CRIMINAL LAW (MENTAL IMPAIRMENT) BILL 2022

Second Reading

Resumed from 1 December 2022.

MS M.M. QUIRK (Landsdale) [1.25 pm]: It gives me great pleasure to speak at length to the Criminal Law (Mental Impairment) Bill 2022. We all know that a fundamental principle of our justice system is that the integrity of a criminal trial would be prejudiced if a defendant did not have the ability to understand and participate in the trial in a meaningful way. Paradoxically, some of those captured by existing laws—for example, the Criminal Law (Mentally Impaired Accused) Act 1996—have suffered diabolical, harsh and unintended outcomes. These outcomes were certainly not in the interest of justice. For example, there are cases in which a defendant with cognitive disabilities has been subjected to indefinite detention for a period longer than that if they had been convicted and sentenced following trial. These unfortunate circumstances may well have created the incentive for even innocent people to plead or be advised to plead guilty in order to avoid the consequences of a finding of unfitness.

Before discussing some specific concerns I have with existing laws and why legislative change is well overdue, I must travel back two decades in order for us to better appreciate why reform of these laws is well overdue. For an excellent summary of the issues, I commend to members a paper by Piers Gooding, Anna Arstein-Kerslake, Louis Andrews and Bernadette McSherry entitled *Unfitness to stand trial and the indefinite detention of persons with cognitive disabilities in Australia: Human rights challenges and proposals for change* published in the 2017 *Melbourne University Law Review*. In 2003, the distinguished Professor D'Arcy Holman made recommendations in *The way forward: Recommendations of the review of the Criminal Law [Mentally Impaired Defendants] Act 1996*.

I will just let the member for Bassendean walk in front of me.

I am impressed by Professor Holman's prescience on page 19 in notes to the report when he observed the following in relation to his recommendations —

> The option of initially making a custody order of a set duration has been removed to prevent the risk that MIDs —

That is mentally impaired defendants —

> might then be detained without adequate consideration of the implications of treatment and possibly recovery in the case of mental illness. The recommendation requires that all initial custody orders are interim custody orders, still limited by the equivalent statutory penalty. The recommendation also provides for the MID or their representative to apply to reappear before the court for reconsideration of the custody order. The recommendation also deals with the question of guidance to judicial officers on factors to be considered in setting the duration of a custody order. The review has accepted that a person who advises on indigenous culture should himself or herself be of indigenous background.

Fast-forward to April 2014. The then Inspector of Custodial Services, Professor Neil Morgan, produced a report entitled *Mentally impaired accused on 'custody orders': Not guilty, but incarcerated indefinitely*. The case study in that report is illuminating and worth citing at length.

He refers to the case of Mr B. Mr B is quoted as saying —

> *"I just want a date. Everyone else has a date. It's not fair."*

The inspector described Mr B as —

> … a middle-aged Aboriginal man with whom I spent time during a prison inspection a couple of years ago. He repeated these or similar words over and over whenever we met. A softly spoken man with serious cognitive impairments and very limited social skills, his words say so much about the dilemmas and deficiencies of the *Criminal Law (Mentally Impaired Accused) Act* 1996 ('the Act') and the desperation it can generate for some severely impaired people.
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> In November 2008, due to the severity of his impairments, Mr B was found unfit to stand trial on charges of damage, street drinking and obscene acts in public. He had appeared before the courts on numerous previous occasions, predominantly for lower end alcohol-related public order offences. Previously, however, he had always been regarded as fit to stand trial. He had therefore been convicted and sentenced to fines and short prison terms. His longest prison sentence, imposed almost ten years earlier, had been 12 months' imprisonment for assaulting a public officer. His most recent prison sentence (six months) had been in 2003.
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> On this occasion, though, the court found Mr B unfit to stand trial. Given this finding, the evidence against him was never formally tested in court and he was never convicted or sentenced. The findings also meant that the court had only two options open to it. These options were polar opposites and highly problematic.

