DECLARED PLACES (MENTALLY IMPAIRED ACCUSED) BILL 2013

Consideration in Detail

Resumed from 11 September.

Clause 48: Access to certain declared places, persons and documents —

Debate was adjourned after clause 47 had been agreed to.

Mr D.J. KELLY: Clause 48 provides very extensive powers for the Disability Services Commission, the chief executive officer or any person authorised by the CEO to effectively have access to declared places and, it appears, to any person in a declared place who is either a resident or doing work in a declared place. I have different concerns about each of the categories of persons referred to at subclause (2). Subclause (2)(b) refers to each resident in the declared place. I understand the commission or the CEO, or someone they have authorised, wanting access to each resident in a declared place for the purposes of ensuring the proper treatment and wellbeing of any resident in a declared place, but I am just unsure—perhaps the parliamentary secretary could explain to me—what protection there is for a resident who does not want to be interviewed or spoken to, or whatever, by the commission, the CEO or someone acting on their behalf. I can understand that if there were a concern about the treatment or the wellbeing of a person or if there had been a complaint, the CEO or the commission would want to have access to that person, but what protection is there for a resident who does not want to be interviewed? Does the parliamentary secretary understand what I am saying? If the resident takes the view that either they are quite happy with how they are being treated or they do not want to talk to the CEO, for example, without someone else being there to represent them, what protection does a resident have to make sure that the quite extensive powers in this clause are not used in a way that the resident is not happy with?

Ms A.R. MITCHELL: There is no compulsion for a resident to speak to that person if they do not wish to do so.

Mr D.J. KELLY: Subclause (5) states —

> A person must not hinder a person referred to in subsection (1) when the person is exercising or attempting to exercise a power under that subsection.

When I read the entire clause, I thought of the scenario in which, for example, the CEO may arrive at the declared place and tell the manager in charge that he wants to interview such and such a resident. A message may go to the resident that the CEO is there or that someone representing the CEO wants to interview the resident, and the resident may say that they do not want to speak to them because they are not in the right frame of mind to speak to someone, or they may not want to speak to that person until they have representation. Presumably, there are a number of circumstances in which the resident may not want to speak to that person. When looking at subclause (5)—I am sure it is not the intention of the legislation—it occurred to me that a resident who takes that view and refuses to attend an interview might be construed as hindering the CEO, for example, from exercising that power and potentially be subject to a fine. How do we make sure that the penalties under subclause (5) do not apply to residents who, we all agree, are simply exercising their rights?

Ms A.R. MITCHELL: Subclause (5) actually refers to staff and people working in the organisation rather than a resident. We have gone through the clause dealing with residents' rights—there is quite a bit of protection for them and they have the right to fair and natural justice. I hear what the member for Bassendean is saying, but the clause does not work in the way that the member has referred to.

Mr D.J. KELLY: I am pleased with the parliamentary secretary's response in that she agrees that it is not appropriate that subclause (5) apply to a resident in those circumstances, but, on the face of it, it would appear to me that it might.

Ms A.R. Mitchell: That is also correct; it could. But, as I said, you have then got the section on residents' rights. I am trying to find that clause, so you keep going.

Mr D.J. KELLY: If there is a provision under the residents' rights part that would override subclause (5), I would be happy if the parliamentary secretary could point that out to me. I can understand why clause 48 is written in very a broad way, but it seems to me that it could cause residents' rights to be impinged upon. If there is a residents' rights clause in the bill that makes it clear, I would appreciate the parliamentary secretary pointing that out.

Ms A.R. MITCHELL: It will always come down to the fact that fair and natural justice must apply in every circumstance. I think it is probably also important to clarify that a "resident" is defined in the bill. A person is not a resident.

Mr D.J. KELLY: Maybe the member for Armadale was going to seek clarification on that point. Although a resident is defined, where the term "person" is used in the bill, I cannot see how that would not include a resident. The plain English language meaning of a person would include a resident. Unless the legislation says otherwise, I think that would be how a court would interpret it.

The parliamentary secretary said, secondly, that natural justice would always apply in these circumstances. Natural justice is a legal concept that requires that people have a right to be heard and to understand what is being alleged of them. It is a procedural point. If in a statute a power is conferred on someone to do certain things, generally speaking, that would override the common law concept of natural justice. I am heartened that the parliamentary secretary said that clause 48(5) is intended to apply to staff, but it seems to me that on a plain reading of it, the powers conferred on the commission, the CEO or any person authorised could be applied to a resident and, therefore, under subclause (5) a resident who says, "I don't want to talk to these people; I'm not in a state of mind to be interviewed", could be in breach of this provision and subject to a penalty. If it is not intended to apply to residents, maybe the government should amend the bill to make that crystal clear. We all know that there is a history of residents in these facilities being subjected to quite draconian powers. We do not want to repeat that mistake with these facilities.

Ms A.R. MITCHELL: I am quite clear now that there is a very clear definition of "resident" in clause 3 of the bill. If "a person" included "a resident", the word "resident" would be included in subclause (5). A person is not a resident. I do not think that the member's concerns are necessary. I probably have to take objection to the member referring to people within these facilities being subject to draconian powers. That may have occurred in the past but it is certainly not how the residents in this facility or any other centre will be treated. I believe it is imperative to get away from that stigma and that approach and to take a more positive view going forward.

Mr D.J. KELLY: Thank you for that, in a sense. I understand the parliamentary secretary's explanation of the definition of a resident, but I do not think that will exclude a resident from being considered a person elsewhere in the legislation. I say to the government that it needs to look at how that clause is framed. If those powers are not intended to be applicable to a resident, I think the government has to look at how the clause is drafted. The parliamentary secretary may have misunderstood my comments about draconian measures being applied to people in these types of institutions. I was not making that accusation about the way things are handled now. I was simply saying that in the past, quite draconian powers have been used against residents, and we do not want to see that repeated in the future.

I said that under clause 48(2) a number of persons could be subject to these powers. Paragraph (c) states —

> each person whose work is concerned with the declared place; …

As the parliamentary secretary indicated, these powers could definitely apply to a member of staff who is employed at a declared place. How does the parliamentary secretary believe the rights in this clause, which can be exercised by the commissioner or the CEO, interact with an employee's rights; for example, if the CEO or one of the authorised persons goes to a centre and says to a staff member, "I want to interview you about the incident that took place yesterday and I want you to immediately answer questions about it." In an ordinary workplace we would expect the rights of natural justice that the parliamentary secretary talked about to be applied; that is, the right to know whether there is an allegation against them or the right to be represented by another colleague or their union. The powers in this clause are quite broad-ranging and without qualification, so it would concern me if it is intended that these powers override an employee's rights to natural justice if an allegation is made concerning their behaviour. How will the rights under this provision and the rights an employee would normally have interact?

Ms A.R. MITCHELL: Any person employed in a centre will have the same rights as any public sector employee or someone employed under an award.

Mr D.J. KELLY: The concerns I have about that answer is that different public sector workers have different rights, depending on where they are employed. We had a long debate, for example—maybe someone can remind me of the name of the bill—on the bill that amended the rights of workers in custodial facilities under the Department of Corrective Services. The minister brought in legislation that severely curtails the rights of Corrective Services employees in circumstances involving disciplinary procedures or accusations of misconduct. In particular, under that legislation employees are denied the right to remain silent, for example, and a host of other things. The parliamentary secretary just said that staff in these facilities will have the same rights as everybody else, and that simply is not good enough, in my view, because different people in the public sector have different rights, depending on who their employer is. If we pass this legislation, it seems to me that there could be a scenario in which there is a complaint about a member of staff—their conduct or their suitability for their work—and it may not even be a serious matter of physical assault; it might just be that so-and-so is not competent to do their job. Instead of the matter being progressed through procedures under an enterprise

bargaining agreement or the Industrial Relations Act, the provisions of this legislation could be invoked by management. Again, a worker who, when asked to meet with a representative of the CEO, said, "Look, I don't want to meet with you to discuss this issue until I'm able to have a colleague represent me or a representative of the relevant union", could, by refusing to be interviewed, be seen to be in breach of clause 48(5) by hindering a person exercising their rights under that provision, and could therefore be liable to a penalty of $20 000. To ensure the proper care and safety of a resident in emergency situations, I completely understand why the CEO and the commission may well need strong powers to access a declared place. My concern is that the way this legislation is written provides for very strong powers that could be utilised in circumstances that do not relate to residents' safety, are not urgent and, in fact, would normally be considered to be routine human resource matters. What comfort can the parliamentary secretary give me that these powers will not be applied to employees in circumstances in which general human resource powers would be better applied?

Ms A.R. MITCHELL: I bring the member back to part 9, which is about contracts for declared places, so any person employed under a contract would have to comply with all the industrial awards that pertain to that contract. We have not brought in any specific changes to that that may have occurred in a previous piece of legislation that another minister might have thought relevant to bring in. At this stage, any person would be under their industrial legislation.

Mr D.J. KELLY: Is the parliamentary secretary saying that clause 48 only applies in circumstances in which the centre has been contracted out?

Ms A.R. Mitchell: That is the part that it is under—part 9.

Mr D.J. KELLY: So these provisions do not apply to employees generally who are employed to operate these centres—is that what the parliamentary secretary is saying?

