ACTS AMENDMENT (SAFETY AND HUMAN RIGHTS OF PERSONS IN CUSTODY) BILL 2009

Second Reading

MR E.S. RIPPER (Belmont — Leader of the Opposition) [4.08 pm]: I move —

That the bill be now read a second time.

In June this year, Coroner Alastair Hope published his findings into the tragic and untimely death of Mr Ward, an elder from the community of Warburton, who died in the back of a prison van travelling from Laverton to Kalgoorlie on Australia Day 2008. The 150-page report makes 14 recommendations, most of which are administrative or resource-related and are the responsibility of the Barnett government. However, there are two which require changes to the law. The Acts Amendment (Safety and Human Rights of Persons in Custody) Bill 2009 is about enshrining into Western Australian law mechanisms to ensure that humane and safe custodial conditions are consistently and universally maintained. It is about the Western Australian community expressing, through these laws, that it expects that certain basic standards should be maintained. If they are not, then this bill provides the mechanisms for full and public scrutiny.

In reflecting on these issues and on the death of Mr Ward, I was reminded of the words of former Prime Minister Paul Keating in his speech at Redfern in December 1992 at the beginning of the International Year of the World's Indigenous People, when he observed of our shared history with Aboriginal Australians —

> It was our ignorance and our prejudice. And our failure to imagine these things being done to us. With some noble exceptions, we failed to make the most basic human response and enter into their hearts and minds. We failed to ask—how would I feel if this were done to me?
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> As a consequence, we failed to see that what we were doing degraded all of us.

Despite this history, we have the opportunity through this bill to, in a small way, create a different future. The first of the two relevant coronial recommendations is on page 133 of the coroner's report, which states —

> **I recommend that a statutory system be put in place which would enable the Inspector of Custodial Services to issue the Department of Corrective Services with a "Show Cause" Notice in cases where the Inspector is aware of issues relating to the human rights and safety of persons in custody.**

In making this recommendation, the coroner took into account submissions made on behalf of the current Inspector of Custodial Services, Professor Neil Morgan, to the effect that the effectiveness of the WA inspection system relies on the professionalism of the inspection process and other ongoing activities, the clarity of the recommendations that are made, the willingness of the department and, when relevant, private contractors, to adopt the recommendations. He also noted that it is not generally the inspector's role to attempt to manage operational departments. However, some matters that relate to human rights, safety and welfare are so fundamental that there is little room for debate and in such circumstances the department should be obliged to respond to such recommendations.

The coroner also observed that while some form of enforcement notice may not be the best way forward, it does appear that it would be helpful if the inspectorate could provide the department or contractor with a written show cause notice. Such a show cause notice would require the department to respond to particular questions and allow the office to set a time frame in which responses were to be received. It would be important for this system to work that the inspector should be able to require a response to specific questions about plans and project time frames et cetera.

In this context, the coroner further reflected that a mechanism of such a notice could have been used in respect of recommendation 1 of the inspector's report number 43, "Thematic Review of Custodial Transport Services in Western Australia", which was released in May 2007. That review recommended that journeys of more than two and a half hours should not be undertaken in short-haul vehicles such as the Mazda in which Mr Ward was transported, and it would have required the department to address that issue in a more timely way.

Recommendation 2, on page 134 states —

> **I recommend that the terms of section 34 and 39 of the Terrorism (Preventative Detention) Act 2006 be inserted in relevant legislation dealing with the Inspector's powers so that those protections be extended to all persons in custody and to all areas of the Inspector's jurisdiction.**

Under the Terrorism (Preventive Detention) Act 2006, the inspector is given jurisdiction for people detained under that act. Under section 39(1), detainees must be treated with humanity and with respect for human dignity and they must not be subject to cruel, inhumane or degrading treatment. The inspector is charged with reviewing any detainee's detention to determine whether that section is being complied with.

It would come as a matter of great surprise to most Western Australians that the inspector does not have a similar power of review for persons who are detained but who are not suspected terrorists. The coroner regarded it as most unfortunate that in this regard there is less protection for a person detained for relatively minor traffic charges, such as Mr Ward, than there is for suspected terrorists. The coroner recommended that these provisions were a guide to a possible model for amendments to other legislation relating to prisons, prisoner transport and court security. The coroner considered that such a power of review by the inspector would provide a mechanism for monitoring the state's compliance with Australia's international legal obligations. Accordingly, the bill seeks to incorporate those two recommendations.

It will no doubt be argued that the bill imposes some onerous and administratively burdensome obligations on the Department of Corrective Services, which is already struggling to cope with a prison muster that is at unprecedented levels. The bill will further stretch the resources of the inspector and his officers, but that can be readily remedied and is no argument to the proposition that certain basic and fundamental standards and rights should not be maintained simply because there is some reluctance to appropriately resource the inspector and the department.

In terms of the first recommendation, the bill imposes a regime that a show cause notice can be issued when the inspector has reasonable grounds to suspect that the security, control, safety, care or welfare of a person for whom the chief executive officer is responsible is at risk. This includes custodial arrangements while in prison, lock-ups, court premises and transport. Accordingly, the bill covers the Prisons Act 1981, the Young Offenders Act 1984, the Court Security and Custodial Services Act 1999 and the Criminal Law (Mentally Impaired Accused) Act. A response to the show cause notice has to be given to the inspector within the time and the manner set out in the notice. Also, the inspector must provide a copy to the Attorney General within seven days of the issue of the notice. In turn, that notice must be tabled in both houses of Parliament by the Attorney General within five sitting days of its receipt. An offence carrying a penalty of up to $20 000 is imposed if the notice is not complied with. This may be seen as highly unusual because if a director general were in breach of his duties or the statutory obligation of his office, that would ordinary be dealt with through public sector disciplinary processes or through ministerial action. However, the imposition of a penalty for which the commissioner will be personally liable emphasises the exigency to take steps to remedy the conduct complained of as a matter of highest priority. We are seeking the best and sustained endeavours, and that means that the commissioner must exercise leadership so that at all levels these basic standards are reached and maintained.

