CRIMINAL LAW (MENTAL IMPAIRMENT) BILL 2022

Committee

Resumed from 23 March. The Deputy Chair of Committees (Hon Dr Brian Walker) in the chair; Hon Matthew Swinbourn (Parliamentary Secretary) in charge of the bill.

Clause 2: Commencement —

Progress was reported after the clause had been partly considered.

Hon MATTHEW SWINBOURN: At the end of last week some outstanding matters were taken under advisement and we sought to get back to the chamber on them. One matter related to when the implementation committee first met. I can confirm that that was 5 November 2021. Hon Tjorn Sibma requested a full summation of the task load associated with the implementation of the bill. We made a commitment to provide information about the next level down of work required to support implementation, so I have a two-page document here to table. It was provided to the member behind the chair, so hopefully it has been of assistance to him. One of the documents is titled "Criminal Law (Mental Impairment) Bill 2022 — Implementation Timeline" and the other one is titled "Program Streams".

[See paper 2120.]

Hon MATTHEW SWINBOURN: Hopefully that will address the issue the member raised. Of course, if he has questions arising out of that, we are as ready as we can be to answer them.

Hon TJORN SIBMA: I confirm that I received those two documents this morning from the Attorney General's office, and I put on the record my appreciation for being provided with that information. Indeed, I do have some questions arising from a cursory examination of the two documents. Firstly, I will reconfirm that the date of the inaugural meeting of the steering committee was 5 November 2021. I understand that the steering committee meets every two months; is that correct?

Hon MATTHEW SWINBOURN: Under the terms of reference, it is every two months, but it has not necessarily met every two months. If I recall correctly, we said that it is capable of meeting more often than every two months; I think "bimonthly" was the term that we previously used.

Hon TJORN SIBMA: Not to be tedious, but how many times since 5 November has that steering committee met?

Hon MATTHEW SWINBOURN: It met on 5 November 2021, as previously advised, and on 1 September 2022. Let me double-check this document.

Thank you; this just goes to prove that I am no Ron Burgundy and just read out what is put in front of me! It met on 20 October 2022 and 27 February 2023.

Hon TJORN SIBMA: Forgive me; I was laughing at the Ron Burgundy reference!

I presume that minutes of those meetings are kept—I will make that assumption—but what reporting obligations to the Attorney General arise from those steering committee meetings? For example, has anything arisen since 5 November 2021 in relation to the implementation committee that would require the Attorney General's approval or guidance? If so, would the parliamentary secretary be able to provide some advice on what those issues might have been?

Hon MATTHEW SWINBOURN: Hopefully, we can give the member an answer that will satisfy him in respect of the thrust of what he is trying to get at. Keep in mind that these meetings are agency-level meetings that involve a number of agencies that fall under a number of different portfolios. The member has asked more specifically about the Attorney General, but just for the sake of fullness, some of the people in that group are representatives from the Minister for Health, the Minister for Mental Health, the Minister for Police, the Minister for Corrective Services and the Minister for Disability Services. I can confirm that there is no agreed reporting procedure within that group to those relevant ministers in that regard. Responsibility rests with each of them to report, as is appropriate, to their respective ministers. The group itself has not agreed to that—I am not saying that there is no reporting—but in terms of the content of the reporting between those agencies and their relevant ministers, it is not something that the Attorney General has insight into, because it is obviously within that particular committee.

In relation to the Attorney General, the Department of Justice and its representatives have reported regularly to the Attorney on these matters. Obviously, that has gone to the formulation of the bill, and the content of those particular things would be cabinet-in-confidence because the formulation of the bill went before cabinet. There has been regular reporting. I think we indicated last week that there is a significant degree of contact between the Department of Justice and its relevant officers and the Attorney General's office on this matter, such that we probably could not give the member a full account of the level because it is fairly regular.

Hon TJORN SIBMA: Just for context, I am reading together the two documents that the parliamentary secretary very helpfully tabled earlier. When I transition between them, I will give an indication so that we know which document we are referring to. In the document titled "Criminal Law (Mental Impairment) Bill 2022 — Implementation Timeline", which I think the parliamentary secretary has in front of him, he will see that on the left-hand side there is a column titled "Tranche 0", which is contextualised at a time when the bill was subjected to targeted consultation, the draft was being finalised and approval to print was being obtained. Under "Tranche 0", the final item of the three items listed under "Program design & delivery activities" says "Develop funding submission inputs". First of all, can I clarify whether that activity related solely to the funding required to either undertake consultation on the bill or take the bill through to being read into Parliament or whether it refers to what I thought it originally referred to and that is the implementation of the bill? Can the parliamentary secretary clarify what we are talking about, please?

