CRIMINAL LAW (MENTAL IMPAIRMENT) BILL 2022

Committee

Resumed from an earlier stage of the sitting. The Chair of Committees (Hon Martin Aldridge) in the chair; Hon Matthew Swinbourn (Parliamentary Secretary) in charge of the bill.

Clause 9: Terms used —

Committee was interrupted after the clause had been partly considered.

Hon TJORN SIBMA: We were last talking about the issue of fitness when I think the parliamentary secretary advised the chamber that the common law interpretation will continue to be applied, yet my inquiry, which I think occurred subsequently, was whether the government had at any stage considered amending that fitness test or establishing a higher or lower threshold of fitness. I think the parliamentary secretary replied in the negative but said that the government subsequently received, after the bill was introduced, some communication from an organisation regarding the threshold test. Can the parliamentary secretary confirm who the representation was received from?

Hon MATTHEW SWINBOURN: It was from the WA Justice Association, which is an association led by law students. I am advised that the correspondence arrived a week or two before the introduction of the bill.

Hon TJORN SIBMA: I think I have similar correspondence from the Justice Association. It might be an issue better addressed at clause 26, but I want to understand whether determinations around the threshold and the application of what constitutes fitness has much of a bearing on the volume of offenders who might be processed by this bill or might otherwise find themselves being dealt with under a conventional trial.

Hon MATTHEW SWINBOURN: We anticipate that although there might be an increase in the number of people who would fall under the new act, vis-a-vis the current arrangements, it is not through the expansion of that particular test. We would say that at the moment a number of people have probably been charged with matters are avoiding being dealt with under the current Criminal Law (Mentally Impaired Accused) Act because of the draconian consequences that occur with it. They rolled the dice by not getting themselves included under that provision. For example, if their offence is on the lower end of the scale of seriousness, they might not even be looking at a custodial sentence so they might plead guilty at an early opportunity to get some sort of other penalty imposed. For example, it could be a community-based order or a fine, or that sort of thing, whereas if they then come under what we have here, under the current CLMIA act, they might end up under a continuing period of indefinite detention. We think that this legislation will lead to a change in the numbers because it will provide a much fairer, better and more humane system, and offenders or their representatives will elect to argue that they were unfit because they are more likely to be dealt with in a way that is more proportionate to their offending. As I say, under the current system, they could end up with an indefinite period of detention that could be completely disproportionate to the alleged offending that they have engaged in. Therefore, any increase in numbers will not be through the expansion of that particular test.

Hon TJORN SIBMA: Effectively, in a layperson's construction, in a situation whereby someone has been charged with an offence and their counsel is deciding which stream to guide them through, this legislation will take out the perversity of incentives or disincentives influencing that decision. That being the case, does the government have any view on, say, the number of offenders captured by the conventional criminal justice system each year—it is not a pejorative characterisation—who might otherwise take their chances in prison but might perhaps find this a fairer regime? Do we have any sense of the quantum of people to whom that might apply?

Hon MATTHEW SWINBOURN: It is impossible to say because it is very complex. There is no reliable data on the number of people who have made a choice, either guided by their counsel, legal representatives or guardians, or in any other way, to go outside of the current CLMIA regime, so we do not know. It is difficult to know, but we know anecdotally that people have reported that the system is so oppressive that they choose not to go under it and would rather face the consequences of being dealt with on the basis that they were fit to stand trial, or that at the time they allegedly offended, they were liable for their offences. It is difficult to model the expected uptake as it is influenced by a range of qualitative factors, including confidence amongst persons with mental impairment, their families and legal practitioners to utilise this legislation rather than the usual court processes; the judicial decision-making, obviously; individual journeys of persons subject to the legislation informed by whether they are found fit to stand trial or not; the outcome of special proceedings; the types of orders a person is subject to; and other court and tribunal decisions. The actual uptake of the legislation will become clearer in time. Agencies will monitor the actual demand and also the delivery of the processes and services supporting the legislation.

If I can wrap that up a little bit, it is known that we will probably have a larger number of people utilising this legislation than have utilised the current regime. The quantum of that cohort of people is unknown. I suppose, to some degree, we know that a significant number of people in corrective services suffer from mental illnesses, and we have data that can reflect those numbers, but we do not know whether those numbers reflect unfitness due to mental capacity, so we cannot necessarily marry them up.

Hon TJORN SIBMA: This might not be the most appropriate place to have this discussion, but if the parliamentary secretary is prepared to entertain the exchange, I think it is an important one. I seek to clarify the number of individuals dealt with under the present act in any given calendar year. That might at least assist us in the establishment of a baseline.

Hon MATTHEW SWINBOURN: To establish a sort of baseline to understand where we are currently sitting, I can provide the member with information on how many times the question of fitness was raised under section 11 of the current Criminal Law (Mentally Impaired Accused) Act in the past three financial years, and it is broken down by each court. The years are 2019–20, 2020–21 and 2021–22. In the Supreme Court, in 2019–20, there was one case raised; in 2020–21, two cases; and in 2021–22, another one case. Obviously, the Supreme Court deals with the most serious charges, so we can imagine what kind of matters those cases related to. In the District Court, which also deals with very serious charges of course, in 2019–20, it was 15; in 2020–21, it was nine; and in 2021–22, it was 15. I will give the member a tally of this at the end, because I can see that he is trying to do some mental arithmetic, but I think it is important for the sake of the record that we get this information in *Hansard*. In the Magistrates Court, the question of fitness was raised 157 times in 2019–20, 114 times in 2020–21, and 118 times in 2021–22. In the Children's Court, it was raised 108 times in 2019–20, 96 times in 2020–21, and 21 times in 2021–22. I will give the member the cumulative total for each of those years. The cumulative total in 2019–20 was 281; in 2020–21, it was 221; and in 2021–22, it was 259. The member can see that as a mean the question of fitness is raised about 250 times a year in those courts as a matter for the courts to determine.

Hon TJORN SIBMA: I think that is exceptionally useful information. I understand that, nevertheless, there are some methodological limitations that we should apply in attempting to extrapolate the potential impact of the passage of this bill on the management of offenders who have an issue of fitness raised. The question of fitness might actually be more frequently sustained; I do not know. However, that volume suggests to me that particularly the matters that have come before the Supreme and District Courts have not necessarily expanded the size of the cohort of 56 offenders astronomically. Is the parliamentary secretary in any position to identify how the size of that cohort may have potentially shifted over the last three years?

Hon MATTHEW SWINBOURN: I will give some context to this because the figure is obviously not static, as the member would appreciate, and we also need to understand that we are talking about a couple of categories. Earlier, I said that the first figures I talked about may not necessarily translate to the 56 people we are talking about now because we said those were matters in which fitness had been raised. Within those circumstances, the court could have found that the person was actually fit. I would say that the court would have either found a significant number of them fit or discharged them from the particular matter, and so they were therefore no longer in the system. The member asked about the numbers over the last couple of years. There was an increase of seven in the calendar year 2020, six in 2021 and five in 2022. Within that group of 56 are people who are unsound of mind and people who are unfit. People who are unfit can become fit over time with treatment and care, and they may be dealt with by the courts on the original charge. We have an idea of the current figure but it will change, and the composition of that 56 has changed over time as well. Seven in 2020 seems to be a higher figure than normal. On average, four to five a year are added, although some may fall away.

Hon TJORN SIBMA: I appreciate that very much because I think it is important to understand potentially not only the human factors at play, obviously, but also, more prosaically, the economic consequences of the management of this cohort. I think it is also useful to differentiate between the two categories of individual that the present act describes as those being unfit and those being unsound. Presumably, the application of this legislation will not affect the unsound category cohort, or will it?

Hon MATTHEW SWINBOURN: We are not interfering with the unsound category because that arises out of the Criminal Code. There are other benefits of this bill that might affect the way they are dealt with later, but no changes will be made to the unsound category.

Hon TJORN SIBMA: Thank you, parliamentary secretary. I am trying to grapple with the throughput consequences of new entrants into the scheme. I will categorise it that way. This is tangential, but where in the budget papers, when we get to it, is the management of offenders under the present act captured? Is it captured under any service line? Is it located wholly within the Department of Justice or is it fragmented across the allocations for corrective services and mental health allocations and the like?

Hon MATTHEW SWINBOURN: To put it bluntly, there is no line item. It is fragmented. It would be encapsulated, for example, in the line item that relates to courts and tribunals, the line item that relates to Communities when it is applied to Communities and it would have some impact on Corrections, but no single line item captures this particular cohort.

Hon TJORN SIBMA: Perhaps we can get to this at, potentially, clauses 50 and 110. However, I want to identify this matter very early on because a key feature of the bill is, effectively, the extinguishment of these indefinite custodial orders by the proposed application of limiting terms. The parliamentary secretary might want to give a more

expanded precis, but I read this as there being two applications of limiting term. I am particularly interested in clause 110, I think; I will double check. I think it is the connection between the limiting term that would otherwise apply, but perhaps there is a special reflection on those offences relating to, potentially, murder and other offences and limiting terms is, I think, linked to someone's actual life —

Hon Matthew Swinbourn: It is clause 262.

Hon TJORN SIBMA: That is the clause that does it. Can the parliamentary secretary explain some of the rationale behind the differentiation or the distinction?

Hon MATTHEW SWINBOURN: I drew the member's attention to clause 262, which sits in the transitional provisions. It is important to understand that that clause belongs to the current cohort of persons who have been acquitted because of unsound mind of murder or manslaughter. It applies to only that current cohort of people within the 56 we are talking about. It deals with them in a particular way. The limiting term would be for their life. There is—I do not want to call it a safeguard mechanism—a potential provision to deal with hardship in certain circumstances that would allow the Director of Public Prosecutions or the person affected to apply to the Supreme Court for a variation of that term. The default position for the existing cohort is that their limiting term is for life, with the option or possibility of the DPP or the affected person making an application to have that term reduced. Clause 50 would apply to people coming into the system charged with murder or manslaughter and acquitted due to unsound mind. That would be the applicable term, and in those instances the court would set the limiting term under that provision. I hope that provides the member with the clarity he was seeking.

Hon TJORN SIBMA: This is a bit disorderly, but I very much thank —

Hon Matthew Swinbourn: I am hoping it pays off later.

Hon TJORN SIBMA: I think it will. I would rather deal with some of these issues earlier on in the proceeding. With respect to the proposed application at clause 262, what is the size of the proposed cohort?

Hon MATTHEW SWINBOURN: It is 26 persons as at January 2023.

Clause put and passed.

Clause 10: Child-specific considerations —

Hon TJORN SIBMA: This should hopefully be an easier exchange. Regarding child-specific considerations, how many of the offender cohort presently captured by the existing act are children?

Hon MATTHEW SWINBOURN: Currently there are none, and it has not been used to make an order for children since 2003. None of the current cohort are children who have subsequently become adults. I know the member did not ask that, but I was anticipating we might end up there, so I just wanted to square that away.

Hon TJORN SIBMA: That is very helpful. I refer to the child-specific considerations outlined in paragraphs (a) to (f). This might be addressed somewhere else in the bill, but this is very much focused on the welfare of the alleged child offender. Where do the seriousness of the alleged offence and the circumstances of the victim feature in consideration?

