CRIMINAL LAW (MENTAL IMPAIRMENT) BILL 2022

Committee

Resumed from 28 March. The Deputy Chair of Committees (Hon Dr Brian Walker) in the chair; Hon Matthew Swinbourn (Parliamentary Secretary) in charge of the bill.

Clause 45: Overview of Part —

Progress was reported after the clause had been partly considered.

Hon MATTHEW SWINBOURN: When we concluded yesterday, two outstanding matters had been raised. One was whether a finding under this legislation would impact a person's ability to work in aged care. We have had an opportunity to consider this point overnight.

Aged care is regulated by the commonwealth government under a suite of legislation and statutory instruments, including the Aged Care Act 1997, the Aged Care Quality and Safety Commission Act 2018 and a range of rules and principles made under that latter act. Part 6 of the *Accountability principles 2014* provides that it is a responsibility of an approved provider of aged care to ensure that each person who is employed as a staff member or volunteer for the approved provider has been issued with a police certificate or has a National Disability Insurance Scheme worker screening clearance. I spoke yesterday about the amendments this bill will make to the National Disability Insurance Scheme (Worker Screening) Act to provide that a finding that a person committed the offence as charged will be treated as a conviction for the purposes of that act. The principles will apply to all Australian government-subsidised aged-care services, including those operated by WA Health.

There is a possibility that a person with a CLMI finding will be captured by aged-care screening requirements if they have applied for an NDIS clearance. I said yesterday that a police clearance would not necessarily show a CLMI finding—it does not currently show a CLMIA finding—but, as I said, there is a potential for this group to be captured through the NDIS avenue. We understand that recommendation 77 of the Royal Commission into Aged Care Quality and Safety was that the Australian government should establish a national registration scheme for the personal care workforce, including criminal history screening requirements, and the commonwealth has indicated that legislation to enact such a scheme will be introduced in 2023. I hope that squares away that issue.

The other outstanding matter is periods to regain fitness in other jurisdictions. Yesterday, I indicated that all jurisdictions give a period of 12 months to regain fitness. I neglected to mention that Queensland does not. Queensland has a wholly different system involving a dedicated Mental Health Court and a Mental Health Tribunal, so I apologise if I have misled the house. That system is so different from what we are dealing with in this bill and from every other jurisdiction's management of this group of people that a comparison is not particularly helpful. For completeness, I can advise that the Mental Health Court must review an unfit person to see whether they have become fit every three months for the first 12 months, then every six months thereafter. This continues for a prescribed period of three years for most offences and seven years in cases in which the sentence for the offence could be life imprisonment. If the person has not become fit by the end of the prescribed period, the proceedings must be discontinued.

As the member can see, that is fundamentally different from what we are doing here and what is happening in other jurisdictions; however, as I say, for the completeness of the record, I made the claim that it was all jurisdictions, and it is not. Queensland sits outside that.

Clause put and passed.

Clauses 46 to 57 put and passed.

Clause 58: Representative of supervised person —

Hon TJORN SIBMA: When considering representatives of supervised people, my attention was drawn to the explanatory memorandum and the final paragraph on this clause, which states —

> A representative may represent or accompany a supervised person in their dealings with and appearances before the Tribunal. A supervised person may also be accompanied by a representative and represented by a legal practitioner in Tribunal proceedings.

I query the use of the word "may". Would this not always be the case? Would they not always be represented by a legal practitioner, or have I misread the intention of that paragraph?

Hon MATTHEW SWINBOURN: It is essentially a permission that they can have representation. Of course, a person is not obliged or obligated to be represented by legal counsel, but this provision is elevating it to make it so that there is a permission in that regard. It would be extremely unusual for someone to have their request for representation by a legal practitioner refused. There would have to be some incredibly serious grounds for that to occur. I also refer the member to clause 165, which has similar provisions for the tribunal. If I step that out very quickly for the member, it states —

165. Appearance in review proceedings

(1) In proceedings under Part 6 Division 4, the supervised person —

(a) may appear before the Tribunal, unless the Tribunal considers that it is not safe or practicable for the person to do so; and

(b) may be accompanied by a representative of the person; and

(c) may be represented by a legal practitioner or a representative of the person.