Hon MATTHEW SWINBOURN: It is the third one that the member mentioned.

Hon TJORN SIBMA: It relates entirely to the implementation of the bill. The second row in this document refers to project management and the second little green diamond on the left-hand side says "Funding decision" and it has an asterisk. The notes underneath say "There may be more than one funding decisions relating to implementation". Can I ascertain how many funding decisions related to the implementation of this bill have been made prior to the bill inevitably passing through Parliament?

Hon MATTHEW SWINBOURN: I think we can understand it in three ways. There is funding that has already been incurred, funding that is under consideration now and possible future funding depending on how the implementation arises. Obviously, we are bringing in a new regime to some degree and, as much as anyone can predict, we do not know what further issues might arise as a consequence of its implementation, which is a natural thing.

I cannot speak about the current thing because it relates to the current budget, which is obviously under consideration and development now and is subject to all those caveats and privileges that we constantly talk about. What I can indicate to the member is the funding for the 2020–21 and 2021–22 periods and the funding to date. The Department of Communities has been funded with $318 000, the Department of Justice with $1 850 000, the Mental Health Commission with $2 494 000, and the Western Australia Police Force with $145 000. That is the funding that they have already been allocated to date over that period. As I said, obviously there will be further consequences with the passage of the bill, and that will be dealt with in the budget. As a matter of completeness, it is for those additional funding matters that have not been anticipated at this time.

Hon TJORN SIBMA: Thank you for that, parliamentary secretary. As a ballpark figure, about $4.5 million or thereabouts has been spent to date.

Hon Matthew Swinbourn: It is $5.8 million.

Hon TJORN SIBMA: Sorry—$5.8 million. I was not listening closely enough. What was that funding for? What activity did that bring to bear that otherwise would not have been brought to bear without that expenditure?

Hon MATTHEW SWINBOURN: It is quite detailed, so bear with me. To date, the funding has been used for project and policy positions across government for varying periods, including for eight full-time equivalents for the Department of Justice; two full-time equivalents for the Department of Communities; 0.6 of a full-time equivalent for the Mental Health Advocacy Service; 1.6 full-time equivalents for the State Forensic Mental Health Service; two full-time equivalents for the Mental Health Commission; one full-time equivalent for the Office of the Chief Psychiatrist; and one full-time equivalent for the Western Australia Police Force. A portion of the funding was used to engage consultancy to assist with developing. Approximately $116 000 was used for a program management framework and plan, and approximately $37 500 was for a program communications plan. Planning for the implementation of the bill has been occurring concurrent with the finalisation of the bill. This work intensified recently due to the bill's introduction in Parliament, which provides further certainty for implementation preparations.

Over the past 12 months, implementation preparations have included the following. Firstly, the preparations have included development of the program management plan, which involved extensive collaboration across impacted agencies and outlines the work required across agencies, including the sequencing of this work; a schedule for implementation that recognises that commencement is dependent on the timing of the bill's passage through Parliament; the roles and responsibilities of the officers and executives from agencies involved in the implementation; governance mechanisms for driving and overseeing the implementation; and reporting requirements by agencies and the criminal law mental impairment program team through to the governance mechanisms. Secondly, the preparations have included the completion of service model design work on key areas across agency implementation, such as disability, mental health and victims. Thirdly, high-level planning for the transition of current supervised persons to the legislative framework provided by the bill has commenced. Fourthly, the preparations have included identifying agency-specific implementation requirements; for example, changes to ICT or policy. Fifthly, the

preparations have included costing implementation requirements to inform a comprehensive funding submission for government consideration. This work will ensure that agencies are well-placed to transition from current planning and service model design activities to preparatory and transitional readiness activities in anticipation of the bill's commencement.

Hon TJORN SIBMA: I appreciate the level of detail provided, because this is an unusual clause to debate in the context of other bills, but considering the effort and the expenditure that has taken the government to this point, I think it is worthwhile spending a bit more time on clause 2 than we would ordinarily do.

