CRIMINAL LAW (MENTAL IMPAIRMENT) BILL 2022

Second Reading

Resumed from 21 February.

HON TJORN SIBMA (North Metropolitan) [2.54 pm]: I rise as lead speaker for the opposition on the Criminal Law (Mental Impairment) Bill 2022. At the outset of my remarks, I want to put on the record my appreciation of the efforts made by the staff within the Attorney General's office, who have been faultless in their commitment to responding to questions I have asked on this bill. By way of a brief personal interlude, this bill is probably the first substantial—not only in terms of its size—piece of legislation I have dealt with as the opposition's spokesperson for justice.

This is not amending legislation and it is not a superficial piece of lawmaking. If the government can lay claim to a single piece of substantial law reform in this forty-first Parliament, it is this bill. It does not amend the Criminal Law (Mentally Impaired Accused) Act 1996; it proposes to repeal that act in its entirety and put together a whole new regimen within the criminal justice system for dealing with people who have suffered mental impairment. This is an area of great complexity and sensitivity and is probably an area of law that this jurisdiction has faulted in over the past 25 or 26 years, despite the best intentions of the drafters of the 1996 legislation.

I come before members as the opposition spokesperson on this bill to put on the record my respect for it because it is a bill that needs to be taken seriously and contemplated seriously. It is not the kind of bill that should be rushed through either chamber of the Parliament. It is a bill that appears to have been the product of laborious, careful and patient drafting. However, the drafting, printing and introduction of a bill are the preliminary stages. A bill must be scrutinised, and scrutinised appropriately. It may well be that the bill we are contemplating now is an article of such perfection that it need not be amended in any way, but it is on a reasonable cautionary note that I would suggest that that should not be our initial assumption. We should, at the very least, attempt to understand how this entirely new proposed regime is intended to operate, how it might operate, and what challenges—practical, legal or otherwise—might stand in the way of its implementation.

I made some public remarks about this bill. I will not quote the entire media release, but it attracted some attention at the time in the other place. It is always awkward to quote yourself in the third person, but I will do so for the purposes of the record. The media release states —

> Shadow Justice Minister Tjorn Sibma said the reforms are inherently complex and the government's rush to push them through —

That is, through the lower house —

> in three days was another unfortunate attempt to evade scrutiny.

That is the phrase that elicited offence in the other place; I will leave that for now. The release continues —

> "This Bill is over 400 clauses long and represents a significant change in the criminal law so it is essential that all substantial measures are forensically scrutinised by both chambers of Parliament and in parliamentary committee," …

I went on to say —

> The community cannot risk the government getting this law wrong.

I actually think they are reasonable statements of fact. What I have omitted from reading in then was the leading paragraph, which I will read in for completeness. I said —

> The Opposition is urging the McGowan Labor Government to stop treating Parliament as a rubber stamp as it seeks to rush the most significant changes to the state's mentally impaired accused laws in three decades through the Legislative Assembly in three days.

There is a time to admit when you get it wrong, and for me, this is the opportunity to provide a mea culpa, because I was wrong. The bill was not rushed through the Legislative Assembly in three days; the debate lasted three hours, and there was no consideration in detail. I am not reflecting on the conduct of the debate, but I was interested to see what passed for debate in that three hours. There were all kinds of assertions, including from the member for Mandurah and the member for Mount Lawley, who I will speak more about later. They made all kinds of insinuations about me personally attempting to mislead the public and being deceptive and dishonest and the like. I completely and utterly rebuke them and refute those allegations. I had drawn the public's attention to the very substantial piece of legislation that we are being asked to scrutinise. It used to be the practice in this chamber that, irrespective of our political affiliation, we took seriously our role as legislators and took seriously the role of the Legislative Council being the house of review. My suggestion in that media release was that this was precisely the kind of bill that should be referred to the Standing Committee on Legislation. Members who were present for the debate a few days ago on the Guardianship and Administration Amendment (Medical Research) Bill 2023 might reflect on how

extensively the legislation committee's forty-eighth report was cited in that debate as an exceptionally useful document. It was put together by sober and well-respected parliamentarians, irrespective of their partisan affiliation. The interesting thing about that example, however, was that referral occurred after the bill was third read. There were peculiar circumstances at the time that led to that referral in that way, but at least that bill was referred, if only in recognition of how novel and potentially sensitive some of the outcomes the implementation of that bill might be.

For the benefit of members here and others, earlier today I advised the Attorney General's office that at the conclusion of the second reading debate, I would move a motion to refer this bill to the standing committee. I want to the put that on record again. My contribution to the second reading debate was largely, but not entirely, the justification for that referral.

First, I will give members a little history, which I think is appropriate in the circumstances. Members here will be familiar with the very unfortunate circumstances concerning Mr Marlon Noble, who I think suffered egregiously under the act that we are now attempting to replace. Dealing with the intersection of mental impairment and the criminal law is complex and sensitive. There is an observation, probably rightly, that we have made only incremental progress over the course of 10 or 12 years. Under the Barnett government in 2012, the Mental Health Court diversion and support program, or Start Court, for offenders with a diagnosed mental health condition, was established. In 2015, Hon Helen Morton commissioned the Disability Justice Centre in Bennett Brook as a non-present declared place to manage the reintegration of such offenders back into the community. In 2014, the previous Attorney General Hon Michael Mischin commissioned a review into the present act. That process resulted in 2016 with a final report, which I think was tabled towards the end of that year. From what I can ascertain, that report and its recommendations are largely reflected in the bill that we have been asked to scrutinise today. I must also speak very clearly to the fact that in 2016 the McGowan government made a very clear commitment to bringing in a law very similar to the bill that we are contemplating now. It said at the time that our justice system is designed to protect the community, and while this is paramount, vulnerable members of the community need to have access to natural justice, fairness and the treatment they require. Yes, that was a Labor campaign commitment, but I cannot fault the principles embedded in that commitment.

