DECLARED PLACES (MENTALLY IMPAIRED ACCUSED) BILL 2013

Third Reading

MS A.R. MITCHELL (Kingsley — Parliamentary Secretary) [1.24 pm]: I move —

That the bill be now read a third time.

DR A.D. BUTI (Armadale) [1.24 pm]: We are finally at the third reading stage of this very important bill before us, the Declared Places (Mentally Impaired Accused) Bill 2013. The opposition is very supportive of the concept of, and need for, declared places. Our major concern was the process by which the locations of the two declared places were nominated by government. I will say only a few words about that, because I am sure the member for Bassendean will have other comments.

Declared places are incredibly important centres. We need community support for them because I am sure that eventually there will be pressure to increase the number of them. We do not want a repeat of the process that was followed to determine the locations of the first two declared places. When I say the "first two declared places", we know that prior to the 2013 state election two other locations were originally nominated. For various reasons, they were pulled. We understand why they were pulled. I do not think the government could ever really deny that it was for political reasons—that is, to safeguard seats held, or to win seats from the Labor side. The process followed to arrive at the two declared places, which is now one, was disgraceful. It meant that there was very little chance that the local community would support these declared places, which is really disappointing because they are very important. The government must take on board the criticism of the community and the various points made by members from this side of the house about the process that was followed.

Getting back to the declared places, it has been a long process. The former Attorney General, Christian Porter, and Minister Morton announced them on 12 May 2012. In the state budget in May 2012, it was announced that there would be funding for declared places through disability justice centres. On the same day, the government put out a media release about that. This was brought to the fore in some aspects by the case of Marlon Noble; a young man who was accused of sex crimes against two minors but, because of his intellectual disability, was not deemed fit to stand trial. As a result, he was under a custody order under the control of the Mentally Impaired Accused Review Board. He never stood trial. The injustice was that he was held in custody for a period longer than would have been the case if he had stood trial and been convicted of the alleged crimes. Narelle Johnson, who was chair of the Mentally Impaired Accused Review Board, stated in January 2011 —

> We think these people —

She is referring to people such as Marlon Noble. I think 13 people were in similar circumstances in prison at the time. She continues —

> should be protected and that the community should be protected, but in the nicest way possible so these people have a good quality of life … they're vulnerable people and it's not an optimum environment.

It is interesting that Justice Narelle Johnson made that comment. I mentioned this during consideration in detail, so I am able to raise it again now.

I now refer to a current case about a person known as Jason. Taryn Harvey from Developmental Disability WA is advocating on Jason's behalf. Jason, a young Aboriginal male, was in prison for 10 years for an offence he committed as a 14-year-old juvenile. He was the driver of a stolen car that crashed following a pursuit, killing his 12-year-old cousin who was a passenger in the vehicle. He was under the influence of solvents at the time of the alleged offence but found to be a mentally impaired accused as a result of his intellectual disability and therefore he has not stood trial. From my understanding, Jason—that is not his real name, obviously—does not have a history of violent behaviour; he does not represent a risk to the safety of the community. It was disturbing to hear some of the Attorney General's comments about declared places, which does worry us on this side; and whether they will be used for what they should be used for—that is, to assist the removal of people with cognitive impairment from the prison environment, not as a transition to the community rather than just an alternative form of prison. The Attorney General was interviewed on the ABC's *AM* program and made a number of comments about mentally impaired accused who have committed serious offences. He stated —

> What do you think ought to happen to someone that is inclined to not control their actions, can't be reasoned with, is not criminally responsible for their actions and hence cannot be deterred, is a clear and present danger to themselves or the community? How should they be dealt with?

These comments raise concerns that these justice centres will be used as an alternative form of prison rather than as a transitional facility. From the briefings that the opposition has received and from the evidence we heard during the parliamentary inquiry conducted by the committee of which I am a member, it was apparent that if there is serious concern about the safety of the community, certain individuals would probably not be

recommended to be sent to these justice centres. The justice centres are for people with intellectual disabilities who have not been able to stand trial and whose behaviour does not appear to put them at risk to the community. In Jason's situation, there would appear to be no pattern of activity that suggests he is a risk to the safety of the community. In any case, it is unclear whether the Minister for Disability Services and the Attorney General have a different view about these justice centres. If they are just another form of prison, we have two major problems. First, will those people with an intellectual disability who have not been able to stand trial and whose behaviour does not pose a risk to the community be sent to these centres purely as a form of punishment or will they be sent there to help their transition into society? Second—this is more troubling to the community—if the Attorney General's apparent view is that these centres are some form of alternative prison, he may push for people who pose a threat to the community to be sent there because he will see them just as a form of prison.