Of the mapping out—I suppose, my complexion—of the sequencing of tasks, is the parliamentary secretary able to provide any particular insight into which of those individual tasks are afforded higher priority than others? Perhaps that priority is because of its inherent complexity or because there is a critical path dependency on getting that particular aspect right. If the parliamentary secretary is able to outline which of the tasks ahead are the high-priority items, that would be very useful.

Hon MATTHEW SWINBOURN: Implementation activity is focused on ensuring that all agencies can deliver what is required of them from the day the bill commences. All agencies are aware of the need to ensure that persons subject to the current CLMIA act have a limited term set and a transition to the new legislative framework as efficiently as possible. However, this cannot occur unless the foundations are set out—this is probably what Hon Tjorn Sibma is after—which includes the court processes and procedures and the establishment of the tribunal. Further, the processes must be in place from the day of commencement to deal with any person who raises fitness or are found not guilty due to mental impairment in line with the requirements of the bill. As a result, no particular—I do not know what has happened to my words!—implementation activities can be singled out as being of a higher priority than others.

I also need to clarify that the Mental Health Advocacy Service funding mentioned earlier is actually 0.8 FTE, not 0.6 FTE, which is what I previously said.

Hon Tjorn Sibma: One additional day a week.

Hon MATTHEW SWINBOURN: Yes.

Hon TJORN SIBMA: I thank the parliamentary secretary for that; it was quite helpful.

Still on this document, which is partially titled "Implementation Timeline", I presume that because it states "Complete" under tranche 0 that we are potentially in the period of tranche 1, which under program design —

Hon Matthew Swinbourn: By way of interjection, yes.

Hon TJORN SIBMA: Are the kinds of activities and issues that the parliamentary secretary outlined encompassed under the service model implementation planning block, which says that there is no further information relating to that, or do I read that in conjunction with the program streams identified on the other document?

Hon MATTHEW SWINBOURN: I will give Hon Tjorn Sibma an answer that might not specifically address what he asked, but it might give him what he is after. The service model implementation planning is—I will use my own term—the rubber going to the road from the previous finalised service model design; it is moving from that into this next stage. It is going from the theoretical to the practical with the people, processes, ICT and those sorts of things. It is obviously connected to the funding decision, which is at the top as well, but a lot of work is presently going on and it will continue to go on, which is obviously dependent on the passage of this bill through Parliament and the delivery of the budget in terms of those sorts things. It is all sort of coming together, if that makes sense to the member.

Hon Tjorn Sibma: By interjection, we are at a point of those elements converging—the passage of the bill, the budget being —

Hon MATTHEW SWINBOURN: Convergence—yes.

Hon TJORN SIBMA: The little bit I take out of that, parliamentary secretary, is that in terms of activity on the program streams document in the vicinity of "S2–Service Model Design", we are leaching more into S3, service model implementation. That would be my assumption.

I refer to either the second or third occasion on which the parliamentary secretary reflected on ICT-related issues. They are referred to briefly in the implementation time line document in this tranche 2 and tranche 3 vicinity as planning commissioning and testing ICT changes. Can the parliamentary secretary elaborate on what those ICT changes are? I suppose the obvious question is: does this relate to the purchase of new software or hardware or the integration of new systems with legacy systems, or is this the creation of an entirely new information ecosystem?

Hon MATTHEW SWINBOURN: The member asked for an example. Information and communications technology changes are required to support the implementation of the bill. New notifications required by the bill must be provided or responded to in a timely manner. These would include notifications to and between the courts, the mental

impairment review tribunal, victims of crime via the Commissioner for Victims of Crime, the Mental Health Advocacy Service and a legal representative of the Public Advocate. Changes have been identified as being required to achieve those things, including the Department of Justice's ICT systems. Courts and Tribunal Services use the integrated courts management system. I will sum this up for the member at the end. Courts and Tribunal Services use a case management system. Corrective Services uses the total offender management solution and a community-based information system. There is also a connection with the Mental Health Advocacy Service's database. Agencies are considering their ICT requirements as part of the implementation and preparations.

As the member can imagine, with the changes that will arise, some of the pragmatic stuff might relate to the proper references in software systems to the particular provisions of the act, the development of new forms and notification processes through ICT systems. That is all part of the process. That is not a new thing for us to consider because we have made changes to other criminal laws, for example, that are affected in that particular way. Obviously, these things need to talk to each other. I can confirm that although no decision has yet been made about software, consideration is being given to new software. That is part of the ongoing consideration of that process and may be dependent on funding decisions and things of that kind.

