NSW Legislative Council Hansard

Crimes (Administration of Sentences) Amendment (Parole) Bill

Extract from NSW Legislative Council Hansard and Papers Thursday 9 December 2004.

Second Reading

The Hon. JOHN HATZISTERGOS (Minister for Justice, and Minister Assisting the Premier on Citizenship) [2.22 a.m.]: I move:

That this bill be now read a second time.

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

Leave granted.

The object of the Crimes (Administration of Sentences) Amendment (Parole) Bill 2004 is to make various amendments to the Crimes (Administration of Sentences) Act 1999 with respect to the operation of the parole system and the workings of the Parole Board, which is a statutory body. Since it was first elected, the Carr Government has continually worked to improve the New South Wales parole system. The Government is of the view that the emphasis of the parole system should be on what is right for the community. The provisions of the Crimes (Administration of Sentences) Amendment (Parole) Bill 2004 will closely align the parole system with the expectations of the community. A particular focus for the Government has been on the interests of victims of crime. Victims groups have already welcomed the proposal and are anticipating the bill.

The Government's most recent legislative improvements to the parole system were introduced by means of the Crimes Legislation Amendment (Parole) Act 2003. Among other things, the Act made changes to the composition of the Parole Board. The Act introduced a presumption in favour of parole supervision in respect of a parole order made by a court. If a court now makes a parole order and the court does not impose conditions requiring the offender to be subject to supervision, unless the court expressly states otherwise, the parole order is taken to include supervision conditions. By this means the Government has increased the number of parolees under supervision by the Department of Corrective Services' Probation and Parole Service thereby giving added protection to the community and added support to offenders. The Act also requires the Parole Board to give reasons for its decision when it decides to release an offender on parole. The board is in this way accountable to the community.

Some aspects of the 2003 Act had their genesis in the tragic death of an inmate in early 2003. The inmate had been detained beyond his release date due to an administrative error. In response to this most unfortunate occurrence, the Minister for Justice asked Mr Vernon Dalton, AM, to investigate certain aspects of the case, and Mr Dalton subsequently recommended that a number of administrative reforms be implemented to enhance the work of the Parole Board. Despite the Government's efforts, both recent and past, there remained scope for improvement to the system of parole and the workings of the Parole Board. Consequently, the Minister for Justice asked Mr Vernon Dalton to conduct a further inquiry. The Minister asked Mr Dalton to examine the structure, membership and procedures of the Parole Board and its secretariat with a view to ensuring that the board discharges its functions efficiently and effectively. Mr Dalton subsequently submitted a report for the Minister's consideration. Many of the provisions of the Crimes (Administration of Sentences) Amendment (Parole) Bill 2004 stem from the recommendations in Mr Dalton's report.

For the benefit of members, I advise that Mr Dalton is a former Chairman of the Corrective Services Commission, which was the authority under the old Prisons Act 1952 that was responsible for the administration of the Department of Corrective Services. Mr Dalton served as Chairman of the Corrective Services Commission from 14 December 1981 until 27 March 1987. After leaving this position, Mr Dalton served as the Director-General of the Department of Community Services. Following his retirement from the public sector, Mr Dalton served as chief of staff to the Hon. Virginia Chadwick, MLC, a Minister in the Greiner and Fahey Coalition governments.

Parole is a pivotal phase in the rehabilitation of an offender. The Government recognises, however, that not all offenders are eager to address their offending behaviour. The Government is of the view that an offender wanting parole should display a desire to behave lawfully and a willingness to address his or her offending behaviour. An underlying principle of the bill before the House is that parole is a privilege not a right. I shall now outline some of the more significant changes proposed in the bill. In recent years the Parole Board has acquired functions additional to its responsibilities in relation to parole. The board now determines such things as: whether to revoke a periodic detention order; whether to reinstate a revoked periodic detention order; whether to substitute home detention in place of a revoked periodic detention order; whether to revoke a home detention order; and whether to reinstate a revoked home detention order or prior revoked periodic detention order. These are important functions that the board now performs. So it is proposed that the Parole Board be renamed the State Parole Authority [SPA].

The bill also makes changes to the constitution of the proposed SPA. At present, the Secretary of the Parole Board is a member of the board. The secretary will not be a member of the SPA. The Government is of the view that, despite there being certain administrative advantages in having the secretary as a member of the SPA, it is inappropriate for the secretary to have the capacity to sit on a meeting of the SPA which deals with the substance of a particular case. The Government is, however, of the view that it is sensible for the secretary to sit on a committee which deals with purely administrative matters. The bill reflects these sentiments.