As I said, this bill is some 400 clauses long. To some degree, that is slightly misleading because the final 100 clauses reflect consequential amendments to other acts, which, in a way, I think strangely underscores how significant this bill is. This is not an insignificant bill. What does it propose to do? Among the things it will do is introduce a new special proceeding process so that evidence against persons who have been found unfit to stand trial can be properly tested and a finding made about whether they committed the offence with which they were charged or another offence, which, on the charge, they could have been found to have committed. A very significant aspect of the bill is that it will also remove probably one of the most egregious offences against natural justice that has remained on the statute book, and that is the model of indefinite detention. I will put it this way—I do not intend to cause any offence—but that is a great sin that this bill seeks to overcome. One of the ways in which the Criminal Law (Mental Impairment) Bill 2022 proposes to deal with that is to provide that custody orders must be of a fixed duration with a set limiting term, aligned to the best estimate of the term the court would have imposed if they were sentencing the person for the offence. It permits extended custody and community supervision orders to be made in respect of persons with mental impairment to address an unacceptable risk of them offending again or committing a serious offence. It also enshrines statutory rights to advocacy and appeal, which is not presently the case, among a range of other changes.

If there is any doubt as to the significance of this bill, one way to test any bill that purports to introduce reform is to assess the kind of work which, of necessity, is required after the bill passes the Parliament. This bill potentially requires a greater post-passage workload than any bill that the forty-first Parliament has contemplated thus far. As evidence for making that claim, I cite the Attorney General's second reading speech. I quote from the part of the speech on implementation work. It is worth members understanding this. This is one of the justifications I have to move a referral motion afterwards. In the Attorney General's words —

> 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.

I want to emphasise that that work is already underway. Oftentimes in committee on other bills we will inquire into that regulatory work and ask: "Have you started yet?" Sometimes we will get a pat answer back: "Oh, no. We certainly wouldn't undertake that kind of drafting until we were absolutely certain that the bill is going to pass and we know the form of the bill." I have not always accepted at face value those assertions. It would be very unwise for anyone to believe that. To the government's credit, it is admitting that it is drafting the implementation workload in addition to members assessing the bill. I found the forty-eighth report of the Standing Committee on Legislation to be pretty helpful in that it unpicked—I will not say apathy—a lack of follow-through in the drafting of certain statutory reforms that were necessary to give effect to the purpose of the bill, which was to enrol people without capacity in COVID-19 trials. There is a relationship, and it can be a constructive one, between the cogitations and deliberations of that committee and the actual regulatory workload that is required in an agency, if only on occasion

to give it a hurry up, to perhaps inquire as to how it is going about its job or to clarify certain practical aspects. But what kind of work will this bill necessitate? The Attorney General's speech continues —

> Although implementation planning is well progressed —

I am comforted to learn —

> 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.
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> 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

That is optimistic, but it may well come to pass. It would be optimistic if none of that work had been initiated, but at this stage we do not know how far advanced that planning is.

There certainly seems to have been a presumption against this Parliament or a parliamentary committee providing any insight or recommendations, or suggesting anything constructive about the way in which that work might be undertaken. I should also identify, because I am probably the person to identify it, the obvious: the enormous resource implications that the passage of this bill and its implementation foreshadows. I wonder whether any new policy proposals might be reflected in the budget to be brought down in May this year, or perhaps I will see some passing reference to it in the "significant issues affecting the agency" part of budget paper No 2. There is some work to be done.

It might also be of some help for members who have not yet engaged in this issue to understand the size of the cohort of people about whom we are talking. In my own defence—I am probably the only person who will provide it—my offensive media release did not stoke fears or community alarm and it made no claims about the inherent danger of this legislation. That is a discipline in relation to the public discussion of these sensitive issues that, and I am not reflecting on any member in this chamber, has not always been observed by government members in respect of the intersection of these kinds of issues, particularly in their own electorates. I will not mention any names. I have attempted to deal with this in a sober and analytical manner.

We are effectively talking about a cohort of people, about 56 in total as of the end of December last year, who were found either unfit to stand trial or not guilty due to unsoundness of mind. It is a small number in comparative terms, when we consider the size of the existing prison population or the size of the population of people on some kind of community release order or community justice program. This is a very small cohort of people. We are talking about less than one per cent, or probably less than half of one per cent. Nevertheless, it is either very much the case or very likely to be the case that they have hurt people. Of the two groups making up that total of 56 persons, 27 are being managed in this way for the offence of murder or wilful murder. At least seven persons are subject to an order made under the Prisons Act for sexually based offences and other offences such as grievous bodily harm, arson and the like.

As someone who had not previously engaged extensively in this field, I was curious to know the dynamics of how these people were managed in a practical sense. I understand that there is an underlying, indefinite custodial order in place in respect of their daily management, if I can put it that way, which is subject to either a conditional release order or a leave of absence. I am given to understand that 49 of those 56 people are being managed in that way. The background of my interest in that was to understand, in a practical sense, how effective those conditional release orders or leave of absences are and whether those absences are rolled over—presumably, subject to conditions or terms. How effectively are they being supervised and managed in the community? I make absolutely no allegation about performance, but the introduction of a new kind of order, a new kind of regime, invites me to ask questions about information sharing between agencies, lines of control and the capacity to deal with someone who quite clearly presents, on the balance of probabilities, a strong predilection towards reoffending. I would like to know how they are monitored.

One of the reasons I ask that is the capacity restraints or a lack of growth in the availability of spaces in non-prison-declared spaces, either at the Frankland Centre or at the Bennett Brook Disability Justice Centre. I think from memory that the Frankland Centre has about 30 beds—I think that was the case a decade or so ago. There has not been commensurate growth in that. The occupancy at the Bennett Brook Disability Justice Centre, for example, whether it is relevant here or not, is of interest to me because it has a 10-person capacity but only two or three individuals seem to be resident there at any one time. That begs the question as to what further

non-prison-based appropriate facilities will the passage of this bill oblige this government, and future governments, to run and staff appropriately.