Hon TJORN SIBMA: If we get to it tonight, which we may well do, I think there are some provisions in the bill relating to information exchange. I am particularly interested in this practical dimension, if only for —

Hon Matthew Swinbourn: It's your love of metrics, member.

Hon TJORN SIBMA: — the timely responsiveness to issues that may arise through the breach of a leave of absence or a community-based order and the capacity of the tribunal to alert the police about potential individuals who might present a very serious risk to the community. We might get to that point as well.

It would be remiss of me not to make an inquiry, at the very least, in recognition of part 15 of this bill, "Consequential amendments to other Acts", which takes us through clauses 280 to 412 inclusive. In light of the validation bill that we have dealt with in this chamber, a measure of caution, and double, triple and, if needed, quadruple checking of the implementation of this bill on all those other acts, in light of this steering committee process, who takes responsibility for ensuring that all the drafting of those other acts is done accurately?

Hon MATTHEW SWINBOURN: As expected, a range of people are responsible and, dare I say, even us here in Parliament. Once the legislation has passed through this place, the administrating agencies have joint responsibility. Parliamentary Counsel's Office is also responsible, along with the instructing officers from the Department of Justice and, where necessary, engagement with the State Solicitor's Office. Because the member referred to part 15 in that regard, we can take comfort in how part 14 is drafted in terms of the transitional arrangements, providing us with a great deal of comfort about moving from the old system to the new system. The advisory officers at the table are very comfortable with the kind of matter that might arise that we previously dealt with not being an issue with this bill, which obviously has a significant gestational period as well.

Hon TJORN SIBMA: This is more an observation than a question. I hope that level of comfort that the parliamentary secretary is taking is proven in the longer term and that the very able advisers at the table do not have to grace us with their presence again in respect of a potential future validation bill, which was one of the reasons I attempted to refer this bill to a committee. Let us hope it works.

Clause put and passed.

Clauses 3 to 7 put and passed.

Clause 8: Paramount consideration —

Hon TJORN SIBMA: Clause 8 is a brief clause but one of great significance, stating —

> The paramount consideration of a person when performing a function under this Act (including when constituting or a member of a court or tribunal) is the protection of the community.

To some degree, this can be a subjective assessment. Indeed, community assessment of judicial decisions is not always in alignment. First, I ask: to what degree is this principle being applied under the current act in relation to the management of those subject to a conditional release order or a leave of absence?

Hon MATTHEW SWINBOURN: The current act does not give primacy to the protection of the community in the same form. It has its own provision. It is certainly titled in a way that would give any judicial officer or member of the tribunal a very clear understanding of what Parliament's expectation is of that paramount consideration. Under the current provisions, for example the board dealing with those two matters that the member identified, risk is still a factor that is taken into consideration. Section 28(3) of the act says —

> (3) Before making a leave of absence order, the Board is to have regard to —

(a) the degree of risk that the release of the accused appears to present to the personal safety of people in the community or of any individual in the community;

Risk will still be a primary consideration for the board when dealing with people on a leave of absence. I think there is a similar provision at section 33(5)(a) of the act for a conditional release order, which provides identical wording in that regard. Those matters are in terms of risk, but, as the member can see, it is framed slightly differently. I suppose one could have a philosophical argument about whether or not it is one and the same thing. With this bill, we are making it front and centre at the very start under this particular division, which is the interpretation provision, so that there is no doubt as to our expectation. Those matters relate to the exercise of the board's power. It is front and centre for "a person when performing a function under this Act", and that includes police officers, court and tribunal staff, judicial officers as well, and all those sorts of things when they perform functions under this legislation.

Hon TJORN SIBMA: This principle is expressed as a paramount consideration. With that in mind, might there be some treatment or the application of higher restrictions. I use the word "restrictions" in a more colloquial sense. At the moment, we have 49 of the 56 or 57 individuals being managed under the present act on either a conditional release order or a leave of absence. None of those individuals is subject to electronic monitoring. I asked that question earlier. I want to understand the step change in the primacy afforded to this principle that might arise out of this bill passing. What kinds of conditions—I do not need it on a case-by-case basis—apply to those individuals presently on a conditional release order in light of places to avoid, individuals to avoid, curfews and the like? I am trying to understand how the principle, nevertheless, is given effect even if it is through a risk-based framework.

