CRIMINAL CODE AMENDMENT BILL (NO. 2) 2011

Second Reading

Resumed from 1 September.

HON HELEN MORTON (East Metropolitan — Minister for Mental Health) [3.48 pm]: Last week when I began my response to the second reading speech on the Criminal Code Amendment Bill (No. 2) 2011, I described how the bill does nothing other than negatively impact on the dignity and respect of people with a mental illness. That is because the Criminal Code already states that if a person has a mental impairment—that is, a mental illness, an acquired brain injury, is senile or has an intellectual disability—at the time of seriously assaulting another person, including a policeman or any other public officers that have been described in mandatory sentencing legislation, or causes grievous bodily harm to another person, including those people, and if the person's impairment, including a mental illness, is such that he or she does not understand what he or she is doing, cannot control their actions or is unable to know whether what they are doing is right or wrong, then the person is not criminally responsible for that act. Section 28 of the Criminal Code states that the aforementioned also applies to people with who have impaired mental health from long-term alcohol or drug abuse.

I also said that the Criminal Code Amendment Bill (No. 2) 2011 merely adds to the stereotypical stigma of connecting serious mental illness and violence to criminality. Hon Alison Xamon's bill will allow a person who assaults or causes grievous bodily harm to be excluded from the laws that apply to everyone else, merely because they have a serious mental illness—that is, one that impairs their thoughts, mood or behaviour, regardless of whether those thoughts, mood or behaviour are under control. According to Hon Alison Xamon, just because someone hears voices they can be excused for bad behaviour; or just because they are depressed or manic they can be excused for assault or grievous bodily harm. But, as I have stated previously, many people hear voices, many people have delusions, and many people have mood swings, but they certainly know right from wrong. They certainly understand that they do not go around assaulting people. The only time that any of these people should be excused from the laws that apply to everybody else is when their illness is out of control, which is what section 27 of the current Criminal Code says should happen.

Equally, under section 23, if a person is not able to control their acts—for example, if a person had an epileptic seizure and assaulted or harmed someone—they also have a defence. That is not to say, for example, that a person is excused or has a defence merely by the fact that they have epilepsy as a diagnosed illness, but only if their epileptic seizure is such that they are unable to control it. People who hear voices or have delusions or mood swings are absolutely sick and tired of being made to feel that they cannot live law-abiding lives. They do not need to be told that because they hear voices, they can escape mandatory sentencing if they hit a policeman. They need to hear—it is probably a great shame that this debate has not enabled them to—that, "Yes, you hear voices. If the voices or the delusions are out of control, you have a defence. But if not, if they are under control with medication, treatment or through any other mechanism, you can live a good life and be treated like every other person in society in the face of the law." The people who have allowed families to believe that their sons, daughters, husbands or wives would not have a defence if they assaulted or caused bodily harm to a policeman, if called, when their illness is out of control, have caused unnecessary worry, anxiety and fear, and I think it is a great shame. I guess it is up to us to undo the damage that has been done.

I started to talk about the process. As I mentioned, the process included police officers who may have been allegedly assaulted, and the police officer making a decision about whether to take it any further or not; that would not change as a result of this bill. It then goes to the lawyers at the Office of the Director of Public Prosecutions, where the lawyers make the case about whether to allow a case to progress at all; once again, that would not change. At this stage, of the 43 cases brought to DPP lawyers in the past two years, 19 have gone on. The case then has to go to a magistrate, and the magistrate can also screen it at that point; once again, that would not change. Of the 19 cases that have gone forward at that stage, only 13 have gone on to receive a mandatory sentence.

Hon Sue Ellery wanted to talk a little about if somebody decides to plead as being unfit to plead, or if they are deemed unfit to plead. If somebody is unable to understand the court process because of mental impairment, they can consider the plea of being unfit to plead. Depending on the nature of the offence, that could lead to a range of different outcomes. There is not any way, shape or form, or concern, that that is going to lead to a custody order. The magistrate can release those people unconditionally, impose a conditional release order, impose a community-based order under which they get treatment and support, impose an intensive supervision order, or impose a custody order. I make it absolutely clear that in the past five years, only two people have received a custody order. The Mental Health Law Centre made it absolutely clear, in the information it sent out to everybody, that it is most unlikely that anybody will get a custody order. I have had absolutely confirmed to me by the Attorney General's office that at no time in the past three years has a mentally impaired accused been subject to a custody order as a result of changes under the laws around mandatory sentencing. Hon Alison

Xamon's bill would not make a difference to that situation. If somebody is considered unfit to plead, whether mandatory sentencing is there or not, or whether Hon Alison Xamon's proposed bill was there or not, it would make no difference; a person who is unfit to plead is unfit to plead. That situation would not change.

