CRIMES (ADMINISTRATION OF SENTENCES) AMENDMENT BILL 2008

Bill introduced, and read a first time and ordered to be printed on motion by the Hon. John Hatzistergos.

Second Reading

The Hon. JOHN HATZISTERGOS (Attorney General, Minister for Justice, and Acting Minister for Education and Training) [4.52 p.m.]: I move:

That this bill be now read a second time.

The Government is pleased to introduce the Crimes (Administration of Sentences) Amendment Bill 2008, which makes further provision for the establishment, control and management of correctional centres and other new kinds of residential facilities for offenders, the detention of offenders and the administration of sentences. The Department of Corrective Services is an integral part of the criminal justice system, working with other government and non-government agencies towards the goals of both keeping New South Wales safe and building harmonious communities.

Corrections is concerned not only with the incarceration of the recalcitrant and worst categories of offenders in full-time imprisonment, but also with administering sentences to be served within the community, and with providing offenders with opportunities and resources to assist in breaking their crime cycle and their resultant return either to another community sentence or to full-time imprisonment. Many people think of Corrective Services as being only about prisons, yet the department has twice as many clients in the community as in correctional and periodic detention centres. To this end the Department of Corrective Services has been developing a number of alternative accommodation facilities. These new residential facilities have a very different purpose from the traditional correctional centre. For example, over the past year members will have heard reference in this place to the development of a residential facility at Tabulam on the far North Coast of New South Wales. Tabulam will operate the program known as Balund-a.

The Government has a strong commitment to the welfare of Aboriginal inmates. It has previously developed and implemented the successful and innovative intervention program for Aboriginal inmates at Brewarrina known as Yetta Dhinnakkal. The Balund-a program at Tabulam will build on this work. It is an initiative designed to assist predominantly young Aboriginal offenders by addressing the underlying causes of their offending behaviour so that the risk of reoffending and the possibility of receiving a custodial sentence is reduced.

In New South Wales over 1,900 inmates, or 21 per cent of all inmates, currently held in correctional centres, are Aboriginal; 20 per cent of males and 30 per cent of females in correctional centres are Aboriginal; the male Aboriginal imprisonment rate is 16 times higher than for non-Aboriginal males and it is 28 times higher for females; and over 2,800 Aboriginal offenders, that is 16 per cent, are supervised in the community. Over the past two years the Department of Corrective Services has been engaged in extensive community consultation in the far North Coast of New South Wales with former offenders and their families, and Aboriginal and non-Aboriginal community members, to establish a cooperative partnership with all stakeholders to reduce the offending and recidivism rates of young adults.

The facility at Tabulam will offer a vehicle not only to achieve the department's objectives of reducing recidivism, but also to contribute to improving the quality of life in Aboriginal communities. The Balund-a facility will eventually have the capacity for 70 offenders, mostly from the Aboriginal Bundjalung nation, the traditional owners of the land on which the facility is built, to participate in residential diversionary programs. Offenders subject to a community-based

order administered by the Department of Corrective Services Community Offender Services may be placed in Tabulam to participate in the Balund-a program.

The types of offenders who may be accepted as residents on the Balund-a program include offenders bailed subject to section 11 of the Crimes (Sentencing Procedure) Act 1999; offenders on community-based orders with no suitable accommodation; offenders on community-based orders where factors emerge which warrant intensive residential intervention; parolees, where revocation of parole is under consideration and intensive residential intervention would forestall or avert revocation of the parole order; offenders on community-based orders where revocation of an order is under consideration and intensive residential intervention would forestall or avert revocation of the order; and participants in circle sentencing who are assessed as in need of intensive residential intervention.

Members will also have heard reference in this place to the development of another style of residential facility to be operated by the Department of Corrective Services, known as a community offender support programs centre or COSP centre. A community offender support programs centre will be a non-custodial, community-based service providing accommodation, re-settlement and reintegration for offenders, generally for a period of between three to six months, but possibly for a longer period in extenuating circumstances. The target population for residence in a community offender support programs centre is those offenders, parolees, or other persons subject to monitoring and supervision by the department who are unable to obtain, or maintain, suitable accommodation and/or access to community support services and programs.