Hon MATTHEW SWINBOURN: That is a bit of a doozy of a question. I will probably do no justice to the advice I have just received but I will try to get my way through it! I understood the member's question was about how the seriousness of a child's alleged offending is taken into consideration. The starting point is clause 8 because the paramount consideration is community safety. At the moment we are dealing with clause 10, which lists what the child-specific considerations are, so they come into it. I then take the member to clause 47, which deals with courts. It says —

> When making an order under this Part, the court must have regard to the following —

All the matters listed relate to children, so the protection of the community; the nature of the offence and the circumstances of its commission; the person's character, antecedents, age and health; the nature of the person's mental impairment; and the treatment of all those sorts of things. Paragraph (h) says that if the person is a child, the child-specific considerations come into it as well. Clause 72 deals with matters to be considered on review by the tribunal. I am also being referred to clause 78(5), which deals with leave of absence orders and those particular matters, and it gives a list of things, including at paragraph (g), which states —

> if the person is a child — conditions relevant to the child-specific considerations.

Also, clause 86(2) states —

> When considering varying the conditions of a community supervision order, the Tribunal must have regard to the following —

It then gives a list of the particular ones and at paragraph (e), it states —

in the case of a supervised person who is a child — the child-specific considerations.

It is a combination of all those particular factors. If the member has further questions, it might be easier for me to sit down and for him to ask them and then we can unpack them further.

Clause put and passed.

Clause 11: Commission of offence: persons who have been acquitted on account of mental impairment —

Hon TJORN SIBMA: This strikes me as being of interest only because I do not have the professional privilege that the parliamentary secretary enjoys. That is a nice way of putting it, is it not?

Hon Matthew Swinbourn: I have just been doing my professional development.

Hon TJORN SIBMA: I have read the bill and then referred back to the explanatory memorandum, from which I quote now —

> In effect, this finding means that the accused person did do the act, or make the omission, that constitutes the offence with which they were charged; however, they were held not to be criminally responsible on account of mental impairment.

Obviously, the phrases "found to have committed" and "commission of an offence" are replete throughout the act. Can I ask a basic and non-lawyerly question? This is for the benefit of the general community. Under this legislation when it is passed, how will the offending or the offence be recorded if not in what would ordinarily be constituted as a formal criminal record that imputes 100 per cent criminal responsibility for the act?

Hon MATTHEW SWINBOURN: I cannot help but be a lawyer, so I will try to un-lawyer myself as much as I possibly can, although I was never a criminal lawyer, so maybe I am in the same position as the member is on some of this stuff. Criminal law was a long time ago for me.

We will talk about the policy considerations not so much for this clause but for what sits behind it, and that is that when we are dealing with a person who is unfit for trial, we are not talking about a person who is of unsound mind. Let us say that the charge is murder. Currently, there are some possibilities for a finding by the court—guilty, not guilty or not guilty by way of mental impairment. Obviously, in that instance, we are not talking about a person who is unfit for trial, but about a person who is found not guilty by way of mental impairment. It was obviously said that at the time they committed the crime, they were not responsible for their actions and they cannot be held criminally liable and therefore they are not guilty, as opposed to somebody who has committed a crime but at the time of the trial was unfit for any number of reasons. For example, they may have had an intervening event or their mental health may have deteriorated over time, such as from a degenerative cognitive disease that made them unfit. Currently, there is no outcome in those circumstances. For a victim or the victim's family in those circumstances, there is no conclusion in terms of that outcome from the point of view of the court system. We are adding this provision, which is that the decision of the court would be that the person committed the offence but was unfit. In these sorts of matters, there is a written judgement, unless there is a jury. Obviously, there is no written judgement with jury trials, but no juries are involved in these matters, so a judge will always be involved. In these instances, there will be a written judgement and then, at the end, there will be a finding that the person committed the offence but is unfit in that regard. The point of all this is so that the victims of the crime can rightfully say that the person is responsible for the particular offence. Obviously, the next phase is how we deal with the person going forward.

It is important to note that a finding that the person committed the offence charged, while not resulting in a conviction being recorded, will in some circumstances have the same effect as a conviction or a finding of guilt. This is for certain legislative frameworks that deal with criminal record checks and security screening, as those frameworks already treat an acquittal on account of unsoundness of mind as a conviction for those purposes. I think that also goes directly to what the member was asking before about how it would be treated. There will be consequences for the individual if over time they are no longer being supervised or are under a community service order. It may still have a bearing on criminal history checks and those sorts of things.

Hon TJORN SIBMA: I asked that because I am curious to know what, if any, implications there might be in this bill in comparison with the act, potentially—I suppose, even pragmatically—on the capacity of victims of offences to access compensation or lodge a civil claim. I am not necessarily sure what the arrangements might be.

I wanted to capture another contingency, and this might not be a realistic hypothesis but, nevertheless, it is a hypothesis. Embedded in the bill is a test of fitness. I think it starts with a presumption. Issues of fitness can be raised. A person might be declared unfit but there will be the capacity for fitness to be regained. I am particularly keen to know about the ongoing record, if I can use that phrase, or the permanence of the finding and its implication on things like working with children et cetera if an individual regains their fitness after they have served out their sentence in the community. For how long will the record be preserved, how will it be exchanged and who will retain it physically? Will it be the court, the Western Australia Police Force or the tribunal? I ask this from the position

of someone who is uninitiated and inexperienced in these particular dynamics. Who will maintain the record and how will adherence to or the application of that finding be managed?

Hon MATTHEW SWINBOURN: There is a bit to cover here, so I ask the member to bear with me while I am trying to do that. I am also conscious of the dinner break. In terms of the practical implications for court records and things like that, it will be no different from other court records; they would be available publicly, unless the court delivers some sort of suppression order or something of that kind. The member asked what impact it might have on someone's ability to claim criminal injuries compensation. It will not impact a person who is found unfit to stand trial or acquitted on account of being unsound of mind. The only amendments the bill proposes to make to the Criminal Injuries Compensation Act are updates to terminology. Section 14 of the Criminal Injuries Compensation Act provides that a person who suffers injury as a consequence of the act or omission for which a person is found not guilty on account of unsoundness of mind may apply for compensation for their injury and any loss suffered. Section 15 of the act provides that a person who suffers injury as a consequence of the commission of the alleged offence by a person found unfit to stand trial may apply for compensation for that injury and any loss also suffered. Again, this bill will not change that position. A finding of not guilty on account of mental impairment at a special proceeding for an unfit accused could potentially be either dealt with under section 14 or section 15 of the Criminal Injuries Compensation Act if a person has been found both unfit and acquitted on account of mental impairment.

In relation to the national police certificate, advice from the WA Police Force—the agency responsible for conducting criminal history checks and issuing national police certificates—is that findings of this type would not be disclosed on an individual police check or NPC consistent with how existing orders under the Criminal Law (Mentally Impaired Accused) Act 1996 and section 27 code acquittals are treated. They are not disclosed either, so we are not interfering with that. However, the existing orders and a section 27 code offence would be disclosable to various agencies, both in WA and across Australia, under screening arrangements—for example, for working with children or NDIS screening requirements. The new findings will similarly be accessible to certain agencies for screening purposes. There will be no change to the current arrangements for criminal history checks or a national police certificate, but there will be changes to screening requirements for working with children or NDIS screening. Provisions in the bill allow for the sharing of that information with the agencies that are responsible for administering those checking arrangements.

The relationship between the bill and the Spent Convictions Act 1988 is the same as the current situation between the act and the CLMIA act. Section 12(b)(ii) of the Spent Convictions Act provides that a charge formally made in court that a person has committed an offence is to be treated as a spent conviction where the charge is disposed of without a conviction being recorded. This means that a finding of "committed the offence" charged at a special proceeding, the discharge of an unfit accused under clause 37(2)(a) of the bill and a finding of not guilty on account of mental impairment under section 27 of the Criminal Code are to be treated as spent convictions. Exceptions to the operation of part 3 of the Spent Convictions Act are set out in schedule 3 to that act. That these findings are treated as spent convictions does not prevent them being considered or otherwise relevant under the various criminal record checking, reporting and licensing schemes. I refer the member to part 15 of the bill for amendments to the Community Protection (Offender Reporting) Act 2004, the National Disability Insurance Scheme (Worker Screening) Act 2020, the Parliamentary Commissioner Act 1971, the Security and Related Activities (Control) Act 1996 and the Working with Children (Criminal Record Checking) Act 2004. These amendments generally provide for a finding of "committed the offence charged at a special proceeding" to be treated as a conviction or a finding of guilt for these various screening and reporting frameworks.

Hon Tjorn Sibma: The capacity to work in an aged-care facility, for example—will that be captured?

Hon MATTHEW SWINBOURN: I think that is a commonwealth arrangement.

Hon Tjorn Sibma: But are there connections?

Hon MATTHEW SWINBOURN: I might have to take some advice on that particular point. I can talk about the NDIS (Worker Screening) Act. The bill amends section 7 of the NDIS (Worker Screening) Act to include a finding of "committed the offence charged" in a special proceeding so that such a finding is treated as a conviction for the purposes of that act. This will ensure that such findings are treated consistently with acquittals on account of unsoundness of mind and mental impairment under section 27 of the code. The same change is made to section 8 of the Working with Children (Criminal Record Checking) Act 2004.

Clause put and passed.

Clauses 12 and 13 put and passed.

Clause 14: Application of *Criminal Procedure Act 2004* to proceedings under Pt. 3 and 5 —

Hon TJORN SIBMA: I refer to the explanatory memorandum and the application of the Criminal Procedure Act to proceedings under proposed parts 3 and 5 of this bill. I want to understand what might occur here. I will quote directly because it is easier for an answer to be provided directly. It states —

> Clause 14 makes special provision for the Criminal Procedure Act to be modified where necessary in order to accommodate proceedings for persons found unfit to stand trial. This recognises that ordinary criminal proceeding processes may not be suitable for persons who are unfit to stand trial, and that requirements arising out of unfitness will vary in each case.

Aside from this being effectively a proceeding undertaken by a judge or magistrate alone, what other modifications are inferred here?

Sitting suspended from 6.00 to 7.00 pm

Hon MATTHEW SWINBOURN: Before we were interrupted for the dinner adjournment, the member asked a question about the Criminal Procedure Act, and I think it was in relation to what kind of modifications we might be contemplating. It is probably better to answer that in a broad way because we cannot necessarily contemplate specific modifications because we do not want to limit what they might be. But if we think of a person who is either unfit to stand trial or who is of unsound mind, the issue is about thinking about their particular circumstances and what might be appropriate for them in relation to a normal criminal procedure process. Typically, a person might be required to be brought before the court under the Criminal Procedure Act to face a charge or to plead and things of that kind. If the person whom we are talking about here is in such a state that it is either inappropriate or completely impractical for them to be brought before the court, the kinds of modifications that we might talk about are whether they could appear by video link or by representative only or things of that nature. Those might be the kind of modifications that would apply in these circumstances.