Importantly, the bill provides for at least one of the SPA's community members to be a person who, in the opinion of the Minister, has an appreciation or understanding of the interests of victims of crime. Such a community member is not to be confused with a victim's representative. Any such community member will not be an advocate for victims. The community member or members will simply add to the SPA's expertise in dealing with victims' issues. All SPA members should be cognisant of victims' issues. The inclusion of a community member or members with an appreciation or understanding of the interests of victims is intended to give victims of serious offenders, and victims generally, added confidence in the fact that their interests as victims, and in the case of victims of serious offenders, their victim's submissions, will be given appropriate consideration by the SPA in the decision-making process. The role of the SPA must be to act as a discerning group of individuals assessing parolees and acting in the public interest as the community gatekeeper.

The need to protect the community is a theme that flows through the bill. Proposed new section 135 relates to the general duty of the SPA. New section 135 (2) contains several matters that previously the SPA did not have to take into account in deciding whether the release of an offender was in the public interest. The new matters that must be taken into account are the need to protect the community, the need to maintain confidence in the administration of justice, the nature and circumstances of the offence, and guidelines established by the SPA in consultation with the Minister in relation to the exercise of the SPA's functions.

The guidelines to which I have just referred are intended to ensure that there is consistency in the process observed and outcomes derived by the variously constituted divisions of the SPA. As with the Parole Board, the SPA may be constituted into divisions to carry out its functions. Following the proposed amendment to section 184, a division of the SPA will consist of one judicial member, at least one community member, and one or more of the official members. The secretary will no longer be a member of a division. For the benefit of honourable members I advise that, for decision-making purposes, a division of the SPA is taken to be the SPA.

I wish to allay any concerns that the drafting of guidelines will encroach upon the SPA's independence. The bill provides for the guidelines to be developed by the SPA in consultation with the Minister. In contrast, the Queensland system provides for the Minister to make guidelines. The purpose of the SPA guidelines is to assist the SPA in making decisions. The guidelines are not intended to override evidence placed before the SPA, nor inhibit SPA members from exercising their discretion. The guidelines will deal with matters such as parole consideration and documents that may be provided to assist the SPA in reaching a decision. The guidelines will provide details of the kinds of things an inmate should achieve prior to being granted parole, such as a low-level security classification, which indicates acceptable behaviour and satisfactory progression in the correctional system. The guidelines will assist current and future members of the SPA to understand their role and the policy considerations that led to the development of the legislation under which the SPA is to operate.

In keeping with the emphasis on the protection of the community, new section 135 (3) provides that except in exceptional circumstances the SPA is not to release a serious offender on parole unless the Serious Offenders Review Council [SORC] advises the SPA that it is appropriate for the offender to be considered for release on parole. This provision recognises the fact that the information on which the SORC relies to prepare reports and to provide advice concerning the release on parole of an offender is accumulated over a lengthy period.

New section 135A sets out matters to be addressed in a report provided to the SPA by the Probation and Parole Service in relation to the granting of parole to an offender. The SPA will also address these factors in its decision. The Probation and Parole Service must examine such things as the risk of the offender re-offending while on parole and the measures to be taken to reduce that risk. The offender's willingness to participate in rehabilitation programs, and the offender's success or otherwise in such programs must be commented upon. The report is to address the offender's attitude to any victim of the offence, and to the family of any such victim. In section 135A the Government is ensuring that the SPA, which is essentially a decision-making body, is provided with the information that it needs from the Probation and Parole Service to make informed decisions.

I will briefly provide a description of the parole process for the benefit of honourable members who may not be familiar with the process. In the main, the Parole Board considers matters involving offenders who are serving sentences that are longer than three years for which a non-parole period has been set. The Parole Board meets in private to consider whether an offender should be released on parole. The board makes a decision on the basis of the written material placed before it. If the board decides to release an offender, and the offender is not a serious offender in respect of whom a victim wishes to make a submission, it will make a parole order. In the event that the Parole Board decides not to release an offender on parole, the offender is given the opportunity to appear before the board at a review hearing to present his or her case for parole. Offenders currently have an automatic right to appear before the board irrespective of the merits of their case.

In the case of serious offenders, there is a statutory requirement for the Parole Board to give notice to all victims of the offender whose names appear on the victims register that the board proposes to release the offender or that the board proposes not to release the offender and the offender has sought to make a submission at a review hearing. Each registered victim may then decide whether to make a submission to the board.