Crisis accommodation will be available at community offender support programs centres for up to 14 days for offenders whose accommodation arrangements suddenly break down in the community. Community offender support programs centres will also provide an opportunity to stabilise and provide enhanced supervision of offenders who may be experiencing difficulties in adjusting to lawful community life and who may otherwise be re-incarcerated for a breach of parole or other community-based order. There are four primary objectives for establishing community offender support programs centres. The first is to contribute to a reduction in the risk of reoffending through the provision of the following: interim accommodation for eligible offenders; assistance to obtain sustainable, independent housing and employment in the community; intensive support and case management; assistance with accessing services; clear exit strategies; and outreach services and programs for offenders who have moved into the community from a community offender support programs centre.

The second objective is to provide a supportive environment, underpinned by a motivational framework including the principles of cognitive skills-based learning, where offenders can be motivated to undertake personal change. This will be done through individual case management and participation in group programs provided at a community offender support programs centre, a district office of Community Offenders Services, or in the community. The third objective is to assist offenders to develop the skills required to resettle in the community. The final objective is to develop sustainable partnerships with community organisations, including cultural and ethnic councils, in order to support the resettlement process.

community offender support programs centres are to be established throughout New South Wales, primarily by utilising existing departmental facilities. Accordingly, the bill proposes at item [32] of schedule 1 to amend the Crimes (Administration of Sentences) Act 1999 by inserting new division 7 into the Act to provide for the establishment of a new type of accommodation facility to be known as residential facilities, and to provide for the management and administration of these facilities. These residential facilities will accommodate two kinds of persons: certain inmates prior to their release from custody; and other offenders who are subject to non-custodial orders, such as good behaviour bonds, or parole orders. This latter group will be known as non-custodial residents.

Consistent with existing provisions relating to correctional centres and periodic detention centres, item [27] of schedule 1 provides that the Commissioner of Corrective Services has the

care, direction, control and management of these residential facilities. A manager of each residential facility is to be appointed or employed under the Public Sector Employment and Management Act 2002. In line with existing provisions for correctional centres, the Governor of New South Wales will proclaim these new residential facilities.

A proclamation is essentially a public pronouncement that the Department of Corrective Services has legal powers within the land it describes. It sets the geographical limits for the use of the powers of staff regarding inmates and the general public. In the interests of operating safe residential facilities, part 2 of the Act, which relates to full-time imprisonment, and the associated clauses in the regulation will apply to the new residential facilities, subject to any modifications that may be prescribed by the regulation. Similarly, if there are any other provisions of the Act that should be applied to the residential facilities, the regulation may likewise provide for such application.

As these residential facilities are not correctional centres, the bill provides, in proposed section 236O, to allow for the commissioner to appoint any member of staff of the department to be a residential facility officer to supervise persons residing at a residential facility or to exercise other functions in relation to the residential facility. This means that the staff of such facilities may be drawn from amongst the diverse classes of departmental employees—for example, probation and parole officers, alcohol and other drug workers, education officers, psychologists, and correctional officers. Item [32] of schedule 1 also requires the commissioner to determine from time to time the functions of a residential facility officer.

In the interests of the safety of those persons residing and working therein, the types of duties and functions such an officer may perform could include, but are not limited to, searching the facility for contraband such as drugs and alcohol, and administering drug and alcohol testing of the non-custodial residents. Items [2], [34] and [35] of schedule 1 are consequential amendments. Sections 79 (h), (h1) and (h2) of the Act currently permit the regulation to provide for the circumstances in which an inmate may lawfully acquire or retain possession of property within a correctional centre; the forfeiture and disposal of an inmate's abandoned or unclaimed property, including money, or of unhygienic or otherwise dangerous property, including money, received from or sent to an inmate; and the seizure, forfeiture and disposal of property brought into a correctional centre in contravention of this Act, the regulations or any other law.

Pursuant to sessional orders business interrupted to permit a motion to adjourn the House if desired.

The House continued to sit.