> The first was to release Mr B straight back into the community without any conditions. This would have offered him no support or supervision despite his impairment-related behaviour bringing him into the courts with monotonous regularity. The only other option was to impose a custody order.
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> The Act specifically nominates four types of place where a person can be detained under a custody order: an authorised mental hospital, a 'declared place', a prison or a juvenile detention centre. The idea behind 'declared places' was that they would allow people with severe cognitive impairments to be held somewhere other than a prison or detention centre. Given that no declared places had been built, and Mr B was not eligible to be held in an authorised mental hospital, he was only able to be held in prison.
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> Mr B was given a conditional release order in 2009. This allowed him to live in the community with supervision and support, while being subject to conditions. However, he committed further lower end alcohol-related public order offences within a few months of living in the community and was returned to prison. The Board has been working hard to progress him towards another conditional release order but his cognitive impairments are severe. As prisons go, the prison where he has been kept in recent years offers a reasonably pleasant physical environment and, at the time I met him, the staff and some prisoners who were family members were looking after him as well as they could. He was also going out of the prison fairly regularly to undertake some community re-socialisation activities. But at the end of the day, this was a prison and he was a prisoner. He was fundamentally out of place and vulnerable to exploitation due to his agreeable nature and poor cognitive skills.
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> In 2012, Mr B's message to me, and to anyone who would listen, was simple: he knew he had to stay in the prison but he wanted something his fellow prisoners had—a date when his time in prison would end. A poignant and despairing request, but one that nobody could help with.
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> Two years after I first met Mr B, the Board is still actively monitoring his case. A number of government and non-government agencies are working with him and there are signs of progress. All being well, he will again be able to be released at some point in the future. But some fundamental realities remain: *Mr B is still a prisoner, five and a half years since the custody order was imposed, and two years since he spoke with me. If he had been well enough to be tried and convicted he would not have served anything like this period. He might not have been sent to prison at all. If he had been sent to prison, he certainly would never have been imprisoned indefinitely: he would have had a 'date', and that date would have been some years ago.*

I had cause to examine the act myself, in April 2015, when I wrote to the then Attorney General with a fundamental concern. The definition for "mental impairment" in the act is "intellectual disability, mental illness, brain damage or senility". It was my contention that "senile" means pertaining to, or a characteristic of, old age, or mentally or physically infirm due to old age. I took the view that the definition was intended to convey cognitive impairment by reason of dementia, but that the imprecise use of the word "senility" means that those with young onset dementia may be excluded from the definition and, hence, not be covered by the act. Although dementia is far less common in people under the age of 65 years, it can be diagnosed in people in their 50s, 40s and even 30s. As of 2019, approximately 27 000 Australians were living with young onset dementia. Clearly, this is an unintended and unfair consequence of the existing legislation. I did not, however, receive a response to that letter from Attorney General Mischin. I also sent copies to the then CEO of Alzheimer's WA, Rhonda Parker, and Enzo Sirna, AM, chair of the McCusker Foundation.

In 2015, former Chief Justice Wayne Martin was interviewed on the ABC's *7.30* about the laws. He told the interviewer –

> "Lawyers do not invoke the legislation, even in cases in which it would be appropriate because of the concern that their client, might end up in detention, in custody, in prison, for a lot longer period than they would if they simply plead guilty to the charge brought before the court," …

In the same interview, the former Chief Justice also noted —

> "There is an urgent need for action," …
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> "There have been reviews of this topic for many years now, it has been a contentious issue not only in Western Australia, but in other jurisdictions, and there are a number of problems arising from it."

In the same program a comment was sought from the then Attorney General, Hon Michael Mischin. He stated —

> "The West Australian Attorney-General's Department is in the final stages of a review of the Criminal Law (Mentally Impaired Accused) Act 1996.
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> Attorney-General Michael Mischin said he would receive the review next month.
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> "It is a complex issue," he said.

> "It's a balancing of the needs and clinical needs and interests of persons accused of crimes, some of whom have committed very serious offences, or be it are not criminally responsible those offences, and how one manages them, balancing that against the interests and safety of the community at large.
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> Mr Mischin acknowledged there had been a number of complaints about the way the legislation currently operates.
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> "I've got to say I'm not convinced of all of them, but I will wait for the outcome of the review," he said.
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> "This isn't simply a matter of the rights of any individual person or even a group of people.
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> "It is a balancing of considerations and it is a process by which people who have may have been accused of, or may have committed some serious acts of harm are managed by the criminal justice system and by the state, and their interests need to be balanced against those of public safety."