As I say, that is a similar provision for the tribunal.

Clause put and passed.

Clause 59 put and passed.

Clause 60: Minister may make order as to declared places —

Hon TJORN SIBMA: In division 2, in this clause, the minister may make an order as to declared places effectively on the proviso that that place has appropriate facilities. How many appropriate facilities are there presently?

Hon MATTHEW SWINBOURN: We can only say how many declared places there are. The member said "how many appropriate places are there", but I do not think that is what the member was asking about. There is one declared place currently.

Hon TJORN SIBMA: Should there be a presumption then that there may be a determination by government for additional declared places; and, if so, has any investment decision been made or is a decision pending?

Hon MATTHEW SWINBOURN: The member said that there was the presumption that there would be more. I do not think it is fair to say that there would be a presumption. I will give the member some more context about the current one. As at January 2023, three persons were in a declared place—that is, the Disability Justice Centre. It has capacity for 10 persons. The tribunal will ultimately be responsible for determining a supervised person's place of custody. Agencies will monitor whether the legislation needs the number of persons placed at the centre increased and whether another centre is required. This will be considered by government as part of a budget process. At this stage, with only three people there and a capacity for 10, it is not necessarily a conclusion to say that there will immediately be more declared places following the passage and implementation of the legislation. That will be monitored over the time the law comes into effect.

Clause put and passed.

Clauses 61 put and passed.

Clause 62: Limitations on place of custody —

Hon TJORN SIBMA: We might be making some further reference to that declared place that the parliamentary secretary was providing some advice on.

Hon Matthew Swinbourn: It is called the Disability Justice Centre.

Hon TJORN SIBMA: It is the Disability Justice Centre. An interesting statement is made in the explanatory memorandum about this concerning the limitations. It then goes on to say —

> The former Act included a further limitation on placement in a DSC declared place, being a requirement for the Minister for Disability Services to consent to the placement (see section 24(5C) of the former Act); this limitation has now been removed.

Upon whose advice was the decision made to lift that consent from the Minister for Disability Services?

Hon MATTHEW SWINBOURN: In October 2017, there was a review of the Bennett Brook Disability Justice Centre undertaken by Mr Alan Carter, and part of the recommendations made by Mr Carter in that report was that this provision be removed—that is, the removal of the need for ministerial consent to a recommendation by the board for a placement at the centre. That informed the removal of that provision in the development of this legislation, and the Minister for Disability Services no longer has that matter. There was consultation with successive Ministers for Disability Services and there was agreement that it was appropriate to remove the minister's discretion and role in this decision-making process.

Hon TJORN SIBMA: I was going to ask this by interjection, but I will seek clarification. What was the rationale for the recommendation?

Hon MATTHEW SWINBOURN: The commentary in the report, says —

> A broad range of stakeholders supported the proposal that the Governor (acting on the advice of the Minister for Disability Services) should no longer have the final say in whether a person should be placed in the Centre. Many people —

They must have been the people making submissions to the report —

> suggested that a Minister is too strongly influenced by the potential for political backlash and therefore errs on the side of being risk averse in relation to decisions to place people at the Centre.

I think it is more consistent with the policy that we are trying to achieve in this bill, which is the deep politicisation of these processes. I think in other parts of the bill the Attorney General's role has been moved to the tribunal and things of that kind. It is consistent with the policy intent here. The tribunal, which will be the body that makes the decision, will be an expert panel of people, so probably better placed to make a determination of risk and appropriateness having regard to the nature of the facilities that are available there.

Hon TJORN SIBMA: I suspected the answer might be somewhat along those lines. On how many occasions since the 2017 review was completed has a Minister for Disability Services not provided consent for the placement of an individual?

Hon MATTHEW SWINBOURN: We do not have the information since 2017; the information we have at the table is for the last three financial years, and it states five times.

