South Wales statistics relating to the prison population show that 75 per cent of inmates have an alcohol or other drug problem, 64 per cent of inmates have no stable family and many suffered child abuse or neglect, 60 per cent are not functionally literate or numerate, 60 per cent did not complete year 10, 44 per cent are long-term unemployed, 20 per cent are homeless prior to imprisonment, 21 per cent of prisoners have attempted suicide, 25 per cent to 33 per cent of prisoners have a mental illness, and 73 per cent of female inmates were previously admitted to psychiatric or mental health units.

There has been some shocking public information recently about the state of our prisons. The *Good Weekend* reported that according to David Heilpern, a New South Wales magistrate, up to 25 per cent of young men in New South Wales gaols have been raped, some every day. Other experts interviewed by the *Good Weekend* thought Mr Heilpern's figure was conservative. Other inmates are contracting serious and sometimes fatal diseases in gaol, such as hepatitis and HIV-AIDS. Inmates, and more generally those who offend, and repeat offenders, are deserving of our compassion and they deserve to be treated fairly and to have their rights respected. The Government, in introducing this bill, is failing to appreciate how the judicial system currently aims to deliver justice at this level. By slapping a standard sentence on anyone who commits a particular crime is not justice; it is the reverse. It is draconian and backward. With this bill the Government has fallen victim yet again to populism and lowest common denominator solutions to the law and order problem.

The so-called problems with our legal system are often supported by anecdotal and ill-informed examples of judicial decision making. This bill buys into this very mentality. It is an indictment of the Government, and the Government ought to be ashamed of it. This bill, and its related regime, will only serve to increase social dislocation and add a further economic cost upon society by increasing incarceration rates, as well as diverting resources away from real and lasting solutions that could address the underlying causes of crime. For example, in September this year, an interim report was handed down after an inquiry into mental health services in New South Wales that was undertaken by a committee of this House. The report highlighted the need for a revolutionary improvement of the mental health system, as it is marred by a lack of funding, beds and qualified staff, and a total absence of services in some regional and rural areas. This shameful situation is not being tackled by the Government, and yet would be an obvious area to tackle if the Government was serious about crime prevention.

At present it is fashionable to scapegoat lawyers and the judiciary rather than face up to complex social problems. There appears to be an increasing tendency in political forums and in the popular media to denigrate lawyers, prosecutors and, in particular, the judiciary. The Government seems to enjoy buying into this populist mentality, as it makes it easier for it to win votes and to avoid having to tackle complex social problems. This is an irresponsible and pitifully short-sighted approach, and ultimately this approach will fail because it is poorly motivated. In taking this approach the Government is feeding public expectations that complex social problems can be solved by instant and poorly conceived legislative solutions—an example of irresponsible government and a style we have sadly come to expect from the current Government. The Greens have received compelling submissions from legal academics and organisations regarding this bill. For instance, Professor David Brown argued in an article published in the latest *Law Society Journal*:

The standard minimums set out constitute a significant increase in current tariff levels. They range from a 25% increase in the case of murder - from a current average non-parole period of 14 years to 20 years standard minimum - to a more than 300 per cent increase in relation to aggravated sexual assault and supply commercial quantities of drugs - from three years to 10 years. Quite how the particular minimums were arrived at is not known.

Professor Brown continued:

There are many objections to the Government's policy; for example, it will produce distorting effects elsewhere in the system, prosecutorial discretion will be enhanced, plea-bargaining pressures will increase, and the prison population will increase even further at considerable social and economic cost, expending resources which could more usefully be devoted to crime prevention and social programs.

A key object to the proposed legislation is that, at a stroke, current tariffs for a wide range of offences are being increased dramatically. Contrary to the process on a guideline sentencing application before the Court of Criminal Appeal in relation to a specific offence category, these increases cover a swathe of offences and have been formulated in secret without consulting interested parties, including the judiciary, on undisclosed criteria.

He concluded:

The Government's proposed standard minimum sentencing policy has been conceived in secrecy and haste, and amounts to a significant escalation in sentencing tariffs across a range of offences without consultation and on unarticulated criteria, and constitutes a considerable shift towards sentencing by Parliament, prey thereafter to a never-ending populist escalation.

The Bar Association opposes the bill because it imposes fetters on judicial discretion. Proposed section 54B (2) is likely to be interpreted as a statutory presumption that significantly fetters sentencing discretion; and the bill is likely to result in a substantial increase in the length of prison sentences for the nominated offences without sound policy justification. An eminent legal scholar, Stephen Odgers, SC, recently commented on the bill as follows:

In sentencing offenders, judges are expected to focus on the welfare of the community and the balance of public interests. Politicians also have an obligation to act in the public interest—not to resort to populism with expensive and ineffective panaceas, not to sacrifice what is just for political expediency.

The Greens are strongly opposed to the bill.

Debate adjourned on motion by the Hon. Dr Arthur Chesterfield-Evans.

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