It took almost a year before the review was tabled in the Legislative Council, at which stage the then Attorney General told the Council on 7 April 2016 —

> The review was informed by two consultation rounds. The initial consultation round targeted key agencies directly involved in the operation of the CLMIA act. The outcomes from this initial consultation informed a public discussion paper that was released in September 2014 as the basis for public consideration of the operation of the act. The two consultation rounds attracted 52 submissions from a broad range of individuals and organisations, including interested members of the public and peak representative bodies in the legal, mental health and disability sectors, and the Western Australian Supreme Court, District Court and Children's Court, government agencies and independent bodies.
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> …
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> Following consultation with my parliamentary colleagues—in particular, the Ministers for Mental Health and Disability Services—I intend to take to cabinet a package of reforms based on the recommendations of the report. When implemented, the recommendations I have outlined and the broad range of other reforms proposed in the report will make a practical and substantive improvement to the operation of the Criminal Law (Mentally Impaired Accused) Act 1996.

Alas, the law reform agenda of the previous government moved at a snail's pace, and it was not until the McGowan government was elected that the recommendations for change were finally given the priority they deserve. Happily, in the 2017 election campaign, the then shadow Attorney General committed Labor in government to reform the legislation as a matter of priority. The mere size and complexity of the bill no doubt presented issues for parliamentary counsel, but it is a cause for celebration and relief that the bill can finally be debated and passed without further delay. I have to say that it is a large and complex bill. Now that parliamentary counsel has knocked this off, I hope that other legislation that has been outstanding for some time can also move ahead.

As we heard in the second reading speech, this bill seeks to do three things. First, it will determine how defendants who are unfit to stand trial should be dealt with. Second, it will provide for the supervision of persons who, in special criminal proceedings, have been found to have offended but have been acquitted by reason of mental impairment. Third, it will provide for offenders' safe integration into the community and their supervision within that setting. The latter is particularly problematic in small, regional First Nations communities. In the time remaining, I want to deal with these three aspects.

The first is relatively easy to appreciate. Is the person, by reason of mental illness, intellectual disability, organic disease affecting brain function or psychiatric disorder—all of which restrict cognitive function—rendered unable to appreciate criminal proceedings, participate in their trial and give instructions to counsel? For the *Law & Order* aficionados amongst you, that is the kind of inquiry that Dr Elizabeth Olivet, Dr Emil Skoda or Dr George Huang would routinely undertake. In real life, it is not quite that straightforward.

[Member's time extended.]

Ms M.M. QUIRK: In *The Law and Ethics of Dementia*, the authors note on page 277 —

> Although it is easier to monitor the more formal, professional, assessments of capacity, the data in this context is relatively limited. Such data as is available suggests that professionals are not particularly effective in carrying out the task, whether because of a lack of legal knowledge … or because of their application of the legal standard in practice … In the words of one geriatrician 'while one may have reasonable high confidence in, say, a liver specialist's judgement that a patient has cirrhosis, the same is not true for even an expert and conscientious judgement of a patient's capacity' …

That is in the context of dementia. What is even more problematic is ascertaining the exact level of impairment. For example, a study led by Professor Carol Bower and conducted by the Telethon Kids Institute in 2018 found that 89 per cent of the children in custody in Western Australia have severe cognitive impairment, and 36 per cent have

foetal alcohol spectrum disorder. The Telethon Kids Institute found that some manifestations of FASD in older kids include low IQ, although not necessarily an intellectual disability and an IQ of less than 70; social and behavioural problems; delayed development; and an inability to connect past experiences with present actions. They may seem competent and agree, but they do not understand. They have a short attention span and poor memory. They have an inability to generalise information, a slow cognitive and auditory pace, impaired judgement and impulsivity. They can be emotional, angry, frustrated and immature, with poor language and communication skills. It is those very factors that make the assessment of their capacity extremely difficult and, frankly, mean that their interaction with the criminal justice system is a revolving door. Likewise, in the case of dementia, the time of day of the assessment can yield widely varying results. The so-called sunset syndrome means that cognition is more seriously impaired later in the day. In such circumstances, a series of assessments over a number of interviews is needed.

