DRAFT SECOND READING SPEECH

Hon Elise Archer MP

Dangerous Criminals and High Risk Offenders Bill 2020

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Madam Speaker, I move that the Bill be read a second time.

This Bill will repeal the current dangerous criminal declaration provisions in the Sentencing Act 1997 and establish the Dangerous Criminals and High Risk Offenders Act. The Bill reforms and updates Tasmania's legislative framework in response to the Government's commitment to two separate but related aims.

Firstly, the Bill reforms Tasmania's indefinite detention laws for dangerous criminals.

Second, the Bill introduces a second-tier scheme for high risk offenders that would provide for serious sex or violent offenders to be monitored post-release. This second-tier scheme applies to serious offenders that do not meet the threshold for indefinite detention, and may also operate as a 'step-down' mechanism for a Court to consider when reviewing a dangerous criminal declaration.

The Bill also establishes a high risk offenders assessment committee that will support the new legislative provisions and enable cooperation and information-sharing between relevant Government agencies.

The background to the need for reform in this area includes considerable criticism and judicial comments on Tasmania's current dangerous criminal provisions in the Sentencing Act.

Justices of the Supreme Court of Tasmania have expressed particular concern about the absence of a mechanism for periodic reviews of dangerous criminal declarations and the inability of the Court to impose any form of pre-release or post-release conditions on an offender whose declaration may be discharged. These deficiencies set Tasmania's current legislation apart from other Australian jurisdictions with indefinite detention regimes.

In July 2017, the Tasmania Law Reform Institute (TLRI) released a research paper titled 'A Comparative Review of National Legislation for the Indefinite Detention of 'Dangerous Criminals.' That Paper made 10 recommendations for the reform of Tasmania's dangerous criminal declaration legislation.

The TLRI Paper concluded that Tasmanian courts are reluctant to approve dangerous criminal declarations under the current provisions due to concerns about the barriers to offenders

discharging those declarations and the lack of capacity for courts to impose conditions upon discharge. It further suggested that the reservations of the judiciary may, in turn, result in fewer applications for declarations, based on a perception that they may be unlikely to succeed.

In the lead up to the State Election on 3 March 2018, the Government released its Law and Order policy, which committed to reforming Tasmania's dangerous criminal declaration laws and introducing a second-tier scheme that would subject offenders to intensive monitoring post-release, including electronic monitoring and other forms of supervision, to help protect the community and ensure offenders do not reoffend.

I am pleased to confirm that this Bill delivers on our Election commitment and responds to each of the recommendations in the TLRI Paper.

I will now outline key provisions and reforms relating to the three major components of this Bill, being the new dangerous criminal framework, the second-tier scheme for high risk offenders, and the high risk offenders assessment committee.

Dangerous Criminal Framework

Firstly, Part 2 of the Bill provides for the new dangerous criminal framework.

The current provisions in the Sentencing Act state that an application for a dangerous criminal declaration may be made if an offender is convicted or brought up for sentence after being convicted for a crime involving violence or an element of violence. They do not explicitly provide for an application to be made after sentencing, although Tasmanian case law has confirmed that an application may be made at any time during the offender's period of incarceration.

Division 1 of Part 2 of the Bill provides for the declaration of dangerous criminals. It confirms that an application for a declaration may be made:

- at the time the offender is convicted of a crime involving violence, or an element of violence;
- at the time they are sentenced for that crime;
- at the time they are serving a custodial sentence for that crime; or
- at the time they are serving a custodial sentence for another crime that is being served, concurrently or cumulatively, with the sentence for the crime involving violence, or an element of violence.

This reform implements recommendation 4 in the TLRI Paper.

A significant problem with the current legislation is the requirement for a dangerous criminal declaration to be made by the judge who convicts or sentences the offender for the crime involving violence, or an element of violence. This means that a declaration is unable to be made post-sentencing where that judge has ceased to hold office. In such circumstances, an application for a declaration may only be made in relation to that offender if they commit another violent crime and are convicted or sentenced by a different judge.

The Government's Law and Order Policy identified this as an area that was in particular need of reform, and the Bill delivers on the Government's commitment to fix this problem by dispensing with the requirement for a declaration to be made by the convicting or sentencing judge. This change also responds to recommendation 5 in the TLRI paper.

The Bill provides a list of mandatory factors that the Court must consider in determining whether to make a dangerous criminal declaration. They require the Court to consider: the nature and circumstances of the offender's criminal conduct involving violence; their antecedents, age and character; the need to protect the community; any relevant psychiatric, psychological, medical or correctional reports; and the risk of the offender being a serious danger to the community if they are not imprisoned, as well as any other matters the Court considers relevant.

These matters closely align to those in the comparable legislative provisions in Victoria, Queensland and the Northern Territory, representing the majority of Australian jurisdictions that provide for indefinite detention. The inclusion of a mandatory list of factors responds to recommendation 3 in the TLRI Paper.

When determining an application for a dangerous criminal declaration, the Court may declare an offender to be a dangerous criminal if it is satisfied to a high degree of probability that the offender is, at the time the declaration is made, a serious danger to the community. Similarly, when a dangerous criminal declaration is being reviewed, the test for the Court under clause 14(1) of the Bill is whether the Court is satisfied to a high degree of probability that the offender is still, at that time, a serious danger to the community.