Hon TJORN SIBMA: I thank the parliamentary secretary, that is very helpful. I just want the record to show that I believe in the concept of executive government and ministerial discretion. I sometimes take the view that although people might object to political intercession—not interference—or the exercise of ministerial prerogative, it is not always appropriate in every circumstance. Applications for placement have been refused by the respective Ministers for Disability Services over the last three years on five occasions; if they had been granted, I presume that the current occupancy at the Bennett Brook Disability Justice Centre would be eight rather than the three who currently reside there.

Hon MATTHEW SWINBOURN: I do not think that simple arithmetic quite applies here, because it is a transitional facility, so the numbers may have gone up and down. The other issue that we do not have any information here about is whether the five we have referred to were five different individuals or whether there may have been double-ups in relation to that. We do not know that, so we cannot provide that information. I think it is reasonable to say that if the intervention had not been there, it is possible that the population at that place would be higher than it is currently. I suppose it could be said that the maximum it could be is eight, but it is more likely to be somewhere between three and eight.

Hon TJORN SIBMA: Perhaps there is not a neat answer to this, but would it also be fair to say that the mere existence of that ministerial veto, as I will call it, may have acted as an impediment or disincentive to lodge an application for somebody who may have been an appropriate candidate for consideration, much in the way that the parliamentary secretary has made an argument that this legislation might provide some incentive for someone to be treated as a mentally impaired person rather than take their chances through the conventional criminal justice system?

Hon MATTHEW SWINBOURN: The advisers are in agreement that we cannot speculate to that extent because we just do not know whether that would in fact be the case. To be cautious in that regard, we cannot speculate.

Hon TJORN SIBMA: This is not to have a go at the member individually, but now that this ministerial discretion or capacity will be removed, it is very likely that the capacity for a political campaign by a member for Bassendean towards a minister will no longer be a threat and that that communication should potentially be between an individual member of Parliament and the tribunal to express any community reservation.

Hon MATTHEW SWINBOURN: I cannot comment on that. I think it was rhetorical on the member's part.

Clause put and passed.

Clauses 63 to 65 put and passed.

Clause 66: Initial and periodic review —

Hon TJORN SIBMA: I note, parliamentary secretary, that we have advanced 20 clauses. Not every clause is equally valid, but we will do what we can. I read clause 66 to be reasonably prescriptive. As a non-practitioner, is there something unusual about the frequency of the reviews of reviewable orders? I take this to imply, at least in relation to adults, that every individual will be subject to a review of their case on a 12-monthly basis. Is that how I should read this?

Hon MATTHEW SWINBOURN: Yes, that is how the member should read it.

Hon TJORN SIBMA: How does this correspond with the practice of the review board currently?

Hon MATTHEW SWINBOURN: The 12 months for adults is the same as what is currently in place for adults. What is new is the three months in relation to children. That is not currently a prescribed statutory arrangement. The additional provision in clause 67 is the individual's right to apply for a review, which does not currently exist as a standalone right.

Hon TJORN SIBMA: I might just launch into clause 67 because the parliamentary secretary has referred to it, not that it is the clause under consideration now. Does this imply that there will be one opportunity post–a review? Effectively, there will be the potential for an individual's case to be reviewed twice in a 12-month period. What will be the terms of the review? Will it be a review of the order, a review of the individual's circumstance or a review of the individual's capacity to abide by the terms of the order? I would like some clarity about what will be reviewed and the purpose.

Hon MATTHEW SWINBOURN: The member said that there could be two reviews in every 12-month period, but that is not quite correct. A review once every 12 months will be the minimum, but, as the member can see from clauses 67, 68 and 69, there will be a number of opportunities for additional reviews. Clause 67 provides for an application for review by the supervised person, a representative or legal practitioner; clause 68 provides for a review by the tribunal on its own initiative; and clause 69 provides for a review at the request of the minister. I had to laugh at the language; it refers to "a review of a reviewable order". "Reviewable order" is defined in clause 65 as a custody order, a community supervision order or a leave of absence order. Essentially, "reviewable order" is a catch-all for those three things. It is in the definitions clause in this division. It could be read as saying that the tribunal may carry out a review of a CO, a CSO or an LOA order. I take the member to clause 72, which details the matters to be considered on review. It says —

> (1) In reviewing a reviewable order, the Tribunal must have regard to the following —

Then paragraphs (a) to (k) detail those.