The Government is proposing to make changes to the procedures in respect of the consideration of an offender for parole. These changes, apart from being in the interests of general efficiency, are in the community interest and in the interests of the victims of crime. Sections 137 and 143 of the Crimes (Administration of Sentences) Act 1999 provide that, if an offender is not released on parole when the offender first becomes eligible for release, the Parole Board must reconsider the matter within each successive year unless the offender is no longer eligible for release on parole. Generally speaking, the Parole Board should reconsider each case towards the end of each subsequent 12-month period. The Parole Board is able to decline to reconsider a case for up to three years and can defer making a decision for up to two months.

In the past, the Parole Board has sometimes reconsidered cases early in the ensuing 12-month period after an offender has not been released on parole. In the Government's view, the early reconsideration of a case is contrary to the original intention of Parliament. Moreover, the practice consumes the resources of the board, the Department of Corrective Services, and the Serious Offenders Review Council when a serious offender is involved. The early consideration of cases may cause anguish to some victims. The making of a submission would be a difficult exercise for many victims.

Proposed new sections 137A and 143A will ensure that the SPA is to reconsider cases only at the end of each subsequent 12-month period. However, the bill makes provision for the different circumstances that may arise. The 12-month requirement for the reconsideration of cases will not apply where the SPA is satisfied that the offender would suffer manifest injustice if it did not reconsider the case sooner, for example where an offender who has been undertaking a required rehabilitation program completes the rehabilitation program shortly after the SPA has considered the offender's case and decided not to grant parole because the offender has not completed the required rehabilitation program.

Regulations will prescribe the circumstances that may amount to manifest injustice. The 12-month requirement for the reconsideration of cases will also apply when the SPA revokes a parole order and the parole order is not revived at the mandatory hearing to review the revocation. In cases involving parole revocation, the 12-month requirement will commence from the date on which the offender is returned to prison. In the past, the Parole Board has seen an offender in person only when the offender has sought a review of the board's decision not to grant the offender parole. New sections 137C and 143C provide that the SPA may examine an offender for the purpose of considering the offender's case should the SPA consider that such an examination would be worthwhile. The SPA is not required to examine an offender but can choose to do so.

As I stated earlier, where an offender is not released on parole when he or she first becomes eligible for parole, sections 137 and 143 require the Parole Board to reconsider the offender within each successive year. The offender does not need to apply to be reconsidered—it happens automatically. However, some offenders behave so poorly that they know, or should know, that they have no prospect of gaining parole. The Government believes that it is reasonable for the Act to be amended to provide that where the SPA has refused to make a parole order at the end of a non-parole period, or where a parole order has been revoked and the offender returned to custody, the SPA should not be automatically required to reconsider the offender for parole each year.

The SPA should be required to reconsider an offender's case only if the offender applies for parole. The manifest injustice safeguard exists to protect the legitimate interests of offenders. By requiring offenders to apply for parole, the Government will reduce the number of cases to be considered by the SPA where all parties to the proceedings know that, given the circumstances, the offender will not be granted parole. The Government also believes that an offender should not be entitled automatically to a review hearing after the SPA has formed an initial intention not to release the offender on parole.

New sections 139 and 146 provide for the withdrawal of the automatic right to a review hearing. It is proposed that if the SPA forms an intention to refuse parole, the SPA will determine whether the offender should be entitled to a review hearing or whether the offender should be required to apply for a hearing, in which case the application will need to convince the SPA that a hearing is warranted. Whether a hearing will in fact be held will be at the discretion of the SPA.

The Government is of the view that the SPA is in the best position to determine whether an offender should be entitled to a review hearing. In some cases the SPA will recognise at the outset that a review hearing will be necessary in order to make a final decision in respect of parole. In other cases the onus will be placed rightly on the offender to satisfy the SPA by way of a written application that the offender's circumstances warrant a review hearing. Most people would agree, for example, that a sex offender should not be automatically entitled to a review hearing if the offender has refused to participate in the sex offender programs offered by the Department of Corrective Services. New sections 139 and 146 recognise, among other things, that the SPA has finite resources that should not be wasted on offenders who have made no attempt to address their offending behaviour.