Sorry; I am distracted by members who are not paying attention sufficiently to the debate and are amusing themselves. She is a serial offender of that as well! I will leave the order of the chamber to you, Deputy Chair.

I think that might give the member an idea, without going into an exhaustive list of those possible modifications, but that is what is being contemplated under these provisions. Over time, of course, we might become more clear about the kinds of things to modify, particularly if we are contemplating things that might become more regular. The regulations may modify the application of the Criminal Procedure Act to proceedings under parts 3 and 5.

Hon TJORN SIBMA: Therefore, effectively, when we speak of modifications here, there is an unknown dimension, but the expectation is along the lines of the practical or physical accommodation of an accused person and the implications of their personal impairment on the actual conduct of the trial.

Hon Matthew Swinbourn: By way of interjection; yes.

Hon TJORN SIBMA: I am always hesitant to use this phrase in a political context, but it is academically correct: out of ignorance, what kind of modifications will apply in the way that the New South Wales jurisdiction runs similar proceedings to this? Is there, perchance, reflections on New South Wales' experience and the modifications that it had to apply as an indication of what modifications might be contemplated by the court?

Hon MATTHEW SWINBOURN: What they do in New South Wales has informed what we are proposing to do here. The most common modification is the requirement not to have to attend in person. Consideration may also be given to regular breaks in proceedings, the presence of support measures such as a support person, giving evidence from a remote location and managing the manner in which the accused is questioned by others if questioning is permitted in particular cases. I hope that gives the member some clarification. There is a long history in the legal process of ensuring that trials are fair and that people are able to properly face their accusers and all those sorts of things. However, we need to concede that for people who are incapacitated for a range of reasons it may be inappropriate for them to participate in the normal processes. The New South Wales provisions that the member referred to have helped to inform us in the development of this particular path.

Clause put and passed.

Clauses 15 to 18 put and passed.

Clause 19: Court may make hospital order in respect of accused —

Hon TJORN SIBMA: I seek to understand whether clause 19 is consistent with the operation of the current act or is a new arrangement being introduced here?

Hon MATTHEW SWINBOURN: I am advised that clause 19 is based on section 5 of the current act. The differences are primarily in the drafting styles. The original act was drafted in 1996 and this bill was drafted last year in 2022. The difference is found in clause 19(6) that states —

> An accused who, while required to be detained at an authorised hospital under a hospital order, is away from the hospital without lawful authority, may be apprehended and returned, either under … the *Mental Health Act 2014* Part 7 Division 5 or on the basis that they have escaped lawful custody.

Escaping lawful custody is an offence under section 146 of the Criminal Code attracting a penalty of imprisonment for seven years, or if dealt with summarily imprisonment for three years and a fine of $36 000. It has been included to put beyond doubt that an accused who is absent without leave while subject to a hospital order may be apprehended under either the civil Mental Health Act framework or the code. Hospital orders have effect as though a referral had been made under section 26(2) of the Mental Health Act for examination by a psychiatrist. I do not need to get into that particular path. I think that covers it off. Clause 19(6) is the material difference between the current regime and what we are proposing in the bill. I think we are proposing this to provide clarification about the operation of those things so that it will all be contained within proposed section 19.

Clause put and passed.

Clause 20: Communication and support measures —

Hon TJORN SIBMA: Clause 20(2) states —

> Communication with an accused or supervised person under this Act must be in a language, form of communication and terms that the person is likely to understand using any means of communication that is practicable and using an interpreter if necessary and practicable.

How does clause 20(2) correspond with current practices under the act?

Hon MATTHEW SWINBOURN: There is no current statutory requirement for these kind of provisions. In regard to how we have come to have this in here, it has been drawn from the Mental Health Act, which I understand provides similar provisions to those proposed here. I am advised that it is section 9 of the Mental Health Act.

Hon TJORN SIBMA: Likewise, is the subsequent subclause (3) also drawn from the section of the Mental Health Act that the parliamentary secretary identified previously?

Hon MATTHEW SWINBOURN: To answer the member's question, no, this has not been drawn from that provision. Clause 20(3) was not drawn from the Mental Health Act because the Mental Health Act makes no similar provision. The Mental Health Act is not primarily about courts and tribunal processes like this proposed legislation. I think, in a broader context, to try to understand why we are being so specific about some of these provisions, we can connect it to clause 32 of the bill, which states —

> If a court finds that an accused is fit to stand trial while the accused has access to support measures, those support measures, to the extent that they remain necessary for the person to be fit, must be made available to the accused throughout the trial.

This is helping to facilitate that provision to try to get people to be able to stand trial and be held accountable for the actions that they have been accused of.

Hon TJORN SIBMA: What resourcing from the court might be necessary to fulfil the provisions in this proposed section, and where will that resourcing derive from?

Hon MATTHEW SWINBOURN: It is not simply a case of resourcing the court, because it really will depend on the specific circumstances of the individual. The individual may already have the necessary supports available to them either through, for example, a carer or family members. If it is a language issue, they may already have support in that regard. I am not talking about interpretation here. It might be that someone has issues being comprehensible and has a support worker who helps them with those functions. Also, as I said, through the NDIS funding they may already have that with them, but we recognise that the implementation of the bill will have some cost to government for these things and it may be necessary, through the Court and Tribunal Services, to make provision for the necessary supports in a particular circumstance. The possible supports could be very broad, so it is hard to say with any specificity what they would entail, but we expect there will be some cost implications for government in ensuring that we meet the requirements of this particular provision. It is part of the broader scope because it is in the public interest to see that the people who have these kinds of issues are properly supported, and if they are able to be supported to the point at which they are fit for committal to trial, it certainly is in the public interest to see that happen.

Clause put and passed.

Clause 21 put and passed.

Clause 22: Submission by close family members and carers —

Hon TJORN SIBMA: This is a question asked, potentially, out of curiosity about this clause. It concerns the involvement or submissions made by close family members and carers. In other parts of the bill it is prescribed that submissions may be made only in writing. Is there any potential for submissions by family members to be made by way of an audiovisual file or, effectively, a streamed contribution? I am making some assumptions, potentially,

around the circumstances or the complexities of the family structure and environment in relation to some family members who are charged. If the parliamentary secretary could provide some insight into how those submissions may be made in a more accessible way, I would be very interested to know.

Hon MATTHEW SWINBOURN: It is probably important to frame what we are doing here and to make a distinction between making a submission and giving evidence. A submission is not subject to the rules of evidence. The danger is that if a person were to make a submission by audiovisual means or even in a recording, it could be incomprehensible, it could be excessively long or it could be irrelevant, and that would require a family member or carer to provide a submission in a written form as a way of moderating that. The courts can be quite jealous about the manner in which information is provided to them. We are trying to provide what will, in effect, be a modified right for family members and carers to make a presentation to the court in the form of a submission. A family member or carer can currently make a submission to the court and seek to be heard, but that will be entirely at the discretion of the court because those people do not have any standing under the normal provisions.

Hon Tjorn Sibma: So this will be a positive right?

Hon MATTHEW SWINBOURN: That is correct. This will be in addition to what would happen normally. We normally have the prosecution and the defence, and they are the ones that control the material that is brought before the court. In this instance, we will be creating what I call a modified right. Clause 22(5) states —

> A court may rule as inadmissible the whole of any part of a submission.

That would typically be done on the basis that it was irrelevant, it was embarrassing, it contained salacious allegations or it was completely unnecessary. Subclause (6) states —

> The Tribunal must establish procedures for the giving of submissions.

Tribunals are usually not affected by the rules of evidence. We will leave that to another time. I think I have answered what the member is trying to get at.

Hon TJORN SIBMA: That is completely reasonable. I appreciate that response. As the explanatory memorandum helpfully reminds the reader —

> An example of a person who may be recognised as a close family member under a written law is the CEO of the Community Services Department. Under the *Children and Community Services Act 2004*, that CEO may be given parental responsibility for a child; …

The parliamentary secretary might have answered this question previously, but how many of the existing cohort of offenders are under the care of the CEO?

Hon MATTHEW SWINBOURN: None, because no children currently come under these provisions.

Clause put and passed.

Clauses 23 to 25 put and passed.

Clause 26: Accused who is unfit to stand trial —

Hon TJORN SIBMA: Previously, when we were discussing the matter of fitness in the clause 9 debate, the parliamentary secretary advised the chamber that the additions of the elements constituting mental impairment have been expanded to include paragraphs (a), (b) and (h) at clause 26; is that correct?

Hon Matthew Swinbourn: Correct, yes.

Hon TJORN SIBMA: What is the material impact of the inclusion of this expanded definition of unfitness?

Hon MATTHEW SWINBOURN: Currently the Presser test is what applies. Under the Presser test, these elements might have been able to have been squeezed—that is, giving instructions to legal practitioners representing the accused, deciding whether to give evidence or giving evidence if they wish to do so. The person is unable to do those things. Under the Presser test, they would have to try to shoehorn that into the other areas. The material difference is that we are providing the specificity for those things so they are very clear. During the 2016 review, the experts and practitioners who deal with these areas probably had some standalone issues with these points. Being very clear, we accept as a matter of policy that those two things—they were three things but they are encapsulated with those two serial points the member identified—are worthy of being elevated to be codified under clause 26. As I say, they were identified by stakeholders as critical indicators of an accused's ability to make meaningful decisions about their trial.

Hon TJORN SIBMA: I just asked that out of general interest because that is an extensive list. Even though this is not subject to a change or expansion, for interest's sake, the very first element at paragraph (a), "understand the nature of the charge", is to some degree connected axiomatically or as a logical progression and would undermine the capacity to comprehend or deal with paragraph (c), which relates to a plea in relation to that charge and so on. It

is a very expansive list. This is now such a universally expanded concept of unfitness that it is unlikely that any person who would be reasonably considered unfit to plead could fall outside of this list. Would that be a reasonable assumption?

Hon Matthew Swinbourn: Yes.

Hon TJORN SIBMA: Okay, great.

Clause put and passed.

Clause 27 put and passed.

Clause 28: When the question of fitness to stand trial may be raised —

Hon TJORN SIBMA: This is more just to embellish my comprehension of the intended operation of this clause. The question of fitness may be raised at any time before or during a trial and is drawn from section 11 of the Criminal Law (Mentally Impaired Accused) Act 1996. What is the difference in this clause and this bill concerning when the question might be raised? Is it a complete carryover from the previous iteration of the legislation?

Hon MATTHEW SWINBOURN: To put it bluntly, the drafters tried to simplify the provision because the existing section 11 was seen as unnecessarily complicated. As a material point, the existing section 11 and clause 28 of this legislation have the same effect, but clause 28 is drafted in a much plainer and direct way. If we had section 11 of the Criminal Law (Mentally Impaired Accused) Act before us, we would see that section 11(1) has paragraphs (a) and (b) and then subparagraphs (i), (ii) and (iii). Essentially, we have just made it so it is obvious that, at any stage during the course of a trial, the question of unfitness can be raised. It just simplifies it and makes it a lot easier for the ordinary person to read it and understand what it means. I hope that was the member's experience when he read it.

Hon TJORN SIBMA: Yes, it was. Obviously there are quantum leaps in some dimensions of the entire enterprise here, if I can use that description, but there are also obviously some very strong foundations that have been built upon. When there is a distinction that is a real difference, I like to draw people's attention to it.