I make the observation, too, that subject to changes in our standing orders in this space, there is probably a range of material that I would have liked to have brought up in the context of this reply, but I am constrained somewhat by time.

I want to focus the chamber's attention on the proposed replacement of the Mentally Impaired Accused Review Board with a new Mental Impairment Review Tribunal. It might be worthwhile me reading this in. On 14 February, I asked the Attorney General, through the parliamentary secretary —

> (1) What substantial change in purpose, function and powers will the tribunal have versus those already exercisable by the board?
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> (2) What resource implications will eventuate a consequence of dissolving the board and establishing the tribunal?

The first question about the tribunal's powers I think is important. It also underscores why I think it is appropriate to refer a bill like this to the Standing Committee on Legislation.

The answer was —

> (1) The Mental Impairment Review Tribunal will, at least transitionally, largely be a continuation of the membership of the existing Mentally Impaired Accused Review Board, with significant enhancements in its functions, powers and responsibilities.

I pause there. This is a significant expansion of power that this Parliament will not necessarily have all that much oversight of. It continues —

> Presided over by a retired judge of the Supreme Court or District Court, 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 disability division of the Department of Communities and the corrective services divisions of the Department of Justice. This mix of members will ensure that the tribunal is well placed to manage supervised persons both in custody and in the community.
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> 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 impose and vary conditions on community supervision orders, which can be completely tailored to an individual's requirements. Unlike the MIARB —

The existing body —

> the tribunal will also have the power to directly grant leaves of absence to supervised persons in custody on such conditions and for such periods as it thinks fit. Conditions placed on leave of absence orders can be similarly tailored to the individual. The tribunal will also have extensive powers to compel the production of documents and information. The tribunal will be guided in all its decisions by the overriding consideration of community protection.

We will be creating an enormously powerful tribunal. I take no issue with its proposed expanded membership and the sorts of specialised individuals that it seeks to rely upon in the conduct of its work. But I note its power, amongst a range of things admitted there, to compel the production of documents and information, presumably from other agencies. That might be, to some degree, an advance on the current situation. Although I did not include it here, I have previously asked whether it was known or knowable that any of those 47 members of the 56-person cohort who are currently on a conditional release order or a leave of absence —

Hon Matthew Swinbourn: Forty-nine. I think it is 49.

Hon TJORN SIBMA: Correction—49 out of 56. There is sensitivity over the number. It is 49—sorry. Forty-seven was stuck in my head for some reason. I asked whether anyone knew whether those individuals had been subsequently charged with another offence while they were on a leave of absence or a conditional release order, because this was my attempt to understand how closely supervised those individuals actually are. I was not disappointed with the answer that I received, but I was concerned to a degree, and I recall an answer. The answer went along the lines of: the board members did not have that kind of information at their fingertips, and it would require some paper-based or manual searching to determine that, and, effectively, I should not anticipate an answer that day, and I did not anticipate an answer that day. Forgive me for missing that in the pile of papers that I brought down; I should have included that, but I did not. But it underscores the point that I am very interested to know about the information-sharing protocols that presently exist.

Hon Matthew Swinbourn: Not to distract you too much from this speech, but I think part of the issue there is the length of time some of these people have been under these arrangements for, and, you know, pre-computerisation—so that was one of the other issues there. I mean, that's some of the context. But you said you were only kind of disappointed.

Hon TJORN SIBMA: That is an interesting point to make, and I think it is important to appreciate exactly what kind of systems support the board in the discharge of its present obligations, as opposed to what is likely to be expected of them in their expanded remit, which underscores again the obvious point about there being the need to ensure that this tribunal is adequately resourced. That is why I asked the question at the same time about what the likely resource implications will be. I know that sometimes when members of the opposition, irrespective of a Parliament, ask that kind of question, the answer is often: how long is a piece of string? Wait for the budget. But I think we now have a definable cohort of individuals. I also appreciate that it is difficult to understand whether there is likely to be any growth in that cohort, so we do not know what we do not know. But I think on average—this is a very inelegant way of expressing it—maybe it is around two to three individuals in a calendar year that might have become subject to an order made under the present act, so if we call that a growth rate, that is the kind of rate it will be, although the population seems reasonably stable. That is not the point. What I would hate to happen is that when this bill passes this house and we have an expanded tribunal with expanded powers, that tribunal cannot do what the government expects of it because it is relying on an antiquated, manually based system, particularly when the paramountcy of public and community safety has been expressed as the highest virtue that this bill intends to enshrine. If we do not know who we are dealing with and we cannot obtain timely information, it is very difficult to guarantee that community safety to the public at large, who might not take the kind of interested and nuanced views on these matters that everybody here is expected to take. It will be very hard to ensure that the paramountcy of community safety is going to be fulfilled if there are doubts about the Mental Impairment Review Tribunal's capacity to discharge its role faithfully and properly because of a lack of resourcing.

I will speak about the other side of the ledger. The bill addresses this in small part, at least. Obviously, we are talking about offences and offenders. There is always a victim on the other side of the ledger. Their rights and expectations have been considered in this bill. I have not yet formed a view on how well they have been considered. I will put this in a phrase that is not self-damning but is also not inaccurate. As someone who is new to this portfolio area, let me put it this way. Shadow minister 101 is: I have this portfolio, who are my stakeholders? It is a pretty good guide when they write the guidebook for the next person. What Western Australia seems to lack—I make no judgement on it—is a non-government, independent centre of victim advocacy. We have a commissioner inside the bureaucracy. I think that is probably a sound approach. We initiated it, I think; I forget when it started. But understanding the concerns of victims of crime or the people close to them is really only ever done on a victim-by-victim and case-by-case basis. Perhaps there is a natural logic at play there. From what I understand, the consultation has also included advocate groups. There are advocacy groups among the legal profession—the Law Society and the Western Australian Bar Association—and mental health advocates who, in general, find the final production of this bill and the fact that it has been delivered something to rejoice in. There has been a long advocacy period in at least those two professional cohorts. Although they obviously come together, I will treat them as distinct groups for now.