The Government is aware that many offenders have poor literacy skills—indeed, some offenders are totally illiterate. Some offenders will have difficulty without proper assistance in applying for parole. Some offenders will also have difficulty without proper assistance in applying for a review hearing. I assure the House that the Department of Corrective Services will provide proper assistance to offenders to help them with their written applications. The department will develop appropriate user-friendly application forms. Of course, offenders will also be able to obtain assistance from outside the correctional system to complete application forms. At present, after having decided that an offender should be released on parole, the Parole Board must make an order that the offender be released on parole on a day that falls within a seven-day period. The seven-day period for a serious offender commences after the seven-day period in which an appeal may be made to the Court of Criminal Appeal.

New section 138 provides for the SPA to order the release of a non-serious offender on parole during a specified period that is longer than the current seven-day period. If a parole order is made earlier than the offender's parole eligibility date, the specified period will begin no earlier than the parole eligibility date and end no later than 35 days after that date. Where the order is made after the parole eligibility date, the specified period will begin on the date that the parole order is made and end no later than 35 days after the date on which the parole order is made. Similarly, new section 151 provides for the SPA to order the release of a serious offender during a specified period. If the order is made earlier than 14 days before the offender's parole eligibility date, the specified period begins no earlier than the offender's parole eligibility date and ends no later than 21 days after that date. Where the order is made after the parole eligibility date, the specified period begins no earlier than 14 days after the date on which the order is made and ends no later than 35 days after that date.

In the case of a serious offender, members will note that the period available to the State in which to research, prepare, and lodge an application to the court in respect of a parole order thought to have been made on the basis of false, misleading, or

irrelevant information has been increased from seven days to 14 days. The seven-day period was inadequate. The proposed changes to broaden the period in which an offender can be released on parole should not be seen mistakenly as a punitive measure. There have been cases when the Parole Board has not been able to release an offender on parole because suitable accommodation has not been available within the current seven-day time frame. The purpose of the proposed expanded time frames is to ensure that there is sufficient opportunity for the department to make suitable post-release arrangements for an offender.

Proposed section 141A and new sections 153 and 185 relate to submissions to the SPA. Proposed section 141A provides for the Commissioner for Corrective Services to make a submission to the SPA concerning the release on parole of an offender. The commissioner may make a submission in relation to a matter that has been considered, is being considered, or is to be considered by the SPA. In view of the nature of the information that may come to the commissioner's attention, the SPA will be required to have regard to any such submission from the commissioner. Under proposed section 141A, the SPA must take into account a submission from the commissioner in relation to an offender who has not yet been released on parole, irrespective of whether the SPA has made a decision to grant parole.

New section 153 provides for the State to make a submission to the SPA concerning the release on parole of a serious offender. The State may make a submission in relation to a matter that has been considered, is being considered, or is to be considered by the SPA. This provision will eliminate a difficulty that could arise at present when the Parole Board initially indicates that it intends not to make a parole order in respect of a serious offender and then later decides at a review hearing to make a parole order in respect of that offender. In such circumstances, the State would be denied an opportunity to make a submission to the board. New section 153 will eliminate this potential difficulty.

The functions of the SPA are restated in new section 185, which also provides that when exercising its functions the SPA must have regard to submissions made by the commissioner. The nature of the position of commissioner makes it highly likely that the commissioner will be privy to information relevant to a matter before the SPA. On certain occasions it will be appropriate for the commissioner to make a submission to the SPA based on that information. A submission by the commissioner may be in respect of any of the SPA's functions in regard to parole, periodic detention or home detention. Members will be aware that the SPA's primary role is to consider whether to release an offender on parole. The SPA is not empowered with a hands-on role in the ongoing management of an offender who is in custody. New section 232 (1) (a1) makes it clear that the commissioner is responsible for the care, control and management of offenders in full-time custody, periodic detention or home detention. It is important therefore for the SPA to have the ability to make a recommendation to the commissioner in respect of any matter that may be relevant to the granting of parole.

Proposed section 193B authorises the SPA to make submissions to the commissioner as to the preparation of offenders for release on parole, either generally or in relation to any particular offender or class of offender. The operational realities of the correctional system dictate that the commissioner not be bound by any such recommendations made by the SPA. Nevertheless, the proposed section recognises the fact that from time to time the SPA is expected to make observations of value to the management of the correctional system. I said earlier that the secretary would not be a member of the SPA. I also mentioned that currently there are administrative advantages to the secretary being a member of the Parole Board. For instance, at present the Secretary of the Parole Board can be called upon at short notice to help constitute a division of the board. The secretary's entitlement to be a member of a division is useful in cases where there is urgent cause to revoke a parole order. Nevertheless, as stated earlier, the Government has decided that the secretary should not sit as a member of the SPA at a meeting that deals with the substance of a case.