Ms A.R. MITCHELL: Yes, that is the case because these clauses allow for the Disability Services Commission to undertake inspections to ensure that matters are fair.

Mr D.J. KELLY: I thank the parliamentary secretary very much for that clarification. Clause 48(2)(c) however still refers to "each person whose work is concerned with the declared place", which would include employees of the contractors. For example, if Serco were to run the centre, its staff would be subject to the provisions of this clause. I am grateful that the parliamentary secretary has clarified that this particular clause only applies in circumstances in which the centre has been contracted out or privatised, but that does not remove my concern that employees of a contractor who would ordinarily have rights under the Industrial Relations Act for representation and the like could, because of these provisions, have those rights denied. It might be that the CEO or a representative arrives at the site and wants to interview a member of staff, but that member of staff is employed by Serco and says, "I don't want to talk to you until I have some sort of legal representation." The government then says, "Under clause 48(5), you're hindering me talking to you; therefore you're potentially up for a penalty of $20 000." What stops that from happening? The parliamentary secretary says that it is unlikely, but if the power is there, it can be used. I completely understand why we need these types of powers in circumstances in which the residents' safety or wellbeing is in some sort of immediate jeopardy; but it may simply be a case that there has been a complaint about a staff member's performance or the way they did X, Y and Z, and the CEO wants to interview them. It may be the case that they are not even directly working with the residents on that day, but the CEO wants to talk to them on that day. The staff member could then say, "If this will have serious ramifications, I want representation, and that representation cannot arrive until tomorrow morning. Can we put it off till tomorrow morning?" The government could say, "You either do it now, or I'm going to accuse you of hindering a person exercising their power and you're likely to get a fine for that—up to $20 000." What is to stop that power being used in that scenario? If it can be used, someday it will be. If it is not intended to be used that way, the clause should not read that way.

Ms A.R. MITCHELL: I fear that the member for Bassendean fears the worst-case scenario too often. It would be very, very unlikely—almost impossible—for someone to walk in, ask someone to say something, and then slap a fine of $20 000 on them if they have not given them the right to have that assistance and support in what they are doing. It is trying to make sure that we will always have a well-operated facility—one that enables the CEO to go in and make sure that things are occurring correctly. I am very happy with what is here and how it could operate if the service—not that it is, or will be in the near future—were to be contracted out.

Mr D.J. KELLY: The parliamentary secretary accuses me of looking at the worst-case scenario, but in a whole range of industries, employees' rights—whether they are employed directly or through contractors—are being eroded. There has been a lot of debate, for example, about the rights of workers in the building industry. Under legislation passed in the federal Parliament, workers in the building industry can be required to do all sorts of things and be denied the natural justice that the parliamentary secretary said would always apply. I am very wary every time we pass legislation that could be used to impinge upon the ordinary rights that people expect at work. The parliamentary secretary's government has just done that for the staff of correctional facilities in the prison

system; it has denied people their basic rights to things like representation and the right to remain silent, and it has introduced serious penalties for people who do not abide by that legislation.

These facilities are only one step away from the regimes that apply in corrective services. It has been said to me that if this legislation is not passed by the time that the Lockridge facility is built, it will be run by the Department of Corrective Services instead of the Disability Services Commission. Parliamentary secretary, if it is not intended that these provisions, which are there for good reason to protect residents, are to usurp employees' ordinary rights, do not be stubborn and say, "You're just looking at the worst-case scenario; it will never happen." If the provision is not intended to operate that way to usurp employees' rights, rethink the clause and put in an amendment. The parliamentary secretary has the numbers to do that. There is no point in me amending the clause, because the government will just vote it down. The parliamentary secretary can improve this legislation. If the parliamentary secretary's intention is that this provision does not apply to employees in the way that I fear that it might, she should be big enough to make the amendment.

Dr A.D. BUTI: I refer to clause 48(5). I came in late on the debate on the definition of whether a person could be resident. I cannot remember the actual term, but I think statutory interpretation would imply that that clause does not refer to a resident because we have defined what a resident is. That is not actually my question. My question is: If a person does hinder a person as outlined in the clause, is there any discretion not to fine them? Is it a discretionary or a mandated fine, and does it have to be $20 000?

Ms A.R. MITCHELL: It is a discretionary fine. Apparently, fines are always listed as the maximum fine that could be given.

Mr D.J. KELLY: Clause 48(2)(d) states —

> each document in the possession or control of the contractor or a subcontractor in relation to a declared place service for the declared place.

I hate to keep using Serco, but it is the company that always comes to mind. If a company such as Serco has a contract to run a declared place, obviously management and a lot of the records and staff who have effective control of the organisation will not be located at the declared place. I am not exactly sure where Serco's office is—I think it has an office here in Western Australia, and presumably some of the managers of the centres would be located at the head office. Is it intended that this clause would give the persons referred to in clause 48(1) the power to exercise these powers outside the declared place—for example, to enter the head office of Serco to interview staff, view documents and all of those things? I think it would be a good thing if the clause does that, but I seek clarification from the parliamentary secretary. Is it the parliamentary secretary's understanding that this clause would enable those powers to be exercised, for example, in the head office of a company contracted to operate a declared place?

Ms A.R. MITCHELL: I think there are two different areas here. One issue is entry and that a person cannot just walk into an office somewhere and take stuff. But, certainly, they would be able to enter an office, with agreement and under the terms of the rest of the applicable clauses, to access documents.

Mr D.J. KELLY: I understand from what the parliamentary secretary has said that this clause only gives a person powers to access a declared place and to interview people and view documents in that declared place.

Ms A.R. Mitchell: The member asked whether Serco's head office was in Melbourne, and I said that a person cannot just walk into a place.

Mr D.J. KELLY: I think I gave the example of Serco having an office here. If these powers only apply in the declared place, there is the problem that when the government contracts out a service—if Serco runs the declared place in Lockridge and it has documentation relating to residents in the declared place that it keeps elsewhere off site—does that mean that these provisions do not apply? If that is the case, it may be a deficiency in the legislation because there are numerous occasions when governments have had arguments with organisations or companies that it has contracted with for overservicing, overcharging, fraud or whatever—mistreatment of residents. It would not be the first time that some of these companies have been charged or had issues raised about that. What would stop a company contracted to run a declared place from holding those documents off site? If a company did that, would that effectively prevent the government from accessing documents that it would otherwise expect to have access to under that clause?

Ms A.R. MITCHELL: They could keep some of those documents off site and it may be appropriate that they do, but it does not preclude the Disability Services Commission having access to those documents.

Mr D.J. KELLY: Can the parliamentary secretary clarify for me how DSC would have access to those documents under this legislation? Would it be under clause 48? It seems to me that the parliamentary secretary correctly pointed out that these powers are exercisable only inside a declared place. A government getting into a stoush with a company that it has contracted to run this type of facility is not a worst-case scenario. The

authorities, whoever they might be, would want access to residents' documentation or documentation relating to financial payments or a whole host of things, and the parliamentary secretary said that even if the documents were housed off site, DSC would still have access to them. If that power is not under clause 48, which provision would give DSC access to such documents?

Ms A.R. MITCHELL: The contract would have to be subject to this legislation as it has gone through. Of course if the contractor did not comply, there would be penalties in the contract for noncompliance. We believe that it is already in place without it having to be listed in the legislation; that is how a contract would operate.

Mr D.J. KELLY: I think we touched on this last time. It is very uncommon for governments to breach companies that they have contracts with. It usually occurs at the end of a very long process. From my reading of clause 48, I assumed it was specifically to protect residents who might be in some immediate threat of mistreatment. The government has put a range of safeguards into the legislation to protect residents. These include going into a declared place, being able to talk to the residents and staff and to look at documentation—all the things we think might be necessary in order to protect residents. If the contractor will house some of those documents off site, and this legislation will not enable the Disability Services Commission to access staff or documents held off site, that to me is a real deficiency. It provides me with no comfort when the parliamentary secretary says that a contract will be in place, and if people are in breach, the company will be breached. If a complaint is made about the treatment of a resident, for example, it seems to me that if dealing with that complaint will come down to enforcing a provision of a contract through the courts, it would be a very inefficient way of doing it. When I read this clause, I realised that it could be taken from various angles—that is, from the residents' and workers' point of view, and to ensure that the parliamentary secretary can get information from a contractor, she will want to get that information from a contractor really quickly. If this clause will not enable her to access either people or documents not in the declared place, that is a deficiency in the legislation. Contractors will either deliberately, or just because that is how they want to do things, maintain documentation outside the declared place in the same way presumably the DSC maintains documents. It seems to me that it is a serious deficiency in this legislation if everything held by a contractor off site is beyond the very sensible powers set out under section 48. What comfort can the parliamentary secretary give us that a contractor would not, for example, deliberately organise their business in a way to ensure that sensitive documentation is not in the declared place?

Clause put and passed.

[Quorum formed.]

Clauses 49 and 50 put and passed.

Clause 51: Terms used —

The ACTING SPEAKER (Ms L.L. Baker): We have a small fracas in hair pulling going on in the consideration in detail stage of the bill!

Dr A.D. BUTI: It is probably the first time the member for Bassendean has walked past the adviser sitting at the table and came very close, but the adviser I know very well. I am often at the primary school where she was a fantastic principal; we never experienced anything like that! I am not sure what happened there with the member for Bassendean.

