

DECLARED PLACES (MENTALLY IMPAIRED ACCUSED) BILL 2013

Receipt and First Reading

Bill received from the Assembly; and, on motion by **Hon Helen Morton (Minister for Mental Health)**, read a first time.

Second Reading

HON HELEN MORTON (East Metropolitan — Minister for Mental Health) [12.30 pm]: I move —

That the bill be now read a second time.

The purpose of this bill is to enable the Disability Services Commission to operate Western Australia's first declared place that will provide accommodation and support services for people with intellectual or cognitive disability who have been accused but not convicted of a crime. It will provide, for the first time, an appropriate alternative to custody in prison—one which is designed and staffed to provide a therapeutic environment that can provide social support and life skills training, while providing levels of security that are required to ensure community safety. The issue of people with intellectual disability or cognitive disability who are not convicted of offences being detained in the mainstream prison system has been a significant social policy issue within Western Australia and remains so in other jurisdictions. This legislation marks a significant milestone in the provision of social justice in this state.

This legislation is long overdue. The Criminal Law (Mentally Impaired Defendants) Act 1996 made provision for declared places. It modernised and clarified the criminal law applying to those found unfit to plead or of unsound mind—that is, the mentally impaired defendant, now referred to as the mentally impaired accused. Its provisions updated a criminal code that had not been amended since enacted in 1913. The act sought to ensure “the paramount goal of a safe and secure environment for all Western Australians, while ensuring that all participants in the criminal justice system are treated fairly and equitably and the process itself is cost efficient and effective.” That legislation in 1996 established a new procedural framework for the courts dealing with those unfit to plead or of unsound mind and established the currently titled Mentally Impaired Accused Review Board. That body is now responsible for deciding the place of custody of the mentally impaired accused, dealing with leave of absence and advising the minister of the timing of their release.

The Criminal Law (Mentally Impaired Defendants) Act 1996 established four places of custody—a prison, detention centres, authorised hospitals and declared places. The latter was intended to provide for people without a mental illness—that is, largely persons with an intellectual disability, and those with a cognitive disability or an acquired brain injury. The authorised hospital was the place of custody for those with a treatable mental illness. The concept of a declared place was sound. However, there was disagreement about which government agency should establish and operate the declared places.

In the intervening years, there has been a concern by successive Ministers for Disability Services that detaining people with disability would have a negative impact on the culture and ethos of disability services, which at one time, in their institutional past, resembled custodial services. It was argued that any service with an element of detention, even if directed to a group with special needs, should be provided by mainstream custodial providers adapting their services. This has not happened.

I am pleased to say that service provision to people with disability has moved well beyond its institutional history and now proudly recognises the inalienable rights of people with disability. There has also been a growing awareness that prison will never be an appropriate environment for most people found unfit to plead or of unsound mind by reason of their disability. These people need a safe and secure environment and the programs and training that will return residents to the community.

The two new, purpose-built declared places, with a maximum capacity for 10 residents, will be operated by the Disability Services Commission. This legislation provides the Disability Services Commission with all the powers necessary to operate a declared place, control residents' behaviour, provide a suitably secure environment, safeguard residents' welfare, and provide them with individualised services directed to returning them to the community as participating and responsible citizens.

This bill will operate under the framework established by the retitled Criminal Law (Mentally Impaired Accused) Act 1996, which governs criminal proceedings involving mentally impaired people charged with offences. Mental impairment under this act includes intellectual disability, mental illness, brain damage and senility. A mentally impaired accused person can be found unsound of mind at the time of the offence, or unfit to stand trial. For people with intellectual disability, cognitive disability or, in rare circumstances, autism spectrum disorder, the latter is most relevant.

To ensure legislative consistency with the Criminal Code and the Criminal Law (Mentally Impaired Accused) Act 1996, the bill does not refer to intellectual disability, cognitive disability or autism spectrum disorder, the

technical definitions of which have been, and may continue to be, subject to change. It specifies that the Mentally Impaired Accused Review Board, when deciding the place of custody for a mentally impaired accused person, should choose a declared place only when the person has reached 16 years of age, the person has a disability recognised under the Disability Services Act 1993 definition of “disability”, and the predominant reason for the person’s mental impairment is not a mental illness.

Members will be aware that the Mentally Impaired Accused Review Board is required to place those persons with a treatable mental illness in an authorised hospital, where they can receive appropriate treatment. As authorised hospitals provide only for those with a mental illness, the review board to date has had to place all other mentally impaired accused in either a detention centre or prison. Members should note that the Mentally Impaired Accused Review Board will be required to have regard to the degree of risk that the accused’s detention in the declared place appears to present to the personal safety of people in the community or any individual in the community. As an additional safeguard, the mentally impaired accused person will not be detained in the declared place without the consent of the minister to whom the Disability Service Act 1993 is for the time being committed.

It is essential that the purpose of a declared place be clearly articulated in this bill. Although it is important that vulnerable people with disability who have not been found guilty of a crime be separated from mainstream prisoners, the principles and objectives of the bill go much further than establishing separate accommodation that will be more homelike. The principles and objectives require, in order of priority, the protection and safety of the community, the protection and safety of residents, and an environment where residents are provided with the best possible training and developmental opportunities to promote their physical, mental, social and vocational abilities. Residents must be treated with dignity, courtesy and compassion, without discrimination or stigma, and with equal opportunity. Programs and services are to be based on the best available evidence and seek to reduce the risk of residents offending and to assist residents live, work and participate in the community. There is provision for residents and their families, carers and advocates to participate in the planning and provision of services that will be delivered in the least restrictive manner, compatible with the protection and safety of the community and residents.