Over the course of the development of this bill, the minister's office has advised me that effectively the bill was consulted upon in three rounds. The first round commenced in May 2019, the second round followed in February 2020 and the third round was in October 2022. The government features strongly in its own consultation. I am not making a cheap shot; that is obviously going to be the case because of the need for multiagency collaboration. But I also make the point that the consultation on this bill is not something that has really excited the imaginations of the broader community, and I think it is something that is or should be of some interest to them.

I raise another issue, which I have a genuine interest in. I think this is worthy of some consideration in the committee process, and I think it would be a useful point of focus if the government were to surprise me and magnanimously agree to a referral motion, although I do not hold out much hope for that, parliamentary secretary. I refer to the model of special proceedings that the Attorney is inclined to adopt. I understand that, effectively, what we have proposed here is something that applies in the New South Wales jurisdiction. I do not know enough about that and I am not sure whether many other members do, either. But I think that the actual physical conduct, the rules of proceedings and the rules of evidence, for example, are worthy subjects of our consideration, if not in what I think is the ultimate option, which is a brief referral, certainly, at least, when we get to committee consideration.

In addition to that is obviously the determination of the fitness of the accused. I bring this up because I am absolutely no expert in this particular field, but I understand that the Western Australian Justice Association has a concern—I do not want to categorise its concern by placing an emphasis or adjective on it which it would not share—or perhaps a sense of the bill not being forward-leaning enough when it comes to the determination of fitness. I would like to understand in a little bit more detail: Is effectively the same test being applied? Is this test the common practice in other Australian jurisdictions? I work on the basis that there is, generally speaking, a presumption of fitness. If

somebody is found unfit, they will potentially be given another six months to become fit. I want to understand the operation of those carve outs and that latitude.

Without wishing to delay things much further, I hope I have, to some degree, in very passing detail, without citing any individual case, identified that this is not an insignificant bill. In political discourse, in any debate, we always anticipate some interesting character aspersions and reflections on capacity and the like. In this debate, I was interested by some of the concluding remarks of the Attorney General. He is paying a compliment to the capacity of the drafters of the bill, but I want to identify something. The Attorney General said on Tuesday, 21 February —

> Perhaps I am some sort of nerd when it comes to the law.

That is a personal reflection that he is in the best place to make, I suppose. He continued —

> There is something like 400 clauses in the bill, and after a bit of exercise, a couple of Sundays ago, —

Bear in mind this was on 21 February —

> I sat at home and thought, "I will start again. Instead of looking at this division and that division, I will slowly read the bill from cover to cover, every proposed section, every item in the index and every proposed section that follows." As I said, I might have been a bit of a nerd because I thought, "What a beautifully written piece of legislation!" I came to one spot and thought, "Now, they have not provided for that", but then I turned two pages and there it was included most elegantly. I would like to thank the drafter Roger at Parliamentary Counsel's Office for such a fine effort. This piece of legislation is something that the Parliamentary Counsel's Office can be truly proud of.

That is a very reasonable and fair assessment to make about the quality of the drafting of the bill. I said at the outset that the bill appears to be the product of patient, sober and deliberate drafting. To do justice to the work that went into drafting the bill, we should also engage in a sober, patient and considered examination. We should not necessarily be beguiled by the elegant and beautiful construction of words on the page, and my compliments go to Roger, wherever he may be, for putting it together.

I started my academic journey by having the principle of charity instilled into me—always see the best in the other person's argument. I was initially alarmed when I read the bit after the Attorney General described himself as a nerd because I wondered how closely he had read the bill. I am not saying that he had not; it seems to suggest that he might have initially read it and then wanted to reread it in preparation for the debate. In fact, that is the construct and assumption that I have going into this. It is a worthy point to reflect on.

We in opposition have been asked, over the course of the last term and a half, to deal with legislation that has been pressed upon us. We were particularly accommodating during the period of peak COVID anxiety. At all stages, we have played a constructive role in this chamber's management of business, but time and again we have upheld the need to get things right.

I will reflect on the management of a bill in the fortieth Parliament that I think was managed in the right and appropriate way. That bill dealt with voluntary assisted dying. We had extensive debate, which was slightly different in that it was a conscience issue, but it was a bill that was effectively the product of a committee's work. It was subject to long and meaningful scrutiny and debate, and expressions of principle and personal disposition. Particularly, as was the case in this chamber—as tedious as it might have felt on occasion when we sat late into the night, on a Friday and all the rest—we had to read things clause by clause. A presumption of this place had somewhat been that that is not always the most efficient way of dealing with bills, which is why we can potentially refer them to a committee. I think that this is the kind of bill that requires if not a clause-by-clause examination, at least a part-by-part examination, an interrogation of the principles, and an understanding of where the government expects it to go and how it might be implemented. My preoccupation is that it be judged against the paramountcy of community safety.

Good and noble people are members of this house's Standing Committee on Legislation. It has at least two very senior and distinguished parliamentarians. This is not to embarrass the member, but the chair is Hon Dr Sally Talbot, and an ex-President of this chamber, Hon Kate Doust, is also a member. Some members might have heard the "professional pleading"—I will call it that—made by Hon Dr Brian Walker the other day on the Guardianship and Administration Amendment (Medical Research) Bill 2023, and he is also a member of that committee. If this bill were referred to them, those individuals would take it seriously. I expect Hon Shelley Payne and my Liberal parliamentary colleague Hon Steve Martin also would. These are people of diligence and integrity. I will also make the obvious observation that it is a committee that has a government majority. If there is any ministerial apprehension about the potential for partisan game-playing, I point to the membership of that committee in an appeal to put the Attorney General's mind at ease.