The ACTING SPEAKER: I do not know whether it was parliamentary behaviour at all! Go ahead, member.

Mr D.J. Kelly: I am sure it's been seen before.

Dr A.D. BUTI: Part 10 is about advocacy services for residents, which of course is an incredibly important issue because the Mental Health Bill has now passed. Given that we have a new Mental Health Act, the Council of Official Visitors will no longer be the relevant body. Clause 51(b) states —

> … means a person belonging to a class of persons prescribed by regulation;

Who will those sorts of people be? I have concerns about the level of advocacy in this area and about access to independent advocates for residents or potential residents. A number of independent advocates can advocate on behalf of residents, but I am not sure whether the system as it currently stands, and the way the government is operating in this area, will allow residents to have full use of the independent advocates available.

Ms A.R. Mitchell: I'm sorry; I missed the member for Armadale's first point. He is addressing clause 51(b) or?

Dr A.D. BUTI: Yes, clause 51(b)—because (a) of course does not really apply anymore.

Ms A.R. Mitchell: Except I have two provisions noted as (b).

Dr A.D. BUTI: Sorry—the one under "advocate". My question is: given of course that we have now passed the new Mental Health Bill, the official —

Ms A.R. Mitchell: We have not yet.

Dr A.D. BUTI: Have we not passed it?

Ms A.R. Mitchell: It is still in the upper house and it has to come back down.

Dr A.D. BUTI: It is more than likely it will pass soon. Therefore, it is more than likely that paragraph (b) will be the relevant provision we will work with. Therefore, advocates will be persons belonging to a class of persons prescribed by regulation. My question is: what sort of people is the government looking at in that respect? While I am on my feet, I comment that there are opportunities for independent advocates to be utilised, and I am concerned that maybe the government has not provided the appropriate systems to ensure that potential residents will understand or have the opportunity to employ or contact independent advocates, not just advocates the declared place will nominate for them.

Ms A.R. MITCHELL: The provision we are referring to here relates to advocates specific to the Council of Official Visitors, but elsewhere throughout a general representative of a resident is also referred to as an advocate, and, of course, at all times the resident's rights will be explained to them so that they understand the differentiation on how each applies and what can be done. But it is also my understanding that with potentially one or two additional advocates through the Council of Official Visitors, there may well be some additional expertise that could be brought in to assist residents in this area.

Dr A.D. BUTI: Although my question does not specifically pertain to this clause, it relates to advocacy. I would like to make this comment; I will not be long. A person by the name of Jason appeared on an SBS TV program last week. He had been denied leave approval. The Attorney General made some comments that do not auger well for the functioning of declared places. I am not really asking the parliamentary secretary to comment on what her colleague said in the other house, or outside it, but what assurance can the parliamentary secretary provide that once this bill becomes law, people who are declared appropriate for a declared place will be placed in a declared place? Can the parliamentary secretary say that it will not be used as an alternative form of punishment, as would appear to be some of the language used by the Attorney General, but it will be a place to help a person transition into the community? My understanding is that one of the motivations behind declared places is that it will help a person's transition to eventual reconnection with the community.

Ms A.R. MITCHELL: I will not comment on any particular situation, as the member would understand. The most important benefit is that once we have declared places, people will have somewhere to be transferred into. That process of education and integration can then occur. Of course if that process is going well, leave will also be part of their plan.

Mr D.J. KELLY: I have a question for my edification. I refer to the advocacy rights that residents will have under part 10. The legislation only refers to people in a declared place. Would a person being held in a prison have the same advocacy rights as residents in a declared place? Will the passage of this legislation set up effectively two regimes of residents' rights—one for people who are in declared places and one in which the board has determined that the person should be detained in a custodial facility?

Ms A.R. MITCHELL: I say at the outset that this legislation provides a significant benefit to people in a scenario that requires this service. Currently within the prison system, prisoners have the opportunity to use the Health and Disability Services Complaints Office. There is also a disability justice service that provides services to people in prison, but the advocacy for service is a significant improvement in that process.

Mr D.J. KELLY: If this is an enhanced set of residents' rights, it seems to be a bit of an anomaly that someone who is intellectually or cognitively impaired, and has been determined by the board that the best place for them is in a facility run by the Department of Corrective Services, will have two different sets of rights depending on where they are located. Maybe it is not an issue that the parliamentary secretary can deal with in this bill, but if we beef up residents' rights to service the people in these facilities, it seems peculiar that the Minister for Corrective Services, who is sitting at the back and who deals with people who are in similar circumstances, has a different regime of residents' rights.

Clause put and passed.

Clause 52: Residents' rights as to visits or other contact —

Mr D.J. KELLY: Reading through clause 52, there are a number of time frames in this legislation that seem to reflect a world before modern communications were available. For example, it is stated at subclause (1) —

> The CEO must inform the chief advocate of the arrival of a new resident as soon as practicable but no later than 48 hours after the resident arrives at a declared place.

I cannot really think of any circumstance that would take 48 hours for the CEO to inform the chief advocate that someone has arrived at a declared place. It is not as though someone needs to get them in, the secretary types a letter in triplicate and then posts it, and the CEO will be informed when the post arrives the next day. These

days communication, especially via email, is almost instantaneous. To say the chief advocate may not be advised for 48 hours seems excessive. For the chief advocate to ensure that each resident is visited or otherwise contacted by an advocate within seven days also seems an extraordinarily long time. It is not as though it will be difficult. Seven days is a lifetime, I would have thought, if a person has been detained against their will, even in a declared place, especially for the first time. I do not understand the time frames of 48 hours, seven days and 72 hours in the legislation. If we really want legislation to give residents a strong advocacy service, subclause (1) should be "no more than 24 hours" and the chief advocate should be contacted "within three days". Why would those sorts of time frames not be more appropriate in legislation that is supposed to set a new benchmark for the care of these residents? Why do the time frames look as though they are much more appropriate for a bygone era when communications and travel were so much more difficult? Why are those time frames still there?

Ms A.R. MITCHELL: I will deal with the second part first—talking about the seven days. Once again, the Council of Official Visitors is not necessarily a large organisation. I suppose it depends where their advocates have been arranged to go within the time frame that someone arrives; they may not have someone readily available at the same time. The resident may wish to have their carer, guardian or someone there as well, so that might need to be arranged. It is to give flexibility, not to make it difficult. It will ensure the visitation is actually well worth it for all concerned.

In terms of notification, yes, we expect instantaneous information nowadays, but perchance someone was admitted late Friday and the chief advocate did not check their emails over a weekend, or something like that, and did not get back to the office until Monday morning, 48 hours covers that sort of time. If technology collapses, and bits and pieces happen—computers shut down—there are a number of reasons why we need flexibility. We certainly do not intend it to take as long as possible close to that maximum time. Arrangements might need to be made for an interpreter or someone from a cultural language group to be there. It really is to make sure that the meeting is worthwhile.

Mr D.J. KELLY: I take on board that clause 52(1) states that the CEO is to be informed as soon as practicable but no later than 48 hours after the resident's arrival. I concede that the term "as soon as practicable" strengthens the provision a little, but that does not apply in clause 52(2)(a); it does not state that the chief advocate is to ensure that each resident is visited or otherwise contacted by an advocate as soon as practicable or no later than seven days after the resident's arrival. It seems to me that seven days is a very long time before a resident is visited. I take the parliamentary secretary's point; there might be a circumstance in which a resident says that they do not want to meet with the chief advocate until the family member they want to be with them can get to Perth. I understand that a number of these residents will be from regional areas. The resident may request that they not meet with the chief advocate as soon as the advocate is available, but it seems to me that that would be an exception. The legislation could provide that the chief advocate must visit the resident within three days, except at the request of the resident. It seems to me that the absence of the term "as soon as practicable" in clause 52(2)(a) means that people could wait for seven days. If that time is needed because the chief advocate is not properly funded and does not have the resources to do their job, I do not think that is a satisfactory answer. Why is the term "as soon as practicable" not included in the legislation after the reference to the seven-day period in subclause (2)(a) in the way it is in included in subclauses (1) and (2)(b)?

Dr A.D. BUTI: Clause 52(3) provides for the resident's right to decline to be visited or contacted by an advocate and to consent to the advocate having access to records. Of course we can argue that the resident should have that right, and that is commendable, but how can we be assured—this does not go to the legislation; it goes to the performance of the legislation—if the resident declines and does not consent if, for instance, they have an intellectual impairment? If the resident says that they do not want to speak to an advocate, how can we be assured that, firstly, they understand what they are saying; and, secondly, the CEO or the management of the declared place is not telling fibs to the advocate?

Ms A.R. MITCHELL: That consent would always be required with the involvement of the carer or guardian.

Clause put and passed.

Clause 53: Advocate functions —

Dr A.D. BUTI: The advocate's functions are quite substantial. Will the advocate have only the functions that are listed? The clause covers most things, but there is the possibility that something might not be covered. Will the advocate be limited to the functions prescribed in clause 53? Of course, clause 53 states, in part —

> (f) inquiring into or investigating the extent to which explanations of the rights of residents have been given in accordance with section 8(1), (2), (3) and (4) and the extent to which those rights are being, or have been, observed;
>
> (g) assisting residents to protect and enforce their rights referred to in section 8(1);

I assume that the advocate will be subject to the provisions of clause 52(3), because the resident may not want the advocate to be privy to certain information. Presumably, the functions listed in clause 53 are conditional on the provisions of clause 52(3). Are the functions listed in clause 53 possibly limited by the provisions of clause 52(3)? Also, can the advocate be involved in any function that is not prescribed under clause 53?