I think that when I talk about custody orders I do not have quite the same range of negative feelings about them in relation to people with a mental illness that some people have. When I was the shadow spokesperson for mental health, unfortunately I had people telling me that they had actually sought a custody order to get into the sorts of treatment that they needed. It has been relayed anecdotally to me that they would deliberately get the police to assist them to get a custody order, to get in and get the sort of treatment that they needed, knowing full well that if they could not get into a secure mental health facility in any other way, this was one way they could do it. Hopefully, that is now not happening; however, that was the case, and it was brought to my attention a few years ago. Of course, now, a person with a mental illness would go into one of our mental health facilities. They would get the sort of treatment—the rehabilitation, and the preparation for release and transition back into the community—that they may need. However, there is always a chance that a person—not necessarily a person with a mental illness, but it could be a person with an acquired brain injury or a person with intellectual disability or some other form of mental impairment—may be a risk to themselves and to the community, and that their custody order may need to be prolonged and other arrangements eventually put in place for them.

I also wanted to make the comment that I had spoken to the Chief Justice prior to him delivering his speech. He sent me a copy of the speech he made around these issues, and it was primarily around the issues to do with custody orders. So, I refute the comment made by Hon Alison Xamon—or it might have been made by the reporter; I cannot remember whom—on radio this morning that the Chief Justice had given an opinion about this bill. That is not the case.

I also wanted to mention the establishment of a couple of our new services, such as the Mental Health Commission and the police now collaborating quite substantially on the level of training that all police recruits get prior to graduation from the academy, in conjunction with mental health professionals; in addition, the Drug and Alcohol Office presents a drug awareness session. That will actually be increased as soon as the Commonwealth Heads of Government Meeting is over. In addition to recruit training, mental health training is delivered to constables and senior constables as part of the promotional course delivered by the WA Police Academy. The detective training unit has responsibility for the tier 1 investigative interviewing training across WA Police. A component of this is the interviewing of vulnerable people, including persons displaying mental illnesses. A significant amount of increased training is taking place, including the introduction of a third day of critical skills training, which every police officer receives on an annual basis to remain operational. That is all coming about.

I have had a reasonable amount of discussion directly with the police commissioner about the changes that we want to put in place and that have already been agreed we will put in place whereby both police and mental health professionals, people who belong to community emergency response teams, go out to a family that is known to include a person with a mental illness. The CERT team has made it clear that a level 2 response to a requested location is usually required by WA Police; that is, a response time within two hours. An immediate or urgent response will also be accommodated wherever possible. The North Metropolitan Area Health Service has three community emergency response teams based in Osborne Park, Joondalup and the Swan district. It has seven staff on from 3.00 pm until 11.45 pm and staff on call overnight. Similarly, the South Metropolitan Area Health Service has teams based in Armadale, Rockingham and Fremantle and similar sorts of night coverage but its total number of staff is 16. A significant amount of change is already taking place around the way in which people with a mental illness should feel comforted that they can call the police and get decent service and assistance from mental health professionals.

I just about dropped dead when I heard Hon Alison Xamon mention that she believes court diversion programs have come about as a result of her intervention. I can assure members that that is not the case. I was very happy to brief the member in my office on what was occurring with court diversion programs. I am happy to say that I have a very strong commitment to progress these programs—to enable the people who come into the justice system with a serious mental illness to be diverted to a mental health court—and make available to those people a range of other options.

The other thing that I would like to indicate is that within the changes to the Mental Health Act 1996 at the moment only the police are authorised to transfer people to involuntary care. We are seeking to change that authorisation within the Mental Health Act. I am hopeful that that will be in place within the next 12 months as it will enable us to put in place an alternative to families needing to call the police.

The second last thing that I want to mention is that this mandatory sentencing legislation will be reviewed in September 2012, in another 12 months. By then it will be three years since it was brought into operation. To date, 13 people have been given a mandatory sentence. If we assume that that is an average of six a year, and we

add another six to that, perhaps 19 people will have been given a mandatory sentence by the time this legislation is reviewed. I can assure members that under that review, each individual case will be given full analysis. If people with a mental illness or mental impairment are inadvertently caught up in that process, that is the time we will find out. Until now, that concern has been expressed but I do not believe it is based on real things that have occurred.

