Legislative Assembly

23/10/2002

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

Second Reading

Mr DEBUS (Blue Mountains—Attorney General, Minister for the Environment, Minister for Emergency Services, and Minister Assisting the Premier on the Arts) [7.30 p.m.]: I move:

That this bill be now read a second time.

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.