Ms A.R. MITCHELL: The member raised a couple of points. Firstly, the resident can withdraw consent to any of the functions. The member asked whether any other functions could be included. I refer the member to clause 53(o), which states —

> the functions given under other provisions of this Act, including participating in the … development plans.

Clause put and passed.

Clause 54: Advocate powers —

Mr D.J. KELLY: Although I support the very robust regime in the legislation to ensure that residents' rights are protected, I am also concerned that the rights of the staff who work in these facilities be protected. I am concerned that under clause 54, the advocate, in doing their job, would likely have cause to ask staff about the matters outlined in subclause (5), which states —

> An advocate may ask a person who works at a declared place questions about any of these matters —
>
> (a) the welfare, health, care, training, safety, management or security of any resident;
>
> (b) the operation, control, …

Those questions may involve the employee being put in circumstances that may have serious impacts on the employee's continuing employment. It seems to me that the staff may be asked about matters that, depending on how the matter is resolved, may result in the staff member being dismissed. If the advocate wanted to interview a staff member about the welfare, care or management of resident X, as they were responsible for the resident on a certain day that an incident occurred, and wanted the staff member to explain what happened on that day, it would be perfectly reasonable, not obstructive at all, for that staff member to say, "That's fine; if you're going to ask me questions essentially about what I've done, I also want some representation." It seems to me that clauses 54 and 55 mean that the employee would be in an extraordinarily tricky position. Clause 55(1) reads —

> A person who is asked a question by an advocate under section 54(5) must answer the question.
>
> Penalty: a fine of $6 000.

On my reading of that, there is no wriggle room for the staff member to ask to be represented when questioned about an issue of performance, which could have serious consequences. I understand that, in circumstances in which there is some immediate danger to the resident, serious powers would be required, but it seems to me that in circumstances in which an advocate is investigating a complaint and wants to talk to a staff member, if the staff member wants to make sure their own legal rights are protected and wants to be represented during those conversations, they should be able to do that. They should not be in a position in which they can be told that under clause 55(1) they face a potential $6 000 fine if they do not answer the question immediately. That is my reading of how the legislation could play out, and it is consistent with what is being done to workers in a range of industries. If that is not what is intended, I would like to hear the parliamentary secretary say so.

Ms A.R. MITCHELL: I am just seeking clarity here. The member referred to clauses 54 and 55. I will respond to clause 54 first, rather than trying to intertwine them, if the member does not mind. I know that the two clauses can be linked, but I would prefer it if we consider the bill clause by clause. Clause 54(8) states —

> An advocate may require a person who works at a declared place to give reasonable assistance to the advocate for the purpose of the performance of the advocate's functions under this Act.

If the advocate needs to know more than what has been provided, procedurally the advocate would go through the senior person at the centre to have the matter dealt with correctly, rather than just having a chat in the corridor and leaving the employee thinking a fine might be slapped on them. I think the member will find that there is reasonable protection for the staff as well, but at the same time the provisions make sure that a person who is working at the centre does not hinder the advocate or withhold information that should be brought forward.

The ACTING SPEAKER (Ms J.M. Freeman): Parliamentary secretary, the Clerk has just advised me, in relation to the question you put to me about clauses 54 and 55, that the member is entitled to ask questions that are relevant to the clause that is before the house if clause 55 is related.

Mr D.J. KELLY: I am not talking about clause 54(8). My primary concerns revolve around clause 54(5), which states, in part —

> An advocate may ask a person who works at a declared place questions about any of these matters —

The clause then lists the matters that may be asked about. If, for example there has been a complaint that a resident has been mistreated by a staff member, it seems to me that the advocate has the right to go in and speak directly to the member of staff involved. The advocate might first of all notify a manager that they want to talk to the person with direct responsibility for the resident making the complaint. If the allegation is that a staff member gave the person a whack, the advocate may want to meet with that staff member and ask questions about what happened, and whether the incident actually took place. Once that employee is advised by the advocate that an issue is being dealt with that, if certain conclusions are reached, may have serious consequences for that staff member's ongoing employment, I would have thought that that employee, who is required to give a high level of care to residents, should have the right to say to the advocate, "Look, I understand what you are saying; you have raised quite a serious matter. I would like to seek advice and have representation in this interview before the matter proceeds." It seems to me that under clause 55 that employee, by telling the advocate that they will not answer the question in the time frame requested, could potentially be subject to a fine of up to $6 000. That circumstance could be easily remedied in the legislation, if that is what the government's intention is, but it seems to me on the face of it that staff in these centres could be put in a position, in this case by the advocate, in which they are asked to give an account of a serious incident, and if they refuse to answer because they want to get advice or representation, they could fall foul of clause 55(1). Is that how is it intended to work? If it is not intended to be used that way against employees, what protection is there in the legislation to make sure it is not used in that way?

Ms A.R. MITCHELL: I referred the member to clause 54(8) because it stated that the staff member should provide reasonable assistance. The member was looking for what the boundaries were, and asking whether the staff member could refuse. I said that the staff member needed to provide reasonable assistance. I will bring up a couple of things. Firstly, the operational processes and procedures for this sort of thing are being put into place at the moment. Obviously, a centre is not running, so those procedures and processes are being prepared so that they are ready to go. That involves the advocacy. To come to the serious situation, I am sure that if there were a serious situation, the advocate would want someone else there as well to make sure that the process is not left with any holes that might cause something to fall over. I think the member will find that the advocates are also very experienced, and know what is appropriate. I cannot comment on the procedures and processes at the moment, because I do not have them, but I can say that they will ensure that, wherever possible, things will be done appropriately. I know the member does not like that, because he does not trust people in the system to make sure that the outcome is fair for all parties concerned. If an issue needs to be brought out, it will be done in a fair and proper manner within which we can all operate.

Mr D.J. KELLY: It is not that I do not trust the people involved in the system. I have seen some rather appalling things happen to staff because of managers who are either not properly trained or are under a bit of pressure to use the powers that are available to them. One that always sticks in my mind is a person at an aged-care facility who was sacked because she took home some chicken that had passed its use-by date. It was unfit for human consumption, so she took it home to feed her family. She was sacked because she had stolen chicken from an aged-care facility. I have seen some pretty extraordinary things happen to employees in workplaces, so when legislation, on the face of it, potentially puts people in quite difficult circumstances, we have to look at the worst possible way in which it could be used, because if it is there, someone will eventually use it that way.

Having said that, I am heartened by the parliamentary secretary's answer. Clause 54(8) states —

> An advocate may require a person who works at a declared place to give reasonable assistance to the advocate for the purpose of the performance of the advocate's functions under this Act.

I am happy with that answer if the reference to "reasonable" is intended to apply to questions that are asked under subclause (5), which is where my concern lies, and if the parliamentary secretary is saying that the word "reasonable" in subclause (8) applies if an advocate asks a staff member to give an account of themselves in a complaint and the staff member does not refuse to answer but simply asks to seek advice or representation before answering. It would be better if the legislation were written more explicitly, but if the parliamentary secretary is saying that "reasonable" in subclause (8) is meant to apply to how things are dealt with under subclause (5), that gives me some comfort.

Ms A.R. MITCHELL: Member, I think that it is. Clauses 55(3) and 55(4) also refer to reasonable excuse and those sorts of things, so they complement each other and they are there to ensure that.

Clause put and passed.

Clause 55: Offences —

Dr A.D. BUTI: Clause 55(5) will remove the right citizens normally have against self-incrimination. In many respects, this is an incredibly radical move and it seems to have been put forward without any great justification. Even the Taxi Drivers Licensing Bill 2013, which contained a qualified removal of the right to self-incrimination, stated that any answers could not be used in criminal proceedings, although, obviously, it will allow investigators to find out that information from another source. However, the Declared Places (Mentally Impaired Accused) Bill 2013 states —

> An individual is not excused from complying with subsection (1) or (3) on the ground that the answer to a question or the provision of assistance might tend to incriminate the individual or expose the individual to a criminal penalty …

That is quite stark. One of the golden rules of our legal system is the right to remain silent to protect oneself from self-incrimination. I am all for prosecuting anyone, whoever they are—whether an employee or a manager—if they have done wrong, especially to vulnerable people. But, of course, one has to be careful how far one goes. We have to be careful if we are to remove from workers, employees and management the right to protect oneself from self-incrimination, because where will the slippery slope end? The government is in a difficult situation because it is correct that everything should be done to ensure that the residents, who are vulnerable, are protected, and we need to make sure that people are brought to book for anything they do that affects the health and wellbeing or future transition into society of those vulnerable people. We need to think further about stating that a person cannot refuse to answer when questioned if it may incriminate them, even in a criminal situation. I am not sure whether we can still protect individuals by removing the right to remain silent. That is worrying at one level. Although I commend the government for seeking to protect residents, I worry about removing that well-established legal principle. There are precedents for doing that and I know that principle has been removed from other legislation, such as in the Taxi Drivers Licensing Bill, but I think that this clause goes further than that. I am concerned about the government removing the right to remain silent to ensure that one does not incriminate oneself.