Hon MATTHEW SWINBOURN: When I described it as a "philosophical" difference between those two things, I might have misrepresented it, because a provision in the current act talks about the least restriction necessary. Electronic monitoring bracelets might offend that provision because it might be considered to be more than the least restriction necessary. We are putting in a paramount consideration so that the new tribunal will be able to consider any conditions that it thinks are necessary to protect the community. That provides a little bit more of a framework around that and it is why we think it is necessary we deal with this under this particular provision in this clause rather than at particular points.

The member's specific question was on the kinds of conditions that might be imposed currently. In relation to a leave of absence escorted or unescorted for such periods as is necessary, and with the approval of the treating psychiatrist, it could be for the purposes of receiving medical, dental or other such treatment that is not available at their place of custody. A leave of absence escorted or unescorted could be for the purposes of attending activities that are reasonable on compassionate, cultural and/or religious grounds, and as approved by the treating psychiatrist. These are examples of conditions that have been imposed: a leave of absence escorted to the grounds of Graylands Hospital, as approved by the treating psychiatrist; and a leave of absence unescorted to the grounds of Graylands Hospital for up to X number of hours per day, as approved by the treating psychiatrist. Again in relation to a leave of absence, examples include a person being unescorted in the community for up to X number of hours per day for up to X number of hours per week, as approved by the treating psychiatrist for the purposes of engaging with drug and alcohol support services, participation in vocational activities or employment, participation in community leisure activities deemed appropriate by the treating team, attending supervision sessions with and as directed by the community corrections officer, and attending random urine analysis if requested by the treating psychiatrist or community corrections officer to provide a valid sample. This is an additional point: a leave of absence escorted in the community for up to eight hours three times a week, as approved by the treating psychiatrist, for the purposes of pursuing community activities with the support and supervision of specialist staff or during all periods of leave X is to abstain from using any alcohol or illicit drugs, have no direct or indirect contact with the family members of the deceased victims or not leave the state of Western Australia without the prior permission of the board.

They are some examples of the conditions under the current regime that we are dealing with. For the sake of future clarity, under the provision at clause 55(2) the court will be able to impose any conditions necessary and clause 78(4) deals with the tribunal specifically.

Hon TJORN SIBMA: I will get off the current practice soon, but I just want to deal with it so we can establish absolutely that, to some degree, this bill represents an elevation in the management of these issues, and that it clearly articulates community safety as the paramount consideration. To what degree does the exchange of information or the systems upon which people are performing a function under the current act enable the de-risking, I suppose, of individuals being—quote, unquote—released into the community on a leave of absence or a conditional release order? I ask that question because I earlier asked a question without notice concerning whether it was known whether any individual on a conditional release order or a leave of absence had subsequently undertaken or been charged with another offence while they were on one of those two arrangements, and I could not get a clear answer. Is it possible to answer whether, over the last 12 to 24 months, for example, any of the individuals who have enjoyed—also in scare quotes—a conditional release order or a leave of absence under the present act have committed an offence while in the community, what that offence was and how long it took to detect that that person had committed that offence; and, if so, were other authorities alerted to the circumstances? Is that clear enough? Just the circumstances around —

Hon Matthew Swinbourn: Yes; I think I get what you're trying to get at.

Hon TJORN SIBMA: Thank you.

Hon MATTHEW SWINBOURN: I think that the member tried to give an indicative range in his question. I can tell the member what we actually know and the extent of what we know. In the last three financial years, we are aware of one person having been charged with an offence, but that charge related to a breach. It was actually under the Criminal Law (Mentally Impaired Accused) Act itself. It was a charge of absence without leave. We do not know what the outcome of that charge was, but there was a charge. We are a bit reticent to search for more information because it is a single case and there is a risk of identifying that person by drilling down into the particular details. We cannot say how serious that charge was for that particular person.

Hon Tjorn Sibma: I appreciate that.

Hon MATTHEW SWINBOURN: The member asked the previous question. One thing that it identifies is a deficiency in the current provisions. This bill will address that because it will provide for the notification by agencies when there is a suspected breach. Perhaps if I can take the member to clause 80, "Notifying Tribunal about breach of leave of absence order", that proposed section provides that the supervising officer will have to —

Hon Tjorn Sibma: Must advise the tribunal as soon as practicable.