Clause put and passed.

Clauses 67 and 68 put and passed.

Clause 69: Review at request of Minister —

Hon TJORN SIBMA: I am somewhat relieved that this clause is here, notwithstanding our earlier discussion about alleviating the involvement of the Minister for Disability Services in contemplation of some of the management arrangements. This is of a different construction and complexion. What would be the ordinary grounds for a minister to make a request that a review be undertaken? Upon whose advice would the minister ordinarily act in such an instance?

Hon MATTHEW SWINBOURN: The important thing to note is that this provision is not new. It is reflected in section 33(1) of the Criminal Law (Mentally Impaired Accused) Act 1996, which is —

> At any time the Minister, in writing, may request the Board to report about a mentally impaired accused.

The wording is slightly different but gives the same effect. The grounds that the minister might consider is difficult to say because it depends on how that comes to the minister's attention. The minister we are talking about here is not the Minister for Disability Services; it is the Attorney General. The Attorney General may have had representations made to him or her by particular members of the community or different groups that the tribunal in making its decision, having regard to the matters in clause 72, has effectively come to the wrong decision and, therefore, the minister should exercise his or her discretion to ask for a further review of the matter. The advice on whether it is appropriate to do that and also the representation would come from the State Solicitor's Office, so it would be involved in the process.

It is not dissimilar to other matters for which the Attorney General has a discretion, for example, like the royal prerogative relief for mercy. People will often make presentations to the Attorney General and the Attorney General will receive advice about the merits of those sorts of things and then make a decision on whether to go forward. It is not outside the realm of the matters the Attorney General would deal with. Previously, we dealt with the Charitable Trusts Bill and the Attorney General had a role whereby groups that made allegations about the mismanagement of a charitable trust would have to make representations to the Attorney General and then he would seek advice from the State Solicitor's Office, which would perform the investigative function. We have effectively changed that under that regime, but again I give the member the assurance that the Attorney General has many representations made to him on many different matters and there is a well-established process for dealing with that.

Hon TJORN SIBMA: I suppose the operative part is "The Minister may, at any time, request". I assume that a minister seeking a review would have been predicated on a recent review decision. There is no limitation on the capacity of the minister to seek a review in any particular case. The parliamentary secretary mentioned that this is effectively lifted from the act. Would the parliamentary secretary be able to indicate whether the Attorney General has utilised this function in the course of, say, the past five years?

Hon MATTHEW SWINBOURN: I do not have that advice at the table. I understand that there are people following this debate who may be able to provide that, and if that advice comes in, I will be able to provide that advice to the member. Hopefully, someone will give that to us, but I would not like to hold up the debate. If I can beg the member's indulgence here; if that advice comes through, we will provide it. If not, I will confirm that we were unable to receive it.

Hon Tjorn Sibma: By interjection, I am happy to pursue this in a pragmatic way.

Hon MATTHEW SWINBOURN: I thank the member.

Clause put and passed.

Clauses 70 to 72 put and passed.

Clause 73: Orders the Tribunal may make after carrying out review —

Hon TJORN SIBMA: This might not be the most appropriate place to ask the question, but I want to get a sense of the latitude afforded to the tribunal in undertaking a review of a reviewable order. I have made an assumption throughout that the tribunal would retain the discretion, upon the process of carrying out a review, of being able to substitute one form of reviewable order for another. For example, on review, it could determine that a custody order is no longer appropriate and it should transfer to a community supervision order. Will that capacity be retained by the tribunal through this review process or will it be through another process?

Hon MATTHEW SWINBOURN: The custody order and the CSO will be made by the court in the first instance and then the court transmits those orders to the tribunal. The tribunal is the one that can vary the conditions. It does not have the power to remove the community supervision order. Its job is to manage that, if I can use that term. A leave of absence order will still be subject to the custody order. A custody order will sit over the leave of absence, so it will be the tribunal's responsibility to effectively, again, manage the leave of absence, but it will not interfere initially with the custody order. At clause 73(3), we see a range of things that the tribunal has after a time. I propose that we do not to get into that until the member is ready to get into that. Does that help to understand?