Ms A.R. MITCHELL: The advocate is not a legal investigator, so any investigation that the advocate carries out does not become a criminal procedure and, therefore, subclause (6) follows on. The important thing to remember is that the advocate will sort out issues and not get into the criminality component. If the manager of a centre wanted to take an issue further, they would need to go to the police, in which case the right to silence would be available for those involved, as the member refers.

Dr A.D. BUTI: I take the point that the advocate is not the police. However, subclause (6) states that whatever one has said in regard to subclauses (1) and (3) is admissible in evidence in any criminal proceeding. In many respects, it is irrelevant whether it is the police or another person who asks the questions, because that evidence can be admissible. Granted, this legislation provides some protection against perjury, which I do not think the Taxi Drivers Licensing Bill provided. The Declared Places (Mentally Impaired Accused) Bill 2013 states that the information is not admissible in perjury proceedings, which is some safeguard. However, the fact is that an advocate could be called as a witness to appear in a criminal proceeding and asked to explain what was said in an interview between the advocate and the worker. As I said, I know that the parliamentary secretary is in a bind and I understand what the government is trying to do to protect the residents, but I am concerned by this easy removal of the long-held right to remain silent so that one does not incriminate oneself.

Ms A.R. MITCHELL: The member is right. The advocate could be called to court, but they cannot be asked to give those comments as evidence in court.

Dr A.D. BUTI: I know about the rule of hearsay, but why could they not be asked to give evidence about an interview that has taken place? I am not sure what would prevent that from happening, because the clause states that it is admissible in evidence in any criminal proceedings, apart from perjury.

Ms A.R. MITCHELL: I refer the member to the first line of subclause (6), which states that the provisions in "neither" (a) nor (b) is admissible in evidence.

Dr A.D. BUTI: I see—neither is admissible in evidence. That is fair enough. I stand corrected and my concerns are alleviated, to a degree, but we should always be careful about removing the right to remain silent. Of course, although that evidence might not be used in a criminal situation, it could be used in an industrial tribunal to provide penalties that could affect the livelihood of a resident. In the end, that is the call the government has made.

Clause put and passed.

Clause 56 put and passed.

Clause 57: Provision of information about residents: Board and CEO —

Mr D.J. KELLY: A number of provisions in the Declared Places (Mentally Impaired Accused) Bill refer to who might have access to information on residents and to confidentiality around residents. Obviously, in the

operation of these facilities, people in the community have an interest in knowing the offences that residents have been charged with. In the community debate to date the government has been willing to provide certain information to the community such as—do not hold me to the number—currently in the system there are eight, nine or 10 people whom the government considers eligible to be placed in a declared place. The government has gone so far as to identify the offences those people have committed without, obviously, naming them. The community has been advised, for example, that eight people are eligible to go into a declared place and the offences have been listed. Does part 11, which deals with residents' information, permit or prohibit that sort of information being given to community members? If the government uses its numbers to push through this legislation in the way it has said it intends to, the community will want to know the day the facility in Lockridge will kick off, how many residents are in the facility and what those people have been charged with. My question is: under part 11, whether it is in clause 57 or elsewhere, will the community be provided with that information or will this legislation prohibit that information being provided?

Ms A.R. MITCHELL: Firstly, on clause 57, information that is submitted to a board is normally treated confidentially and I cannot imagine that this board would operate any differently. The external communication of information about residents is not part of the Mentally Impaired Accused Review Board's responsibility. That currently comes through the MIA board, which produces an annual report that describes offences of all people with an intellectual disability or the mentally impaired accused but it does not necessarily give names.

Mr D.J. KELLY: I understand what the parliamentary secretary is saying; information is in the Mentally Impaired Accused Review Board's annual report. It is my recollection that the annual report gives global numbers of people within the care of the MIA board. It differentiates between people who have a mental illness and those who have an intellectual disability or cognitive impairment and it identifies the offences of those two different groups. That gives the community some understanding of how the board operates, but in the future, there will be at least two categories of people with intellectual disabilities or cognitive impairment—people held in facilities run by the Department of Corrective Services and people held in facilities run by the Disability Services Commission. To date, in an effort to give the community greater understanding of how the declared place will operate, representatives of the government have given information at community meetings about how many people will be in a declared place. The government has said that a maximum of 10 people will be housed in a facility. The government has also given the community a snapshot of how many people in the system it considers are eligible to go into a declared place and what offences they have been charged with. In the government's mind, that is a way of giving people some confidence that the centres will operate in the community safely. I want clarity. We obviously do not want names of people or personal details, but will the legislation either allow or prohibit the government, the board or anyone else from providing the sort of information that has come to the community so far; namely, how many residents will be in the facility at Lockridge and what offences they have been charged with? There are two things that I can see the community has an interest in knowing; how many residents there are and what are their offences. Under this legislation, will that be provided or prohibited?

Ms A.R. MITCHELL: This bill is silent on that; it is not in the bill. That will come through another avenue. I understand that the MIA board does not differentiate between authorised places and who in them have committed what offences and things like that. I cannot comment on what the MIA board might do but it is not included in this bill.

Mr D.J. KELLY: When the parliamentary secretary says this bill is silent, does that mean the passage of this legislation will not prohibit that information being provided by government, for example, in the MIA annual report or elsewhere?

Ms A.R. MITCHELL: I will confirm again that no personal information is provided by the MIA board or through this legislation about any person.

Mr D.J. KELLY: I thought I was pretty clear. We are not talking about personal information. I have read the MIA board's annual report and it gives numbers and lists offences. We could say that describing offences committed by a group of people could be called personal information. I am not asking for personal information; I am just inquiring about information that is already given in the MIA annual report. It has already been given to the community by various government representatives and I dare say even some of the public servants. If it is the case that this legislation does not prohibit that, does the government intend to continue to provide that information once the centres are open?

Ms A.R. MITCHELL: The Mentally Impaired Accused Review Board reports on all people, whether they are in prison, detention, a declared place, an authorised hospital or in the community. What we see in the Mentally Impaired Accused Review Board report will be the same. There will not be any differentiation with a declared place becoming part of that responsibility as well.

Mr D.J. KELLY: As I have already said, to date the community has been given quite specific information about the numbers of people likely to be in the centres and the offences committed. The parliamentary secretary has said that some information will come through the MIA board annual report. Is it the policy of the government to continue, whether through the MIA annual report or elsewhere, to provide information to the community about the numbers of residents in those centres and what offences they have been charged with?

Clause put and passed.

Clause 58 put and passed.

Clause 59: Confidentiality of information about residents —

Dr A.D. BUTI: Clause 59 provides for confidentiality of information about residents, which is incredibly important. Clause 59(1) reads —

> A person must not, directly or indirectly, record, use or disclose information that relates to a resident and that was obtained by the person when performing a function under this Act or in the course of duty in the provision of declared place services.
>
> Penalty: a fine of $2 500.

Does that imply that for a person to be in breach of this provision and therefore liable to a fine of $2 500, there has to be an intention to disclose? For instance, if one had a document and placed it on a desk and someone else came past and picked it up, and it was a negligent act but one had no intention of disclosing that information, would one still be liable under that proposed section? At the moment I think it is unclear as to whether one would be or not.

Ms A.R. MITCHELL: Once again, that fine would be the maximum; it would have to be determined whether the act was intentional or unintentional, and it would be dealt with accordingly.

Dr A.D. BUTI: It is not really in relation to the level of the fine; it is in relation to whether one would be liable to a fine at all if one had just been basically negligent.

Ms A.R. MITCHELL: I think the same would apply in that determination.

Clause put and passed.

Clause 60: Reports about declared places —

Mr D.J. KELLY: Clause 60 reads, in part —

> The CEO must include in the Commission's annual report required under the *Financial Management Act 2006* Part 5 a report on these matters for the relevant financial year in relation to each declared place —
>
> (a) the operations of the place;
>
> (b) the number of people admitted to the place as residents;
>
> (c) the number of people who ceased to be residents of the place;
>
> (d) any other matter prescribed by regulation.

It seems to me that this would be an ideal place to include in the report the offences that people have been charged with. To return to the MIA board annual report, it lists offences that people have been charged with. What I am suggesting to the government is not unusual at all. The community has an interest in the types of persons who are placed in these declared places, and that information has been provided to date, but it would be a great shame if the information were to be turned off once the centres began operating and a veil of secrecy were to be thrown over the operation of declared places so that the community would have no idea about the nature of the offences committed by the residents. If that veil of secrecy does come about, I would suggest to the government that it will only increase the likelihood that the community will feel uncomfortable about the operation of these centres. There is a strong likelihood that quite a few of the people who go into these centres will have been charged with quite minor offences, and the government is telling us that people who pose a great risk to the community will not be there. That, presumably, will be reflected in the types of offences that people who end up in declared places are charged with. I ask the parliamentary secretary whether it is the government's view that the regulations referred to in clause 60 will disclose the offences that people placed in declared places have committed, in the same way that the MIA board report, for example, identifies the nature of the offences that it deals with; and, if not, why not?