The government needs to articulate its position more clearly. It needs to articulate that these disability justice centres—these declared places—are for people who have allegedly committed an offence but, due to their cognitive impairment, are unable to stand trial and they do not pose a risk to the community. They are the people who should be housed in the declared places. Once that threshold that there is no threat to the community's safety has been met—the way the bill is written, community safety is given the greatest priority—those centres should focus on transitioning that person into the community. The focus should not be on these centres being seen as a form of punishment or an alternative to imprisonment. For that to happen, it is imperative for community support that the people who are sent to these centres do not pose a threat to the community. From my understanding, it would appear from the information I have about Jason that he is not a threat to the community. It is important that the parliamentary secretary or the minister discuss Jason's case with the Attorney General, even though declared places are not under his portfolio as such, and also determine the focus, which is the function and purpose, of declared places. As we said, the opposition supports these declared places. One could argue that they should have been in place many years ago. As we know, people with intellectual disabilities are often forgotten by governments of either persuasion and also often marginalised by the community. We have situations involving people with an intellectual impairment who have also allegedly committed a criminal offence. They are even less likely to be on the radar of being worthy of favourable public policy and also more unlikely to receive support from the community.

We have the declared places and now it is important that the structure or the functioning of these centres is closely scrutinised. It is very important that Minister Morton puts systems in place to ensure that these centres are operated properly. One would hope that the systems that she puts in place are better than the systems that appear to be in place for the DPC with regards to the suspension motion that we just —

The DEPUTY SPEAKER: Order, member! Stick to the third reading of the bill please.

Dr A.D. BUTI: I seek clarification, Madam Deputy Speaker. I am sticking to the bill. Surely I have a right to bring into play other issues with regard to the system and talk about whether the minister may have been failing in that area.

The DEPUTY SPEAKER: Under the third reading, you do not. Please just confine yourself to debate that has already taken place on this bill.

Dr A.D. BUTI: Thank you for your ruling.

It is important on a number of levels that proper systems are put in place. It is important for the residents—that is the terminology that has been used in the bill—the staff at the declared places, management and the Disability Services Commission, and it is also incredibly important for the community. The situation we have with the declared place in Lockridge is that the government, through its mismanagement of the process, has a community that is not hostile to the concept of a declared place but is hostile or scared of the fact that the centre is located there. The government has a lot of work to do to win over the confidence and support of the local community. I dearly hope that the government puts procedures in place to ensure that that will happen because so far the community has not been listened to very carefully in many respects. It has in some respects as the plans for the other declared centre have been terminated. It is good that through the advocacy of the local member and the local community, the government has reacted to that.

I think the bill is well put together in many respects. There appear to be some important safeguards for the protection of the residents. There are some issues about industrial relations matters for staff members. Our greatest concern is that the bill has quite clearly been established to allow the government to contract out the running of the declared places. We have a problem with that. It is interesting that when the member for Bassendean talked about Serco Australia, he asked whether its headquarters were in Perth. Ultimately, its headquarters are in London, so one would wonder —

Mr D.J. Kelly: It's beyond the jurisdiction of this legislation.

Dr A.D. BUTI: That is right; it is beyond the jurisdiction of this legislation. It is a massive organisation that has done very well under conservative governments in various states in Australia and the commonwealth government. However, the point is that part 9 of the bill deals with contracting out. I have not seen many bills dealing with prisons or facilities for people with disabilities that have such a prominent part that will easily allow services to be contracted out. Once private organisations are brought in, ultimately the private organisation's motive is profit. I cannot criticise a private organisation for wanting to make a profit. But how does an organisation make a profit? In a situation in which the government contracts out the services, it will pay a certain amount of revenue to the private organisation. An organisation increases its profit by decreasing costs or by saying that it is seeking to run the services more efficiently. Once the organisation seeks to reduce costs, shortcuts will be made; there is no doubt about that. Issues such as whether enough staff are available, whether there is enough service provision for residents or whether safety is compromised become quite concerning and problematic, and they worry the opposition. That is not even getting down to a philosophical discussion necessarily about private versus public, which we can have if we want to, but I know this is the third reading stage of the bill. The seven clauses in part 9 will allow the government to quite easily change this facility from a publicly run facility to a privately run facility. That is where I have concerns. I have concerns for the community and the residents. I have concerns for the community because safety may be compromised. I have concerns about the residents because I feel that their rights may be jeopardised. I can imagine the pressure that the staff of a private organisation would be put under if it tried to reduce costs. Even though the legislation may say X, Y or Z about advocates, one must be concerned about whether those advocates will be given the access that they are allowed under the legislation. I know we can say that the legislation must be followed, but I can assure members that many private organisations often find ways to circumvent their duties under the legislation.

An entire part of the bill, part 10, "Advocacy services for residents", deals with advocacy. There is a very urgent need for the Disability Services Commission to ensure that people in the disability sector generally and, in this case, the residents can utilise a full array of possible independent advocates. There is some concern that the independent advocacy sector is not being properly utilised in the disability sector, particularly when the government is involved. It is commendable that a part of the bill deals with the rights of residents and the functions and powers of the advocate, but we must ensure that there is a proper pool of advocates, because the wider the pool of advocates, the greater the chance that people will be properly represented. Under clause 52, "Residents' rights as to visits or other contact", residents have the right not to see an advocate. If we increase the pool of advocates who are provided, there will be less chance that the resident will not take up the option of being represented by an advocate of their choice. If the pool is reduced, there is more chance that people will not want to be represented by advocate A or B, but if the pool is increased, they may want to be represented by advocate C, D or E.

Before I forget, I commend the way the parliamentary secretary has dealt with the bill. Of course, it is difficult when a parliamentary secretary represents a minister in the other house, because they are restricted in what they can do, but the parliamentary secretary sought to answer my questions, as did her advisers who were in attendance. Of course, we had a very interesting and comical episode at the table yesterday, but I will not go on about that. I am sure that the footage of that will appear one day. I ask the parliamentary secretary to pass on my thanks to her advisers for the way the bill has been handled.

I note that, under clause 64, there will be a review of the legislation. It will be interesting when the legislation is reviewed in five years. We are fully behind the concept of declared places for people with cognitive impairment; it is overdue and it is necessary. However, there may be some problems in the operation of the declared places. The legislation will be reviewed after the third anniversary of the day on which this clause comes into operation, so there will be a review after three years, and then every five years after that. I think that is right from my reading of the clause. It will be interesting to see the outcome of the review process. I hope it is a full review process that takes into account the views of the residents or their guardians or advocates, the staff involved and the local community. I think that is incredibly important.

I have some concerns, which I think were also raised by the Commissioner for Children and Young People in a submission on an earlier draft, about ensuring that children are properly catered for. I know that under the legislation, a child will have to reach the age of 16 years before they can be a resident of a declared place, but they could be aged between 16 and 18. During the consideration in detail stage, I asked whether any child aged between 16 and 18 years could be placed in a declared place at the moment, and the answer I received was no, they could not. But there was a qualifier that they do not have a cognitive impairment. Presumably, some children of that age who have a mental illness could be incarcerated, but, as we know, the disability has to be an intellectual disability. As I have stated, this bill and the consequential amendments to other acts, such as the Criminal Law (Mentally Impaired Accused) Act 1996, will definitely not prevent someone with a mental illness from being housed in a declared place; it is just that that cannot be the predominant reason for the disability. Clause 66 will amend section 24 of the Criminal Law (Mentally Impaired Accused) Act 1996 by inserting proposed subsection (5A), which reads —

> A mentally impaired accused is not to be detained in a declared place that is established by the Disability Services Commission under the *Disability Services Act 1993* (a **DSC declared place**) unless the Board —
>
> (a) is satisfied that the accused is a person with disability as defined in the *Disability Services Act 1993* section 3 and the predominant reason for the disability is not mental illness; and
>
> (b) is satisfied that the accused has reached 16 years of age;

The proposed subsection goes on to refer to community safety et cetera. The predominant reason for the disability has to be intellectual or cognitive disability, not mental illness; however, that is not necessarily considered a factor in the offence. The offence does not have to relate to a person's intellectual disability. They cannot stand trial because they have an intellectual disability, but they can also have a mental illness. I am interested in how the interplay between intellectual disability and mental illness will play out at the ground level, in the role of declared places and also for those people who are determined suitable to be housed in a declared place. In issues of community safety, there is a difference between someone who has an intellectual disability and someone with a mental illness, and also the interchange between the two.

As this bill progresses to the upper house, it is important that the government gives consideration to the comments made by members of the opposition, as I am sure they will be repeated and reinforced by the opposition in the other place. Members on this side of the house moved some amendments on the location of declared places, which cannot be divorced from community support, whereas the parliamentary secretary argued that they did not go towards the functioning of declared places. If the government wants community support for declared places, it needs to ensure that proper process is followed. The opposition supports the need for declared places and if the government wants more declared places over time, it has to ensure adequate community support for the establishment of those centres. I understand it will always be difficult to find the right location, but even under the government's own criteria there seem to be many more suitable locations than those that were finally determined. The places that were selected breached many of the criteria established by the government and the Disability Services Commission. One has to wonder why the government proposed those criteria if it was not going to follow them.

The bill is sound in many aspects and I commend the parliamentary secretary for bringing it into this house. However, I ask the government to consider seriously the processes that were followed. This is an important piece of legislation that will establish an important legislative regime that requires community support for its success and the eventual expansion that will take place as the population grows. If someone who has a cognitive impairment and who cannot stand trial remains incarcerated for longer than the penalty for the alleged offence had they stood trial, that is an injustice that should not continue. Declared places are a good solution to that problem and they also are a better place to house these residents. I wish the Disability Services Commission the best of luck in the functioning of these declared places.

MR D.J. KELLY (Bassendean) [1.54 pm]: I want to deal, firstly, with the types of residents who will be located in these centres should they finally be established by the government. Clause 3 of the Declared Places (Mentally Impaired Accused) Bill 2013 defines a resident as —

> ... a mentally impaired accused who is detained, under a determination made by the Board under the MIA Act Part 5, in a declared place that is controlled and managed by or on behalf of the Commission;

A person will get into one of these declared places through a decision of the Mentally Impaired Accused Review Board. There has been some debate about whether these residents will be people who pose a risk to the community or those who pose no risk to the community. When this matter was first raised in this place, the Premier tried to say that anyone who opposed these centres had no compassion for people with disabilities. He used the example of a person who had been charged with stealing an ice-cream, and went to great lengths to say that residents in these centres will be there for minor crimes. As the Mentally Impaired Accused Review Board will make the decision about who will or will not go into these declared places, I refer to the 2013 annual report of that board and what it says about declared places. The report states that currently there are no declared places in Western Australia and therefore putting people in prison is the only custodial option available. The report reads —

> The reason why prison is the only effective custodial option is because, at the time of writing, there is no "declared place" in Western Australia. A lack of an appropriate secure residential facility for accused —

This is the important part —

> who present too high a risk to the safety of the community for them to be released, even if supervised, has long been recognised by the Board.

The board believes that these declared places are for people "who present too high a risk to the safety of the community for them to be released, even if supervised". Far from these declared places being places where people who have been charged with minor offences are likely to be detained, in all likelihood they will be for people who have, in fact, committed serious offences and whom the board considers pose such a serious risk to the community that they cannot be released even if supervised. They are the words of the board that will be determining who is detained in these centres, which is in stark contradiction to what the Premier said would be the nature of the offences committed by people detained in a declared place. The government put out a lot of misinformation when it announced that two of these declared places would be located in my electorate. One of the bits of misinformation was around the nature of who would be detained. Clause 3 defines the meaning of "resident" and when read in conjunction with the annual report of the Mentally Impaired Accused Review Board, it is perfectly clear that misinformation was out there; that is, that these declared places will not be for people who pose no risk to the community. It is quite the opposite. People who pose no risk to the community are likely to be released and people detained in a declared place may pose such a significant risk to the community that even if released under supervision, they would pose too much of a risk for the community.

That is the first point I want to make about the bill and the nature of the people who will be detained pursuant to it. The second point is that under part 2 of the bill, "Principles and objectives", clause 5(1) refers to the paramount considerations in performing a function under this act.

Debate interrupted, pursuant to standing orders.

[Continued on page 6847.]