This might be a little hypothetical but it is not intended to be. Under clause 28(3) the issue of fitness is addressed. It states —

> The question may be raised more than once but, if the question is raised a second or subsequent time, it need not be considered unless the court is satisfied that new facts have been discovered, new circumstances have arisen or the circumstances have changed since the question was last raised.

This might be a bit cute, but can the parliamentary secretary elaborate on the kinds of new facts being introduced that should seize the mind of a magistrate or judge in this instance? What material difference would compel the question to be considered for a second time?

Hon MATTHEW SWINBOURN: If the member can imagine, some criminal proceedings sometimes extend over a period of months. In the case of a person with a degenerative condition, what they might have been at the time of their first assessment may have significantly or materially changed within a matter of months. Alternatively, there might, for example, be another compelling reason for the person becoming incapacitated. The original argument might sit on a particular foundation, but let us say that they were involved in a car accident and were then brought back before the court because it was halfway through the trial. They might have suffered some sort of acquired brain injury, so that will be a whole set of new evidence that might come up. Obviously, we are trying to avoid people repeating the same argument time and again about why a person is unfit or incapacitated and therefore delaying the delivery of justice. If the court has already determined that they are fit on a particular set of facts and those facts have not changed, a person later raising that same issue and re-ventilating it is obviously a way of delaying the progress of a trial. As I say, we can contemplate that throughout the course of some proceedings. Things can change. It is a terrible scenario, but sometimes a person who is on remand for a charge might have been assaulted in a serious way in prison and that may affect their incapacity. They are some examples.

Clause put and passed.

Clauses 29 to 34 put and passed.

Clause 35: Opportunity for accused to become fit to stand trial —

Hon TJORN SIBMA: Will the opportunity provided to an accused to become fit to stand trial be in any way enabled by government support of some kind?

Hon MATTHEW SWINBOURN: I think the answer to the member's question is yes, with some government support. We could contemplate that the person has been released on bail, subject to the condition that they undertake certain treatments, such as seeing their psychiatrist or undertaking certain medical processes. We also need to contemplate persons who might be involuntarily detained under the Mental Health Act and who may be going through a course of treatment during that involuntary detainment or persons who might be on a community mental health order that might also involve that sort of thing. It is a process over time. Government assistance could be

provided in relation to those things. It goes from the voluntary to almost the compulsory side of things in the examples that I have given the member.

Hon TJORN SIBMA: I read with interest clause 35(3), which, for the benefit of the chamber, states —

> The court may adjourn proceedings under subsection (2) for any period or periods that the court considers appropriate, but not beyond the period of —
>
> (a) 6 months after the finding of unfitness; or
>
> (b) if the court is satisfied that there are exceptional circumstances that justify a longer period or periods of adjournment — 12 months after the finding of unfitness.

As the explanatory memorandum helpfully points out, this will effectively double the length of adjournment allowable under the act—it says "former act", but the act is still alive. Can I understand the justification for that doubling, and on whose advice was that included in the bill?

Hon MATTHEW SWINBOURN: The justification is to bring us in line with the other jurisdictions that provide for 12 months, but also we were informed of our position by the mental health and legal stakeholders and the courts that were engaged on this particular point. They told us that six months is not enough time to generally provide for someone to go from unfit to fit. We acted on their submission to us, which was that a longer period was needed, and 12 months is consistent with all other jurisdictions. We were out of step with them and what we are proposing is to bring us in step with them, and for good reason. It is not always the case that getting in step with other jurisdictions is for good reason, but in this particular case there is a strong foundation in that we want to get people to fitness; we need an appropriate period and 12 months is the settled period.

Hon TJORN SIBMA: Nevertheless, there is obviously a balancing act at play here, particularly as it relates to the swift administration of justice if potentially this becomes—my words, nobody else's—an easily utilised provision of the legislation. It is potentially open to abuse as is any provision. Will the parliamentary secretary elaborate on what the exceptional circumstances will be to justify a longer period being applied?

Hon MATTHEW SWINBOURN: It is important to remember that six months is still the default; people will only get the additional 12 months under exceptional circumstances. Sorry, the additional six months.

Hon Tjorn Sibma: It is 12 months in total.

Hon MATTHEW SWINBOURN: Yes, that is right; I was just corrected. A person would need to satisfy the court on exceptional grounds that they are entitled to the additional six months; that is the default position. Obviously, medical evidence would be necessary. There is some case law because in the matter of the State of Western Australia v Stimpson [2019] WASC 279, an accused was unwilling to comply with a treatment plan involving medication that may have assisted him to become fit. The matter was adjourned to allow time for treatment to continue to be attempted. However, the statutory maximum period of six months to regain fitness expired before the accused fully complied with his treatment. In that instance, the prosecution might have made an application for the extension of time in order to achieve fitness. The member said there is a balancing of interests. Giving an unfit accused sufficient time to regain fitness, considering the effect on victims and the accused of drawing out proceedings for long periods and the most effective and efficient use of court time all come into this. In the context of other jurisdictions providing 12 months, our default position is still six months and a person can only get the additional six months in exceptional circumstances, which, as I said, in their very nature must be above the ordinary. We think that what we are trying to achieve is appropriate, although I do not think the member asked whether it was appropriate; I think he was trying to understand it, and I am trying to close off what I am saying on my feet!

Hon TJORN SIBMA: Bearing in mind that this bill has taken some guidance from arrangements that apply in other jurisdictions, and to some degree Western Australia stands out as an aberration by having such a tightly circumscribed period within which fitness might be regained, do other jurisdictions apply this exceptional circumstances test or is that 12-month period just applied as the default proposition?

Hon MATTHEW SWINBOURN: No, their position is that 12 months is the default, so what we are proposing is a little stricter.

Hon TJORN SIBMA: This might be a speculation of mine and perhaps it is more appropriate for consideration at a future clause, in which case I will take that on advisement. Parts of the bill relate to the operations of the new tribunal and its annual review of every case. Is it intended that a fitness test be applied annually in each individual circumstance by the Mental Impairment Review Tribunal?

Hon MATTHEW SWINBOURN: The direct answer to the question is no. The tribunal will not be considering the extra fitness. It is a matter for the courts to determine fitness. Once that has been determined and the matter is dealt with by the tribunal, the tribunal's test, if I can put it that way, is risk to the community rather than whether the person remains fit or unfit.

Clause put and passed.

Clauses 36 to 40 put and passed.

Clause 41: Nature of special proceedings —

Hon TJORN SIBMA: It will please the government to know that we are in the penultimate stages of settling part 3 of this bill. This clause is an aspect of the bill that I have taken some interest in because it represents the introduction of quite a novel set of arrangements in the Western Australian jurisdiction. First and foremost, I will probably focus on the more prosaic economically reductive aspects of its implications. I am seeking to understand what particular physical arrangements will be required in terms of the administration of courtrooms, or perhaps additional court space, to accommodate this new range of special proceedings.

Hon MATTHEW SWINBOURN: It is important to understand, firstly, that half the people we are talking about are already going through a trial, and they are the ones who would be unsound. That component is already accounted for. In terms of the question about court infrastructure, at this stage we do not think there is any immediate need for more court infrastructure because the number of people going through legal proceedings will not be any greater. People are still being charged with these offences and dealt with by the courts. It may be the case, in time, that some people, through their counsel, use these mechanisms to challenge certain aspects of it. If that happens, it will be a future consideration for additional funding for courts. I do not think that what we are doing here is going to significantly impact the resources of courts at this time, because people are already undertaking certain acts that are of a criminal nature and getting arrested, charged and brought before the courts. It is really about the process the court uses to engage with them. That is what we are dealing with here, rather than the creation of a new set of offences. For example, when we brought in the insignia changes, that increased the work for the courts because a new charge can now be laid that could not previously be laid. The police are now bringing those people before the courts. Here, we are not creating any new offences or expecting new people to be charged who otherwise would not have been charged and dealt with in that process. If, over time, we find that the process put in place by this bill places demands on the courts, there may be a necessity to deal with that.

Hon TJORN SIBMA: Effectively, it is not contemplated that these arrangements will contribute to an expanded volume of matters before the courts in the same way that the insignia legislation did because it necessitated the creation of a new charge. Nevertheless, my interest was piqued by earlier clauses that spoke about the modification of certain procedures with respect to the application of special proceedings. I am wondering whether any physical or logistical management issues might arise out of conducting a special proceeding. For example, is it imagined that it will take longer to conduct a special proceeding or, conversely, potentially a less amount of time by virtue of the fact that it will be presided over by a magistrate or a judge sitting alone? At this stage, there is not necessarily any burning platform or compulsion for the expansion of resources or the creation or exploration of new space arising from the conduct of special proceedings. I just want to ensure that I understand that.

Hon MATTHEW SWINBOURN: It is a bit of a swings-and-roundabouts argument, member. Sorry; there are a few interruptions from behind me. Removing jury trials will be a saving in itself. Some matters will be quite short. Other matters might be a bit longer. On balance, we do not anticipate they will be any longer overall than the average trial that might take place in the Supreme Court, the District Court or the Magistrates Court. In terms of the physical stuff that we were talking about—the member talked about the physical and the logistical—we think we have sufficient provision to accommodate people in the many courthouses around the place. We already deal with people with disabilities, for example. Some courts are old and there are issues with them. It will be a listing matter for the individual courts. Once the court is aware of the restrictions that might apply to a particular accused, they will need to ensure that the matter is listed in a court that can accommodate them—for example, when a person is in a wheelchair or needs additional hearing support or when their behaviours are so bad that they need to be confined to a particular area. Courts have remote access facilities and we deal with those sorts of situations in any event. For example, there is the use of e-court arrangements when people appear from where they are remanded. We do not expect that we will have to retrofit a whole heap of courts to accommodate what might be the necessary means. The Supreme Court also has access to the *Equal justice bench book* on how to deal with people who have disabilities and limitations, and how to accommodate them in terms of the length of court sessions and how many breaks might be allowed and things of that kind.

The point here is that we do not need to reinvent the wheel with these particular things because the courts already deal with a range of people who have limitations on them for a variety of reasons. That applies not only to the accused, but also witnesses and other people who might interact with the court system.

Hon TJORN SIBMA: Bearing in mind the answer the parliamentary secretary has just provided, is it a fair assumption that special proceedings can be delivered in a regional setting? We obviously have a metropolitan bias here but —

Hon Matthew Swinbourn: Yes.

Hon TJORN SIBMA: With respect to clause 41(1), aside from the potential cost saving of being constituted by a magistrate or a judge sitting alone, were any other factors considered important in deciding the most effective

way to run a special proceeding? Can the parliamentary secretary elaborate on the advantages of having these particular cases heard in this way by a single member?