Hon TJORN SIBMA: That is perfect. Again, I am just finding the appropriate juncture, in line with the mutual decision not to unduly elongate this process. I would be grateful for the parliamentary secretary's consideration of a division 4–based question. Is a victim of an offence notified in every particular instance when a review takes place in relation to that offender, irrespective of the origins or the reasons for that review to be undertaken—that is to say a ministerial request or an own-motion review and the like? What are the implications of managing that frequency of notification if it is every occurrence?

Hon MATTHEW SWINBOURN: Member—follow me! The first thing to indicate here in relation to victims is that the system generally provides for them to opt in because, in many circumstances, victims do not want to have anything to do with it so we are not placing on them the onus to continually relive their trauma in relation to these matters. A group of victims are never notified because they have chosen not to be notified. There is, however, an obligation to notify in relation to each review—if I can use those terms—through a combination of provisions in the bill, starting with proposed section 71, which provides that the tribunal must give notice of the proceeding to the chief executive officer of Justice, which is effectively the director general, as I understand it. Part 9 deals with victim considerations and provides comprehensive arrangements for how victims will be notified and the particular considerations. If we look at proposed section 72, "Matters to be considered on review", we see that proposed subsection (1)(g) provides —

> a victim impact statement or a victim's submission under Part 9 that was given or made in respect of the supervised person;

If a person has opted to be notified, the existing mechanism is the Victim Notification Register. It does not just apply to persons affected by this particular regime; there are obviously victims who are not affected by people with mental impairment. The register already exists and they will continue to opt in to be notified. The system will make the CEO aware once the tribunal has advised them of a review that the victim associated with a particular matter will need to be notified and then that victim will be given an opportunity to make a submission or statement to the tribunal.

Clause put and passed.

Clauses 74 to 76 put and passed.

Clause 77: Leave of absence orders —

Hon TJORN SIBMA: Parliamentary secretary, I have a deep curiosity about the management of leave of absence orders presently. Proposed section 77(2) outlines the purposes under which a leave of absence might be granted. The three justifications are medical or dental treatment, cultural or compassionate purposes and reintegration into the community. Are these effectively a carryover of the existing arrangements into the proposed new act?

Hon MATTHEW SWINBOURN: The first thing to note about this provision is that the three justifications identified do not represent an exhaustive list because of the qualifying words "Without limiting subsection (1)(b), the purposes that may be specified include"; it is giving an example of that. Hon Tjorn Sibma's question was: is it a carryover of existing arrangements? It is not quite a carryover because this provision refers to the purposes whereas the present arrangement refers to the conditions. It is a bit of an overlap in one respect because if the condition of the leave of absence is that a person attends for medical or dental treatment or for a compassionate purpose, although they are different, the conditions always go to what the purpose is. The conditions are tailored to meet the particular purpose.

Strictly speaking, no, it is not a carryover from the provisions in the current act, but in practice it reflects the common purpose for which they are currently granted in that regard. Current practices are not prescribed in the legislation and neither are they prescribed strictly in this clause because it provides specific guidance about three particular things.

Hon TJORN SIBMA: I accept that as effectively providing guidance which, in the main, I suppose, is consistent with the current practice.

Hon Matthew Swinbourn: By way of interjection, I am advised that the act uses similar language, which is why we have picked it up here.

Hon TJORN SIBMA: I am reading an implication in the succeeding proposed subsections, which, effectively imply a time restriction on the validity of a leave of absence granted to a particular individual. Should I have my attention drawn to anything more prescriptive about how long an individual leave of absence of approval will be valid?