The test and standard of proof provided for in this Bill will align the new Tasmanian provisions with those in Victoria, Queensland and the Northern Territory.

Like all other Australian jurisdictions with equivalent legislation, the Director of Public Prosecutions (the DPP) bears the onus of proof for the original application to impose indefinite detention and any subsequent review or application to discharge the order.

The reforms that I have just outlined in relation to the test, standard and onus of proof in Tasmania's dangerous criminal provisions respond to recommendations 1, 2 and 7 in the TLRI Paper.

The key effect of a dangerous criminal declaration is that the offender is not to be released from custody until that declaration is discharged, regardless of whether their custodial sentences have expired. For example, a declared dangerous criminal cannot be released on parole or leave.

Madam Speaker, I made earlier reference to one of the major criticisms of Tasmania's dangerous criminal laws being the absence of periodic reviews of declarations, with concerns frequently raised by legal stakeholders and the judiciary. I am pleased to advise that the Bill addresses this by providing for mandatory reviews of dangerous criminal declarations.

Periodic review of dangerous criminal declarations is provided for in Division 2 of Part 2 of the Bill. Periodic review applies to both declarations made under the Bill once commenced, and also to offenders already subject to a declaration under the current or previous legislative provisions.

Where an offender's relevant custodial sentences – that is, their fixed-term sentences – have already expired at the time that the Dangerous Criminals and High Risk Offenders Act commences, the Bill requires the DPP to apply for an initial review of the offender's dangerous criminal declaration within three years after the commencement day. For declarations made after commencement of the Act, the first review application is to be made within 12 months before the day on which all the offender's relevant sentences expire.

If an offender's dangerous criminal declaration is not discharged as a result of the initial review, the Bill requires the DPP to subsequently apply for further reviews, making each application within three years of the most recent decision refusing to discharge the declaration. This means that every offender's declaration will be regularly reviewed by the Court.

In addition to these mandatory periodic reviews, and at any time after the initial review has taken place, the Bill provides for an offender to apply for a review of their dangerous criminal declaration, provided that the Court grants leave on the grounds that exceptional circumstances apply to the offender.

To inform the Court's review of a declaration, the Bill requires the DPP to provide the Court with certain reports facilitated by the high risk offenders assessment committee. It also provides a discretionary power for the Court to order a report in relation to the offender that is prepared by a psychiatrist, psychologist or medical practitioner, by the Director of Corrective Services, or by any other person.

When conducting a review, the Court will be required to consider the mandatory list of factors set out in clause 14(2) of the Bill in determining whether the offender is still a serious danger to the community. These factors include whether the risk posed by the offender may be appropriately mitigated by imposing a high risk offender order on the offender – part of the new second-tier scheme – instead of refusing to discharge the dangerous criminal declaration.

Implementation of the review provisions I have just outlined responds to recommendations 8 and 10 in the TLRI Paper.

The discharge of a declaration does not take effect until any appeals in relation to the Court's decision have been determined, and the discharge of a declaration has no effect on any sentence of imprisonment being served by the offender. An offender whose declaration is discharged may not be released from custody until the DPP has had the opportunity to apply for a high risk offender order.

The Bill also includes new provisions for the Court to make pre-release orders during the review of a dangerous criminal declaration, either of its own motion or upon application by the DPP or the offender.

The purpose of a pre-release order is to provide the Court with additional information in relation to the offender's suitability for release from indefinite detention. As set out in Division 3 of Part 2, a pre-release order may require the offender to participate in rehabilitation, treatment or re-integration programs or other activities specified by the Court, or achieve certain results. It may also require the preparation of additional reports relating to the offender, or the provision of

information as to the accommodation, employment or any other support that may be available to the offender if they are released from prison.

The Court may make orders that assist it in determining whether to make a pre-release order and what conditions should be included in such an order. For example, the Court may obtain information about the availability and suitability of programs and activities that may assist with the offender's rehabilitation or reintegration into society.

Where the Court makes a pre-release order it must specify a period of up to 12 months for an offender to complete the requirements of the order and adjourn the review hearing.

The provisions in the Bill for pre-release orders respond, in part, to recommendation 9 in the TLRI Paper by enabling the Court to impose pre-release conditions prior to discharging a dangerous criminal declaration. The other part of recommendation 9 – enabling the imposition of post-release conditions when a declaration is discharged – is addressed through the making of high risk offender orders, which I will outline shortly.

Appeals relating to initial applications, reviews and pre-release orders will be heard by the Court of Criminal Appeal.

High Risk Offender Orders (HRO) Orders

Madam Speaker, I now turn to Part 3 of the Bill which provides for high risk offenders.

There are some serious offenders who do not meet the threshold for being declared a dangerous criminal, warranting indefinite detention, but who nevertheless may pose an unacceptable risk of committing another serious offence if no supervising conditions are in place when they are released post-sentence.