Such a referral might eventuate in the Attorney General's position being vindicated; Roger has done such a marvellous job—no disrespect to Roger—that this bill cannot be improved in any way. That may well be the case. Where I suspect things will go is to an examination of what happens when this bill passes through Parliament and

how it will be implemented. That is within the broader scope and remit of the standing committee. It clearly appears that the implementation workload has already commenced and is to some degree advanced, and the committee's consideration may actually enable, improve and assist in that process rather than encumber or enfeeble it. I will propose a short referral of three months' duration. Bearing in mind that the Attorney General has already publicly said that it will be at least 12 months before this legislation operates as it is supposed to, I do not consider that to be a delay in any way. My first reason is that the implementation work has already commenced, and my second reason is that, as I reflect on the obvious majority that the government has in this house, the bill will pass anyway. There is no vector of uncertainty here—none!

If, as I expect, the government opposes the motion that I am about to read in, it might like to consider an alternative. I will not move it but just offer it as a constructive suggestion. It is not the best outcome, as was the case with the Guardianship and Administration Amendment (Medical Research) Act 2020, but there would appear to be nothing errant or necessarily without precedent in a referral after the third reading. That is something that the Attorney General might consider, in consultation with the parliamentary secretary and the Leader of the House. Knowing as I pretty much do that the government will oppose the motion I am about to move, I think it would be to the credit of the government if it were willing to expose its work to that kind of examination and make good use, at long last, of the expertise of the high-calibre people who occupy the membership of the Standing Committee on Legislation. The committee members, unfortunately, have not been inconvenienced by any work being referred to them for the last two years.

Discharge of Order and Referral to Standing Committee on Legislation — Motion

HON TJORN SIBMA (North Metropolitan) [3.49 pm] — without notice: I move —

> That the Criminal Law (Mental Impairment) Bill 2022 be discharged and referred to the Standing Committee on Legislation for consideration and report by no later than 30 June 2023.

The ACTING PRESIDENT (Hon Sandra Carr): The question is that the motion be agreed. All those in favour say aye —

HON MATTHEW SWINBOURN (East Metropolitan — Parliamentary Secretary) [3.50 pm]: Acting President, I am seeking the call to give the government's response.

The ACTING PRESIDENT: My apologies.

Hon MATTHEW SWINBOURN: Thank you. It would have been a truncated debate, but the member's as always erudite and very well-developed arguments need responding to and it is important that the government's position on this referral motion be put on the record.

To be open from the very beginning, the member and I, in conjunction with the Attorney General's office, have had some ventilation of this issue behind the chair. My instructions as to the government's position were communicated to him, which is that we will not be supporting the referral motion. I will go through some of the reasons we say it is not necessary and why we will not refer the bill. The member highlighted this consultation in his contribution to the second reading debate; it was quite thorough.

The bill was subject to extensive consultation over many years, with more than 40 stakeholders across government, the legal profession, the mental health and disability sector, advocacy bodies and other expert groups consulted on various drafts. For the sake of the record, I will indicate who they were. The list is quite long. In relation to government, the heads of jurisdiction in Western Australia—the Supreme Court, the District Court, the Magistrates Court, the Children's Court, the President of the State Administrative Tribunal, the President of the Court of Appeal and the Coroner of Western Australia—were consulted. In addition, the following were consulted—the Magistrates' Society of Western Australia, Magistrate Felicity Zempilas of the Start Court, the Mentally Impaired Accused Review Board, the Solicitor-General, the Office of the Director of Public Prosecutions, Legal Aid Western Australia, the Commissioner for Corrective Services, the Western Australia Police Force, the Office of the Inspector of Custodial Services, the Commissioner for Children and Young People, the Department of Communities, the Department of Health, the Department of the Premier and Cabinet, the Mental Health Commission, the Mental Health Advocacy Service, the Office of the Chief Psychiatrist, the Office of the Public Advocate, the Office of the Public Trustee, the Office of the Commissioner for Victims of Crime, the State Solicitor's Office, the Public Sector Commission, and the Ombudsman Western Australia.

The non-government stakeholders that were consulted in the development of this bill were the Royal Australian and New Zealand College of Psychiatrists, Professor Harry Blagg from the University of Western Australia, Dr Tamara Tulich from UWA, Dr Piers Gooding from the University of Melbourne, the Law Society of Western Australia, the Criminal Lawyers' Association of WA, the Western Australian Association for Mental Health, Consumers of Mental Health WA, Mental Health Matters 2 Ltd, the Aboriginal Legal Service of WA, the Mental Health Law Centre, the WA Bar Association, the Youth Legal Service, the Ethnic Disability Advocacy Centre, now known as Kin, the First Peoples Disability Network, Developmental Disability WA, People with

Disabilities WA, and Hon Alison Xamon, MLC, as she was then. It does not say it in my notes, but I presume the reason she was consulted was that she was previously the CEO of a mental health consumers' association. I cannot remember the precise group, but it was a lead group and she had some expertise.

The purpose of highlighting that is that the exhaustive consultation with those groups on the three phases of this bill—not everyone was consulted at every phase—is a fact that lends against the need for it to be referred to the Legislation Committee. There was ongoing consultation with experts during the drafting, particularly with the DPP, the heads of jurisdiction, the Solicitor-General and the State Solicitor's Office.

Hon Tjorn Sibma made the point about the government group, but he would agree with me that the group of government bodies that were consulted were, first, the courts, separate from the executive; and, second, some of those statutory agencies that are also independent agencies, and a number of different departments that have different interests that do not necessarily all align with the interests of others. Even within government, it is not that they are always at one voice.