Hon MATTHEW SWINBOURN: Under the current provisions, the maximum period is 14 days, which has served to be problematic because, in effect, a leave of absence could be for a more extended period. The 14-day current arrangement has created issues because it requires people to sometimes, unnecessarily, continue to report back, because once the leave of absence has its reached time expiry under the current provisions, the person must go back into custody effectively and be granted a further leave of absence. The changes here are informed by the practical effect the current regime not being fit for all purposes. It is also important to understand that a leave of absence may not just be a for a period of time; it might not be say, for example, a leave of absence for 14 days. A leave of absence can sometimes be that someone is released on a Thursday afternoon for a particular purpose, almost in perpetuity, if I can put it that way, because that might be when they have a job and when their shift is, and it is important for them to continue to be able to meet that particular need. What we are doing now is moving from what was quite prescriptive and restrained to giving more flexibility to accommodate the actual circumstances of the leaves of absence of particular people. It is also important to have regard to subclause 77(4) —

> A leave of absence order does not have effect after the limiting term for the custody order expires.

Once that custody order expires, it comes to an end. That, of course, is not the current arrangement because of the indefinite nature of—what do we call them?—the custody orders currently in place.

Hon TJORN SIBMA: Not having had the direct experience, my assumption at the commencement was that a leave of absence was something that was episodic in nature and tightly temporally constrained in time and space. I suppose, with the exception of appreciating individual circumstances for medical treatment and the like, I would have otherwise considered a 14-day leave of absence to be particularly generous, frankly. The clarification the parliamentary secretary has provided that, for the management of a particular individual, the leave of absence might, as he said, relate to someone being granted a leave of absence to undertake employment every Thursday henceforth until whenever is a particularly interesting insight. I could not figure out, despite the responses I had received about differentiation of the overall cohort into the two distinct types—conditional release order and the leave of absence—what the material difference was for conditions and supervision. Even if the underlying purpose might be different, I do not think there is much difference, to be honest, but I could be wrong.

Is the present experience that leave of absence orders are effectively rolled over, and on what basis is that process maintained? That might not be the best complexion that I could put on it, but I looked at the snapshot of 31 December last year, for example, and thought, "Jeez! That is an extraordinarily large amount of people on one day to be having a leave of absence order." Is it effectively a leave of absence order that is rolled over on a weekly, fortnightly or monthly basis? Can the parliamentary secretary give an indication of how it is managed and what might change as a result of this?

Hon MATTHEW SWINBOURN: I will answer the member's question, which was: are they effectively rolled over? Although there might be some technicalities about exactly how that happens, effectively, yes; many of them are rolled over. I will give some more context about what the leave of absence currently means in practice and some of the consequences of, for example, the 14-day limit. As I said before, one of the consequences is that the person must return to the Frankland Centre, must spend a period overnight in the Frankland Centre—notwithstanding that there may be no other reason for that—and then must have a new leave of absence or a rollover, as we are describing it.

I will give more context to a leave of absence. Once a person has made sufficient functional progress as a result of their inpatient treatment and rehabilitation, then a leave of absence may be made. Access to leaves of absence is currently approved by the board, based on advice regarding risk profiles from the State Forensics Mental Health Services treating team. There can be several conditions on the leave of absence, including escorted and unescorted grounds access, escorted and unescorted community access, and overnight leave. The amount and type of leave is increased gradually, and it can take many months and often years from the initial leave of absence until the person is approved to spend some nights away from the hospital. As the member can see, it is a graduated system, depending on the individual circumstances. Leave of absence from the inpatient setting allows people to further develop their independent living skills and increase their reintegration into the community.

I think the member highlighted that his initial sense was that a person in custody gets a leave of absence, goes out to do a particular thing and then comes back into custody. In fact, more broadly, leaves of absence are a system to help manage people's reintegration into the community. Sometimes, yes, it can be for a narrow and specific purpose, but often it is being used to rehabilitate and reintegrate the person into the community when necessary. I am being pointed to subclause 77(3) —

> A period specified should not, to the extent practicable, exceed that which is necessary for the purpose or purposes specified.

They remain limited and will remain limited under that provision as well, under the current arrangements. We mentioned prisoners before and perhaps that is the mindset we think about. They are called an "absence permit", and in those particular circumstances an absence permit is probably more likely to be what the member contemplates, which is a low-risk prisoner allowed time to attend a dental or medical appointment outside of the prison system for particular reasons, and they are given that leave of absence permit and then expected to return to the custodial facility to continue to serve out their term of imprisonment.

Clause put and passed.

Committee interrupted, pursuant to standing orders.

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