The second issue is that of supervision, and it is particularly challenging. As the then Inspector of Custodial Services Professor Neil Morgan noted in his 2014 report —

> Those with a cognitive impairment not only need accommodation in their time away from prison, but also high levels of supervision and support. Given the permanency of cognitive impairments, long-term supervision is typically required. This is a hugely resource intensive process involving the formulation of release plans, and the provision of staff, programs, allied health professionals and accommodation … finding appropriate supervision and support for this cohort can be very difficult since they commonly lack community and family support. As a result, … some people remain in prison even though their charges do not indicate that they present a significant risk to the community.

Of course, when they are finally released into the community, their conditions need to be sensible and practicable. Members will be familiar with the shameful case of Marlon Noble, who served a total of 10 years and three months, including 17 months on remand, when his likely sentence would have been two to three years if he had been tried and convicted. When he was finally released into the community, Mr Noble was subject to 10 very restrictive conditions of unlimited duration, and he had no avenue of appeal to have them lifted. The conditions included never entering licensed premises, including restaurants; not staying overnight anywhere other than at his primary address without prior approval of the board; and not being in the company of a girl under 16 years without a preapproved supervisor. These conditions meant that he could neither lead a normal life nor visit his mother's grave, almost 500 kilometres north of Geraldton. Mr Noble's mum died while he was imprisoned.

The final pillar of reintegration into the community and supervision is similarly vexed. This is especially so when the person has limited family or other supports in his own small community, and he is not wanted back in that community because of his original offending behaviour. I had personal involvement in such a case, in which the young person had a severe cognitive impairment from glue and petrol sniffing. He had spent many years in the special handling unit at Casuarina Prison because of his violent outbursts and erratic behaviour. He came from a small, remote community that was unwilling to have him return on his release. A plan had to be formulated, involving a number of agencies, including an expert forensic psychiatrist whom we flew in from Victoria. Making practical plans for such eventualities requires a multidisciplinary approach in which all agencies and interested stakeholders contribute.

I want to make two final observations. First, we have a need for a purpose-built larger forensic facility than the Frankland Centre. I have visited Thomas Embling Hospital in Victoria, which has over 100 beds and high levels of security. Under the Carpenter government, work was done to establish such a facility. The need is even more compelling now. In his 2014 report, which I have already cited, then Inspector of Custodial Services Neil Morgan referred to the paucity of forensic psychiatric beds.

The second matter I want to raise in conclusion is that since the 1996 act passed, we have found ourselves having to comply with additional international obligations. In July 2009, Australia ratified the Convention on the Rights of Persons with Disabilities, and in 2017, Australia ratified the Optional Protocol to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, which is thankfully shortened to OPCAT. I grieved to the Minister for Corrective Services about OPCAT late last year. Both these conventions place additional obligations on the way we deprive those with mental impairment of their liberty, their interface with the criminal justice system and their access to avenues for review and appeal. For those reasons, I wholeheartedly welcome the bill and hope for its speedy passage.

MR M. HUGHES (Kalamunda) [1.50 pm]: As the member for Landsdale pointed out in her contribution to the debate on the Criminal Law (Mental Impairment) Bill 2022, the current laws pertaining to mental impairment and fitness to plea have been known to deny people due process, natural justice and human rights, and to compromise public safety by creating barriers to people accessing vital support. As a result, as the member for Landsdale mentioned in her closing remarks, our existing regime has been roundly condemned internationally, including by the United Nations. It is a fact that all Australian jurisdictions have in place legislation that addresses the fitness of a defendant within the criminal justice system to stand trial. These diversion provisions are applied when people with disability, particularly those with cognitive or psychosocial disability, are deemed unfit to stand trial, and

a fitness test is applied in those circumstances. However, these justice diversion provisions have resulted in people with disability being detained indefinitely in prisons or psychiatric facilities without being convicted of a crime. I think our only option other than prisons and psychiatric facilities in this state is a facility in Caversham—the name of which escapes me for the moment. In numerous cases, people have been detained for a longer period than they would otherwise have been had they been convicted, and this situation continues to be exasperated by a lack of community-based housing and therapeutic and disability support options for people with a disability who are deemed unfit to stand trial.