Hon MATTHEW SWINBOURN: I think the first thing to set out here is that it is important to understand that fitness is already determined by a judge or magistrate sitting alone. Magistrates do not have juries anyway, so that is that particular part. Magistrates obviously deal with less serious offences. What has informed us about not making it a provision for jury trials in these circumstances really comes down to trying to be consistent with the fitness provisions—so the judges are already determining that. Also, the cost and time issues with juries come into it. It is fair to say that these matters are complex. Juries need to have arguments presented to them and judges need to give instructions to juries. If a person is presently unfit—the jury is discharged—and then becomes fit, a new jury has to be empanelled, and that brings an additional layer of complexity and time and cost and a potential to deliver an injustice. We acknowledge that in other jurisdictions juries are available for these types of proceedings, but, in our view, a policy decision was made to limit it to judge-alone hearings for the District Court and Supreme Court for these particular matters.

There is obviously a balance that has been considered in making that decision. Some might not agree with it because they might think they should have the right to access a jury, but I think in this instance it will become embedded in the Western Australian system, and it will be accepted that this is the process used when dealing with these matters. To be fair, judges are much better placed to deal with issues to do with medical evidence and the determination of those things than are juries. Juries are made up of the members of the community, but they are not legally or medically trained, and we want the better people to be in a position to make these kinds of judgements.

Hon TJORN SIBMA: Clause 41(3), in relation to the preceding subclause, relates to a finding being made that an accused committed an offence, and that the court, in this case the magistrate or judge, must be satisfied beyond a reasonable doubt. I ask the obvious question: does the same standard of proof and evidence apply to these kinds of proceedings as occurs in an ordinary criminal trial?

Hon MATTHEW SWINBOURN: Yes, reasonable doubt is the criminal standard as opposed to balance of probabilities, which is the civil standard.

Hon TJORN SIBMA: Just for the satisfaction of anxiety, because this bill implies a range of regulation-making powers and potential modifications to arrangements that occur within the context of a special proceeding, are there express prohibitions about those standards of proof being in any way further modified or potentially watered down or even alternatively increased?

Hon MATTHEW SWINBOURN: Member, I can be emphatic that the regulation-making power does not extend to being able to affect the burden of proof. The burden of proof will remain beyond a reasonable doubt. The regulation-making powers actually go to procedure, rather than to burden. The member said, as a matter of anxiety —

Hon Tjorn Sibma: I was just interested.

Hon MATTHEW SWINBOURN: Fair enough. I think it is an important thing to make clear. As I said, I can emphatically say that the regulation-making power cannot interfere with that particular thing. I draw the member's attention to clause 42(2). It basically relates to the conduct of special proceedings. It states —

> However, the court must, to the extent practicable, endeavour to conduct the proceeding as if it were an ordinary criminal proceeding.

Any modifications that happen to the proceedings will still be to only the extent necessary to make sure that they can be practically undertaken. That is keeping in mind what clause 42(2) seeks to achieve, which is that the trial be consistent with what would ordinarily happen in a criminal proceeding.

Hon TJORN SIBMA: One of the advantages that the parliamentary secretary has is that I come to this debate free of any professional presumptions or prejudices. That means I might ask questions that others might not. That is why I am asking from a position of genuine anxiety about the —

Hon Matthew Swinbourn: I wasn't meaning to —

Hon TJORN SIBMA: No, not at all! I do not take much offence from what comes from the parliamentary secretary's side. The law of politics is that you worry about your colleagues. That is an issue for another day.

Hon Matthew Swinbourn: I think there is a guilty party on your right.

Hon TJORN SIBMA: Indeed. Well, who knows? There are people who say —

Hon Dr Steve Thomas: I am very supportive of him.

Hon TJORN SIBMA: I suspect we are far enough away from respective preselection processes to engage in somewhat of a freer exchange. That was encouraging.

I thank the parliamentary secretary for his clarification there. I have a question on clause 41(4), which states —

> The decision of the court must include the reasons for its decision but the validity of a decision is not affected by a failure to comply with this subsection.

I will just quickly ask: what are the origins of this inclusion and how does it relate to the publishing of decisions that are made in other courts and proceedings in this jurisdiction?

Hon MATTHEW SWINBOURN: I am advised that we obviously want reasons for decisions. However, it is an acknowledgement of the practical circumstances of courts. Courts are often making decisions not even on the urgency of the matter before them, but on the urgency of other matters. A decision is made and then a promise is made to provide reasons for that decision. I have been in that situation as a practitioner. A decision has been made on the day, the matter has been dealt with and the reasons for decision are promised. Then it is like a receding horizon and we do not see them. That does not mean the decision was incorrect or that we want it invalidated because of the absence of providing reasons for decision, which are important. It is also a reflection of the Magistrates Court. In the Magistrates Court, there are often no written reasons for decisions in many proceedings because of the pure volume of decisions it goes through. Often in other proceedings when a party wants a magistrate to give it written reasons, it has to make it very clear to the magistrate that it would like the decision in writing. We anticipate that the ordinary course of a magistrate's work is not to reduce a reasons for decision to writing unless specifically asked. It is possible in a matter like this that it could be overlooked, but, again, we do not want the decision to be invalidated by the lack of that written reasons for decision. As I said, it is really a recognition of the practical realities of what courts deal with. As I say, the Supreme Court deals with matters of a very serious nature. The Magistrates Court deals with matters that are serious but in high volume. I do not know whether the member has ever been to the Magistrates Court.

Hon Tjorn Sibma interjected.

Hon MATTHEW SWINBOURN: He has not yet appeared! A lot can be happening all at once and its lists are very busy. As I say, this is a recognition of that. We do not want to be in a position in which a judge or a magistrate is aware of their obligation to give a written decision and says that they are going to do it at a later date, then for reasons that could be multiple, fails to do so and invalidates the decision of the special proceedings.

Hon TJORN SIBMA: Among many individuals who will perform functions under this act, as a lay observer I would have thought that the proposed Mental Impairment Review Tribunal would take a particular interest in reflecting upon the written reasons for a decision for the management of a particular individual for whom it is charged with some authority. A question then asked out of curiosity, since it is quite explicit in this provision that the court must include reasons, is: Could the tribunal, for example, seek those reasons effectively after the fact in relation to the management of a particular offender? What would be the process by which that would be undertaken?

Hon MATTHEW SWINBOURN: The answer to the member's question is, yes, it is possible that that could happen post the decision being issued. As a general point, a court could, having not provided written reasons for a decision in a particular matter, still have access to the transcript of the proceedings and access to the evidence. All magistrates and judges also take their own notes as well, so they can reduce their reasons to writing. I also bring to the member's attention regulation 3(2)(g) of the Criminal Law (Mentally Impaired Accused) Regulations 1997. It states that the court is to provide certain documents to the board —

> (g) either —
>
> (i) the written reasons for making the custody order;
>
> (ii) if written reasons are not given or they will not be available in time, a copy of the relevant parts of the transcript of proceedings; or
>
> (iii) if there is no transcript or it will not be available in time, a written summary of the reasons prepared by the judicial officer who made the order.

Under the current provisions there is already an obligation to provide information from the court to the board. Clause 48, "Court to notify Tribunal and Chief Mental Health Advocate of orders", states —

> If a court makes a custody order or a community supervision order, the court must immediately —
>
> …
>
> (b) give the Tribunal and the Chief Mental Health Advocate a copy of the order and the prescribed information.

That is what I have referred to under the current regulation in terms of prescribed information. I assume that it means that under the new regulations that information would remain prescribed. I do not think the likelihood of a matter that will involve the tribunal not having reasons for the decision is very high. Obviously, this provision

just makes sure that we will not invalidate a special proceedings decision in the, hopefully, very rare circumstance that it might rise. The problem is if it invalidates the outcome of those proceedings, it will have to be redone, and that is obviously a significant issue. At many levels, I think the member can probably appreciate why that would be undesirable.

Clause put and passed.

Clause 42: Conduct of special proceedings —

Hon TJORN SIBMA: It might be worthwhile to make a broader observation here. I reflect on the discussion we had earlier at clause 2 about implementation plans and the like. I think this is probably a more apt clause than even clause 41 concerning the conduct of special proceedings. Can the parliamentary secretary please outline to me the body of work around the implementation schedule that will arrive at, I presume, some court procedures or court rules? What documents will be produced out of this process, which has been underway for some time, that will guide the conduct of these proceedings and give life to clause 42?

Hon MATTHEW SWINBOURN: Essentially, the work is for the courts to undertake because the guidance will come under their own rules. The courts generate their own rules. I think they have access to the Parliamentary Counsel's Office when they make the rules. But, ultimately, it is a matter of the separation of powers; it is a judicial function in relation to those things. However, the heads of jurisdictions have been consulted and they are aware of the need for this body of work. I doubt that any of them will commence the work until they are sure that the bill has passed Parliament because they are busy people and they are probably waiting on us to make sure that that happens. To be clear, the courts that will need to create new rules on these matters will be the Children's Court, District Court, Magistrates Court and the Supreme Court because they cover the gamut of courts that will be affected by what we are doing here.

Hon TJORN SIBMA: I have another question that I ask out of curiosity. Will there be some consistency, then, between those jurisdictions that the parliamentary secretary named, or will there be some differentiation in the operation and the practical procedures that will apply, I would imagine, in the Supreme Court as distinct from the Children's Court? Can the parliamentary secretary elaborate on what that might look like?

Hon MATTHEW SWINBOURN: Whilst the bill will become an act, and that is the source of need for the generation of these rules, as the member can appreciate, each of those courts is quite particular and the way that they each address the need for the rules in their jurisdiction will be bespoke, for want of a better word, particularly for the Children's Court. Its arrangements are quite different from what they might be elsewhere. The member also has to appreciate—I do not mean this in a condescending way—that the District and the Supreme Courts deal with more serious charges than the Magistrates Court and therefore the level of complexity in relation to rules might be quite different. The Supreme Court deals with charges of murder and the range of issues that come with that, as opposed to how the Magistrates Court might deal with a simple assault-type offence.

Hon TJORN SIBMA: Bearing in mind that there is some obvious differentiation, at least in terms of the likely complexity in the way that these proceedings might occur in those respective jurisdictions, to what degree is executive government actually supporting that process? Has a request for funding or resourcing been made of the government? What is the government's response to that?

Hon MATTHEW SWINBOURN: I will go back to my previous answer, member, as a point of clarification. The Supreme Court and the District Court essentially use the same rules. The Supreme Court has its rules and the District Court, by virtue of rule 6 of the District Court Rules, incorporates the Supreme Court rules; there is an overlap between those two. It is also important to appreciate and understand that the heads of jurisdiction will talk to each other to make sure that their rules work because there are some overlapping areas. For example, matters are sometimes dealt with initially in the Magistrates Court and then moved to the District Court, and sometimes the Supreme Court as well.

In terms of executive government support, they are supported by the Parliamentary Counsel's Office, although sometimes I wonder whether they are part of executive government. Court and Tribunal Services, which is part of the Department of Justice, will also provide support for that. That is essentially the bureaucracy that supports the core services, ably led by Jo Stampalia. Apparently, there is a funded project officer position within the Department of Justice sitting within that courts and tribunal division.

Hon TJORN SIBMA: That is interesting, particularly the final part of the parliamentary secretary's reply that multiple individuals are involved in this. I take absolutely at face value the fact that heads of those jurisdictions convene with each other regularly in a constructive way. But for argument's sake, there is a single point of contact potentially at the Department of Justice in that funded position. Is that individual also represented at that steering committee level? I want to know what might be the point of contact for a very senior judicial officer to seek clarification around support, expectations and the like.