If I thought that there was any additional benefit in this bill that ensured that people were protected or that mums and dads needed the sort of protections that Hon Alison Xamon is talking about, I would have argued for that, even at the time of the bill's passing, or I would have been quite comfortable to argue for it when Hon Alison Xamon introduced this bill. I have gone in on this matter in this way not because I am toeing the line of a particular government position or of anybody else but because I am absolutely convinced that if this bill were to pass, even if it was only neutral, or if I believed that it might have some potential benefit that would not really make a difference, I would have gone in to bat for it but it is not neutral; it is absolutely detrimental.

HON PHILIP GARDINER (Agricultural) [4.05 pm]: I rise to speak as the lead speaker for the Nationals on the Criminal Code Amendment Bill (No. 2) 2011, which I know has been proposed with the best of goodwill to try to protect those who, for one reason or another, do not have the full capacity of their senses at the time of doing something that has a mandatory sentencing complication to it. Many of us are surprised to learn how many people suffer from some of these conditions. They can be all kinds of psychiatric and psychological conditions but it is not just those that force people to lose their senses. I am very familiar with the diabetic condition. People suffering from diabetes can similarly lose their senses. They often become not necessarily violent, although some may, but more aggressive in their words when they are not sure and do not quite know what they are doing. It covers a very wide field of people. Those people do not have their senses. They do not recall what happens under those conditions. When they are told about it, they are staggered that that is what could have happened. The interesting thing for the law in this area is that there are two aspects. One is the presumption of innocence and the other is the presumption of sanity. The only problem I have with those two principles in our law is the use of the word "sanity". If a person is not sane and they are called insane, that is very debilitating. Those who do not have their senses at the time of doing something do not mean it. If they did something deliberately—that is, they meant to do it—they almost deserve to have the word "insane" applied to them but the trouble is that it is implied when they do not know what they are doing. It may be of value to change that in the law only because of the meaning that it implies when talking about people and the branding that it gives.

When I read section 27 of the Criminal Code as a layman, it makes all the sense in the world. I know that it has already been mentioned. It very clearly states —

> A person is not criminally responsible for an act or omission on account of unsoundness of mind if at the time of doing the act or making the omission he is in such a state of mental impairment as to deprive him of capacity to understand what he is doing, or of capacity —

This word is important all the way through this section —

> to control his actions, or of capacity to know that he ought not to do the act or make the omission.

That seems to me to be a pretty all-encompassing section to protect anyone who does not know what they are doing at the time of committing an offence against our law. The second part of that section is to do with the issue of delusion. If I am deluded and I hit a policeman who I think is my brother or my uncle, the act of hitting someone is an act of my delusion, and therefore I am not guilty. It seems to me that the current construction of the Criminal Code provides the protection that should be given to those who are judged by anyone to not have their full capacity.

The trouble is that a lot of people out there have deep concerns; we have all received these emails, and I accept that each individual one of those emails is totally genuine. They have deep concerns because they are people who support people who suffer from conditions that result in them not having full control of their senses. They are caring for these people in probably extraordinarily difficult circumstances, and I take my hat off to those people. But their concerns are, I believe, unfounded. I have tried to communicate with some of these people to try to give them my view about how their protection works; I have not had any responses back, but my understanding is that they just do not understand the full protections they have. What they are concerned about, of course, in the home environment of supporting someone who loses control of themselves, is their ability to call anyone in—for example, the police—to protect them or members of their household, for fear that the police will be assaulted and the person suffering the condition will be culpable and sent to jail for a minimum sentence.

I actually think that that is an issue of education, but fear is a hard thing to override. Unfortunately, I cannot see that clauses 4 and 5 of the Criminal Code Amendment Bill (No. 2) 2011 will give any extra protection, in their homes, to those people who are concerned. It does not add anything to section 27 of the Criminal Code. When it comes to the issue of custody orders for people who are found guilty and are then considered insane, that falls

outside this area. If it is that they are sufficiently out of their capacity and require additional treatment, then—as Hon Helen Morton has already said—we need to have some measures in place, somewhere, somehow, in a right treatment environment, to protect and work with those people so that they can either be turned around to understand more about their incapacities, or maybe just to be contained for a period in a different environment from a jail environment, but nonetheless in a protected environment of some kind, that has some compassion and can help deliver them out of the trough in which they may be.

