CRIMINAL LAW (MENTALLY IMPAIRED ACCUSED) AMENDMENT BILL 2014

Second Reading

MR J.R. QUIGLEY (Butler) [4.01 pm]: I move —

That the bill be now read a second time.

I advise the Leader of the House that a copy of the second reading speech has been emailed to the parliamentary papers office and it will provide copies for members; the speech will be with the minister in a moment.

The Criminal Law (Mentally Impaired Accused) Amendment Bill 2014, when passed into law by this Parliament, will correct a deficiency in the head legislation, the Criminal Law (Mentally Impaired Accused) Act 1996—a deficiency that has resulted in many injustices in Western Australia.

In short, this amendment bill will require magistrates and judges making a custody order in respect of an accused who has appeared before them charged with an offence but whom they have found to be mentally unfit to plead or who has pleaded not guilty and been acquitted on the basis of insanity, to require the sentencing judge to fix a finite term to the custody order, the length of which would be equivalent to the period of imprisonment that the court would have imposed for the alleged offence if the accused had been fit to plead and convicted or if the accused had not been acquitted on the grounds of insanity.

In instructing the Parliamentary Counsel's Office to draw the appropriate amendments, the instructions were both brief and simple; that is, to leave all of the Criminal Law (Mentally Impaired Accused) Act 1996 in place and intact, but to draft provisions that would require the court, be it of summary jurisdiction or superior courts, when making a custody order in relation to a mentally unfit accused person, to fix a term for that custody order that is equivalent to what the accused would have received by way of a term of imprisonment if the accused had not been mentally unfit and had been convicted before the court. The second instruction to the Parliamentary Counsel's Office was that this should also apply to those custody orders made at the end of a trial where the accused was found not guilty on the basis of his or her mental unfitness. The third instruction to the Parliamentary Counsel's Office was that there should be transitional provisions within this bill that would require the Attorney General to bring back before the court any person who was being held subject to a custody order, so that it could be amended by the inclusion of a fixed period or limiting term.

The absence of a fixed period or limiting term has caused many injustices, because people who have been put before the court and found to be mentally unfit or acquitted on the grounds of mental unfitness have then been made the subject of custody orders of indeterminate length, which has seen them held in prison for many years longer than they would have ever been imprisoned had they been convicted of the offence. I cite two examples. The first example is the case of Marlon Noble, a person who labours under the burden of permanent brain damage. It has been publicly reported that Marlon suffered oxygen deprivation, otherwise known as hypoxia, during his birth and, through no fault of his own, was permanently and irreversibly brain damaged for the rest of his life. In approximately 1998, Marlon was charged with indecently sexually assaulting two young girls to whom he was related in Carnarvon. When presented to the court, the court quickly determined that Marlon was unfit to stand trial and, under the act, made a custody order of indeterminate length. Marlon was held at the Greenough Regional Prison. After Marlon had languished in prison for some eight or nine years, some well-intentioned prison officers contacted a visiting lawyer and explained their concerns about Marlon's ongoing indefinite detention. The lawyer reviewed Marlon's case, and a psychiatrist provided an opinion that Marlon was, indeed, now fit to stand trial. The lawyer wrote to the Director of Public Prosecutions asking that Marlon be put to trial, as he wished to plead not guilty and the two young girls had provided a statement to the police that they had arrested the wrong uncle; it was not Marlon who had assaulted them, but a different relative. The DPP of Western Australia said that given the time that had passed and the effect that had on witnesses' memories, and the length of time that Marlon had already spent in prison, there was no public interest in prosecuting Marlon at trial. The consequence of this was that Marlon was still held in prison due to the continuing custody order that was not limited by time. As a result of the storm of publicity that surrounded these circumstances, the Prisoners Review Board eventually decided to release Marlon on a release order subject to many conditions that would normally only apply to a parolee, not a person who had never been convicted of an offence nor a person whose head sentence had expired.

The effect of these amendments, had they been in place at the time of Marlon appearing before the courts, would have meant that the courts would have had to fix a limiting term for the custody order, which would have been equivalent to what the court would have thought was an appropriate term of imprisonment had Marlon actually been mentally fit and pleaded guilty. I estimate, or guesstimate, that for an indecent assault of the nature described in the media, a custody order would have been made of approximately two or three years' duration. By the time Marlon was eventually released, as a result of the public outcry, he had served nearly 10 years in prison.