Hon MATTHEW SWINBOURN: The person in the funded position that we talked about before will not be on the steering committee; they will be the next level down on the program board. However, I am advised that an executive officer from Court and Tribunal Services will sit on that steering committee. They will be the source of contact for the heads of jurisdiction and will effectively act as the conduit for the information that they need to put to the steering committee and vice versa, if I can put it that way.

Hon TJORN SIBMA: As I understand it as a layperson, the best analogue for what is being proposed here for the conduct of special proceedings are the arrangements that occur in New South Wales. Does that serve as a model jurisdiction to some degree? I just want to clarify that.

Hon MATTHEW SWINBOURN: It would not be fair to say that we have modelled these special proceedings on the arrangements that occur in New South Wales. The explanatory memorandum deals with this in some way, and I refer to the clause 41 explanation. A combination of jurisdictions that are similar have informed us—New South Wales, Victoria, Tasmania, Northern Territory and the Australian Capital Territory—and the particular acts that apply there are listed in the EM, so I will not read them out. We have reviewed those, picked the eyes out of them and then developed our own system. It would not be fair to say that it is based on the New South Wales arrangements, but I am told that they are similar.

Hon TJORN SIBMA: I thank the parliamentary secretary for pointing that out at the preceding clause. What we might arrive at here is effectively a hybridisation of arrangements that are based upon —

Hon Matthew Swinbourn: By way of interjection, yes, member.

Hon TJORN SIBMA: I thank the parliamentary secretary. Are there particular operational aspects of these special proceedings that are more challenging or potentially sticky than other dimensions? I look at this from a position of being without any professional prejudice. Are there any particularly curly issues that arise from getting these procedures correct and implementing them efficiently that stand out more than others?

Hon MATTHEW SWINBOURN: I think the member has characterised it as particularly curly or sticky issues. I am advised that we would not necessarily identify anything as being particularly curly or sticky. The issues that we have previously talked about—for example, the modification of procedures—are matters that we have ventilated quite thoroughly before. A body of case law from the other jurisdictions has helped inform our position on all this. I think the wait-a-while state has had the benefit of being able to overview what others have done and develop our hybridised system, as the member has described it—we agree that is a good characterisation—to deliver what might be a better model for all concerned. That is, I think, the best way I can characterise it. There was no particular problem in that regard, though, in us doing that when designing the system.

Hon TJORN SIBMA: Thank you. One of my professors said that there is wisdom in being the first to be second, particularly for market entry or whatever, but sometimes first to be last is not such a bad idea either if it means we can at least stress test the system and identify some of the potential difficulties or deficiencies of the existing models and seek to avoid them or build on their strengths.

The parliamentary secretary has been quite generous in his explanation of the range of officers that exist within the Western Australian jurisdiction who will be brought to bear to finalise this aspect of the overall implementation plan, but is there a plan to reflect on or apply the guidance or experience of other jurisdictions through the employment of a consultant, for example, or consultancies; and, if someone has been engaged, can the parliamentary secretary outline the circumstances of that engagement?

Hon MATTHEW SWINBOURN: To answer the member's question directly, no consultants have been engaged in that regard, but I can provide further context. The general experience with heads of jurisdiction when talking about their rules and those sorts of things, is it is very common for them to talk to their colleagues in other jurisdictions and have regard to the way they have cracked a similar nut in their respective jurisdictions. There is comity between those high-level people. In the development of these areas, I am advised that at the officer level we sought engagement with the New South Wales DPP regarding its particular provisions of the development. That work has been done with, as I said, the New South Wales DPP, to get its insights and we have ended up here.

Hon TJORN SIBMA: Far be it from me to indirectly reprimand some colleagues, but I am finding it a little difficult to engage with the parliamentary secretary at the desk. Sometimes the message is hard to get through.

The DEPUTY CHAIR (Hon Stephen Pratt): Order, members! Can we have some quiet, please.

Hon TJORN SIBMA: To what degree is this work likely to be undertaken within the next, say, six months, or is it likely to take the full 12 months of the program that the Attorney outlined in his second reading speech? I am also asking whether an obligation will be placed on, potentially, the Department of Justice to fund, for want of a better expression, an education campaign of practitioners and others involved or who will likely be involved or enjoined in a special proceeding? Would the parliamentary secretary mind outlining what that might entail?

Hon MATTHEW SWINBOURN: I think there were two elements to the question. The first was about the likely development of these rules from the courts' perspective.

Hon Tjorn Sibma: But that is not something that you have control over?

Hon MATTHEW SWINBOURN: No. I was going to say that the bill will commence when all these things are in place. Obviously, after this bill has been passed and assented to, we will communicate to every jurisdiction that they will need to develop these additional rules ready for the commencement of this new regime. Our expectation and hope is that that will happen within the 12-month time frame that we have set ourselves for commencing this process. They will obviously need assistance from the Parliamentary Counsel's Office. There is a range of issues. The 12-month time frame is in contemplation of those things being achievable during that time.

The department is contemplating what it will need to do to educate and engage with that part of the profession that deals with these matters. That education function has not yet been designed and/or funded but it is certainly part of the package of work that we know will need to be undertaken once the bill has been passed and assented to. We are not talking about thousands of lawyers being engaged in this kind of work. Many of them will not need to engage in any kind of additional training. I imagine that the department will work with the Law Society of Western Australia, the Western Australian Bar Association and other groups of that kind to understand what their needs are. I know as a practitioner that a lot of this stuff is already being talked about. There have been articles in *Brief*, the Law Society's magazine, about the potential passage of this bill and the necessity for it. The profession does not sit around waiting for these things or for government to do a lot of the work, so there will be further communication. I am sure that the profession will come knocking on the door asking to work collaboratively with the government on this matter.

Hon TJORN SIBMA: Indeed. I thank the parliamentary secretary for that. This is obviously a key aspect of this bill. The operationalisation and implementation of the bill is the critical part if we are to identify a single attribute within the bill that needs to be brought to bear in the most comprehensive way imaginable.

I have a different question. Clause 42(1) states —

> A special proceeding may be conducted in the manner that the court considers appropriate in the circumstances of the case, including without holding a hearing.

Would the parliamentary secretary be able to elaborate on the circumstances in which a judge or a magistrate sitting alone might determine that it was appropriate not to hold a hearing?

Hon MATTHEW SWINBOURN: In practice, it is likely that a hearing of some kind would be held in every case, tailored to the needs of the individual accused. In circumstances in which the court is satisfied that it has sufficient evidence to make a finding, the bill will allow the court to proceed without a hearing. This will always be a matter for the court to determine. It is not possible for us to provide an exhaustive range of circumstances in which that might apply, because the courts will make their own decisions. However, there will be some safeguards. First, it is important to note that although a court will not be obliged to hold a hearing, clause 42(2) provides that a court must, to the extent practicable, endeavour to conduct a special proceeding as though it were an ordinary criminal proceeding. Clause 42(3) requires the court to confer with the parties in determining the manner in which a special proceeding is to be conducted.

It is also important to note the objects and principles in clause 7 of the bill. That includes that people with mental impairment who are charged with offences must be given a fair hearing even if they are unfit to stand trial in accordance with ordinary procedures. The Criminal Procedure Act, at section 93, already provides flexibility to the court when dealing with an accused who has pleaded not guilty on account of unsoundness of mind, and where that is the only fact in issue, the judge may decide the issue on any evidence and in any manner that the judge thinks just. If I can provide an example, if a court is of the view that the accused is able to make admissions to the extent that evidence does not need to be led on the essential elements, a hearing may not be required. If I can add a bit more insight here, it would be highly, highly unusual for a court at any level to proceed without a hearing if it was being asked for by the parties. The court is most likely to be led by the position that is being put, so often there will be conferral between the prosecution and the defence about how the matter might proceed. They will propose that to the judge, and the judge might endorse it because it is seen to be the most efficient, fair and effective way of proceeding with the matter. However, if a party says the hearing is an essential element of proceeding with the matter and the judge were to ignore that and proceed without going to a hearing, it would probably make quite strong grounds for appeal, and no judge likes being appealed, so, as I say, it would be a rare circumstance, and there are protections in the system if there was a capricious use of this kind of provision.

Hon TJORN SIBMA: That was asked out of curiosity but also out of the potential scenario in which, I presume, a victim of an offence might be unable to provide a submission or a victim statement in relation to a hearing not being called. There would be a way around that; is that correct?

Hon MATTHEW SWINBOURN: Typically, the prosecution takes responsibility for the management of victims—if I can use that term; it is perhaps not the most polite—rather than the court. For example, the Director of Public Prosecutions as the prosecuting body has procedures in place for how to deal with victims, how to involve them in matters and how to communicate with them in matters. Unfortunately, there have been failures in the past;

the DPP has recognised that previously. There is always a process for making sure that victims are taken on board. There is provision when making orders to take into consideration—so the orders under part 5—victim impact statements. Typically, those statements can be delivered in written form at that point because, again, victim impact statements are contestable evidence in the same way that a witness to a crime might be giving evidence. A victim impact statement will almost always be in the context of the victim's own experience and perspective, and the court will take that on board when deciding which orders to make. As I say, the victims themselves do not have standing to apply directly to the court; they need to deal with the particular parties.

The thing about victims, and where trouble comes over time, is the matter of who are the victims. For an assault it is quite obvious to say a particular person is a victim of the offence, but in the case of a murder we often see the victims as being family members and friends. But there is a limit to where the line has to be drawn on who is a victim because if it is the bloke who someone used to occasionally see at the coffee shop when they bought their coffee, that has to be managed as well. Generally, we are not so much interested in those as we are others. I am just being told that there is a definition for "victim" in clause 142 of this bill. I was speaking at a more general level, but clause 142 helpfully defines "victim".

Hon TJORN SIBMA: I find that response exceptionally helpful and I appreciate it.

Clause put and passed.

Clause 43: Effect of findings —

Hon TJORN SIBMA: I think we already spent a bit of time on the effect of findings and their interpretation in the clause 9 debate before the dinner adjournment, and we actually covered some ground on that occasion. Just to reiterate, the question I wanted settled was whether there would be no impact on the way these findings relate to a victim of an offence being able to access the compensation that is owed to them. I think the parliamentary secretary identified the relevant connection. We also spoke about the recording of these findings and how they would be maintained. Again, this is a question asked out of curiosity: are there unfettered rights to access these findings; and if there are any prescriptions or restrictions on accessing these findings, what might they be?