The legislation that we seek to replace with this bill sought to recognise that people with a decision-making disability who came into contact with the criminal justice system needed their disability recognised and respected. However, as is the case with all aspects of policing and the criminal justice system in Western Australia, the application of the law in my view has resulted in Aboriginal offenders, mainly men, being over-represented by population size and consequentially serving extraordinarily long periods of detention. It is evident that the people most likely to be caught in the predicament of being subject to a custodial order are Indigenous males, who are unlikely to have been the recipient of any appropriate disability support while in the community. As our Attorney General mentioned in his media statement of 1 December last year, approximately 50 people were subject to indefinite custody orders and were detained in Western Australia under the current legislation.

I know this is going back a way, but in the 2002 paper *Unfit to plead: Unsentenced prisoners in Western Australia*, van der Giezen and Sacha reported that nine out of 10 people in prison on indefinite detention in Western Australia were Aboriginal. Recent data that I sourced through the Attorney General's office from the Department of Justice suggests that, 20 years later, the situation has improved, with the figure being closer to slightly more than one in two persons in prison on indefinite detention in Western Australia being Aboriginal. In my view, this figure hides an uncomfortable truth, which the member for Landsdale referred to in her speech and I will pick up on later.

In a more recent 2017 Australian Law Reform Commission report dealing with incarceration rates of Aboriginal and Torres Strait Islander people and access to justice issues, including indefinite detention when unfit to stand trial, reference was made to the rate of cognitive impairment of First Nation people. The report cites the inquiry into indefinite detention conducted by the Senate Community Affairs References Committee, to which the Aboriginal Legal Service of Western Australia made a submission. That submission, again supported by the references made by the member for Landsdale, states —

> In my estimation, 95 per cent of Aboriginal people charged with criminal offences appearing before the courts have either an intellectual disability, a cognitive impairment or a mental illness.

The submission by the National Aboriginal and Torres Strait Islander Legal Services to the Senate committee inquiry identified that as a minimum standard, all legislation for mentally accused should provide for—our bill goes to these points—judicial discretion, special hearings to test evidence, procedural fairness, finite terms for custody and release orders, and rights of review. Again, our proposed legislation addresses those principal points as outlined to the Senate inquiry.

The final report of that inquiry highlighted a number of matters, including the importance of assessment and screening tools in order to detect cognitive impairment at an early stage in criminal justice proceedings, including foetal alcohol spectrum disorder; the importance of a therapeutic approach towards people with cognitive impairment in the criminal justice system, particularly under legislation that allows for their indefinite detention; and that particular attention be given to responding to Aboriginal and Torres Strait Islander people with cognitive impairment within the criminal justice system, including that these responses be culturally competent and pay particular attention to court processes and police questioning practices. When cognitive impairment or issues of mental health are acute, the capacity of a person's fitness to stand trial, which this legislation goes to, may be raised.

The central purpose of this bill is to reform how our courts deal with an accused person's fitness to stand trial and what follows. Under sections 9 and 10 of the current Criminal Law (Mentally Impaired Accused) Act, the criteria closely mirror what is known as the Presser test, and emphasise an accused's inability to understand the nature of the charge, incapacity to properly engage in the trial process, or inability to understand the purpose and nature of defending the charge. Section 9 outlines in paragraphs (a) to (g) the circumstances under which fitness to plea is in fact evident, and section 10 deals with the presumption as to mental fitness to stand trial. In other words, an accused person is presumed to be mentally fit to stand trial until the contrary is found, and when it is found that a person is not mentally fit, that person is presumed to remain not mentally fit until the contrary is found. What follows in the remainder of my contribution to this debate, in my view, is central to why change is needed. The question of whether an accused is fit to plead is decided by the presiding judicial officer in a criminal trial. The matter is determined on the balance of probabilities after the presiding judicial officer informs themselves in any way they see fit.

Debate interrupted, pursuant to standing orders.

[Continued on page 510.]