I have been through a couple of relevant cases that have gone through the courts of Western Australia. One of them went through the Supreme Court in 2010; it was an appeal. The appeal related to the judgement of the magistrate who first heard this case. The case was of a person who caused grievous bodily harm to a female bus driver. This chap was asleep on the bus and the bus driver got up and said, "You can't sleep on the bus; you're going to have to get off at the next stop". That interaction is very similar to interactions I heard about when I was most concerned about the introduction of mandatory sentencing back in 2009. I have a very close friend in New South Wales who, at that stage, was working in the New South Wales Magistrates Court. She said, "Oh, that's just typical: it's the one-two-three". Someone might be in a bar drinking, having had a skinful, and the police come into the bar. It may be that he makes some sharp comment to the police, and the police make some aggravated comment back to him, and that inflames the situation to the extent that the next thing that happens is that the man who has had a skinful physically assaults the police.

There is an ingredient that is hard to assess in all these cases, sometimes even when there are clear witnesses: the nature of the communication between the parties such that a normal situation can become inflamed to a point at which it results in aggression. I guess that happens everywhere in the world; the killing of Archduke Franz Ferdinand in Sarajevo ignited the commencement of World War I. If one stands back and looks at those sorts of things after the event has taken place, it is amazing to think that such a small thing could inflame a situation to the extent that it causes that kind of action, but perhaps that is often what does not come out in the courts, especially the Magistrates Court. The other thing that we have to consider is that the Magistrates Court is a lower-level court, and there are two implications in that. One is that a lot of the magistrates may not be as well informed or prepared, or as good at the job of listening to the evidence, as they should be, especially in comparison with the higher courts. That is why good judges are appointed to the higher courts. The second thing about the Magistrates Court is that it is the jurisdiction that most of the public sees. If a decision being made by magistrates does not seem to make commonsense—a lot of it is commonsense—then respect is lost or diminished in the court system.

I refer back to the appeal case in the Supreme Court; I will leave the identity out. It was found that the learned magistrate erred in law by failing to consider whether the appellant's mental illness had caused or contributed to the offending behaviour, or should otherwise have impacted on a just sentence, including by requiring a sensible moderation of the factors of general and specific deterrence.

One of the grounds of failure to consider mental illness states —

> … I have already indicated the respect in which the learned magistrate considered the appellant's bipolar condition.

Here we have a bipolar condition—a condition that comes and goes. Medication is important for these people, and these events often happen when the medication is not taken. Further along in the same case, the finding reads —

> … serious psychiatric illness not amounting to **insanity** is relevant to sentencing in at least the following five ways: …

Rather than reading them out, I will say that each of the ways are the ways that we would normally expect mental illness to be evident. The appeal in this case was upheld, so the person who claimed mental illness before the Supreme Court was exonerated. This is a clear case of the system working; the only problem is that it costs a lot for those who have to go through it, both financially and emotionally. Of course, people who suffer with mental illness on and off take that as an additional stress, which they should never have to go through but have had to go through, to reach the just conclusion. I do not have a solution for that. I do not believe the bill would help in this case in any manner or form, but it is something which ideally we should try to do better, but I do not know how to do that.

The home of mandatory sentencing is the United States of America. I have a real problem still with mandatory sentencing, respecting that the act provides for a review after three years. This review was included in the act with the assistance of the National Party, and we also tried to get a public disclosure campaign so that anyone who may be close to assaulting a policeman, especially if that person has had a skinful and is in a bar, could have their friends pull them back and say, "If you do that, you will go to jail for six months." Some measures were inserted in the bill to improve it, for which we are all very grateful. Based on what I just read out relating to that former magistrate and the appeal being won in the Supreme Court, perhaps there still needs to be a much better

engagement between police and magistrates. I know that people might say that that is crossing the line between the judiciary and the operations of the police, but unless people talk and engage, they are not sharing some of the difficulties that each side has. I cannot help but believe that in this area of mental health, magistrates should have a deeper knowledge of what is entailed, especially given the example to which I just referred.

Mandatory sentencing has proved to be successful when we measure it in terms of the reduction of assaults on police: in the first 12 months of its introduction assaults on police fell by 30 per cent. The issue is whether that is sustainable and whether it will continue to fall or whether they will be repealed, as in the USA, where Governor Rockefeller of New York introduced mandatory sentencing for drug offences and these laws were repealed after 30 years because they had not worked on a sustainable basis. I will give members an example of the incarceration statistics in the USA compared with the rest of the world, and I do this because the United States is the home of mandatory sentencing. At the end of 2009 in the USA, there were 743 prisoners per 100 000. Where was the next highest rate of incarceration? It was New Zealand, where there were only 200 prisoners per 100 000; it was even lower everywhere else. The incarceration rate in Australia is 133 per 100 000; in the UK, it is 154; in Norway, it is 71, and in the Netherlands, 74. The United States has a much higher incarceration rate than any country in the world, with almost 3.1 per cent of US adults under correctional supervision—be it probation, parole or jail.