Ms A.R. MITCHELL: The member is correct that further information may become available through regulations that are yet to be prepared and will be after the passing of the legislation. I again reaffirm that there will not be anything in that information to identify people. I also restate that these people have not been convicted of anything, so we need to be careful about the language we use when we talk about this. I would also

say that the charge of the offence does not always necessarily mean that the degree of risk is determined by that charge, because it does not necessarily correlate.

Mr D.J. KELLY: In one way I am encouraged that the parliamentary secretary is saying that the regulations might be an appropriate place to include the sort of information I was referring to. I do not know why she keeps going back to making statements about personal information; we are not seeking that. Is it the case that the government has decided that it would include in the regulations the types of offences that people have committed, or is that still an open question for the government? If it is still an open question for the government, I suppose that is a good thing; but has the government, in fact, made a decision to disclose this information? Where is the government at in relation to the issue of the regulations?

Ms A.R. MITCHELL: I did say that the regulations have not been prepared yet, and they will not be prepared until the legislation is passed, so the answer to the question is no, it has not been decided. I do not know how much clearer I can be.

Clause put and passed.

Clauses 61 to 65 put and passed.

Clause 66: Section 24 amended —

Dr A.D. BUTI: Clause 66 amends section 24 of the Criminal Law (Mentally Impaired Accused) Act 1996. I remember we went over this for quite a long time, and then the Leader of the House gagged the debate. I will not go back to the issue that I was trying to get an answer about because I do not want to suffer the same consequences. My question is about proposed subsection (5A), which states —

> (b) is satisfied that the accused has reached 16 years of age;

At this stage, how many people in the system whom we know of are between 16 and 18 years of age?

Ms A.R. MITCHELL: I understand we have no accused with intellectual disability between the ages of 16 and 18 years.

Dr A.D. BUTI: Yes, of course. I will not be tempted back into my discussion; however, I did state that if such an accused had a mental illness, that could be a reason why they are also placed in the declared places, even though the main disability has to be cognitive. But we will leave that as it may be.

At some stage we will probably have someone between 16 and 18 years of age. The government has taken notice of the submission by the Commissioner for Children and Young People, because part of the bill has been changed to comply with some of her wishes—this is the former commissioner. Will the government give the commissioner some role to play with declared places if we find that there is not an influx of, but a trend for, people between 16 and 18 to be housed in the declared places?

Ms A.R. MITCHELL: The Commissioner for Children and Young People would be incorporated in the discussions, as would organisations such as the Department for Child Protection and Family Support and others, because it is important that we have that information sharing and discussion going on fairly constantly.

Dr A.D. BUTI: On a point of clarification, proposed subsection (5B) states —

> The Board may determine that a mentally impaired accused be detained in a DSC declared place only if the member referred to in section 42(1)(bb) is present at the meeting ...

We are now talking about the Criminal Law (Mentally Impaired Accused) Act 1996. I have that act in front of me, and unless I have got an earlier act, I cannot find a section 42(1)(bb). I must have an earlier version, but it is the one that the Parliament has given me—unless I am reading it wrongly and it is referring to another act.

Ms A.R. MITCHELL: It is my understanding that paragraph (bb) is a new paragraph that will come into the legislation after proposed section 42(1)(ba).

Dr A.D. Buti: But where is that?

Ms A.R. MITCHELL: If the member goes to next page of our legislation —

Dr A.D. Buti: Yes.

Ms A.R. MITCHELL: Is that okay?

Dr A.D. Buti: Yes.

Mr D.J. KELLY: Proposed new subsection (5C) states —

> Despite subsection (1), even if the Board determines that a mentally impaired accused should be detained in a DSC declared place, the accused is not to be detained in a DSC declared place without the consent of the Minister to whom the *Disability Services Act 1993* is for the time being committed.

I suppose I am interested in why the government has made a decision to, in effect, give the minister the final decision as to who is placed in a declared place. I am not saying I do not think it is a good idea, but I am interested to hear why the government has made that decision and whether there will be any—dare I say it—criteria or guidance that the government would see the minister applying or would it simply be an issue of ministerial discretion?

Ms A.R. MITCHELL: I suppose the ways in which someone would, through the mentally impaired accused board, go to a declared place would follow a set process. By allowing the minister to also have a say in that matter probably gives a different perspective to whether a person should be considered for a declared place. That might come under the issues that the member raised on public interest or further community protection. It is a plus.

Mr D.J. KELLY: Again, for the purpose of my education, I ask this: people who find themselves in this predicament can be held in a prison, put into a declared place or released. If the board decides that an accused will be released, does the minister have the power to override that decision, or will it be only in a decision to require someone to be detained in a declared place that the minister will have that power?

Ms A.R. MITCHELL: The minister will have authorisation only for a declared place.

Clause put and passed.

Clause 67: Section 42 amended —

Dr A.D. BUTI: This clause refers to membership of the board. I note that we have a deputy chairperson, which makes sense, obviously. Under the Criminal Law (Mentally Impaired Accused) Act, the chairperson is the chairperson of the Prisoners Review Board. Is that person—I just cannot remember—a lawyer? If he or she is a lawyer, does the deputy chairperson have to have any particular qualifications, or is it just whoever the commission, the government or the minister considers appropriate?

Ms A.R. MITCHELL: The chairperson of the MIA board is a judge. The deputy chair is the person with disability experience. A number of people with expertise are on the board.

Clause put and passed.

Clause 68: Section 50A inserted —

Dr A.D. BUTI: Clause 68 deals with the insertion of a new section, "Protection from personal liability". Proposed section 50A(2) states —

> An action in tort does not lie against a person for anything that the person has done, in good faith —

That provision is understandable and pretty standard. However, even though they acted in good faith, they may have acted in a manner that was ultra vires their authority or far removed from what would reasonably be expected of that person. They may have thought they were acting with good intention, but they acted in a way that was far beyond what one would think or expect of them or was ultra vires their power. Would they then lose that protection?

Sitting suspended from 6.00 to 7.00 pm

Ms A.R. MITCHELL: The member for Armadale asked me a question about personal liability. Clause 68 refers to the Criminal Law (Mentally Impaired Accused) Act. This protection from personal liability would apply to the Mentally Impaired Accused Review Board. The issue of personal liability is probably not as significant as the member thought it might be, although, in other aspects of the bill, it is important that a person's liability is protected. The member was concerned that a person might do something absolutely outrageous. Their liability is protected, but they may be subject to some disability measures. They would not find themselves being sued or anything like that. The government may have to deal with some of those things. The person is protected, but there may be some disciplinary consequences for behaviour that may be outside their duties.

Dr A.D. BUTI: I have a bit of a problem with that. If someone is acting outrageously or acting in a way that is far removed from what is reasonably expected, but it cannot be proved that it was not done in good faith, I am not sure why they would still be protected from personal liability. Surely, if they are protected from personal liability in that scenario, where is the deterrent not to engage in such behaviour?

Ms A.R. MITCHELL: The wording is "in good faith". We may determine that it was a little outrageous, but if they did it in good faith, that is okay.

Dr A.D. BUTI: I know it may be rare, but a person may act in good faith but in a way that is far removed from what a reasonable person may expect, or they may act ultra vires their power. The parliamentary secretary has been quite strict in providing protection to the residents—that is, by providing the self-incrimination defence—but she will still allow a person to be protected from personal liability even if they act in an outrageous manner but do not have a malfeasant state of mind.

Ms A.R. MITCHELL: The issue is around that person being sued, which is when the protection comes in. It does not mean that they will not be subject to some disciplinary action. This clause refers to the MIA board.

Mr D.J. KELLY: The division we are considering contains consequential amendments to the Criminal Law (Mentally Impaired Accused) Act 1996. It has been said that this consequential amendment is required because of the establishment of a declared place. I do not quite understand why proposed new section 50A, "Protection from personal liability", is a necessary consequence of the board having the option of placing people who come before it in a declared place. Currently, the board has the option of releasing people into the community, placing them in a prison or, if they are mentally ill, placing them in a hospital. Currently, it performs that function without this protection. All we are doing under the declared places bill is giving the board another option—that is, to put them into a declared place. I suppose I am seeking an explanation of why the government feels the need to put in this protection for the MIA board against basically being sued for the way it does its work. If that was not in the legislation before, why is it necessary just because declared places are an option when people could have already been released into the community? What is the connection, or is there none?

Ms A.R. MITCHELL: Clause 61 relates to protection from personal liability. Therefore, the consequential amendment is made to the MIA act. It is something that the MIA board wanted. It is a comparable provision that needed to have a consequential flow and, as I said, it is something that the MIA board sought to have included.

Mr D.J. KELLY: I can see that at clause 61, we provide this protection for people who are running declared places. I can see the wisdom of that. Is the parliamentary secretary saying that the decision to extend this protection to the MIA board was simply a request of the MIA board for this protection? A declared place could have been established and persons who operate declared places could have been given this protection without extending the protection to the MIA board. That is the way I see it. Is it just the case that the MIA board said that if people operate declared places, they should have protection from being sued, and it wanted that protection as well?

Ms A.R. MITCHELL: As I said, it is a comparable provision. The MIA board requested it, but it is also for the board and its staff. If it is in the bill, it asked for a comparable provision in the MIA act.

Clause put and passed.

Clauses 69 and 70 put and passed.

Clause 71: Section 12 amended —

Ms A.R. MITCHELL — by leave: I move —

> Page 54, lines 18 to 21 — To delete the lines.
>
> Page 54, lines 28 to 30 — To delete the lines.
>
> Page 55, line 3 — To delete the line and insert —
>
> functions; and

These are only structural amendments to ensure that there is consistency in the wording of the bill. For example, the words should be arranged in sentences, not in a list. It is as simple as that. It is to ensure consistency and to keep the legislation tidy and ensure that it is all as it should be.

Amendments put and passed.

Clause, as amended, put and passed.

Clause 72: Section 21 amended —

Dr A.D. BUTI: Clause 72(1) states —

> In section 21(1) delete "For parliamentary purposes or for the proper conduct of the Minister's business, the" and insert:
>
> The

I assume that this does not put any limits on the minister's entitlement to information in the possession of the commission, although the minister is not entitled to certain information that discloses the identity of the person. Has that been put in place to give the minister greater governance and control over and the ability to obtain information? That may be laudable, but I just want to know why that is the case. I assume that if that is the case,

it might be quite good because it would allow greater freedom of information requests. I notice that some government ministers have tried to prevent freedom of information applications on the basis that the information had been prepared for parliamentary purposes. Can the parliamentary secretary give the rationale for removing that limitation, which I think may be a good thing?

Ms A.R. MITCHELL: This simply modernises the language to bring it up to date, because the functions of the minister are implied through the legislation. It modernises the language to improve the standard of the bill.

Clause put and passed.

Clauses 73 to 76 put and passed.

Clause 77: Section 38 amended —

Dr A.D. BUTI: This clause will insert proposed new subsection (2A) into the Disability Services Act after section 38(1). It states —

> The Director may reject a complaint if, in the Director's opinion, the complainant has not taken reasonable steps to resolve the matter with the respondent.

This may be also to modernise the language of the legislation; I am not sure. This proposed new subsection possibly puts an unfair onus on the complainant to resolve the matter with the respondent. The complainant may have a grievance with the respondent that does not really allow them to resolve the matter or they may not wish to resolve the matter, but the director may think that they should sit down with the respondent to try to resolve the matter. I wonder whether the director will be given too much discretion to knock out a complaint by requiring the complainant to resolve the matter with the respondent. If a complaint is made, surely it should be acted upon or the director should decide whether it is a vexatious or genuine complaint. I know there are other provisions that give the director the ability to knock out a complaint. Should we leave it at that and not require the complainant to resolve the matter on their own? This provision is asking the complainant to resolve the matter with the respondent on their own. I would have thought that once a complaint is made and the director believes that it is bona fide, the complaint should take its normal course.

Ms A.R. MITCHELL: I have a couple of points, if I may. The director referred to in this clause is the director of the Health and Disability Services Complaints Office, as the member is probably well aware, but I want to put it on the record. The legislation states that at all times the complainant must take reasonable steps. If it were felt that it would be unreasonable for the complainant to take reasonable steps and there was an absolute breakdown, it would be accepted as making some effort. Of course, the complainant can then go to the Disability Services Commission, so it is not as though they are left completely without recourse. Once again, it is the reasonableness of the situation. The complainant can also be referred to a consumer liaison officer when the official line does not seem to be working very well. We always try to resolve an issue at the first level, if at all possible, rather than escalating it straightaway.

Dr A.D. BUTI: I agree that we should always seek to resolve matters and there should be encouragement for people to do that. Section 38(1) of the Disability Services Act states —

> The Director must reject a complaint that in the Director's opinion —
>
> (a) is vexatious, trivial or without substance; or

The director has that power in that legislation. Once the director has determined that it is a bona fide complaint, the complainant and respondent should be encouraged to resolve the issue. However, if the complainant and respondent do not want to do that but in the director's opinion it is reasonable that they do that, I do not think that should be a reason for the complaint to be knocked out. I think that is too much of an onus on the complainant that allows some bona fide complaints to not proceed. As the parliamentary secretary said, they can appeal or use other avenues, but that is a further effort that they have to undergo. Why can the matter not just proceed? They should be encouraged to resolve the matter, but there should not be grounds for dismissing the complaint.

Ms A.R. MITCHELL: We certainly do not want complaints dismissed out of hand, and this is the preferred way to operate. But, as I said to the member before, residents have other avenues to take a complaint forward so that it is heard in an environment in which they believe they get the best hearing.

Clause put and passed.

Clauses 78 to 86 put and passed.

Clause 87: *Parliamentary Commissioner Act 1971* amended —

Ms A.R. MITCHELL: I move —

> Page 66, lines 8 to 12 — To delete the lines and substitute —

(3) In section 17A(4) after "*1999*," insert:

the CEO as defined in the *Declared Places (Mentally Impaired Accused) Act 2013* section 3,

I move this amendment because recently the Legislative Assembly amended the Mental Health Legislation Amendment Bill and a clause in that legislation required a change to the amendment suggested to the Declared Places (Mentally Impaired Accused) Bill; hence we are moving this amendment now.

Amendment put and passed.

Clause, as amended, put and passed.

New clause 87A —

Mr D.J. KELLY: I believe the parliamentary secretary has a copy of my proposed amendment. I move —

Page 66, after line 17 — To insert —

87A. *Planning and Development Act 2005* amended

(1) This section amends the *Planning and Development Act 2005*.

(2) In section 4 insert in alphabetical order:

declared place has the meaning given in the *Criminal Law (Mentally Impaired Accused) Act 1996* Part 5;

(3) In section 14 insert:

(da) to regard public safety as the paramount consideration in determining the location of a declared place under this Act; and

(db) to ensure, when determining the location of a declared place under this Act, that the location:

(a) is not in close proximity to:

(i) schools;

(ii) kindergartens; or

(iii) child care centres; and

(b) is a reasonable distance from neighbouring residential properties; and

(dc) to ensure that a place cannot be designated as a declared place unless it has been granted planning approval by the relevant local government under its applicable planning laws; and

This side of the house moved a similar amendment to an earlier clause of the bill. I was not here that day, but I have read *Hansard*. The parliamentary secretary gave that amendment scant regard. One complaint raised by the parliamentary secretary was that, in her opinion, it was not the correct place in the bill to move such an amendment. In her words, this amendment would more properly be dealt with under either the Public Works Act 1902 or the Planning and Development Act 2005. I do not agree that the original amendment was inappropriately placed. I have taken advice and come back with an amendment to the Planning and Development Act 2005. Hopefully, the parliamentary secretary will give this amendment greater regard than she did originally and get past the assertion that it is simply the wrong place in the bill to deal with it. Hopefully, she will respond to the actual issues that are raised in the proposed amendment.

One of the tragedies about the way this issue has been dealt with is that we on this side of the house support declared places being established so that people who have been charged with an offence but who, because they have an intellectual impairment rendering them incapable of being dealt with by the court system, the Mentally Impaired Accused Review Board —

Mr D.A. TEMPLEMAN: I would like to hear further from the member for Bassendean.

Mr D.J. KELLY: We support giving the Mentally Impaired Accused Review Board the option to detain or care for—whichever way one wants to put it—a person in a declared place. The Labor Party supports that in principle. Unfortunately, the government has betrayed the trust of the community that I represent in the way that it has gone about this process. Rather than there being a maximum amount of community buy-in, the chance of the community accepting the location for the centres was virtually nil. I say that for a number of reasons. The government said that it would do a number of things but simply did not do them. The Minister for Mental Health said that there would be consultation with the local community about where these centres would be located. The minister in fact deliberately withheld the locations of the first two centres until immediately after the state

election. Without any public consultation, the Minister for Mental Health announced that there would be one very close to Lockridge Primary School and one very close to Lockridge Senior High School. When the community is not consulted, obviously people are suspicious and they do not trust the government's motives.

I do not know what the Minister for Mental Health said when she tried to justify the process. It is patently clear that the minister and her department made a decision on where these centres would be located. She deliberately withheld that information and simply announced them when it suited her. My proposed amendment tries to put into the legislation criteria around where the centres will be located to ensure that this sort of thing does not happen again. The first part of the proposed amendment requires that the relevant government authority making a decision on where the locations will be should "regard public safety as the paramount consideration in determining the location of a declared place under this act". The principal bill uses those words. It states that public safety will be paramount in the way centres are operated, but it does not state that public safety will be "the" paramount consideration when a decision is made about where the centres will be located. Obviously, one of the key issues about public safety is where the centres are located. My proposed amendment will simply extend what is in the bill about the operation of a centre to the government's decision about where the centres will principally be located.

Proposed paragraph (db) does nothing more than put into the legislation the criteria that the government says it used in determining the location of the centres. I have a letter from the Minister for Mental Health dated 14 June 2013 in which she identifies eight criteria that she said she used. My proposed amendment simply pulls out the criteria which the community considers to be most relevant and which plainly the government did not abide by when it made this decision. The first criterion is that the centres not be in close proximity to schools, kindergartens or childcare centres. We support that criterion because, in our view, it is patently unreasonable for any community to accept a medium-security custodial facility that is close to schools, kindergartens or childcare centres.

Dr A.D. BUTI: I would like to hear more from the member for Bassendean.

Mr D.J. KELLY: In determining the location of centres to be placed in the electorate of Bassendean, it was decided to locate one on the border on land currently used by Lockridge Senior High School. The second centre is about 450 metres from Lockridge Primary School.

Good Shepherd Catholic School and Eden Hill Primary School are less than a kilometre away. In determining the location of the centres, the minister clearly did not apply her own criteria. When the opposition raised this issue in the chamber previously, we debated the meaning of "close proximity". In probably his most sensible contribution in this place while I have been here, the member for Swan Hills volunteered that he thought "not in close proximity" meant "not in walking distance". Clearly, the locations proposed for the centres in my electorate are within walking distance to schools. If the government votes down this amendment, in particular the reference to centres not being in close proximity to schools, kindergartens or childcare centres, the government, and this minister in particular, will show how dishonest it has been in the way it has handled this decision. No-one believes that the government has complied with the criteria it put forward for schools in the way it has located the centres in my electorate.

The ACTING SPEAKER (Mr I.M. Britza): Member for Bassendean, I want to clarify that you cannot call a minister dishonest; you can say "government" but not a minister. I am just clarifying that for you.

Mr D.J. KELLY: I learn things, and I am quite happy to call the government dishonest on this issue rather than the minister.

Mr J.H.D. Day: Equally inaccurate.

Mr D.J. KELLY: I am surprised that the Minister for Planning would pop his head up on this debate; he has been a co-conspirator from day one in this process. In order to locate the centres where they are proposed to be located, the government sought a planning control order under legislation that the Minister for Planning administers basically to sideline local government and the local community. All the preparation for that planning control order was going on long before the public announcement of the location of the centres. I am glad that the Minister for Planning is here with us, but I am surprised he would raise his head, because from day one the community has considered him to be a co-conspirator in what has occurred.

I get back to the amendment, which proposes that declared places be a reasonable distance from neighbouring residential properties. Again, that comes directly out of the minister's letter that I referred to earlier. It was supposed to be one of the criteria that the government followed when it located these centres. The government clearly did not do that, because both centres are across the road from residential areas. If the government votes down this amendment because it does not support this limitation on where centres are to be located; it will simply show how dishonest the government has been in the way it has dealt with this issue. The final subparagraph of my amendment proposes that places not be designated as declared places unless the government

has been granted planning approval by the relevant local government's applicable planning laws. That part of the amendment comes straight out of the minister's letter to me setting out the criteria for locating these centres. My amendment will try to hold the government accountable to the criteria it has said it will apply when locating these declared places and will put those criteria into legislation.

Ms L.L. BAKER: I am very interested in listening further to the member for Bassendean.

Mr D.J. KELLY: The opposition has attempted to hold the government to account by proposing an amendment that includes the criteria that the government has said it applies in determining the location of centres, but which the community says it has completely ignored. The opposition has done this for two reasons. One reason is that the community is still intent on opposing what the government is doing in Lockridge. We know that the centre that was proposed to be located near Lockridge Senior High School has been cancelled, but the government is still proceeding with the centre near Lockridge Primary School, so the community is still keen to continue to raise its voice against that centre. The second reason is so that this does not happen again. In future, the government may decide to have a second declared place, and it is the view on this side of the chamber and certainly the view of my community that it does not want the government to follow a policy process such as this again.

An immense amount of goodwill has been exhibited on this side of the chamber and in the community for providing fairness and just outcomes for people with intellectual disabilities who come before the criminal justice system. We do not believe it is appropriate that people in these circumstances end up in jail effectively because there is nowhere else to put them. The opposition supports declared places and earlier moved a private member's bill on this. The effect of that bill would have been that people would not be detained for longer than the sentence they would have received had they been found guilty of the offence. For some reason, the government saw fit to vote that down. However, that bill demonstrated the good faith in which the opposition approached this issue. We do not believe the government has shown similar good faith on this issue. The community feels as though the government deliberately withheld its decision on where it planned to locate the centres until after the 2013 election and it had got over what it thought prior to the election could be a politically difficult issue. Once the government got past the election, it dealt with this issue in such a way that was bound to cause maximum disquiet in the community. Right from the start when the opposition raised the issue in this place, there were accusations by the government that if we did not support the bill, it would indicate that we did not care for people with disabilities. The Premier said that these facilities would be for people who had committed only minor offences such as stealing an ice cream. We now know that is simply not the truth. I ask the parliamentary secretary to give this amendment serious consideration. If this amendment were passed, it would ensure that some of the worst aspects of this process would not be repeated. I do not think anyone in the community thinks it is a good idea to have these facilities close to residences and certainly not close to schools, kindergartens or childcare centres. I urge the parliamentary secretary to support the amendment.

Ms A.R. MITCHELL: Member, the government received notification of this amendment in the middle of the afternoon and did give it consideration, but as it is very similar to the amendment that the member presented on clause 4, which we also gave consideration to, I will repeat much of what I said at that time. The government cannot support the amendment for a number of reasons. Firstly, the purpose of this bill is to provide for the operations of the centre. We have said all along that the location of the centres is not part of this legislation. The member proposes to insert this clause in division 3, which relates to consequential amendments, but the government has said all along that this bill bears no relationship to the Western Australian Planning and Development Act, so it cannot be a consequential amendment to that act, which is where the opposition proposed this amendment would go. I am trying to pick up some other points that the member referred to. This bill cannot dictate the functions of the Western Australian Planning Commission. The member referred to section 14 of the Planning and Development Act, which refers to the functions of the Planning Commission, and it does not make any sense why the member would refer to that act. This amendment is not consequential to the act, and it does not apply. We cannot make it apply to the Western Australian Planning Commission or to the Planning and Development Act.

I turn to new clause 87A(3)(dc). A place is declared by the Governor of Western Australia, not the minister, and it is done so through an order and on the decision of Executive Council. This bill cannot amend that process. The place will be declared under the provisions of the Criminal Law (Mentally Impaired Accused) Act. The Western Australian Planning Commission makes decisions about public works as a consequence of a determination that a development be a public work. The new clause has a requirement for local government planning approval; however, once a development is a public work, it does not need local government planning approval.

A number of provisions in the new clause cannot be complied with and are not appropriate for the legislation; therefore, the government will not support the amendment.

Mr D.J. KELLY: I am disappointed with the parliamentary secretary's response. Again, she opposed the amendment on procedural grounds rather than dealing with its substance. There was no reason that the

amendment could not have been dealt with in its original place in the bill; indeed, we were advised that it was a perfectly appropriate place to deal with these issues. We took the lead that the parliamentary secretary gave us during her earlier speech that this type of amendment would best be dealt with under either the Public Works Act or the Planning and Development Act. We followed her lead. The fact that the parliamentary secretary stood up and did not address the substance of the amendment shows that, in dealing with this matter, the government has behaved in an absolutely deplorable way. We have formed the view that the government deliberately withheld the location of the centre from the community that I represent to suit its political purposes. We have also formed the view that the government threw out the criteria that it said would apply. The location chosen clearly does not fit the criteria. Rather than defend the government's handling of this matter on any of those issues, the parliamentary secretary has simply said that in the government's view, the amendment is inappropriate because of where it was placed in the legislative framework. The parliamentary secretary has not defended the government at all. I suppose in the absence of a defence, I will take her silence as acquiescence that the conclusions that we have drawn about the way she has handled the issue are absolutely true. I am not surprised. The parliamentary secretary was asked to come into this place to defend the indefensible. Anyone who looks at this issue can see that the government has handled it very badly. It has been dealt with on a political level rather than a good public policy level. In all likelihood, the government's handling of the bill has made it that much more difficult to secure this or a similar type of facility, should one be required elsewhere. The government has made it more difficult for whatever community is asked to host the centre and more difficult for the community to accept it. Again, I am disappointed by the parliamentary secretary's response, but her silence on the substance of these issues speaks volumes.

Division

New clause put and a division taken, the Acting Speaker (Mr I.M. Britza) casting his vote with the noes, with the following result —

Ayes (15)

Ms L.L. Baker	Mr D.J. Kelly	Mr J.R. Quigley	Mr P.C. Tinley
Dr A.D. Buti	Mr F.M. Logan	Ms M.M. Quirk	Mr P.B. Watson
Mr R.H. Cook	Mr M. McGowan	Ms R. Saffioti	Mr D.A. Templeman *(Teller)*
Mr W.J. Johnston	Mr M.P. Murray	Mr C.J. Tallentire	

Noes (27)

Mr F.A. Alban	Mr J.H.D. Day	Mr S.K. L'Estrange	Mr J. Norberger
Mr C.J. Barnett	Ms E. Evangel	Mr W.R. Marmion	Mr D.T. Redman
Mr I.M. Britza	Mr J.M. Francis	Mr P.T. Miles	Mr A.J. Simpson
Mr G.M. Castrilli	Mrs G.J. Godfrey	Ms A.R. Mitchell	Mr M.H. Taylor
Mr V.A. Catania	Mr C.D. Hatton	Mr N.W. Morton	Mr T.K. Waldron
Mr M.J. Cowper	Mr A.P. Jacob	Dr M.D. Nahan	Mr A. Krsticevic *(Teller)*
Ms M.J. Davies	Dr G.G. Jacobs	Mr D.C. Nalder	

Pairs

Ms J. Farrer	Mrs L.M. Harvey
Ms S.F. McGurk	Dr K.D. Hames
Ms J.M. Freeman	Ms W.M. Duncan
Mr B.S. Wyatt	Mr R.F. