CRIMINAL LAW (MENTAL IMPAIRMENT) BILL 2022

Introduction and First Reading

Bill introduced, on motion by **Mr J.R. Quigley (Attorney General)**, and read a first time.

Explanatory memorandum presented by the Attorney General.

Second Reading

MR J.R. QUIGLEY (Butler — Attorney General) [11.14 am]: I move —

That the bill be now read a second time.

I am incredibly pleased and proud to be standing before the chamber today introducing the Criminal Law (Mental Impairment) Bill 2022. My colleagues in this place will know that reforming the state's unfair and outdated mental impairment framework has long been a matter of importance to me, and it gives me great pleasure to see those reforms come to fruition today with the introduction of this very important and complex bill.

In 2017, the McGowan government committed to this reform. Since then, the bill has been subject to extensive consultation with more than forty stakeholders both within and outside government. I would like to thank those stakeholders who contributed to the development of the bill.

The bill will completely repeal the existing Criminal Law (Mentally Impaired Accused) Act 1996—hereafter referred to as the CLMIA act—and establishes a new scheme in its place. It has been an extraordinary effort and I take this opportunity to express my thanks to the officers of the Department of Justice. They have persevered over several years to develop an outstanding bill. I also want to thank Parliamentary Counsel's Office, and the State Solicitor's Office for the significant work they have done to assist the Department of Justice in getting us to this point.

Members will be familiar with the sad tale of a gentleman by the name of Marlon Noble, whose unjust treatment under the CLMIA act rightly drew adverse comment from around the world, including a finding by the United Nations that the state had violated Mr Noble's human rights. I might, with the indulgence of the house, speak a little bit about what happened to Mr Noble, and how this new bill will ensure that such a travesty will not happen again.

Mr Noble came before the District Court in 2002 on two indictments, and during those proceedings, questions were raised about his fitness to stand trial. He was subsequently found unfit to stand trial on 11 March 2003, and the District Court found itself in a position in which it was required to quash the indictments and either release Mr Noble unconditionally or make a custody order against him. As we all know, the court made a custody order in respect of Mr Noble, and he languished in prison for over 10 years as a result. The evidence against him was never evaluated. Indeed, the complainants in Mr Noble's matters came forward after the fact to indicate that they did not want charges to proceed against Mr Noble and they had no idea that he had been languishing in prison under a custody order for far longer than he would have been had he been convicted of the offence.

That custody order was subject to annual review by the Mentally Impaired Accused Review Board; however, that board, despite its expert membership and excellent discharge of its duties, has never had the powers that it should and has been limited in its abilities as a result. The board currently has no authority to release, or even grant leave of absence to, people in Mr Noble's predicament without first making a recommendation to the responsible minister, who in turn may advise the Governor to grant leaves of absence or make a conditional release order. Worse still, custody orders under the CLMIA act are indefinite, leaving a person with mental impairment who may not even have been found to have committed the offence with which they were charged in custody until the Governor determines otherwise, with no end date in sight. With that, I now turn to the key features of this bill.

This bill implements a commitment taken to the 2017 state election to reform WA's mentally impaired accused laws, together with recommendations from a review report that was tabled in the other place on 7 April 2016, and further recommendations from an expert stakeholder working group chaired by His Honour Peter Blaxell, which was established out of that 2016 review.

I will now take the house through the key features of the bill. The first reform introduced by this bill is a special proceeding to test the evidence against an accused person who has been found unfit to stand trial. The purpose of a special proceeding is to decide the charge against the accused on the available evidence. A special proceeding must be ordered by the court if the charge is to be dealt with on indictment. Special proceedings are to be conducted as closely as possible to a criminal trial, despite the accused having been found unfit. Although this might sound like a difficult concept for the courts, I assure the house that it is achievable; special proceedings are in place in almost every other Australian jurisdiction's mental impairment legislation and have been for over 20 years.

Regulations will allow the court to modify the application of the Criminal Procedure Act 2004*,* and the rules of evidence may also be modified to allow for flexibility in how special proceedings are conducted. The findings coming out of a special proceeding will determine how an unfit accused person is to be dealt with. At a special proceeding, an accused may be found not guilty, not guilty on the basis of mental impairment—otherwise known as the

"insanity or unsoundness of mind defence" under section 27 of the Criminal Code—or it can be found that, on the evidence available, the accused committed the offence or another offence which, on the charge, they could have been found to have committed. Following those findings, the court may make a community supervision order or a custody order or may, in certain limited circumstances, order unconditional release. This will open the disposition options available to the courts for unfit accused persons for the first time, providing an intermediate step between unconditional release and a custody order, in the form of a community supervision order. When the court makes a custody order, which will only be available when the statutory penalty for the offence is or includes imprisonment, it must set a limiting term on that order, being the best estimate of the sentence that the court would have considered appropriate in all the circumstances if it had been sentencing the person. That limiting term will be the maximum period an accused can be held in custody under the original order. Following the making of a custody order, the court's ongoing involvement will end, and the accused will become a supervised person under the management of the new Mental Impairment Review Tribunal.