Hon Simon O'Brien: There is also a number of similar-aged Americans who are looking after them in custody.

Hon PHILIP GARDINER: That is another big cost.

Hon Simon O'Brien: A very significant part of their population is either in prison or looking after those who are in prison. It makes you wonder what else they are doing!

Hon PHILIP GARDINER: The minister is right; it is a big number. Imagine if that cost did not have to be incurred and was instead put into early childhood education or something that would get to the grassroots to stop people going into jail.

Hon Simon O'Brien: That is the point I make: so many more American youth, in particular, could be more productively engaged.

Hon PHILIP GARDINER: Absolutely; and part of that relates to the economy, but more important is the point to which Hon Simon O'Brien is referring; that is, that money spent on prisoners, which I cannot help but agree, is wasted money. It should ideally be allocated in other ways so that we can reduce the amount that we apply to prisons and increase the amount we apply to the genesis of the problem that leads a lot of people into prison.

They say that the main reason the US has this high rate of incarceration is harsher sentencing, which of course would include mandatory sentencing. One of the four other reasons they gave for this is that judges are elected, and because they are elected, they tend to respond to populist sentiments and the demands of their communities. Populism has always grated with me, because it often compromises what, in a true objective judgement, is the better way of doing things. Another reason could also be the legacy of the racial turmoil that that country has had; and maybe it is just part of the US temperament. It is a package of things that causes that incarceration.

Let me go back to our situation. The issue of mandatory sentencing goes beyond those who are suffering mental illness. Injustice will apply just as much to those who do not have mental illness as it might to those who do. I am much more confident that the injustice to people with mental illness will not just be because of their mental illness, it will be because of other factors. As I see it, our current law has good solid protections for those who at a point in time do not have the capacity to control their behaviour and break the law. Therefore, the National Party is against the bill.

HON MIA DAVIES (Agricultural) [4.27 pm]: I also rise to speak on the Criminal Code Amendment Bill (No. 2) 2011. I commend Hon Alison Xamon on the intent of the amendment she proposes to the legislation, but I concur with Hon Philip Gardiner and other members on this side of the house that I do not believe the amendment will achieve the stated intent.

I will start by making a few comments about the research that I have done, which follows on from Hon Philip Gardiner's comments. Certainly, the people who live with mental ill health on a long-term basis, periodically or even one short episode, certainly deserve the support and protection of this government. In particular, when these people meet our justice system, we need to ensure there are adequate protections in place. I am quite sure that not one member in this place believes it is acceptable for any person to be falsely imprisoned, and it is worse for people who are not responsible for their actions at the time of the offence who find themselves in this position. We have a responsibility to provide a system that protects the most vulnerable in our community. As a member of this place who has taken a keen interest in improving mental health outcomes for people who live with a mental illness or live with a family member with a mental illness, it has been quite distressing for me to receive correspondence from a number of people in the community in relation to assault on a police officer resulting in a

mandatory jail term, and I think there are some misconceptions in the community that need to be addressed, some of which have been raised already in this place.

Certainly I was concerned with the issues raised and I took some time to investigate some of the issues that were raised in correspondence. We have met with Hon Alison Xamon and have heard from a number of stakeholders in this matter as well. I supported the legislation that passed through the house to impose a mandatory sentence for assault on public officers. It was not a decision that I took lightly. It is still my strongest preference to leave decisions of sentencing to the judiciary, but in that case, it was important to send a strong message to those people who felt it was acceptable to assault a public officer, like a police officer, ambulance officer or similar in the course of doing their job. It is my understanding that there has been a significant reduction in the number of reported assaults on police officers in particular since the introduction of this legislation.

As we have already heard, this legislation is due to be reviewed. I am pleased to note that the Nationals played a role in making sure that there was a review clause in the mandatory sentencing legislation.

There are people in the community who are looking to the Nationals to support this amendment to the legislation. My colleagues and I take our role in this house very seriously, as I am sure all members do. Therefore, we have sought briefings from key stakeholders, the Attorney General, the Minister for Mental Health, Hon Alison Xamon, and various members of the legal sector.

Debate interrupted, pursuant to temporary orders.

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