Hon MATTHEW SWINBOURN: It is important here to make a distinction between children and everyone else. In relation to children, there is already a range of provisions that protect their identity and the disclosure of particular information. Nothing we do here will interfere with those restrictions. That is a matter of public policy in respect of how we treat children who are dealt with by the criminal justice system. In relation to adults, there is the general principle of open justice, which is that information that relates to court proceedings, outcomes and those sorts of things should be, for good reason, in the open and available to people. Typically, that could involve the publishing of the judgement and the reasons for decisions on the court's website or in journals or things of that kind. It could even be to the extent of someone going and inspecting the court file. However, courts still retain the power to suppress that information. In those circumstances, a court may issue suppression orders on particular matters, including the publishing of the reasons for a decision or the identity of the person concerned, and things of that nature. That is not particularly special under these provisions, as it applies to any other matters. I do not think, in what we are talking about here, we are creating any special privacy or secrecy arrangements, other than what the courts already have for dealing with these matters. As I say, usually the overriding principle is open justice. Newspapers quite regularly seek the lifting of suppression orders, but I note that in some proceedings that relate to them, they often seek them with a degree of vigour that is somewhat hypocritical; but that is an unrelated matter.

Hon TJORN SIBMA: We discussed in the chamber and behind the chair the issue that we identified in the debate on clause 9, which the parliamentary secretary generously entertained at that time, about how findings might be interpreted and what their implications might be. In referring to clause 43(3), the explanatory memorandum states —

> … despite not resulting in a conviction being recorded, a finding of committed the offence charged is to be treated as a conviction or a finding of guilt for certain purposes across the WA statute book. These include:

As the parliamentary secretary has outlined previously —

- securing a Working With Children or National Disability Insurance Scheme worker screening check;
- being licensed to perform certain security-related functions;
- for the purposes of the Ombudsman's reportable conduct scheme; and
- for the purposes of being a reportable offender under the *Community Protection (Offender Reporting) Act 2004*.

I introduced the question: where will aged care potentially enter into this? I am not seeking an answer to that now; I am happy to wait. But how did the government come to the view that these were the appropriate acts and schemes under which a finding would effectively be treated as a finding of guilt in the ordinary sense?

Hon MATTHEW SWINBOURN: This is an extension of how we treat an acquittal for unsoundness of mind, which is already treated as a conviction for all the purposes that the member has identified. It is a matter of consistency for this other thing that we have created. We are extending it to be treated as a conviction for the purposes of those other things. It is just to be consistent, and I think that is appropriate given what we deal with in relation to those other matters.

Hon TJORN SIBMA: I concur with that assessment. Just to encapsulate the logic here, the government is attempting to avoid the unfortunate and perhaps inappropriate interaction between a class of offender with vulnerable groups of people in particular occupation-based or other settings. Is that effectively the logic that underpins it?

Hon MATTHEW SWINBOURN: Yes, member, because those provisions will always give primacy to the protected people—children or people with disability. Their interests will always be considered to be much greater than those of anyone else. It is often lost on people sometimes when they say that they should have got their working with children card and it is unfair. The primary thing in that particular matter is the protection of children. We are, of course, extremely cautious about the people that might apply to. Last year, we dealt with the Working with Children (Criminal Record Checking) Amendment Bill and we exhaustively went through those matters with the member's colleague.

Hon TJORN SIBMA: Do not be too early to reminisce, parliamentary secretary; there will be other opportunities to go over issues!

There is a dimension included in the EM relating to this clause that I seek an explanation of. It is on page 26 and it concerns child offenders. It says —

> Additionally, where a charge against a child is proved and the court (constituted not to include a judge) makes an order against or in relation to the child as a consequence of that finding, the review provisions in Part 5 of the Children's Court Act apply. These provide that the court, constituted by the President, may, of its own motion or upon application, reconsider the order made.

Can I just understand under what circumstances the president may, of their own motion, reconsider an order made under this soon-to-be act?

Hon MATTHEW SWINBOURN: I might not be able to give the member any real insight into when the President of the Children's Court might exercise that own-motion power; however, I can provide some more context, and say that it is reflective of the existing provisions under which the president operates. It is important to have an appreciation of how different the Children's Court and the role of the president is from other courts. Every magistrate of the Magistrates Court is potentially also a magistrate of the Children's Court, so the president may have oversight of a decision made by a magistrate and then make a decision that is not consistent with the decision made by a magistrate acting as a Children's Court magistrate. The president can almost exercise a form of appeal on that matter in their own right. We need to understand that youth justice is very different from other forms of justice. If a magistrate made a decision in a court and the Chief Magistrate was not happy with it, there is nothing the Chief Magistrate can do in that matter because the remedy in those circumstances would be for the affected party to appeal the decision rather than have the oversight. The President of the Children's Court is a somewhat different beast as a head of jurisdiction from the other heads of jurisdiction in that regard. That remains a reflection of what essentially happens in any other number of matters that apply in the Children's Court.

Clause put and passed.

Clause 44 put and passed.

Clause 45: Overview of Part —

Hon TJORN SIBMA: I note that although clause 44 was given very brief reference in the bill, there is an extensive but technically end note to the clause, which probably eludes our capacity to edify other members of the chamber, which is why I decided to skip over that clause in the application of mercy to everybody else and just start at the commencement of part 5. I just note that we have dealt with the first four parts of this bill, representing some 12 per cent of the entire bill, so we are making progress, everybody.

Hon Kyle McGinn: Great job.

Hon TJORN SIBMA: I thank the honourable member very much. I am sure that he has used his time profitably to draft his member's statement.

Hon Kyle McGinn: I am ready to go!

Hon TJORN SIBMA: I have no doubt about that whatsoever.

Hon Kyle McGinn: Mine tend to be in response to somebody else.

Hon Darren West interjected.

Hon TJORN SIBMA: Indeed. Members will understand that exercising has to be a team sport on occasion, if only just to get to the end of the evening.

Clause 45(2) expresses the three kinds of orders that might be made—a custody order, which I think we are all generally familiar with; a community supervision order; and an order that the person concerned be released unconditionally, which I think is self-explanatory. I might just reflect on that, parliamentary secretary. In general terms, there is a degree of opacity around the administration of community supervision orders, at least in my mind. What I am seeking to understand is how community service orders are discharged across the justice system at present, and what the ordinary person is to take from the word "supervision". I refer to the cohort that we are dealing with presently or even those who are subject not to a leave of absence but to a conditional release order of some type, which implies that there is some form of supervision. What does that supervision entail and does it change on a case-by-case basis, or are there some fundamental aspects of being under a supervision order that should apply irrespective of the individual?

Hon MATTHEW SWINBOURN: I think initially the member was talking about the more general provisions for community supervision that might occur for a person who is not covered under these provisions. If I can be a little bit bold, I am not quite sure that is helpful to understanding what we are doing with this clause. Although there might be similar people within corrections who might be connected with these provisions, there are specific roles that happen. The starting point might be to understand that the first part is the role of the tribunal. The tribunal will make a supervision order dependent on the particular circumstances of the individual concerned, taking into consideration matters of risk and impairment, and matters that apply particularly to them—for example, their support networks, where they live and all those sorts of things. The orders will be made by the tribunal but it will involve a supervising officer. The supervised person will also be obligated to follow every lawful instruction from their supervisor. In addition to the particular elements that are dictated by the tribunal, the supervisor will also be able to issue instructions, which obviously have to be lawful, to the supervised person that they are obliged to follow. Obviously, a consequence of not following that is a breach of supervision and potentially then being detained.

The kinds of conditions that might be imposed on a supervised person for whom a community supervision order is in place could include spot checks to ensure compliance with curfews, urine analysis to determine whether they are using drugs that they are not supposed to be using as a term of their conditions, whether they are residing at the residence where they have been directed to reside, and whether they are attending certain meetings at certain times. It is fair to say that the supervisor will not be spending 24 hours a day, seven days a week with this person; however, for those persons who present a high risk, the ability to use electronic monitoring will be a matter that the tribunal can consider and set as a condition of their community supervision order. Does that give the member an idea about that sort of thing in terms of what it would mean to be under a community supervision order?

Hon Tjorn Sibma: Yes.

Hon MATTHEW SWINBOURN: The level of supervision will be a spectrum depending on the risk that the particular person represents and their level of incapacity. If someone is a high-level risk to the community but deemed safe enough—this comes back to community safety being the paramount consideration, but that within that paradigm there is a scale of risk—the conditions will be tailored to meet and ameliorate that risk. The impairment may also be a factor. I do not know whether we can necessarily always equate impairment with risk; it is a different kind of risk. That is a factor as well. The expert tribunal, supported by the professional and qualified supervisors who will come from the department of corrections will also be involved; they do an excellent job with community supervision generally anyway. Then there is the cascading series of things I have talked about with the level of supervision that is required.

Hon TJORN SIBMA: That was quite helpful. I suppose what I was seeking, unhelpfully in the way I structured that question, was probably macro-level management with micro-level administration. That was probably my error. Maybe I will go back to the macro first before zeroing in a bit more. The purpose here is to understand the relationship of a community supervision order as envisaged under this bill. The general application of community-based orders in the community at present, is this effectively a substratum of that kind of umbrella or should they be thought of in conceptually distinct ways?

Hon MATTHEW SWINBOURN: Using the member's term, they are conceptually distinct. However, there are two elements that obviously are similar. They are supervision, clearly, and the obligation to comply. When we are talking about them being conceptually distinct, there is a subset of similarities. Where they are different is, under the Sentencing Act, the considerations for supervision are set in the act—I will go through them for the member in a second—as opposed to what we are proposing under the bill, which is that they will not be set. They will be bespoke. The tribunal has the capacity to make a range of very specific and innovative—if I want to use that term—conditions that will apply to the circumstances of a particular individual. I take the member to section 63 of the Sentencing Act, "CBO, standard obligations of". A CBO is a community-based order. It reads —

> The standard obligations of a CBO are that the offender —

(a) must report to a community corrections centre within 72 hours after being released by the court, or as otherwise ordered by a CCO; and

That stands for community corrections officer —

(b) must notify a CCO of any change of address or place of employment within 2 clear working days after the change; and

(c) must not leave Western Australia except with, and in accordance with, the permission of the CEO (corrections); and

(d) must comply with section 76 of the *Sentence Administration Act 2003*.

I can take the member to that, if he wants that level of detail.

Hon Tjorn Sibma: Maybe not.

Hon MATTHEW SWINBOURN: Okay. Does the member see the difference here in which there is a standard set of conditions that are applicable under the Sentencing Act and a broad and not limited number of potential conditions under our bill? Is the member okay if I leave it at that?

Hon TJORN SIBMA: Yes; thanks. That was helpful because I am attempting to contextualise the management of individuals who have undertaken offences outside of a correctional facility in the community. For the parliamentary secretary's benefit, and that is not supposed to be a condescending phrase, last month I asked through the parliamentary secretary to the Minister for Corrective Services about the number of community-based orders currently in effect in Western Australia. I was staggered at the number. It was some 7 000-odd orders.

Hon Matthew Swinbourn interjected.

Hon TJORN SIBMA: That is correct. What are the resource implications, at least at a personal level, of them complying with the act? We have something like 36 assistant community corrections officers, 190 community corrections officers, an additional 111 senior community corrections officers, 75 youth justice officers and a further 47 senior youth justice officers. In spite of that army of officials, I also asked in the calendar year last year that among the cohort of 7 000-odd orders, how many breaches of community-based orders occurred. I was advised that there were some 3 062 offences from that 7 000-odd cohort. That could mean a number of things. It does not reflect on the seriousness of the breaches. It does not refer to the fact that, frankly, there might be one offender committing a range of breaches.