Hon MATTHEW SWINBOURN: Yes, that is right —

> … after forming a reasonable suspicion that a condition of a leave of absence order has not been complied with.

I suspect that will include not committing other offences. We are trying to address that.

Hon TJORN SIBMA: I make these remarks conditional on the condition that the parliamentary secretary placed on the answer that he just gave me, which was a cautious and appropriate answer in light of the circumstances. I am to some degree relieved that within the cohort we are talking about, the offence was one of that nature, and not the commission of another schedule 1 offence, for example, which is exactly the kind of outcome that we are all trying to avoid here.

The parliamentary secretary can take this as an indulgence to the person asking the question, but my earlier preoccupation with matters concerning implementation particularly of the ICT arrangements stems directly from the answer to this particular question. I want to read in the offending answer—"offending" in scare quotes. This was a question I asked on 14 March 2023. For completeness, I will read the question —

> I refer to the cohort of 56 offenders, as of 31 December 2022, managed under the Criminal Law (Mentally Impaired Accused) Act 1996.
>
> (1) How many were granted a leave of absence and/or a conditional release order?
>
> (2) Were any of this cohort charged with an offence while on a leave of absence or a conditional release order?
>
> (3) Regarding (2), what was or were the nature of this charge or charges?

The answer to the second and third limbs of my question was —

> (2)–(3) Electronic records of any charges alleged against a mentally impaired accused while subject to a leave of absence order or conditional release order are not retained by the Mentally Impaired Accused Review Board's case management system. Paper records would exist; however, the cohort to which the honourable member's question applies dates back to 1986 and would require considerable investigation to ascertain a response. Further, the board could not be confident that following such an investigation, any response would be accurate as it is unable to guarantee it was notified by the Western Australia Police Force of any and all charges alleged against a mentally impaired accused who was undertaking board-sanctioned leave.

My interpretation of the last hour or so of our exchange has been that the implementation of an ICT system would spell the end of paper-based record keeping in the discharge of these functions; it would not obliterate it, but we would not have a system that is reliant upon their use. Would that be a fair assessment?

Hon MATTHEW SWINBOURN: With regard to the paper records and the offending question that the member indicated in—what did the member call them?

Hon Tjorn Sibma: Scare quotes.

Hon MATTHEW SWINBOURN: Scare quotes. It will not be obliterated. The moving of electronic documents will be supplemented by paper records because of the age of some of these things. I think the concern, though, is the possibility that a person who is subject to one of these conditional supervision orders would be charged with an offence—I cannot say "committed" because that suggests the person has been through the judicial system and

found guilty—and that the new tribunal and others would not be made aware of that because of a lack of connection between the actions of the police and the relevant agencies. There is a concern about a lack of communication of those particular things. To allay any fear that that might happen, I can indicate that the agencies involved in the implementation of the bill are currently considering the information-sharing arrangements that will be put in place to facilitate information sharing across agencies. Part of those arrangements will be a mechanism whereby the WA Police Force will inform the Mental Impairment Review Tribunal of any charges against a supervised person on a leave of absence or that a CSO is being investigated. That information sharing will include the consideration of any necessary ICT changes to ensure that supervised persons can be readily identified within the Western Australia

Police Force's system. Therefore, if a person is arrested and subsequently charged, the agencies will be aware that the person is under one of these orders, and that will then trigger a workflow process between the relevant agencies.

Hon TJORN SIBMA: Thank you, parliamentary secretary. Of all the potential information nodes activated by these issues, I am particularly satisfied that there is a focus on the connection between the soon-to-be-established tribunal and the Western Australia Police Force. I am particularly concerned because I interpreted that answer to suggest that there are some unfortunate gaps or opportunities and that perhaps messages have not been sent or received in a timely fashion. Might I ask, just for the completeness of this particular element, whether the paper-based records that exist, particularly for a number of offenders who date back to 1986, will be digitised in any way, or will they be retained as paper files?

Hon MATTHEW SWINBOURN: There is no plan for digitisation, but it is not out of the realms of possibility that in time the tribunal in particular might have the capacity to dedicate some of its resources to that, particularly if it sees some utility in how it manages those people, but it is not currently part of the package of work that we are undertaking at this stage.