It is likely to be argued that we are imposing a human rights agenda and template onto a range of custodial arrangements that would not apply at law in the absence of this bill. I believe that proposition is contestable. Australia has ratified a number of international conventions and instruments that apply to the range of situations that we are seeking to cover under this bill. In particular, Australia is a signatory to 2002 United Nations Optional Protocol to the Convention against Torture and other Cruel, Inhumane or Degrading Treatment or Punishment. The federal government has recently indicated that it will ratify this protocol soon. Under OPCAT, an inspection regime is enshrined.

It is a source of immense pride to me that during Labor's term in government, determined native title land in Western Australia reached a total of more than 800 000 square kilometres with a further 164 000 square kilometres proceeding towards consent determinations. Comprehensive native title agreements giving traditional owners a stake in development were negotiated for the Burrup Peninsula and East Kimberley. Regional standard heritage agreements were concluded between native title representative bodies and the mining industry to protect Indigenous heritage and to facilitate mineral exploration. Many remote communities, for the first time, received proper policing and child protection services through multifunction police stations. It is, however, a matter of infamy that Indigenous imprisonment levels did not markedly decrease in that time. It is of deep regret that substance and child abuse continues to shatter communities, and it is a grave concern that symptoms of social disadvantage are all too evident in many Indigenous Western Australian communities.

The principle that everyone should be equal under the law is fundamental. However, too often in our system its application leads to unequal outcomes. Sometimes these unequal outcomes are described as being the result of structural or systemic racism. It is my experience that using the word "racism" acts as an impediment to sensible and moderate analysis, as this label tends to polarise and stigmatise. Those within the justice system who are sincerely using their best endeavours feel unfairly maligned. There can be no doubt that systemic racism is present in Western Australia's custodial and judicial systems. In a modest way, this bill, I believe, can act as a circuit-breaker and as a catalyst for how we can do things, resulting in more equitable outcomes. This is unfortunate in a controversial proposition, but if we are to move forward we need to confront these hard issues. To illustrate the ways in which the system disproportionately impacts on Indigenous Western Australians, I will give some examples that are by no means isolated. First, the imprisonment for several years of a young man in a special handling unit at Casuarina. This young man, who was from a remote community, was severely brain damaged from petrol sniffing. His crime? Stealing an ice-cream. Secondly, the lack of availability of interpreters

in courts on many occasions for Indigenous offenders who are unable to speak English. Thirdly, a security classification system that means that persons such as Mr Ward who pose no real safety risk to the community are nevertheless over-classified. Fourthly, a Children's Court direction in which a 15-year-old from Kalumburu was expected to travel, unassisted, hundreds of kilometres to Kununurra for his hearing because the court video link was not functioning. Fifthly, the placement of so many Aboriginal prisoners out of country, even though it is known that imprisonment close to family directly correlates with lower risks of recidivism. Sixthly, a policy that those serving longer sentences have priority for programs whilst in prison, which means the 43 per cent of the prison population that is Indigenous have considerably less access to programs while in prison because, by and large, they are serving shorter sentences. Finally, a system that, while penalising unlicensed drivers, provides no facilities in remote communities for driving instruction from a licensed driver, to sit learner's or driver's licence exams and to pay for licences and traffic fines.

Western Australia is one of the largest single police jurisdictions in the world, and that poses special issues. The so-called tyranny of distance presents enormous challenges for law enforcement. This is no justification for complacency and the imposition of arbitrary rules and guidelines that impact disproportionately on Indigenous Western Australians.

This bill will not solve many of the entrenched issues that I have alluded to, but it will provide mechanisms so that where the system irretrievably breaks down there is the capacity to highlight that failure in a timely manner. The 2005 Mahoney report recommended up-to-date and comprehensive corrective services legislation. I understand that it is still being prepared and is to be presented in this Parliament. It is hoped that even if the government does not accept or vote for this bill, it will nevertheless consider enshrining the provisions of this bill into the new laws.

As the coroner noted in the Ward inquest, the tragic death was caused by the unhappy coincidence of a series of failures and omissions. We must use our best endeavours to ensure that no other family or community has to experience the loss of a loved one and respected community elder in similar circumstances at the hands of the authorities in the future.

It is my fervent hope that partisan politics will not intervene to prevent this bill from being enacted. If it is unacceptable to the government in its current form, I pledge, on behalf of the opposition, to work cooperatively so that an alternative bill can be arrived at that can be enacted without undue delay. We should leave political sentiment aside and work diligently to find practical and timely solutions.

On that note and to conclude, I am once more mindful of former Prime Minister Keating's Redfern speech, in which he noted —

> Down the years, there has been no shortage of guilt, but it has not produced the responses we need. Guilt is not a very constructive emotion.
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> I think what we need to do is open our hearts a bit.
>
> All of us.
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> Perhaps when we recognise what we have in common we will see the things which must be done—the practical things.

I commend the bill to the house.

Debate adjourned, on motion by **Mr R.F. Johnson (Leader of the House)**.