However, there remains a need for a process for the swift revocation of a parole order. Such processes exist in overseas jurisdictions such as Canada and New Zealand, and in domestic jurisdictions such as Queensland. New section 172A provides a process for the swift revocation of a parole order. In the event that a division of the SPA cannot be constituted, the proposed section will enable the commissioner to apply to a judicial member of the SPA for an order suspending an offender's parole order and, if necessary, a warrant for the offender's arrest. The judicial member to whom the commissioner applies for an order will grant an order only if satisfied that the commissioner has reasonable grounds for believing that the offender has failed to comply with the offender's obligations under the parole order, or if there is a serious and immediate risk that the offender will leave New South Wales in contravention of the parole order, harm another person, or commit an offence. While the provisions of this section are likely to be used infrequently, the introduction of a mechanism for urgent situations is necessary in the community interest. Ideally, of course, it will be possible to constitute a division of the SPA in all urgent cases.

New section 172A also provides that the SPA is to review a decision to suspend a parole order within 28 days of the offender being returned to custody. The new section recognises the urgency that will be associated with applications for an interim suspension of a parole order. The section provides for applications to be made in person or by telephone, electronic mail, or facsimile transmission. The consideration of offenders for parole often causes victims alarm and anguish. The Department of Corrective Services is of the view that on occasions a victim may better deal with the prospect of the proposed release on parole of an offender if the victim has access to some of the information in the possession of the SPA. New section 193A gives a victim of a serious offender access to documents held by the SPA in relation to an offender, subject to certain safeguards under section 194.

Section 194, which deals with the security of certain information, currently states that a document need not be provided if in the opinion of a judicial member of the Parole Board the release of the document would adversely affect the security, discipline or good order of a correctional centre, endanger the person or any other person, jeopardise the conduct of any lawful investigation, or prejudice the public interest. Section 194 is to be amended to expand the grounds on which a judicial member of the SPA may prohibit the disclosure of a document to include the grounds that the document might adversely affect the supervision of offenders who have been released on parole, and that the document might disclose the contents of an offender's medical, psychiatric or psychological report.

When the Parole Board decides that an offender has failed to comply with his or her obligations under a parole order, the board may do one of three things: revoke the order; decline to revoke the order—in which case the board may issue what is known as a "board warning"—or decline to revoke the order but impose further conditions. If the board decides to revoke a parole order, it must state the reason for doing so. There is, however, no parallel section requiring the Parole Board to give reasons when it decides not to revoke a parole order. The Government is of the view that the SPA should be required to give reasons when it decides not to revoke a parole order where the commissioner or a probation and parole officer has applied for revocation of the order. It is to be expected that from time to time there will be occasions on which the SPA will reject a request for the revocation of an order. New section 193C will require the SPA to keep records of its decisions and to supply copies of them to the Minister, the commissioner, or the Probation and Parole Service on request.

The Crimes (Administration of Sentences) Act 1999 currently provides for an offender or the State to apply in certain circumstances to the Court of Criminal Appeal [CCA] for a direction as to whether in making a decision the Parole Board relied on material that was false, misleading or irrelevant. The requirement for appeals to go before the CCA has existed from the time of the introduction of the Sentencing Act 1989. The appeal-related provisions of the Sentencing Act 1989 later became sections of the Crimes (Administration of Sentences) Act 1999. At various times the Law Reform Commission and judges of the CCA have commented on appeals involving Parole Board decisions. The consensus has been that the requirement for matters to be determined by the CCA, which is constituted by three Supreme Court judges, is unnecessary.

The proposal to omit from the Act all references to the Court of Criminal Appeal and to insert instead references to the Supreme Court is common sense. It will provide for decisions of the SPA to be reviewed by the Common Law Division of the Supreme Court rather than by the CCA. It is possible that from time to time the chairperson of the SPA will be a retired Supreme Court judge. The Government believes, however, that the review of an SPA decision by a single Supreme Court judge in such circumstances will not be inappropriate as the Supreme Court will be reviewing a decision of the SPA and not a decision of the chairperson. The hearing of a review by the Common Law Division of the Supreme Court will clearly not diminish the integrity of the appeal process. Finally, the Corrections Health Service has been renamed under the Health Services Act 1997 as Justice Health. The name was changed to better reflect the organisation's role. The bill therefore makes various consequential amendments to the Crimes (Administration of Sentences) Act 1999, and I commend it to the House.