Speech by

# Hon. Kerry Shine

## MEMBER FOR TOOWOOMBA NORTH

Hansard Tuesday, 21 August 2007

## DANGEROUS PRISONERS (SEXUAL OFFENDERS) AMENDMENT BILL

**Hon. KG SHINE** (Toowoomba North—ALP) (Attorney-General and Minister for Justice and Minister Assisting the Premier in Western Queensland) (5.21 pm), in reply: At the outset I thank all honourable members who made a contribution to this important legislation. This bill will strengthen the protection of the community from the risk of reoffending by sexual offenders. At the outset, I must say that I am disappointed that the opposition is opposing these amendments. The opposition is attempting to block amendments that will strengthen the protections for the community.

I believe the opposition has misread the provisions of the bill. I believe, as the member for Barron River stated in his contribution, that the opposition 'intends to not meet the obligation to protect the citizens of this state' by opposing this bill. The member for Gladstone's contribution made the point of this bill very clear, and that is to enhance the protection of the community. I welcome the offer of bipartisan support from the member for Gladstone. This bill does not make it easier for these offenders. This bill enhances what this parliament provided, with unanimous support, in the Dangerous Prisoners (Sexual Offenders) Act 2003. The member for Caloundra raised the fact that this is the fifth amendment to the Dangerous Prisoners (Sexual Offenders) Act in four years.

The 2003 act was groundbreaking legislation. It certainly was the first of its kind in Australia, and other states have followed or are closely examining our laws in this area. Two previous attempts to legislate in this way failed in other jurisdictions. Queensland's legislation was held to be valid by the High Court by a strong majority in the Fardon case. This challenge was a constitutional one. Given the comments made by the members for Caloundra and Burnett it is important to reiterate the principles from the High Court decisions of Kable and Fardon.

In broad terms, the Kable principle is that, because of Chapter III of the Constitution, state parliaments cannot enact laws conferring upon a court functions which make it an unsuitable repository of federal judicial power. In general terms, the kind of interference with judicial power considered in Kable involved the imposition of functions which might significantly compromise the institutional impartiality of and the maintenance of public confidence in the court. In Fardon, the majority concluded that the dangerous prisoners legislation to be a valid law, and two of the key reasons were because it is preventive legislation which purpose is to protect the community rather than to punish prisoners and because the conferral of power to the court must be exercised subject to normal judicial process.

The legislation is new law and our willingness to amend where there is a perceived need shows our commitment to ensuring the greatest level of protection for the community. I believe that regular review of legislation is inherently a healthy thing. Out of the five amendments, one was a consequential amendment arising from a change in terminology in the Corrective Services Act 2006 and another was merely a clarifying amendment in relation to electronic monitoring. The original legislation was guided through the parliament by the then Attorney-General and current education minister in the House today. I note that the legislation was supported unanimously by the parliament.

Despite the contributions of the opposition members in this debate, I also note that they have supported each of the four amendments to these laws over the past four years. The member for Burnett

has not voted against any of these previous amendments. I also note that the honourable member for Caloundra has supported all previous amendments to the act. The member for Caloundra stated that the conditions imposed on released offenders under the act are so stringent as to be unenforceable and, given how dangerous these people are, they should be detained. The conditions are stringent, and in many cases numerous, and no-one should apologise for that.

It is the Supreme Court which determines that the safety of the community can be ensured by the imposition of such conditions. The conditions are tailored to address the specific offending behaviour of the prisoner and are based on psychiatric evidence. The management of released prisoners is in a category of their own, entailing intensive supervision. Probation and parole officers monitor closely released prisoners through the highest levels of surveillance and case management to ensure compliance with supervision orders so that the safety of the community can be maintained.

There is a real difficulty in taking away the judicial discretion of supervised release. That is the real result of any successful opposition to supervised release—not permanent detention but invalid legislation resulting in the release of prisoners without any control or supervision at all. The member for Caloundra states that the only option is to permanently detain these prisoners. To do so may render the measures punitive rather than protective and, like similar legislation in New South Wales and other states, risks being struck down by the High Court as unconstitutional. What the honourable member proposes would result in these prisoners being released into the community without the benefit of any supervision at all—a result that nobody wants.