The Hon. JOHN HATZISTERGOS: The proposed amendments contained in item [9] of schedule 1 make it clear that property, which may include money, may be seized by the State and disposed of or destroyed. The amendments also provide for the seizure, forfeiture and destruction of any drug, or any thing reasonably suspected of being a drug, in the possession of an inmate or in the possession of any other person in a correctional centre or correctional complex, or found within a correctional centre or correctional complex, or sent to or delivered to a correctional centre or correctional complex. These amendments ensure that the law retains currency and applicability and deals with the situation of the discovery of drugs, or suspected drugs, on or within correctional property, but not necessarily attributable to a specific inmate—for example, drugs found on common property, such as in a car park on visiting days. The Crimes (Administration of Sentences) Act currently allows the commissioner to confiscate any property unlawfully in the possession of an inmate and this property becomes the property of the State and may be disposed of as the commissioner directs. Accordingly, item [6] of schedule 1 makes it clear that such property may be destroyed or otherwise disposed of.

Section 4 of the Crimes (Administration of Sentences) Act regulates the types of persons that the department is authorised to accept as full-time inmates into the correctional system. Section 4 (1) (e) of the Act provides that an inmate includes any person who is the subject of a warrant or order by which a court or other competent authority has committed the person to a

correctional centre. Clarification is required in terms of two classes of persons who may be held in a New South Wales correctional centre: those persons who have been tried and found guilty by the recently constituted Australian Military Court [AMC], and immigration detainees. The Australian Military Court was established under the Commonwealth Defence Force Discipline Act 1982. The provisions establishing the AMC commenced on 1 October 2007. The Australian Military Court replaces the system of individually convened trials by court martial or a defence force magistrate.

The court is a service tribunal under the Defence Force Discipline Act. It is an important part of the military justice system, which contributes to the maintenance of military discipline within the Australian Defence Force. Some offences are considered far more serious—that is, impacting on discipline—when committed in a military context than if committed under the civil law, for example, an assault on a superior or a subordinate, theft and drug offences. Additionally, there are service offences that are specific to the Australian Defence Force, such as absent without leave, desertion, and mutiny for which there are no civilian equivalents. However, where appropriate and available, civilian criminal matters continue to be referred to the civilian jurisdictions.

An accused person appearing before the Australian Military Court may be acquitted or found guilty on the evidence heard and determined by that court. If the accused is found guilty, a range of punishments may be considered by the presiding military judge in exercising sentencing discretion, including the imposition of a fine or reduction in rank, and in the more serious cases imprisonment, dismissal from the defence force and detention. Owing to the way the Australian Military Court has been legislatively constituted, doubt is cast as to whether the Australian Military Court is a court, or competent authority, for the purposes of the Crimes (Administration of Sentences) Act. The proposed amendments contained in the bill in item [3] of schedule 1 put beyond doubt that part 2 of the Crimes (Administration of Sentences) Act, which pertains to full-time incarceration, applies to a person sentenced to imprisonment under the Commonwealth Defence Force Discipline Act 1982 who is committed to a correctional centre to serve that sentence; and an immigration detainee within the meaning of the Commonwealth Migration Act 1958 who is held in a correctional centre under that Act. Item [4] of schedule 1 provides that a defence force detainee is a convicted inmate for the purposes of the Crimes (Administration of Sentences) Act.

Section 6 of the Act provides that the general manager of a correctional centre can direct convicted inmates to perform work. Item [1] of schedule 1 amends the definition of "convicted inmate" accordingly. In relation to immigration detainees, the proposed amendment in item [3] of schedule 1 puts beyond doubt that the Department of Corrective Services is able to receive immigration detainees, although this practice is not common. Notwithstanding, it is important that the Commissioner of Corrective Services, who is responsible for the welfare of those in his care and custody, is able to lawfully provide services such as the facilitation of the administration of medical treatment.

The bill proposes to make a number of amendments to matters relating to the parole of offenders and the constitution of the State Parole Authority [SPA]. Firstly, I note that registered victims of a serious offender currently are provided with an entitlement, should they choose to exercise it, of access to all documents held by the SPA in respect of the offender and the measures that offender has taken, or is taking, to address his or her offending behaviour. However, the existing provision does not assist those victims who do not have ready access to the SPA or who otherwise are not able to exercise their entitlement. Items [23] and [24] of schedule 1 provide that an agent of the victim who is authorised in writing by the victim and the commissioner may access the documents on the victim's behalf. A victim may revoke an authorisation at any time by notice in writing to the commissioner.

Secondly, items [15] to [22] of schedule 1 provide that an inmate who is still in custody after his or her initial parole eligibility date becomes eligible for release on parole on every anniversary of his or her parole eligibility date, and no sooner, subject to manifest injustice considerations. If the SPA orders the release of the offender on an annual review of the offender's case, the release

order will not take effect until the anniversary of the offender's parole eligibility date. The phrase "parole eligibility date" is defined in section 3 of the Crimes (Administration of Sentences) Act to mean, in relation to an offender subject to paragraph (b), the date on which the offender first becomes eligible for release on parole; or if the offender is returned to custody while on release on parole or following revocation of parole, the date occurring 12 months after the date on which the offender is so returned.

Thirdly, item [36] of schedule 1 provides that members appointed to the SPA—that is, judicial members and community members—may be appointed for a period of up to three years rather than for a period of three years, as is currently the case, which will allow for more flexibility in relation to appointments. Item [37] of schedule 1 sets at two the maximum number of community members who may attend a meeting of the SPA. This will set the total number of members at any meeting at five. These five members will comprise representatives from the following membership categories: a judicial member; two official members, one from the New South Wales Police Force and one from the Department of Corrective Services Probation and Parole Service; and two community members. Where possible, one of the community members may be a victim's representative. The chairperson of the SPA continues to be able to convene up to six meetings of the SPA each year that all community members may attend. This will ensure that all members of the SPA are eligible to attend policy and procedure setting meetings.

I now refer to issues relating to community service orders. At present, section 110 of the Crimes (Administration of Sentences) Act provides that a community service order remains in force until the offender has performed community service work in accordance with the offender's obligations under the order for the required number of hours, or, in the case of a community service order under section 79 of the Fines Act 1996, until the order is revoked or satisfied in accordance with that Act, whichever first occurs. Item [10] of schedule 1 provides that a community service order expires if the relevant maximum period expires, which is generally 12 or 18 months, even if that occurs before the inmate has completed the required number of hours of work. Item [13] provides, however, that if an application is made to the Local Court to extend the period of an order and the relevant maximum period expires before the application is determined, the community service order is taken to remain in force until the application is determined by the court. Items [12] and [14] ensure that an application to extend or revoke a community service order can still be heard if the relevant maximum period has expired. Item [11] is a consequential amendment.

Currently sections 9 to 22 in division 2 of part 2 of the Crimes (Administration of Sentences) Act relate to the segregated and protective custody of inmates. Section 10 of the Act provides that the commissioner may direct that an inmate be held in segregated custody if the commissioner is of the opinion that the association of the inmate with other inmates constitutes, or is likely to constitute, a threat to:

(a) the personal safety of any other person, or

(b) the security of a correctional centre, or

(c) good order and discipline within a correctional centre.

Similarly, section 11 of the Act provides that the commissioner may direct that an inmate be held in protective custody if the commissioner is of the opinion that the association of the inmate with other inmates constitutes, or is likely to constitute, a threat to the personal safety of the inmate, or if the inmate requests the commissioner in writing to do so. The Act provides for a review process for inmates who may be placed in segregated custody or protective custody for a period in excess of 14 days. On application, the inmate may seek a review of the custody direction by the Serious Offenders Review Council [SORC].

Section 197 of the Act stipulates the functions of the Serious Offenders Review Council. By convention, generally a quorum of Serious Offenders Review Council members, comprising one each of the judicial, community and official members, convenes to conduct a review hearing.

However, in certain circumstances information that has caused the inmate to be placed in segregated or protective custody may be so sensitive—for example, it may be intelligence provided by international justice agencies that may have international implications and/or repercussions—that it is preferable that only a judicial member convene and conduct the hearing and be privy to the restricted, sensitive information. Accordingly, item [26] provides that the Crimes (Administration of Sentences) Regulation may require any of the functions of the Serious Offenders Review Council that relate to segregated and protective custody of inmates who belong to a specified class of inmate to be exercised by the chairperson alone. Item [25] is a consequential amendment. The class of inmate that is envisaged in item [26] is inmates who are subject to the new designation regime, "extreme high risk restricted"—the discussion of which I now turn to.

The Crimes (Administration of Sentences) Regulation 2008 provides for two distinct concepts in relation to the separation and management of inmates in full-time custody. One is the security classification and placement regime, to which all inmates are subject, and the other is the designation regime that imposes a restrictive daily management regime on a very small number of inmates who, by virtue of their designation, come within the purview of management by the Serious Offenders Review Council. Accordingly, any amendment of the designation regime will predominantly be contained in the Crimes (Administration of Sentences) Regulation. It is the intention of this Government to provide the legislative framework for a more stringent management regime that is over and above those already in place for high security and extreme high security inmates. The new designation will be called extreme high risk restricted [EHRR].

There are currently more than 9,750 inmates in full-time custody in New South Wales. Of these, the Commissioner of Corrective Services has designated 101 as being either high security or extreme high security inmates. In other words, for the purposes of correctional centre management, around 1 per cent of the inmate population, in the opinion of the commissioner, constitute a danger to other people or a threat to good order and security. In some cases that danger is considered to be extreme. Of the 101 inmates designated as high security or extreme high security, 39 are high security and 62 are extremely high security. There is some movement of inmates between the two designations, according to circumstances prevailing at the time.

As I previously advised members of General Purpose Standing Committee No. 3 during the budget estimates hearing held on 17 October 2008, the Commissioner of Corrective Services has expressed grave concerns about a very small number of inmates who are disrupting the good order and security of the New South Wales correctional system by attempting to influence, engage and persuade others to undertake illegal activity. These inmates present an extraordinary level of danger to other people, or threat to the good order and security of the correctional system, given their capacity to network and recruit contacts and to incite or organise illegal activity, both outside and inside the correctional system. Given the extraordinary level of risk posed by these inmates, it is necessary to take extraordinary security and management measures to protect others in the correctional system, as well as curb the threat posed to the community at large.

The current designations and the management concerns are provided for in clauses 25 to 27 of the Crimes (Administration of Sentences) Regulation. The proposed EHRR designation will affect only a small proportion of the 1 per cent of inmates identified by the commissioner as presenting a greater-than-normal security threat. The inmates most likely to require an EHRR designation are anticipated to be among a small group of those who are already designated as extreme high security. Extreme high security inmates constitute approximately 0.6 per cent of the inmate population. While the Crimes (Administration of Sentences) Regulation changes are still being drafted, the bill currently before the House contains a number of legislative amendments that relate to, and arise from, the impending creation of the new security designation category, EHRR.

These proposed changes to the Crimes (Administration of Sentences) Act are necessary to facilitate the pending changes to the regulation. The creation of a new EHRR designation will allow the Commissioner of Corrective Services more scope to crack down on inmates who

attempt to influence other inmates to take part in illegal activities and subversive activities whilst in custody. Accordingly, items [6], [7], [8] and [9] relate to the strict management regime for inmates who receive the new designation that will be implemented primarily by way of changes to the regulation. Under the new designation, it is intended that the regulation provide that only the Department of Corrective Services be able to provide funds for payment into the correctional centre account of an inmate who has been designated EHRR. This restriction is intended to prevent an EHRR inmate seeking to influence other inmates by arranging for monetary assistance to be provided to those inmates.

It is further proposed that any money sent or delivered to the department for payment into an EHRR inmate's account should be returned to the provider or, if that is not possible or practicable, forfeited to the Crown. These items create a regulation-making power in the Crimes (Administration of Sentences) Act to allow changes to the regulation to occur in this regard. It is intended that the pending Crimes (Administration of Sentences) Regulation amendments propose to require that all outgoing mail from EHRR inmates be written in English or another language approved by the commissioner unless the correspondence is to an exempt body, or unless the commissioner otherwise exercises his discretion to approve otherwise. In regard to what constitutes approved languages, it is intended that the approved languages would be those 85 languages and dialects, including Auslan, that are listed by the Language Services Division of the New South Wales Community Relations Commission, for which comprehensive interpreting and translation services are available. I assure the House that the Government will not delay drafting changes to the Crimes (Administration of Sentences) Regulation relating to the creation of the EHRR designation following the passage of this legislation.

I now turn to the other amendments contained in the bill. Items [28] to [31] of schedule 1 provide for correctional staff to be tested for steroids, as well as alcohol and prohibited drugs, as is currently provided. Although anabolic steroids are not an illicit substance, they are regulated and may cause aggressive behaviour in those taking them. The risk of increased aggression in a correctional officer is not a risk that the Department of Corrective Services is willing to take, given the unpredictable and volatile nature of the correctional centre environment. Part 11, division 5 of the Crimes (Administration of Sentences) Act regulates the testing of correctional staff for alcohol and prohibited drugs listed in schedule 1 of the Drugs Misuse and Trafficking Act 1985. The department also has a comprehensive Employee Alcohol and Other Drugs Policy, which provides guidance on confidentiality, accountability, record keeping and support for staff following random, targeted or mandatory tests. Testing for anabolic steroids will come within this policy.

All officers who test positive currently are subject to follow-up testing, and are then referred to the departmental risk assessment committee or the professional conduct and management committee. Staff members are then managed through the staff support programs unit and individual treatment plans are developed and monitored. Anabolic and androgenic steroidal agents are a controlled substance, and may be prescribed under the New South Wales Poisons and Therapeutic Goods Act 1966 and the Poisons and Therapeutic Goods Regulation 2008. As such, the legitimate use of such steroids will not attract disciplinary action. As with the introduction of testing staff for alcohol and illicit drugs, there will be a period of amnesty and detailed information provided to all staff about the new aspect of the testing regime.

Item [5] makes it clear that the general manager of a correctional centre may direct a convicted inmate to perform community service or other work either within the correctional centre or within the correctional complex but outside the correctional centre, or outside the correctional complex. Item [4] provides that an inmate who is aged 21 years or more and who is sentenced to full-time imprisonment in a correctional centre by the Children's Court is a convicted inmate. Under the Crimes (Administration of Sentences) Act, the general manager of a correctional centre may direct a convicted inmate to perform work. Item [1] amends the definition of "convicted inmate" accordingly. Section 252 of the Crimes (Administration of Sentences) Act provides that a person in custody may be accommodated in a correctional centre, police station or court cell complex while being transferred from one place to another, if it is necessary or convenient to do so. Item [33] provides that a person under the age of 18 who is being transferred to a juvenile

correctional centre may also be temporarily held in a children's detention centre. Items [38] and [39] relate to savings and transitional provisions.

I turn now to schedule 2 to the bill, which amends Acts other than the Crimes (Administration of Sentences) Act. Schedule 2.1 amends the Children (Detention Centres) Act 1987 and consists of items [1] to [5], of which items [1] and [5] are consequential amendments. Item [2] clarifies that section 9A of the Children (Detention Centres) Act 1987 applies to a person arrested in relation to an alleged escape from custody, under section 39 of the Crimes (Administration of Sentences) Act, only if the person is arrested pursuant to a warrant. Item [3] extends the operation of section 9A to, first, a person aged between 18 and 21 years who is the subject of an arrest warrant issued because of a suspension or revocation of parole, or a failure to appear at a parole hearing; and, second, a person aged between 18 and 21 who is the subject of an order or warrant made or issued for an escape from a detention centre. Accordingly, a person between 18 and 21 years who is arrested pursuant to one of these warrants or orders is not to be detained in a children's detention centre.

Item [4] provides that if a detainee who is being detained as a result of the revocation of his or her parole by the Children's Court is transferred to a correctional centre the court is to continue to exercise the functions of the Parole Authority with respect to the revocation of that parole. This includes, for instance, the function of reviewing that revocation. Schedule 2.2 amends the definition of a "place of detention" to include a residential facility, which thereby extends the application of part 4A of the Summary Offences Act 1988 that makes provision for offences relating to places of detention that are currently defined as "correctional centres", "correctional complexes" and "periodic detention centres". I commend the bill to the House.