I will re-emphasise the point that the virtues of the motivations of this bill are beyond reproach. Every time so far that I have attempted to test the paramountcy principle of community safety, I have been satisfied with the answer and I have taken some comfort out of it. But this bill will live and die on its implementation. Therefore, I am trying to ascertain the differing complexities in managing, albeit a vastly reduced number in comparable terms, individuals who might be given a community supervision order direction. What I can ascertain from that is there is a reliance on the individual offender or subject of the community-based order to actively comply with a range of certain conditions. That sort of active compliance might actually be beyond the capacity of a person of this class who is unsupported. That was the longwinded run-up to this question: What particular resourcing implications will arise out of these community supervision orders? Will it be the case that the same class of officer who is responsible for administering CBOs in the community will also, for example, take responsibility for the management of CSOs, or are we likely to recruit or compartmentalise responsibilities in a way that differentiates the two tasks?

Hon MATTHEW SWINBOURN: I will give the member some context, which will be helpful, and an explanation. At the outset, there is recognition that additional resources will be required. Obviously, those additional resources will be subject to a budget process and all those sorts of things, so I am not able to give the member any figures or details other than that it is recognised that there will be an increase in work associated with these matters. Adult community corrections supervision caseloads vary from a ratio of 20 to one for the general offender population through to eight to one for the high-risk serious offenders. That helps the member to understand the complexity of these cases. Persons currently supervised under the Criminal Law (Mentally Impaired Accused) Act on leave of absence or conditional release orders typically have complex needs, as the member has recognised, a high-risk profile and involvement with multiple service providers. These factors point to the need for a default case load with an eight to one ratio, similar to those high-risk serious offenders.

Hon Tjorn Sibma: Would that be the maximum recommended ratio?

Hon MATTHEW SWINBOURN: I cannot say maximum because it depends on other things. This is the default case load. We need to recognise that in particular circumstances, for example, someone might get injured at work and be absent, that might temporarily result in a co-worker having to lift up on their case load. Those are the vicissitudes of life that we cannot take into account. These factors point to the need for a default case load ratio of eight to one when the bill is implemented and community supervision orders are introduced as a disposition option. This is equivalent to the high-risk serious offender service model. These particular people will be allocated to senior community corrections

officers, so we are not just giving them to the most junior person in community corrections. Less intensive support and monitoring will be required for persons who have a limited leave of absence and who still reside in their place of detention—for example, when the leave of absence permits only brief outings. In these cases, a ratio of 20 to one would be viable. We are obviously talking about the difference between someone on a CSO and someone on a LOA.

In relation to children, senior youth justice officers will be the supervising officers for children on a CSO, and that recognises that children without any particular issues will need a higher level of supervision than an adult. The current case load ratio of six to one is expected to apply as part of the management model. Children who are involved and already being supervised in the community already have highly complex needs in the first place. I would not expect there to be a significant need for adjustment in terms of managing any child who might fall under these provisions as opposed to another child who might have foetal alcohol spectrum disorder, a cognitive functioning disorder or those sorts of things.

In relation to what training will be provided for supervising officers managing persons with mental impairment on a CSO, senior community corrections officers and youth justice officers are experienced in managing clients with complex needs, as I have already highlighted. Additional training will be required to support supervising officers to meet their responsibilities under the bill, and this is likely to include training on the CLMIA legislation; disability and mental health awareness training, including the fundamentals of positive behaviour support; National Disability Insurance Agency training; total offender management solution system training; support and monitoring system training; and cultural awareness training.

It might also be the case that these individuals have support in any event through the NDIS because typically they would fall under the auspices of the NDIS. The job of the NDIS is not to supervise and monitor them in relation to the provisions of the act, but there is an expectation of being able to work with support workers when people, who for reasons of incapacity, need a higher level of care. It might actually be the case that they live in a supported accommodation arrangement due to their disability in the first place. We have not really talked about them in terms of being people with a disability, but someone with an incapacity is someone with a disability. As I say, they are highly likely to be entitled to NDIS support and, therefore, the additional resources that we can ask our commonwealth cousins to provide for us.

Hon TJORN SIBMA: I take that explanation to very clearly infer that the management of this cohort presents a different range of complexities from, say, a high-risk offender who has a different dimension of complexity and severity and what have you.

Hon Matthew Swinbourn: Yes, by way of interjection. I suppose it also depends on the particular offence that they may have been accused of committing, so a serious assault as opposed to a serious sexual offence, or someone who has committed murder or manslaughter as opposed to someone who may have committed a small burglary or something of that kind. There is a spectrum here.

Hon TJORN SIBMA: Indeed.

Hon Matthew Swinbourn: That was a long interjection!

Hon TJORN SIBMA: It was; nevertheless, it is helpful. I refer to the allocation of offenders under a community supervision order to a senior officer. I presume that provision is also made so that when people are allocated to the person charged with supervising the CSO, those more serious offenders will be allocated to a corrections officer who has, I suppose, experience in dealing with offenders who have committed murder, manslaughter or sexual assault. I took it that this entire case load of offenders under a CSO will be managed by the most senior cohort of corrections officer staff, but is there also an elevation within that cohort for the most experienced officers to deal with those people who have been found to have undertaken the most serious offences?

Hon MATTHEW SWINBOURN: I think it is helpful to understand that both adult corrections and youth justice services if necessary will be involved in the tribunal process. The kind of considerations that the member is talking about will be fed into the process for determining supervision. For example, if a person has an extremely complex range of needs and there is no officer able to manage those, that might be a factor that militates against that person being released on a community supervision order. That could have an impact on the decision.

We are talking here about extreme cases, of course; I am not talking about every ordinary case. But it will really come back to case load management within Communities and ensuring that the appropriate people are put in the right directions, taking into account a range of other factors. Another issue that might arise is a geographical issue about someone's location. We have said that the supervision would be undertaken by a senior corrections officer, but if a person lives in a remote or regional area, for example, and the supervision of that person would require an officer with a particular skill set, that will come into the decision-making matrix when deciding whether that person could be appropriately supervised if they return to their regional community and are not in a position to be sufficiently

supervised within that community. Again, that will be a matter for the tribunal to consider in the particular circumstances of the case.

I can give the member some background about adult community corrections. It operates six centres and 13 sub offices in regional areas. I think one of them is about 100 metres from my electorate office in Maddington. Community corrections officers based at these centres supervise offenders as well as a small number of people who are subject to the current Criminal Law (Mentally Impaired Accused) Act in their local areas. This role involves identifying support needs and arranging access to services to address them, which may include referrals to National Disability Insurance Scheme services, including support to request access to the scheme; public mental health services for those with a major mental illness; NGO support services; accommodation services; and criminogenic and other programs funded by the Department of Justice such as substance abuse counselling. These services are provided by a mix of contracted service providers and departmental staff, depending on location.

Access to specialist services is an ongoing challenge in some regional areas and is beyond the scope of adult community corrections. CCOs work to develop the best possible support arrangements in view of the resources that are available. Formal supports represent only one part of the overall response to a person being supervised in the community. Also of relevance is that informal support provided through families and kinship groups is also critical, particularly in locations where access to specialist services is limited. CCOs liaise with both formal and informal support providers to monitor progress and address gaps when they are identified.

As I said, there is a matrix here. Consideration of the matters that the member has raised about the appropriate allocation of a particular case officer with the necessary skill sets is something that will happen at the tribunal level. I hope that has addressed the member's concerns. We are both getting a bit tired but we have only a short time to go.

Hon TJORN SIBMA: That is fine. I was also interested in the default ratio that the parliamentary secretary described as one officer to eight individuals under a supervision order. Other than its transference from the other utilisation, are there any science or workplace studies to justify that, or is it just standard practice?

Hon MATTHEW SWINBOURN: I cannot point to any particular science, but I think it is informed by experience. As is always the case, you cut your cloth according to your means. That is probably an element of it as well. The default ratio of eight to one, as I said, is informed by experience rather than by any particular science. If any further information about that comes to light to us overnight, we will provide it tomorrow.

Hon TJORN SIBMA: At the risk of being tedious, we dealt with how I should consider the intended management of these community supervision orders against community-based orders. I presume there will be a distinction between the actual operation—actually, I do not know. Is it anticipated that there will be much of a substantial difference between the actual application or supervision that occurs or is intended to occur under a community supervision order against whatever management or supervision would apply to the current cohort of offenders who are on a conditional release order? To what degree are those terms interchangeable, or is there a distinction here?

Hon MATTHEW SWINBOURN: Practically, there will not be a paradigm shift between these two things. In terms of practicalities, under the transitional provisions, the existing CLOs and LOAs will become new CSOs. There will then be an obligation on the tribunal to review all those transitioned arrangements, it might add to or modify the conditions as a result of the tribunal's review. The other important point is to understand that supervision currently is not mandatory. The bill will require some form of supervision under all CSOs and LOAs.

Hon TJORN SIBMA: I have been waiting for that to be expressed in such a clear way. I had formed the view that the supervision that would be applied to individuals on a CRO or leave of absence was a pretty light touch, but I could not necessarily have that substantiated or articulated in such a clear way. The parliamentary secretary mentioned the management of individuals under CDOs. He also mentioned in passing that there would be the capacity to undertake spot checks on individuals who are subject to a conditional release order. I am not sure whether I heard the parliamentary secretary correctly. I want to ascertain whether that is the case.

Hon MATTHEW SWINBOURN: I think my previous comments were in relation to CSOs rather than CROs. A lot of acronyms are flying around here. To be clear, currently under CROs, depending upon the conditions that are imposed, it is possible for the supervising person to conduct ad hoc checks. Once this bill commences as an act, particularly with the introduction of specific electronic monitoring and curfew, that supervision will become more formalised. The electronic monitoring will obviously be largely automated, with oversight from the supervisor, to ensure that the person is complying with the conditions that have been plugged into the AI for that particular monitor. I do not understand the technicalities of it, but I presume that the person will not be allowed to go here or there, and if they do, the GPS in the monitor will ping and someone will find out about it. It will be largely dependent upon the AI. Clause 223(3) refers to supervision and states —

> To ascertain whether or not a supervised person who is subject to a curfew is complying with the curfew, a supervising officer may, at any time —
>
> (a) enter or telephone a place specified under section 222(3) in relation to the person; and

(b) enter or telephone a person's place of employment or any other place where the person is authorised or required to attend; and

(c) question any person at any place referred to in paragraph (a) or (b).

That will provide explicit powers for community corrections officers to deal with people who are under these new CSOs if required.

Hon TJORN SIBMA: I am in equal parts alarmed and heartened by the fact that this bill, if I hear the parliamentary secretary correctly, introduces a positive obligation on behalf of supervising officer to directly supervise —

Hon Matthew Swinbourn: Yes, and to report breaches.

Hon TJORN SIBMA: And to report breaches.

Hon Matthew Swinbourn: I am going to have to interrupt you because I have to ask for progress to be reported.

Hon TJORN SIBMA: I am more than happy to indulge that.

Progress reported and leave granted to sit again, on motion by Hon Matthew Swinbourn (Parliamentary Secretary).