Hon TJORN SIBMA: That is fine. I will move from the current day, parliamentary secretary, to try to understand what interpretation we can form about the passage of this bill and its implementation. This may seem somewhat of a leading question, but what obligations will this paramountcy of community safety place on the executive government in respect of a number of other functions related to the faithful discharge of obligations here in the bill? For example, will this create obligations on the executive government to find additional declared places suitable for the accommodation of these kinds of offenders? Might it also place obligations on the issue that we have just been discussing, which is the adequate establishment of ICT systems and the like? If I might focus a little more prosaically on where the rubber might hit the road, will it place an additional emphasis on the need to recruit more staff to supervise individuals in the community? I am very interested in the parliamentary secretary's reflections on ensuring that the paramountcy of community safety, at least at that level, will be abided by the people who set the parameters for everybody else to work underneath.

Hon MATTHEW SWINBOURN: I think we need to understand the wording of clause 8 and what it actually applies to. I think that in this particular instance it refers to a person who will perform a function under this act. Perhaps some of the things that the member has identified are not functions that will be performed under this act. I think one of the things the member referred to was the hiring of staff, which might happen under the Public Sector Management Act, for example, or in declaring additional places. That is a function under this legislation, but as to whether it places an imperative to declare additional places, the act of declaring an additional place would be performed under this legislation, therefore the consideration of the paramountcy of community safety comes into it. Also, with this provision we can take some additional guidance, for example, from section 5B of the Sentence Administration Act that provides an almost identical provision for the Prisoners Review Board when exercising its functions. There is a simile titled provision, "Community safety paramount", which states —

> The Board or any other person performing functions under this Act must regard the safety of the community as the paramount consideration.

That is almost identical to the wording here. Further, the members of the Prisoners Review Board are also members of the board that makes decisions on people covered under the current act. Under the transitional provisions, the members of those two bodies, being the same people, will transition to the new tribunal as well, so they will be very familiar with considering the paramountcy of community safety. We have moved past clause 7, but clause 7(2) provides additional guidance for people performing quite detailed functions under this legislation, particularly in relation to children.

Hon TJORN SIBMA: My question is about the obligations this might place on those who make decisions at a level—I will say above—those who might ordinarily perform a function under this legislation. However, the decision was made because the capacity of individuals to perform their roles and functions appropriately is to not an insignificant degree circumscribed by the tools they have to bear, particularly when it comes to supervision and the timely exchange of relevant information. That is a political statement, but I think it is absolutely appropriate to

make in these circumstances. I thank the parliamentary secretary for drawing attention to clause 7(2). I deliberately jumped over that just to have a broader discussion at clause 8; otherwise, I would have been accused of going clause by clause, and I would not want that accusation to be made against me by the government.

Hon Sue Ellery: You could do that because you are very good on clauses!

Hon TJORN SIBMA: I do not know yet!

How is the chamber to form an impression that this paramount consideration is being applied and abided with? For example, what insight will be publicly available to the Mental Impairment Review Tribunal decisions on any individual offender?

Hon MATTHEW SWINBOURN: The member was going okay and then he talked about an individual offender.

Hon Tjorn Sibma: If it is an individual case, how would the community be satisfied that this principle is being applied by the review tribunal?

Hon MATTHEW SWINBOURN: With individual cases or offenders there are restrictions under this provision that relate to how these matters are reported, and for obvious reasons. These apply to a small number of people. They are already vulnerable people for a range of reasons so we cannot allow the identification of those persons in a way that might be similar, for example, to a person who has been charged and convicted of an offence that does not fall under this area. Remember, these people are not convicted by reason of their incapacity or inability to be held responsible for the crimes alleged against them. However, in terms of the tribunal's activities, how it is conducting itself and the number of cases it is dealing with, there will of course be the annual report process, so things will be reported in annual reports. The Standing Committee on Estimates and Financial Operations, of which the member was once an esteemed member, has the opportunity to hold annual report hearings. There is also the budget estimates process to determine how matters are being expended on, and there are parliamentary questions and things of that kind that can deal with that. That obviously deals with things at a more executive level of the agency rather than the individual matters the member is focusing on. Individuals have a range of rights, so if, for example, they are going through a process, their representatives can appeal decisions that apply to them through the system. The Attorney General also retains an appeal right. If a published decision of an individual case comes to the attention of the Attorney General that he is not happy with, he has the capacity to exercise his rights.