The Northern Territory and South Australian departments of Attorney General and Justice were also consulted on the consequential amendment to the heading of part 9 of the Cross-border Justice Act 2008 in accordance with the relevant intergovernmental agreements in place governing that framework. Those jurisdictions will be consulted further during drafting of regulations to support the bill and apply the necessary cross-border modifications to it. The 2016 review report includes at page 23 a list of all the stakeholders who made a submission to that review. As indicated, many of the reforms proposed in this bill were informed by the recommendations of that review.

The government's intention is to commence the new act, all necessary subsidiary legislation and administrative arrangements on the same date, approximately 12 months after royal assent. Hon Tjorn Sibma drew that to our attention in his speech. He described it as optimistic. I think only time will tell, but that is certainly the government's intention. Implementation of the reforms provided by the bill will involve approximately 10 agencies and statutory bodies and a significant body of work has already been undertaken in preparation. Agencies, statutory bodies and stakeholders are preparing for commencement 12 months after royal assent. Given that the body of preparatory work, together with the extensive consultation, including with the judiciary, the Solicitor-General, the State Solicitor's Office, the Law Society and disability advocates, and the fact that people are currently being held on indefinite detention, in our view it is not appropriate that the bill be further delayed by referral to the Legislation Committee.

I will respond briefly to the member's comments about the bill being rushed through the other house. As the member knows, it is not my practice to get caught up in the hub-drub of what goes on down there, but I think it is important in the context of our debate here that we understand what happened in the other place with the progress of the bill. The bill was introduced in the Legislative Assembly on 1 December 2022. It laid on the table and was on the parliamentary website for two months prior to debate in the lower house commencing on Tuesday, 21 February. The government briefed twice the opposition alliance, specifically members of the Liberal Party. We provided a briefing to Hon Nick Goiran when he was the shadow Attorney General and again to Hon Tjorn Sibma to accommodate the change in the opposition's shadow portfolios. The opposition was first briefed on 30 January and Hon Nick Goiran and an adviser from the LOOP office attended. We then briefed Hon Tjorn Sibma on 10 February to accommodate those changes. When debate in the Legislative Assembly was announced, the opposition was offered the entire week, including the option to sit late, to consider the bill. The Deputy Leader of the Opposition and manager of opposition business, Peter Rundle, informed the Leader of the House that the opposition did not plan or intend to speak on the bill for very long.

When we talk about the level of consideration that was given in the other place, it is a little rich to suggest that that is on the government. The government could have filled the space with multiple government speakers to keep it before the house for a greater time, but it is the member's own counterparts in the other place and their level of scrutiny of legislation that deserves his ire rather than the government of the day. However, I do not plan to get into the quagmire of what happens in the other place. The less attention this place pays to it is always better in my mind.

Hon Tjorn Sibma: By interjection, I concur with that statement.

Hon MATTHEW SWINBOURN: Yes, it certainly does not pay much regard to us up here.

I want to emphasise the last point I made prior to talking about the other place—that is, the potential impact on those who are in indefinite custody. We have spoken already about the 56 people who are subject to custody orders under the existing Criminal Law (Mentally Impaired Accused) Act 1996. Their terms of custody are of an indefinite period. They may continue to be held indefinitely until the bill becomes operable, unless recommended for release by the MIARB and approved for release by the Attorney General in the meantime. Once the bill is proclaimed, many of the people currently subject to custody orders will have a limiting term set in relation to the charge they originally faced. This limiting term will be based on an assessment by the Supreme Court of the term they would have likely received had they pleaded guilty to the offence through the usual court process. It is important to note

that the bill does not provide that a limiting term of life imprisonment will be deemed for those persons subject to custody orders due to murder or manslaughter. However, once operational, the bill will enable those persons or their legal representatives to apply for a different limiting term to be set.

Until the bill commences operation, the people subject to custody orders will continue to be held indefinitely. We can have a debate about how we prioritise time in the Legislative Council, but the cold hard reality is that a referral to the Standing Committee on Legislation would delay the commencement of this piece of important legislative reform. That is just the reality. We have to balance the utility that could come out of the legislation committee's work—we all acknowledge the work it does—against the further confinement of the people subject to this bill. I do not think it is really for any of us to suggest that a three to four-month delay is something they should bear so that we can examine the bill in greater detail. As I said, I am comfortable with the work the government has done, including the government prior to this one, on this issue. The extremely thorough consultation that occurred is sufficient for us to be comfortable that the bill currently before the house is in a state that we are able to pass without the need for further reference to the legislation committee.

On that basis, we will not be supporting the motion for referral.

Division

Question put and a division taken, the Acting President (Hon Sandra Carr) casting her vote with the noes, with the following result —

Ayes (11)

Hon Peter Collier	Hon Steve Martin	Hon Dr Steve Thomas	Hon Dr Brian Walker
Hon Donna Faragher	Hon Sophia Moermond	Hon Neil Thomson	Hon Colin de Grussa *(Teller)*
Hon James Hayward	Hon Tjorn Sibma	Hon Wilson Tucker	

Noes (18)

Hon Klara Andric	Hon Lorna Harper	Hon Martin Pritchard	Hon Darren West
Hon Dan Caddy	Hon Jackie Jarvis	Hon Samantha Rowe	Hon Pierre Yang
Hon Sandra Carr	Hon Kyle McGinn	Hon Rosie Sahanna	Hon Peter Foster *(Teller)*
Hon Kate Doust	Hon Shelley Payne	Hon Matthew Swinbourn	
Hon Sue Ellery	Hon Stephen Pratt	Hon Dr Sally Talbot	

Pairs

Hon Nick Goiran	Hon Stephen Dawson
Hon Martin Aldridge	Hon Ayor Makur Chuot

Question thus negatived.

Second Reading Resumed

The ACTING PRESIDENT (Hon Sandra Carr): Members, the question is that the bill be read a second time. All those in favour say "aye".