The honourable member raises the issue that the legislation provides no guidance as to the decision-making process as to when the offence provision is used rather than a return to the Supreme Court. The honourable member also asked me to clarify whether the offence provision covers all contraventions. It is clear on the face of the legislation that the breaching offence relates to all contraventions. I am advised that at the briefing to which the member for Caloundra refers departmental officers stated that the intention of the new regime is that the offence provision will be used for contraventions of a less serious nature where there is no indication of an elevation in the risk posed by the released prisoner. Where there is such concern the released prisoner will be taken back before the Supreme Court. It would not be appropriate to attempt to include as an element of the offence that it must be a breach of a minor nature as it would give rise to endless debate between the defence and prosecution. Further, it is impossible to predict all possible future factual circumstances.

The legislation is deliberately silent in this regard to allow full discretion as to when and how this process is used. Although prima facie the offence provisions will be used in what might be described as less serious contraventions where no question is raised as to heightened community risk, it is impossible to predict all future fact scenarios that might arise. Therefore, it would be appropriate to leave a broad discretion. The member for Caloundra can be assured the decision making will not be made by a junior public servant. At present, any contravention by a released prisoner is referred to a case management conference which is held at an executive level within Queensland Corrective Services. This practice will continue.

Not all contraventions point to an elevation in the risk of the released prisoner reoffending. In the case of a breach such as failing to attend a medical appointment, it would be inappropriate to refer such a matter to the Supreme Court because it would not warrant any change to the terms of the supervision order. In such circumstances, charging the prisoner with a breach offence is signalling that noncompliance with the supervision order will not be tolerated.

However, where the contravention is of a serious nature warranting application to the Supreme Court, such as consuming alcohol where this has been a factor in the offending behaviour, these new amendments mean that the released prisoner will be detained in custody pending final determination of the Supreme Court, unless they can show that exceptional circumstances exist. There may be circumstances where it is appropriate to refer the matter to the Supreme Court as well to charge the breach offence. By being too prescriptive in the legislation, we restrict the manner in which the QCS officers, who have the expertise, determine the best way to manage the released prisoner.

The member for Caloundra also raised the concern that the amendment removes the right of the Supreme Court to hear breaches of its own orders. I assume the member for Caloundra is saying that if a decision is made to charge the released prisoner with a new offence, as proposed in this bill, the Supreme Court is denied the ability to consider the contravention in relation to its order.

Among the key considerations of the Supreme Court in relation to the DPSO legislation is the risk of the released prisoner reoffending and ensuring the adequate protection of the community. The purpose of the breach offence is to deter non-complying behaviour and prevent an escalation of such behaviour. It is an added tool for Corrective Services when it comes to the risk management of these released prisoners. Certainly where a released prisoner’s conduct is such that it raises a question as to the risk that the

released prisoner poses to the community, a warrant will be sought to bring the released prisoner before the Supreme Court.

The other key objective of the DPSO legislation is the rehabilitation of the released prisoners. This government recognises that Corrective Services have the expertise and the risk management of these offenders and it will appropriately identify noncompliance, which warrants a return to the Supreme Court.

The member for Caloundra states that the new offence provisions also overload an already overworked Magistrates Court. The members for Caloundra and Burnett both referred to the performance of our courts. The report on government services released in January of this year showed that Queensland courts were efficient, cost-effective and accessible courts. It showed that Queensland courts were performing well and keeping up with their workloads.

The Queensland Supreme Court finalised 97.9 per cent of its criminal appeals within 12 months of them being lodged. In terms of overall case loads, the Queensland Magistrates Court achieved a clearance rate of 97.1 per cent. Clearance rates for the Supreme and District Courts were 91.6 per cent and 116 per cent respectively, which is comparable with the performance of other jurisdictions. Queensland's Children's Court performed incredibly well with a clearance rate of 99.5 per cent for all matters.

In terms of the Magistrates Court, in the past two years the government has appointed an additional four magistrates. In the budget there was further good news for the magistracy regarding appointments and judicial registrars, which is a matter dealt with in other legislation currently before the House. I should also make the point that given the number of released prisoners—a prediction of 100 over the next three years—even if every one of them appeared on a breach offence the number is negligible in the context of the workload of the Magistrates Court across the state.

The member for Caloundra raised the issue of how the two processes, that is, the offence in the Magistrates Court and the Supreme Court procedure, will interface. Where a released prisoner contravenes a condition of the supervision order in circumstances which raise a real question as to the risk the released prisoner poses to the community, a warrant will be sought to bring the released prisoner before the Supreme Court. In such a case, the onus will rest with the released prisoner to satisfy the court that adequate protection of the community can be ensured by a supervision order. The offence provision will be used where the contravention is of a minor nature to deter the prisoner from such conduct and to prevent the escalation of an offender's contravening behaviour where the nature of the breach does not threaten community safety.