Hon TJORN SIBMA: That was precisely the information I was trying to elicit. From my reading of the bill, other than the statutory review in five years' time that is embedded in it, I was not certain of what executive oversight there would have been in the consistent application of this principle. If the Attorney, presumably with some foundation, there must be some ground specified, called in the decision—I will use planning language—and replaced it with another one, what would be the process? If the Attorney was unsatisfied with a tribunal decision, what process must be followed to remediate the problem?

Hon MATTHEW SWINBOURN: Clause 93 deals with appeals against certain decisions and who has standing to make those appeals. Clause 93(2) says —

> The Minister may, with the leave of the court, appeal to the Supreme Court …

The Attorney General is the minister who has the capacity to make that application to the Supreme Court to appeal a number of things. We might get to the details of that a bit further along in the examination of the bill.

Clause put and passed.

Clause 9: Terms used —

Hon TJORN SIBMA: I note the very extensive list of terms and their definitions included under this clause. I have also noticed—this is an issue that we touched on earlier—that there seems to be no statutory definition of "fitness" amongst the terms defined here. Can I ask what the definition of "fitness" is? I know this is touched on in other parts of the bill, but we might be able to deal with it somewhat here. How are we to interpret "fitness"?

Hon MATTHEW SWINBOURN: The member is right, there is no definition of "fitness" in clause 9. I take the member to clause 26, "Accused who is unfit to stand trial". That provision deals with the issue of fitness. It is important to appreciate "fitness" as not being a single thing; it is a spectrum of things. Clause 26 provides a range of criteria that a court needs to consider when determining whether a person is unfit to stand trial. That clause codifies what was previously provided under common law. Some other jurisdictions still use the common law that has developed over a long period to determine unfitness, but we have attempted to codify those criteria under clause 26. When a court is dealing with a person who is claimed to be unfit to stand trial, it will go through an iterative process, if I can use that word, to work out whether the person is unfit to stand trial because of mental impairment.

The clause refers to a person being unable to do one or more things listed, so again, it is a spectrum. It could be all of them—although, I suspect some of them conflict, so that would not be possible—or it could be a number of them, but as long as one of them apply, the person is unfit. They include the person being unable to understand the

nature of the charge; unable to give instructions to a legal practitioner representing them; unable to understand the requirement to plead to the charge or the effect of a plea; unable to understand the purpose of a trial; and unable to understand or exercise the right to challenge jurors. The list goes on, and I do not think the member needs me to read them all. If the court is satisfied that one of these criteria apply, it will be determined that the accused has a mental impairment and is therefore unfit to stand trial. In that regard, I think we can understand that to mean that there is no single definition for "fitness".

No other jurisdiction has a fixed definition. They either use the common law or take the same approach we have taken in this bill. I think if courts are looking for further guidance, they will look to the common law interpretations for the matters we have dealt with here, so we are not completely throwing the common law out. It is also based on section 9 of the current act, so the case law that applies to that section will have a significant degree of usefulness for those who are making these determinations.

Hon TJORN SIBMA: I thank the parliamentary secretary. In light of the three rounds of extensive consultations that took place as part of the preparations for this bill, did the government entertain the question of fitness by way of either increasing or lowering threshold tests to establish fitness or unfitness?

Hon MATTHEW SWINBOURN: Not during the consultation process, but there was a group that contacted us post-consultation and there is quite a lot we can address on that issue if the member wishes to pursue it. I am conscious of the time left before question time, but I will provide a bit of additional context in relation to this clause. We were informed largely by what happened during the 2016 review, and the report and recommendations that arose from it. Obviously, there was consultation on that during that process. The report noted that the majority of stakeholders supported the retention of the Presser test, with some enhancements and clarifications. Recommendation 6 of the 2016 review report was that the fitness criteria should be expanded to include consideration of the accused's ability to instruct counsel, decide whether to give evidence, and give evidence if they wished to do so. These were identified by stakeholders as critical indicators of an accused's ability to make meaningful decisions in respect of their trial. To that end, clause 26 of this bill retains the Presser test, with the expansion of these additional criteria at paragraphs (b) and (h).

Committee interrupted, pursuant to standing orders.

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