Among Australian states and territories, Tasmania and the Australian Capital Territory are currently the only jurisdictions that do not have legislation in place that enables these serious offenders to be appropriately supervised in the community after their sentences are complete. This Bill delivers on the Government's election commitment to introduce such a second-tier scheme by providing for the making of high risk offender (HRO) orders.

The Bill provides that the DPP may apply for an HRO order in relation to a 'relevant offender' as defined by the Bill. This includes an offender who is serving a custodial sentence for a serious offence listed in Schedule 1 of the Bill, or for the breach of an HRO order, including where that offender has been released on parole.

An application may also be made where a dangerous criminal's declaration is reviewed by the Court, as a potential 'step-down' should that declaration be discharged.

In making the application, the DPP must provide the Court with relevant reports in relation to the offender that have been facilitated by the high risk offenders assessment committee and provided to the DPP.

To make an HRO order the Court must be satisfied to a high degree of probability that the offender poses an unacceptable risk of committing another serious offence unless the order is made. This test and standard of proof is consistent with most Australian jurisdictions that have post-sentence supervision schemes.

Amongst other specified factors, the paramount consideration for the Court must be the safety of the community.

Where the Court makes an HRO order, it is required to impose the mandatory conditions set out in the Bill, including reporting and residential conditions, permitting police to enter premises and conduct searches, not leaving the State without approval, and complying with directions by a probation officer to engage in treatment, counselling or other activities. The Bill also provides a non-exhaustive list of other conditions that may be ordered at the Court's discretion.

An HRO order may have an operational period of up to 5 years. This period may effectively be extended by applying for a new HRO order before expiry of the current order.

The Bill provides for the making of interim HRO orders if it appears to the Court that an offender may cease to be in custody, or cease to be subject to an existing HRO order, before the Court can determine an HRO order application in relation to that offender.

The Bill also provides for the variation or cancelation of HRO orders or interim orders, breach and enforcement provisions and appeals.

High Risk Offenders Assessment Committee

In response to consultation on the proposed legislation, changes were made to the Bill to establish a high risk offenders assessment committee to support these reforms.

The committee will facilitate the provision of reports and risk assessments in relation to offenders, and ensure effective cooperation and information-sharing between the Government agencies that deliver services in relation to the supervision, management and support of offenders in the community. Similar bodies operate in other Australian jurisdictions to support their post-sentence supervision schemes.

Division 2 of Part 3 of the Bill provides for the establishment of the high risk offenders assessment committee and its functions. The committee will include representatives from the Department of Justice, the Department of Health, the Department of Communities Tasmania, and the Department of Police, Fire and Emergency Management.

A significant function of the risk assessment committee will be to facilitate behavioural and management reports in relation to relevant offenders. This includes any declared dangerous criminal whose declaration is to be reviewed by the Court and any other offender who may be eligible for an HRO order application.

Where the committee determines that these reports warrant a risk assessment in relation to a particular offender, the committee can appoint a psychiatrist, psychologist or medical practitioner to conduct that assessment and prepare a report. A person conducting a risk assessment will provide their opinion as to the likelihood of the offender committing another serious offence unless they are subject to an HRO order.

The DPP may refer to those reports in determining whether to apply for an HRO order in relation to a particular offender, and must provide these reports to the Court for any HRO order application and for dangerous criminal declaration reviews. The decision as to whether to apply for a HRO order will sit with the DPP, and the risk assessment committee will not make a formal recommendation.

The Bill also provides for information-sharing and cooperation between relevant agencies to support the management of relevant offenders and the functions of the risk assessment committee.

Conclusion

The Government recognises that there are diverse and strongly held views about how we, as Tasmanians, should deal with dangerous criminals and ensure that the community is protected from offenders who pose a serious danger to our safety.

In noting that indefinite detention should be confined to very exceptional cases, where the exercise of the power is demonstrably necessary to protect society from physical harm, the High Court of Australia has affirmed the legality of indefinite detention regimes.

The Government believes that this Bill strikes the right balance in enabling indefinite detention to be used as a last resort, to safely protect Tasmanians from an offender who has proven to be a serious danger to the community.

With the introduction of the second-tier scheme for high risk offenders, the Bill provides an alternative mechanism for the Courts to ensure that an offender is appropriately supervised and subject to strong conditions in order to minimise the risk that they will commit another serious offence following their release.

In developing this Bill over the past 20 months, the Department of Justice has undertaken extensive analysis of Tasmanian judicial decisions, the recommendations in the paper prepared by the Tasmania Law Reform Institute and the comparable legislative frameworks in other Australian jurisdictions.

A consultation draft of the Bill was released for public consultation for a period of nearly eight weeks and was also provided to targeted stakeholders. Following consultation, the Government has made a number of changes to the Bill to take into account the significant stakeholder feedback that was received.

I would like to take this opportunity to thank every stakeholder who provided submissions and comments on the draft Bill. In particular, I would like to acknowledge the invaluable work of the Tasmania Law Reform Institute in formulating the recommendations that are reflected in these important reforms, and the substantial work undertaken by my Department.

I would also like to acknowledge the work of the Office of Parliamentary Counsel in drafting and finalising this substantial piece of legislation, particularly in light of the additional challenges created by the COVID-19 pandemic.

I commend the Bill to the House.