It is possible that a released prisoner could be subject to offence proceedings and to the commencement of proceedings in the Supreme Court at the same time. This situation may arise where offence proceedings have already been commenced against a released prisoner and, subsequently, the released prisoner commits a further contravention of the supervision order. If the further contravention means that the released prisoner is a greater risk of reoffending, then the QCS officers will apply for a warrant to detain that offender and have him returned to the Supreme Court.

The member for Caloundra made issue of the fact that, when the matter comes back before the Supreme Court, the standard of proof is the civil standard, that is, on the balance of probabilities. The honourable member suggested that the released prisoner should have to prove beyond a reasonable doubt that the adequate protection of the community can still be ensured by a supervision order. Even though the civil standard applies, nevertheless the prisoner must be detained in custody unless the prisoner can show exceptional circumstances. These amendments do not change the onus of proof in these matters, as the honourable member seemed to imply, but reverse who bears the onus of proof, placing it solely on the released prisoner.

The protection of Queensland's community hinges on the High Court continuing to categorise the act as preventive rather than punitive. The Attorney-General's originating application is on the balance of probabilities and that standard applies to all decisions under the act. By inserting a criminal standard of proof, we run the risk of giving the legislation a punitive flavour.

The honourable member for Caloundra also raised some questions in relation to the use of electronic monitoring by Corrective Services officers as part of their supervision regime of released prisoners. There are, of course, two types of electronic monitoring available on the market today. The first is a general radio frequency monitoring system. Standard radio frequency technology does not track offenders but can determine if an offender has breached the electronic perimeter. This type of electronic monitoring is available in Queensland, Victoria, South Australia, New South Wales, Western Australia and New Zealand.

The second type of electronic monitoring available uses a global positioning satellite or GPS system. A GPS system enables the real-time tracking of offenders and has the capacity to set exclusion zones to warn offenders that they are about to breach the condition of their order if they continue to enter

an exclusion zone. However, this type of technology is still relatively new to the marketplace and I am advised that it still has some significant shortfalls.

The member for Caloundra called for the scrapping of the dangerous prisoners legislation and the implementation of the private member's bill that was introduced last year. I hold strong concerns as to the constitutional validity of much of that bill.

The member for Burnett stated that the bill asked the Magistrates Court to overrule the decision of the Supreme Court. That is not the case. If a magistrate finds the contravention is proved and convicts and sentences the released prisoner, the Supreme Court supervision order continues. If the released prisoner is sentenced to imprisonment, the supervision order is suspended for the period of incarceration. I refer honourable members to sections 23 and 24 of the act.

Finally, the member for Burnett also stated that if a person is charged with the new offence, the Bail Act will not apply. This is incorrect. The Bail Act will apply to a charge of contravening a supervision order.

Section 4 of the Dangerous Prisoners (Sexual Offenders) Act 2003 provides the Bail Act does not apply to a person detained under the dangerous prisoners legislation. However, a person charged with the new offence will not be detained under the dangerous prisoners legislation. They may be detained under the Police Powers and Responsibilities Act 2000, depending on the manner in which those proceedings were begun, or if sentenced they will be detained pursuant to the Penalties and Sentences Act 1992. Therefore, the Bail Act will apply as intended.

Finally, I wish to foreshadow that I will be moving a number of amendments to the bill which have been circulated in my name. These amendments to the Dangerous Prisoners (Sexual Offenders) Act 2003 will ensure that prisoners released on supervision orders are subject to a mandatory condition of electronic monitoring with an associated curfew.

In 2006 the dangerous prisoners legislation was amended by the inclusion of a specific example to clarify that a judicial authority can order that a released prisoner must wear a device for monitoring the prisoner's location. Since that amendment, 10 applications for electronic monitoring have been made to the Supreme Court with the court declining to order such a condition on five occasions.

The community expects that sex offenders released under the dangerous prisoners legislation will be subject to stringent and intense supervision and surveillance in the community. The ability of Queensland Corrective Services to apply stringent controls and limitations on released prisoners is vital. Electronic monitoring with associated curfews allows Corrective Services to impose movement restrictions on these offenders and to effectively monitor compliance with such restrictions. This provides an additional layer of control over those offenders who pose the highest risk to community safety.