The Mental Impairment Review Tribunal will be, at least transitionally, a continuation of the existing Mentally Impaired Accused Review Board, with significant enhancements. It will be presided over by a retired judge of the Supreme or District Court, and the tribunal will have a specialist membership of experts including psychiatrists and psychologists; community members with knowledge and understanding of relevant issues including the criminal justice system, Aboriginal cultural considerations, victim's interests, and forensic mental health and disability; and members from the Department of Communities disability and the Department of Justice corrective services divisions. This mix of members ensures the tribunal will be well placed to manage supervised persons, both in custody and in the community. The tribunal will be responsible for the day-to-day administration and management of custody, leave of absence and community supervision orders. That means the tribunal could vary conditions on community supervision orders, which could be completely tailored to an individual's requirements. The tribunal will also have the power to grant leaves of absence to supervised persons in custody on such conditions and for such periods as it thinks fit, although never longer than the custody order itself. Conditions placed on leave of absence orders could be similarly tailored to the individual. The tribunal will be guided in all its decisions by the overriding consideration of community protection. To that end, it will be a statutory condition of all community supervision and leave of absence orders that the person be under the supervision of a supervising officer, including complying with the lawful directions of that officer.

Extensive procedural fairness provisions have been built into the bill. All supervision orders will be subject to annual review; however, a supervised person could also apply to the tribunal for a review at any time. The tribunal must provide reasons for its decisions, and those decisions will be open to internal review by the president and on an appeal to the Supreme Court. Supervised persons will have a right to appear before the tribunal and may be accompanied by a representative and a legal practitioner.

I want to assure the house that I remain committed to ensuring the safety of the community. The paramount consideration for any person performing a function under the bill is the protection of the community, including when a person is a member of a court or tribunal. As a safeguard, the bill provides for extended custody orders to be made in certain limited circumstances, when there is an unacceptable risk that a supervised person will commit a serious offence if not subject to an extended custody order. Extended custody orders can be made only by the Supreme Court on application by the minister and will be subject to annual review by that court. Extended community supervision orders will also be available, again made by the Supreme Court.

Approximately 50 people are currently, under the Criminal Law (Mentally Impaired Accused) Act, subject to indefinite custody orders. This bill contains transitional provisions that will require these people to be brought before the court for a limiting term to be placed on their custody order as soon as practicable after commencement of the new act. This will ensure that none of the existing "mentally impaired accused"—as they are currently known—slip through the cracks and remain subject to indefinite orders.

A significant amount of work will be required across government to prepare to implement the reforms provided by the bill. The Department of Justice has been coordinating this work in collaboration with impacted agencies in parallel to the drafting of the bill. Although implementation planning is well progressed, adequate time is required between the passage and commencement of the bill to allow for a number of matters, including the establishment of the new Mental Impairment Review Tribunal and preparation for its commencement as a new body; establishment of new court hearing types for special proceedings and transitional limiting term matters; expansion of the Mental Health Advocacy Service's functions; and the drafting of subsidiary legislation to support the new framework.

The Department of Justice and impacted agencies must also put in place new and updated administrative arrangements such as policies, procedures, information sharing and notification processes. Information and communications technology changes must be put in place, as well as the recruitment and training of staff. At this stage, it is anticipated that this implementation work will take approximately 12 months and, therefore, the new bill will commence approximately 12 months after it has been passed by Parliament.

Madam Acting Speaker, I will close with a few final remarks. Firstly, it is important to note that we do not know how many people will come within the framework of this bill in the future because there is a longstanding practice of people likely to be found unfit to stand trial choosing instead to go through the justice system without raising the question of their fitness for fear of coming under the Criminal Law (Mentally Impaired Accused) Act and never being released. Many vulnerable people would rather cop a finite sentence of a few years' duration than risk being found unfit to stand trial. Of course, this means that many people with mental impairment are not identified in their contact with the justice system, do not get the appropriate treatment and care to address either their needs or their offending behaviours, and may leave custody in a worse position than when they entered. This serves no-one—not the person, nor the community. It is critical that people with mental impairment who are found to have committed offences are appropriately managed in the justice system.

Secondly, I urge members to take a good look at this bill. I have just scratched the surface of what the bill proposes, linked to the commitments we took to the 2017 state election. Aside from those key features, the bill includes extensive objects and principles, provides a legislated right to access the Mental Health Advocacy Service for all unfit accused and supervised persons regardless of their place of custody, enshrines victims' rights to be notified of proceedings and make victim impact statements and submissions to the courts and the tribunal, and provides for interstate transfers with participating jurisdictions. None of these matters have previously been addressed in the CLMIA act.

In addition to all these improvements, the bill will update pejorative terminology across the statute book. Many will note my use of the terms "unfit accused" and "supervised person" throughout this speech and see that these terms are also used in the bill to replace the previous descriptor "mentally impaired accused". Similarly, the phrase "acquittal on the basis of unsoundness of mind" will be replaced with "acquittal on the basis of mental impairment". These are small but significant improvements to the language used in the justice system to describe people with mental impairment.

Finally, Madam Acting Speaker, I note that the CLMIA act has been in operation for more than 25 years without significant amendment. It has operated under successive governments of both persuasions and has been subject to justifiable criticism since it began operation. I recognise that the intersection of mental impairment and the criminal justice system is complex and difficult, and a careful balancing of protecting the community and protecting a vulnerable cohort of people is required, and that the challenges inherent in this area have stymied numerous attempts at reform by governments past. That is why it has been so important to me to right these wrongs. Fixing this ongoing injustice is imperative; it is urgent, and it is not a partisan issue.

I urge members to support this bill, and I commend the bill to the house.

Debate adjourned, on motion by **Mr P.J. Rundle**.