Hon Dr Steve Thomas: You've got to let the parliamentary secretary respond.

HON MATTHEW SWINBOURN (East Metropolitan — Parliamentary Secretary) [4.06 pm] — in reply: I can understand the need for haste in terms of getting through the Criminal Law (Mental Impairment) Bill 2022, but, sadly, we have a duty to provide a reply. I am standing perhaps a little earlier than I had presumed I would be to give the reply. One issue regarding the reply that I want to flag at an early stage is that it will not be a very thorough reply on the basis that a lot of these matters will be fully ventilated in the committee stage. Throughout Hon Tjorn Sibma's contribution to the second reading debate, he referred to things being more appropriately dealt with in Committee of the Whole, and that is what we are expecting in terms of scrutiny.

I have some notes, fortunately, for this. Because I did not get a chance to do this with the other bill, at the outset I would like to mention the acknowledgement that Hon Tjorn Sibma gave to the staff of the Attorney General's office. They were ably helped by staff from the Department of Justice, who provided a lot of what we have provided to the member. We strive to be cooperative and collaborative with members when we can, regardless of their political affiliations, aside from the cut and thrust of normal political debate. I appreciate Hon Tjorn Sibma recognising them, and they certainly appreciated being recognised as well. Hopefully, we can keep that spirit up through the clause 1 to clause 412 debate.

Hon Tjorn Sibma: Maybe the first 250 I will take an interest in.

Hon MATTHEW SWINBOURN: The first 250! I entirely agree with Hon Tjorn Sibma about the significance of this law reform. It is very significant and important. Although there are currently only 56 people affected by the current provisions, it is a matter of concern for all people who care about liberty that the manner in which they are held is as fair and just as possible. The matters we are dealing with may also give the victims of their alleged crimes some comfort in that regard. I will not attempt to answer all questions raised in the second reading debate in my response, as we can deal with them in committee.

Hon Tjorn Sibma indicated an interest in learning more about the number of issues, including with the management and supervision of supervised persons in the community and the role of the new Mental Impairment Review Tribunal. We can get into those matters in detail in committee. The member correctly pointed out that the tribunal will have extensive powers. That is appropriate for it to meet its obligations and acquit its duties under the new scheme. As I said in answer to a recent parliamentary question, the tribunal will carry over much of its membership from the board. I assure the member, who is now absent on urgent parliamentary business, that the board members and secretariat are very experienced in the management of this group of people. We will benefit from that experience as we get the new legislation up and running.

Consideration of the IT changes that will be required by the bill has formed and continues to form part of the implementation preparations and service design, including the issue that the honourable member raised regarding information sharing with the tribunal in the future. Hon Tjorn Sibma mentioned the bill's considerations around victims; these are set out under part 9. Again, we can canvass those provisions in much greater detail during Committee of the Whole. The paramount consideration of this bill is the protection of the community and that, of course, includes victims. Their rights to be heard are enshrined in this legislation and the government has closely engaged with the office of the Commissioner for Victims of Crime in the drafting of the bill.

In the course of the member's contribution to the second reading debate, he made reference to the absence of a body outside government to speak uniformly on behalf of victims. He is probably right; there probably is an absence of such a body. Unfortunately, the government is not the body to remedy that situation, but we do have the very able and dedicated Commissioner for Victims of Crime. The commissioner does a lot of work with victims, as is her remit—a lot of very good work with victims. I know from my own experience of victims of crime contacting the Attorney General that the Commissioner for Victims of Crime is very responsive to their needs. The Attorney General has great confidence in her and has asked her to do some important work around coercive control in relation to family and domestic violence. We have a lot of faith in the Commissioner for Victims of Crime and, as I say, her position is informed by her very close contact with victims. However, in respect of the issue of resolving how a non-government organisation for victims might exist, it could be a post-parliamentary career for Hon Tjorn Sibma to —

Hon Tjorn Sibma: By interjection, I am open to just about every opportunity that can be suggested to me!

Hon MATTHEW SWINBOURN: Time will tell, of course, how necessary that might be!

All jokes aside, there might be a hole amongst our civil society groups that could be filled by such a body. Without getting too bogged down, I think one of the issues with victims of crime is how much they want to continue considering themselves to be victims and how much they want to move on with the rest of their lives. Compared with other groups that represent people, there may not be the necessary momentum because any organisation is only as good as the people who are involved in it. In terms of a group like that, its legitimacy will come under scrutiny in respect of how well connected it is to actual victims of crime. Anyway, I digress from my short reply.

As the member noted, this bill has been subject to exhaustive consultation. I think we have covered that off to the necessary degree at this stage of my response to the member's referral motion. We talked about the WA Justice Association report that was released late last year and its consideration of the fitness test. Again, we can go into more detail during Committee of the Whole, but I can confirm that most jurisdictions use similar criteria to those contained in this bill, arising from the Presser test—that this bill expands upon the existing criteria, with an emphasis on decision-making ability, and that it provides further time for a person to potentially regain fitness.

I will take one small issue with the member with regard to this legislation being a significant law reform. He said that this was probably the government's first. I would say that the uniform legal profession legislation was a very significant one. However, in terms of the social good and significance of that reform, compared with this legislation it was probably not even in the same ballpark. I will maybe be a bit like the Attorney General and indulge in some hyperbole, but I think in time we will all be able to reflect that we were lucky enough to be involved with this legislation. It is probably not something that the vast majority of the community ever takes the time to turn its attention to; it is usually when a problem arises that we see any kind of interest. Part of our responsibility as serious lawmakers is to dedicate our attention and time to these sorts of things. With those short comments, I commend the bill to the house.

Question put and passed.

Bill read a second time.

Committee

The Deputy Chair of Committees (Hon Sandra Carr) in the chair; Hon Matthew Swinbourn (Parliamentary Secretary) in charge of the bill.