The second case I wish to refer to received a lot of publicity on the ABC's *Lateline* program approximately a week ago, and that is the case of Roseanne Fulton. Roseanne suffers from foetal alcohol syndrome, a condition that has left her mentally impaired for the rest of her life. The condition was contracted during gestation, when her mother apparently consumed alcohol during the pregnancy. Approximately 18 months ago, Roseanne Fulton was presented before a Kalgoorlie court charged with a number of traffic offences. Again, it did not take long for the court to conclude that she was mentally unfit to plead, and consequently the court made a custody order of indeterminate length. As was highlighted on national television, Roseanne has been held in custody in a Western Australian prison for over 18 months without ever having been convicted of any offence.

I note that a public petition was instigated on the website change.org following the national television broadcast of her circumstances, and within a week had attracted 104 000 signatures, which the proprietors of change.org said is the sixth largest petition ever on that website.

Once again, had Roseanne been fit to plead and had pleaded guilty to the traffic offences, one can say with confidence that she would not have received a term of imprisonment of 18 months and likely would not have received a term of imprisonment at all.

These are but two of the many cases that evidence the injustice arising out of the courts being required by law to make custody orders for mentally unfit accused persons and to make those orders of indeterminate length. I understand from the public comments of the Honourable Chief Justice of Western Australia, reported in *The Australian* and those made by other members of the judiciary, that there is widespread judicial, as well as public, support for the proposition that custody orders made for mentally unfit people accused of crimes should not exceed in length the period that it would have been appropriate for the person to spend in prison had they been mentally fit and convicted of the offences charged.

The Chief Justice's comments also highlight another problem with the present scheme of custody orders of indeterminate length, in that members of the legal profession are loath to bring to the court's attention their client's mental unfitness. This is because if the accused person raises mental unfitness, the likelihood is that they will be given a custody order of indeterminate length and could languish in prison for years, as has been the case with many other lost souls. I can confirm the Chief Justice's concerns in this regard from my years in legal practice.

One case that readily springs to mind is that in which a person who was charged with wilful damage of a parking meter elected to have the case dealt with before a judge and jury. When I saw the accused in the dock, his demeanour was so odd, and the way in which he gave his evidence was so odd, as to immediately raise the question in my mind of his fitness to be participating in the trial. I broached this question with his defence counsel during one of the breaks in the trial, and was told by his counsel that he believed his client was mentally unfit. But there was no way he would raise this before the court, because if the court accepted that proposition, his client would have been made the subject of a custody order of indeterminate length; whereas if the client was convicted at trial, it was unlikely that the judge would order any term of imprisonment, but place him on a community supervision order. The accused, who also happened to be an Indigenous person, gave his evidence, was convicted and sentenced to a non-custodial sentence.

Now I want to speak about what this amending bill will not change. This bill in no way impacts upon the court's capacity to make a hospital order under section 6 of the legislation, nor the capacity under provisions of section 6 requiring a person to be transferred to an authorised hospital should they become categorised as an involuntary patient during the term of their custody order. Clause 15 of the amending bill preserves the position in relation to people who have been released from detention under a custody order, either at the expiration of the custody order or who are enjoying release on conditions, so they can still be declared an involuntary patient at any time; that is, at the expiration of a custody order that has been limited to a certain period of time. Under these amendments, if a person by reason of their mental infirmity is to be regarded either as a danger to themselves or the public, there are provisions within the Mental Health Act that provide a person can be taken into custody as an involuntary patient.

The answer to the community's concerns about the ongoing conduct of mentally unfit accused is therefore secured under the provisions of the Mental Health Act, and not by using the prisons and the criminal justice system to "warehouse" the mentally ill in our prison system. Given the limited nature of these amendments, the community's deep concern about the current regime and the support that fixing finite terms for custodial orders has the support of the judiciary, and finally the raft of injustices occurring under the current legislation, which requires the court to fix custodial terms of an indefinite length, I therefore commend this bill to the house.

Debate adjourned, on motion by **Mr A. Krsticevic**.