A key challenge in the drafting of this legislation was emphasising the protection of the community while safeguarding the human rights of people who are among the most vulnerable and disadvantaged in the community.

As a consequence, the powers to apply regulated behaviour management, such as seclusion and restraint, as last resort measures to help residents gain control of their behaviour or protect other residents from harm is balanced by a series of safeguards. These include requiring all restrictive practices to be part of a considered behavioural support plan, which in turn is part of a broader individual development plan. There are strict criteria about when such restrictive practices can be used, detailed reporting of such matters and regular external reviews of these practices. The individual development plan will detail the programs and services that will be provided to promote the resident’s development, care, support and protection and the actions needed to support the resident’s reinstatement into the community. It is acknowledged that, however skilled the workforce of a declared place—these declared places will employ skilled and well-trained staff—demands will be made on staff by the often challenging behaviour of residents. As a consequence, external monitoring of residents’ wellbeing, procedural compliance and the operational environment is essential.

The granting of necessary and appropriate custodial powers to the Disability Services Commission has needed to be balanced with provisions that prevent any abuse of those powers and ensure accountability, transparency, and the protection of residents’ rights. It is vital that the monitoring of a declared place be undertaken by a body independent of the commission. It would be inappropriate for that body to be established and contracted directly by the commission. The monitoring body needs to have experience and expertise in overseeing services that combine custody with treatment, training or social support.

This important task has been assigned to the currently titled Council of Official Visitors. I say “currently titled” because the Mental Health Bill seeks to rename this body the mental health advocacy service. The Council of Official Visitors has in the past worked exclusively to protect the wellbeing and rights of mental health patients, including persons who are deemed mentally impaired accused. Its demonstrated advocacy skills and commitment to human rights will allow for a successful expansion of its role to a different but related population. The functions of the Council of Official Visitors advocated in this bill have been specifically designed for a declared place. They include personal advocacy; monitoring the use of regulated behaviour management; protecting rights; and assisting a resident to make a complaint to the Health and Disability Services Complaints Office, or making a complaint on their behalf and inquiring into any matter that is adversely, or is likely to adversely, affect the health, safety or wellbeing of a resident. This broadened role is compatible with the envisaged role for advocates within the Mental Health Bill. It combines speaking for and on behalf of residents about their issues and concerns with a freedom to raise with the commission any matters that advocates think

need to be addressed. Advocates have been granted considerable powers to access records, visit at any time, and ask questions of staff about the welfare, health, training or security of any resident. It is an offence for staff not to cooperate with advocates. Matters not resolved between an advocate and the commission may be reported to the chief advocate whose report to the minister each year will be tabled in each house of this Parliament.

Other examples of provisions that safeguard the rights and welfare of residents include an explanation of residents' rights. This must be provided in a manner that the resident is likely to understand and a copy must be given to a carer or other person who has a close personal relationship with the resident. Freedom of lawful communication is one of these rights. However, where a resident's communication is not in their best interests or it is necessary to protect other residents or members of the community, such communication may be restricted. When the commission makes a restriction order, it must send a copy to the advocacy service, which is empowered to challenge any inappropriate or overuse of restriction orders.

The bill also creates a requirement for all who work in declared places, whether on contract of service or for services or voluntarily, to report any ill-treatment or neglect, sexual contact with residents or unreasonable use of force. This provision acknowledges the demands that can be made on staff working with challenging individuals and the vulnerability of residents living in a closed environment. This whistleblower provision is one positive action to preventing or identifying any systemic abuse of residents.

Residents or their representative have a right of complaint to the Health and Disability Services Complaints Office. To avoid duplicating the extensive complaint provisions of the Disability Services Act 1993 in this bill, consequential amendments to the Disability Services Act have provided this right and tailored the grounds of complaint specifically to residents of declared places. The matters that can be complained about include not being provided with an explanation of rights, unreasonable restriction of communication and unreasonable use of regulated behaviour management.

The design of declared places and the operational procedures will ensure the maximum level of security and protection of the community. This will allow the Mentally Impaired Accused Review Board to transfer from prison any person eligible for a declared place. As stated previously, the mentally impaired accused person will not be transferred and detained in the declared place without the consent of the minister to whom the Disability Services Act is for the time being committed. The Mentally Impaired Accused Review Board will be required to have regard to the degree of risk that the accused person's placement in a declared place presents to the safety of the community or of any individual in the community. Although the Disability Services Commission will provide declared places for the foreseeable future, the bill has provision for these facilities to be operated under contract. In a changing world, it is possible that at some future point there will be advantages in operating these facilities under contract. This needed to be anticipated in this legislation and there are a number of safeguards in the bill that govern the provisions of any such contract and limits to the powers that may be given to a contractor.

Pursuant to standing order 126(1), I advise that this bill is not a uniform legislation bill. It does not ratify or give effect to an intergovernmental or multilateral agreement to which the government of the state is a party, nor does the bill, by reason of its subject matter, introduce a uniform scheme or uniform laws throughout the commonwealth.

I commend the bill to the house and table the explanatory memorandum.

[See paper 2070.]

Debate adjourned, pursuant to standing orders.