Clause 1: Short title —

Hon TJORN SIBMA: I have no questions on clause 1, which would be amazing to most of us.

Hon Sue Ellery: Oh, God!

Hon TJORN SIBMA: By way of explanation, since there seems to be some disappointment with that approach, I reinforce the very obvious point that this bill is some 400 clauses long. The questions around the policy of the bill have largely been settled. Obviously, as the parliamentary secretary representing the Attorney General was gracious enough to indicate, the bill in front of us is the result of a long process that was initiated under the previous government. I want to reinforce the fact that I will not be one of those parliamentary members who has an issue with every single one of those 400 clauses. The first 13 to 14 parts of this bill are of serious import. I will indicate as we go where the priorities are, although I think I gave a fair indication in my second reading reply speech. I have no questions on clause 1. That might be the first time.

Hon Sue Ellery: It is the first time in my 20-plus years, but I welcome it.

Clause put and passed.

Clause 2: Commencement —

Hon TJORN SIBMA: Significant emphasis has already been placed on the workflow consequences of the passage of this bill. We have an understanding of the task ahead, noting that in his second reading speech, the Attorney General already indicated that plans for the implementation of the provisions of this bill had already been initiated and are happening concurrently with our contemplation in this place. I will get to this question later. I want to underscore that I have a full and comprehensive understanding of the task by task or item by item list of the workflow. I must also extend my compliments to the drafters.

If members here have a chance to read only one document, the explanatory memorandum is a very good one. Page 3 of the explanatory memorandum states —

> Clause 2 provides for commencement on proclamation to allow time for the drafting of rules and regulations to underpin the new Act, establishment of the Tribunal in place of the Board and preparation for its commencement as a new body, establishment of new court hearing types for special proceedings and transitional matters, expansion of the functions of the Mental Health Advocacy Service, the development of new and updated administrative arrangements, such as policies, procedures, information sharing …

It goes on and on. Is that, however, a complete or full summation of the task load ahead?

Hon MATTHEW SWINBOURN: At a high level, that is correct. However, obviously, within those particular things that the member identified, and which are outlined in the explanatory memorandum, there will be different streams of work. For example, where it refers to policies, obviously work on different policies will need to be done within different government departments. There is a multitude of that type of work. As I said, what is in the EM, which the member helpfully read out, maps that out at the executive-type level. If the member has specific questions about each of those, we can probably drill down into them if he wants us to. I am not sure whether that is where he is going with his questioning, but consideration has been given to the very detailed work that will be required.

Hon TJORN SIBMA: Thank you, parliamentary secretary. Yes, I read that as being a very high-level description of the magnitude of the task ahead. I had anticipated, and am pleased that the parliamentary secretary confirmed, that that effectively connotes or implies that a range of subsidiary tasks or work must fall out of that. I have an interest in understanding how this will work. That was largely my motivation in seeking to refer the bill to the Standing Committee on Legislation, knowing that that would be a forlorn quest in reality. This substantiates why I suggested that the bill may be worthy of the committee's consideration even after the third reading. Can the parliamentary secretary table a list that gives a more detailed appreciation of those high-level tasks and some of the work that underpins them? I am not seeking a granular work plan on a flow chart, which is really the operational domain of the respective departments, but I would like to appreciate what the task list is and what is expected will be produced in terms of individual outcomes. If the parliamentary secretary has any advice to that effect, I would be very pleased to hear it because it will inform how I plan my subsequent questions.

Hon MATTHEW SWINBOURN: We do not have a document of that kind with us that we could table right now. I am conscious that we have maybe four minutes left before question time, then maybe 15 minutes afterwards. Then we will be back onto this bill next week. The advantage that gives us at this stage of the debate is that we can reflect on what we have—there is definitely stuff that has been done—to be able to produce something that

could be tabled in Parliament. Some matters are cabinet-in-confidence, which we obviously cannot get into for those particular reasons.

However, to the extent that the member has asked us, we have what we have said is the higher level. The next level down is something that we can provide the member to do that sort of thing. To the extent that I can, I will give the member the undertaking that we will go back and do some work. If it is prepared before we come back, it might be the case that to assist the member, we can provide it in advance of when we return to the debate. Handing it to the member as we are standing here will not give him a great deal of opportunity to reflect on it.

Hon TJORN SIBMA: Thank you, parliamentary secretary. I think that would be a very helpful document, if indeed there is something the government can table. I would imagine that there is already a document, but it might need to be re-presented for a parliamentary purpose. I will put it that way. I am not going to see the raw stuff.

I am bearing in mind that we might be two or three minutes away from an adjournment. Who knows whether we will get back to the bill after question time. I might just give an indication of what I am interested to see if that kind of information can be presented. That effectively includes the prioritisation of the individual tasks within the overall work plan, a sense of what time line milestones are part of the critical path of developing the formal implementation, a view on how the government has consulted to date, and the future consultation and refinement it plans to do on discharging or executing the subsidiary work that will come out of that high-profile document. If that garbled contribution is intelligible or comprehendible, I would very much welcome the presentation of a document to that effect.

Hon MATTHEW SWINBOURN: What the member has said is on the record for our benefit. I have got something that has been given to me on how the implementation of the bill is being coordinated. That might help to give some further context. The implementation of the reforms provided by the bill involved approximately 10 agencies and statutory bodies. An executive level interagency implementation steering committee has been established to drive and oversee implementation, chaired by the Department of Justice. We are very fortunate to have that, because it is the powerhouse when it comes to this stuff—those are some gratuitous compliments for the people at the table.

The group meets on a bimonthly basis, or more often as required. An officer-level program board is responsible for the day-to-day implementation, planning and preparation. This group meets on a monthly basis. A program plan has been developed to provide the agency with a structured framework for planning and undertaking reporting on implementation activity.

Committee interrupted, pursuant to standing orders.

[Continued on page 1400.]