SENTENCING BILL

Second Reading

Adjourned debate on second reading.

(Continued from 16 November 2016.)

Ms CHAPMAN (Bragg—Deputy Leader of the Opposition) (15:40): I indicate that I am speaking on the Sentencing Bill 2016 and that I will be the lead speaker, and quite possibly the only speaker, and that I wish to make some remarks about this bill. I indicate that the opposition will be supporting the bill, other than amendments in respect of the proposals in relation to home detention.

Let me say that the bill was introduced by the Attorney-General on 16 November last year. It completely repeals the Criminal Law (Sentencing) Act 1988 and sets out a new regime for the sentencing of offenders in the criminal justice system. New options for sentencing discounts and home detention changes are included. In fairness, the bill is the result of considerable work done by former judge of the Supreme Court, John Sulan. His Honour was appointed in December the year before to undertake a review, look at the preparation of a new sentencing act and generally advise the government on where there needed to be some contemporary updating and also consider how it might best operate.

On 2 December, I attended a forum hosted by the Attorney-General at which John Sulan was present. He was most helpful in advising us that, in his opinion—and that is to be valued given his extensive experience on the Supreme Court—there needed to be a whole rewriting of the act. There were some concerns raised about the limiting of the discretion of judges in general commentary and other matters on this issue.

In the previous June, the government committed to investigating how we might better deal with sentencing. A discussion paper was issued and, with that, a home detention bill and a first principles bill, which were distributed for some limited consultation. The Statutes Amendment (Home Detention) Bill 2015 provided for home detention as a stand-alone sentence. Further minor changes, which we will now incorporate separately, or which we propose to, needed to be considered.

It is fair to say that during the public debate on this matter arising out of some fairly controversial cases, which reached a crescendo in the latter part of last year, there had been significant public disquiet about the application of the current home detention, particularly in circumstances where offenders had been given the opportunity to have home detention as part of their sentencing, or as their sentencing.

There were questions about the exploitation of that. These covered notorious cases of a person removing their bracelet, an electronic apparatus designed to track the detainee, usually from their place of residence. In particular, it identifies whether they were in breach of obligations in respect of their home detention, restrictions on where they go, when they leave the property, etc. Other controversial cases dealt with what type of remunerative employment was being presented for consideration of home detention, including leisure activity, employment and sport.

Before I come back to this more controversial area of home detention, I would like to mention a few areas of reform in this bill which we support and which we think need to be accommodated in contemporary laws in this area. Firstly, the bill makes protection of the safety of the community a primary consideration. All other matters are identified as secondary considerations. It is currently a factor, but it has been given prominence as a primary consideration. Secondly, it introduces a new way to provide compensation to victims of dishonesty offences. Presently, criminal offenders can be ordered to provide compensation.

The property of the convicted offender can only be seized if it is the proceeds of a crime or unexplained wealth. Any assets can be seized for drug dealers; this is an expansion. It is fair to say that it is a bit controversial, but that is a matter which is incorporated. Thirdly, it introduces

community-based orders and also intensive correction orders. These regimes, firstly in respect of community-based orders, are designed to replace the good behaviour bonds and community service orders. They can be conditional and include social obligations, such as undertaking education and treatment programs. Privileges can be denied through curfews, drug and alcohol testing, restricting contact with others and restricting movement.

Perhaps some would say that is really just a matter of form and not any change of substance to that area, but nevertheless we have always accepted that this area is an important option for sentencing. The new option of intensive correction orders will apply to a person sentenced to imprisonment for less than two years. The offender is sent home and subject to intensive supervision by a non-government sector and community-based rehabilitation. The offender may be required to pay the cost of any treatment or rehabilitation during that time. It is designed to apply to adult offenders.

Again, at first blush the proposal has merit on inquiry with interstate operators, including the judiciary in Victoria, where this option has been offered for some time. It appears to be little used, and that is largely because we have such a shortage of people available to provide supervision. Generally, providing this more intensive regime is near impossible and so it has been rarely applied. Nevertheless, we do not disagree with it being in there as an option and, if there is some capacity for the minister for corrections/law and order budgets to be expanded to provide for that, I suspect there will be some good use of it.

The fourth area is to introduce new sentence discounting guidelines that match the new time lines for the disclosure of evidentiary material in the Summary Procedure (Indictable Offences) Amendment Bill, which we have just dealt with in this house and which is on its way to another place for consideration.

The government has indicated that sentencing discount clauses will not be progressed if the indictable offences bill does not succeed. That is hardly surprising, as they are referred to in both bills. We have not expressed a disagreement with the change in the sentencing discount clauses, but I previously commented in the debate on the previous bill that reviewing the sentencing discount clauses is probably premature and that the reforms that we made in the last few years ought to have some time for consideration.

I note the Attorney advised the parliament that those previous initiatives have been the subject of review—I think he even suggested for the 2½ years that they have been operating. In fact, they only reviewed the first 12 months, and commentary was made in that report on the short time that new regime had oxygen and that therefore, whilst there were some signs of benefit, it needed some further time for review. In my view, in the absence of further information being brought forward, they ought to be given an opportunity to deliver.

Furthermore, I made a comment that in my view the appointment of the new head of the District Court, who carries a massive workload in relation to criminal matters, ought to have the opportunity to progress other initiatives before we start tampering with the sentencing discount clauses. Nevertheless, the government are insisting on progressing that at this stage.

The second aspect of this sentencing discount is that the reform does not vary the principles of sentencing discounts for assisting the court and pleading early; however, the maximum discount available reduces more quickly than the previous time frame. A new clause is added to provide a 10 per cent discount for an accused who has already pleaded guilty but who assists the court throughout the trial. So, there is some new novelty added to that and we will see whether it helps.

The fifth area of reform is covered by the provisions for home detention. According to the government, these new provisions state the purpose of home detention. The new provisions for court consideration are the length of time of the proposed sentence, a new provision noting that the court must consider if the home detention would affect public confidence in the administration of justice and a new provision making it a condition that the defendant be monitored by an electronic monitor at all times.

Secondly in this area, the provisions allow that the home detention officer can determine what appropriate remunerative employment is and at what times it is to occur. There is no specific

definition provided. However, the bill we have in the parliament—as distinct from the previous draft proposals—sets out that remunerative employment (being one of four areas for which home detention may apply to have release from home incarceration) is qualified. In particular, the terms and conditions of remunerative employment are to be set by the home detention officer. The government consulted quite widely in this area. That was a fairly effective process under the helpful stewardship of John Sulan, in that it gave everyone an opportunity to put in a comprehensive submission, if they wished to.

The weakness, we would suggest, is in home detention. Over the last few months I have repeatedly sought that there be some restriction placed, or at least prescription inserted, in respect of the circumstances in which the relaxation of the home detention should occur, namely, allowing people to leave the property. Unfortunately, that appears to have fallen on deaf ears. Accordingly, I foreshadow that an amendment will be tabled and progressed; I think it has already been tabled. The gist of it is to make some provision in the bill to say that the approval for a person who is subject to home detention to leave a residence for any purpose must be on the basis that the aggregate period of absence has to be less than 12 hours in a 24-hour period.

The second qualification, which I think is certainly common sense, is that participation by a person subject to a home detention order in a sporting activity for which they might receive a payment may not be approved for the purposes of remunerative employment. Some would say, what about a highly paid AFL footballer who has as his employment very significant remuneration? If they are the subject of a home detention order, they might miss out—and yes, they may.

That is a consequence of that amendment, and from our side of the house we see this as necessary to ensure that there is not exploitation of this opportunity to have a punishment which is laced with the opportunity to still undertake employment or have medical treatment or many other reasons, as I said, to leave the property. It should be treated as a privilege and not as something that is to be some optional home holiday. We, on this side of the house, otherwise recognise the importance of updating the sentencing law generally and accordingly, subject to those amendments, we will be supporting the bill.

I add one other matter, and that is that it seems rather curious that I pick up a schedule of CPD proposed forums for the forthcoming months and on 12 April there is to be a CPD event entitled 'The Sentencing Bill 2016 SA'. I raise this because it is either a very late opportunity to consult on the bill or it assumes that it will actually be an act by then and that there will be some briefing to the profession about how it is going to operate.

Of course, it is important that when legislation passes, once it is an act or indeed a promulgated regulation which is allowed to survive, it does avail itself of the appropriate advisers to inform the legal profession and the public generally. We have no issue about that whatsoever. It is a rather curious presentation as a bill. If it is to presume, on the other hand, that it will be an act by then, I see it as quite disorderly and quite inappropriate for the government to make those arrangements, publish them even, before we have even canvassed the bill in the parliament.

In the regime that will operate, the government also suggests that the eligibility for a home detention order will be denied if the adult offender has a non-parole period of two years or more for prescribed designated offences, for serious and organised crime offences and for specified offences against the police. Those incorporations do two things. Firstly, they incorporate the thrust of the legislation currently sponsored by the member for Stuart, who has a private member's bill before the house to cover the proposed exclusion of home detention for people who are convicted of various serious crimes such as murder, terrorism and serious sexual offences.

The Attorney has acknowledged that that is being incorporated, and we appreciate that, especially as this bill has been sitting there since November last year. Prior to that (I think in 2015), a bill presented by the member for Morialta in similar terms was again ignored by the government, and unfortunately it has taken a very long time for it to be accommodated; nevertheless, we note it and we appreciate it.

The second matter I point out in respect of home detention orders if the bill had already been dealt with is the recent conviction of Tabitha Lean, when she was sentenced to a prison term with the opportunity to serve in home detention a period of six years and eight months from memory (I am looking quickly at the sentencing remarks). In any event, she had a 3½ year non-parole period. This is an offence of which she was convicted. It was an extraordinary case where she and her

partner orchestrated to fraudulently, and through deceptive means—sending threatening letters and bloodstained T-shirts, and it all sorts of other macabre aspects to it—attract the authorities to give her free hotel accommodation and have the benefit of very significant moneys to protect her and her family during that period.

I think the amount was $270,000 for a serviced apartment and significant other moneys to pay for holidays to minimise the stress to this family, who on the face of it, were the victims of horrible death threats and the like. The partner, in crime in this instance, was sentenced to imprisonment and not given any home detention. It is fair to say, on viewing the sentencing remarks, that His Honour took into account that she had three children to care for and that that was a persuasive matter to enable her to stay out of gaol. She had an important and respected role in her Aboriginal community and she had employment in the Public Service.

These are all matters which, not unreasonably, are taken into account, but it seems that here we have a situation of the government saying, 'If you get more than a two-year non-parole period for certain offences you shouldn't be able to be eligible for home detention.' I believe—and I think the Attorney agrees, at least on this point—that there needs to be a level of discretion in most cases to allow the sentencing judges to access tools in the toolbox. This is one of them, to take into account the specific circumstances of the person convicted and accommodate that.

I am concerned that we have a situation now where, with the two-year non-parole period, which is to deal with only prescribed designated offences, this would not be captured. If it is, then why was this bill not progressed earlier? Why did we not deal with it here in the parliament two weeks ago when it was listed? Why was it simply removed from the list as a priority bill, and identified by the government as a priority bill, in that week's business and not dealt with?

If the government were seriously concerned about the importance of reforming sentencing law, which, in itself, would not attract immediate attention or priority, but, on the other hand, were serious about dealing with home detention and tidying that up, then why did we not progress that bill in the last session? Surely we then would have had some opportunity to deal with these continuing cases where there is public outcry about the accessibility to an opportunity to have home detention, either with or without adequate restriction, including at least the consideration of the amendments that we present.

Flexibility is one thing, but very serious offending should exclude a person from having access to this option. It is now going to be incorporated in this bill, and we welcome that, but the government cannot have it both ways. It has to either progress this and deal with it, which we have been begging them to do for some time, or at the very least accept the proposed amendments we will present to try to ensure that we have a fair compromise in respect of the home detention option surviving—and, in fact, being available and being utilised—while at the same time balancing the areas of concern that have been raised not just by us but by members of the public.

The final thing I want to say about this bill is that the recent public commentary about home detention, and the circumstances of its application about which a number of commentators have expressed disquiet, raises another ever pressing issue. We have a prison resource in this state that is burgeoning. We have something like, I think, 2,996 people in prison. Obviously that changes daily, some go out and more go in, but we have 3,000-odd people incarcerated.

There are two things I want to say about that. The first is that that obviously puts pressure on corrections officers to let people out, so that a person court-sentenced for imprisonment can come in the other door. Secondly, even with the opportunity to use court facilities, police cells, it is still full. There was a recent announcement that two of our prison cells would not be available—from memory one was at Port Adelaide, but I cannot remember now where the other one was—because the two areas were going to be renovated. Sure, we accept that we have to have these upgrades from time to time; however, they provided 20 or 30 extra capacity to be able to take up some of the shortfall.

They are unavailable for the next few months, so there is a very clear, pressing need to deal with the overcrowding in prisons. We see, almost on a daily basis, concerns raised by the correctional services officers' union themselves or riots or people who do not appear, on the face of it, to be apprehended when they should be. I am speaking about people who break out. We had a very sad case some months ago when a woman who was on work leave left her post, absconded and, two

weeks later, was found dead. I find the whole circumstance of this crisis situation in the prisons to be totally unacceptable.

The second aspect I will raise about it is even more concerning. Because we have such inadequate court operations at the moment in respect of progressing cases through the system, and we have a huge backlog of cases, we now have a cohort of 25 to 30 per cent of prisoners at any one time who have not even been convicted of anything. These are people who are on remand, awaiting determination by the court process.

So, we have our prison population sandwiched between the walls of prisons in South Australia with a multiple number of people who really should be there only for short periods of three or four months before their case is heard. They are sometimes there for a much longer period, and they are clogging up the beds. If you ever want to talk about bed stoppers, it is in this capacity. Secondly, there is a demand by us here as a parliament, let alone the government, to ensure that there be this ranking up of prison terms that are to apply for offences. These terms are not just mandatory in some circumstances but are ever-increasing in their period of operation.

We have a very serious problem. It is alarming to read today in the paper that a person who is in prison received a $100,000 compensation settlement for an apparent failing of the Correctional Services community to employ sufficient access to the management of that prisoner's diabetes health issue. There is a lot of commentary about whether he should have got his $100,000 or whether the victim should get it and so on, and I think they are important matters, but for the purpose of this exercise I want to say that not only do we have prisoners crammed in there but we also have, in my view, totally inadequate rehabilitation programs in the prison.

Today's exposure highlights to me that there is clearly a problem in being able to ensure that adequate services are given for the medical, psychological and even dental treatment of prisoners. As has been clearly said many times, if you are in the custody of the state, whether you are in a prison or under the guardianship of a minister as a child, there is an obligation, a duty of care, to those persons to ensure that they are cared for to the extent of their medical needs, in particular.

I do not know the detail of whether this person should have been given a different diet or whether it enhanced his diabetes problem, or whether it has left him with some residual health problem that he should not have had, but a $100,000 settlement suggests that there is some acknowledgement, on the advice of the Crown Solicitor's Office, that there had been some dereliction of duty in the supervision and restraint of that prisoner, or more particularly a lack of service that was given to him while he was there.

I have raised a number of questions about what should be happening in prisons. I am not going to go through all those today, but I will remind the house of one, and that is that we are one of the few states in Australia that does not make any provision for women prisoners to keep their newborn children with them while they are in prison, to have care of those children for up to two years. In some jurisdictions they get to enjoy that for longer.

We have had that provision in this state before. With the crushing number of prisoners we have in our prisons, it does not surprise me that it is not available at present, but it should be. These are basic rights to ensure that we do not create another generation of problems by—

Members interjecting:

The DEPUTY SPEAKER: Order!

Ms CHAPMAN: —effectively requiring those newborn babies to be placed in the care of others. I make no criticism of others, particularly if they are in their immediate family, but I make the point that there is a lack of opportunity, sometimes for months and sometimes for years, for that mother to acquaint herself with her child.

The second matter, which I again raise because it infuriates me, is the inadequate number of forensic beds available for mental health patients, who are therefore required to be sent to prisons. Again, they are taking up a prison bed when they should be appropriately accommodated in James Nash House or such other facility that can give them the psychiatric care that they need. With those qualifications, I indicate our support of the bill.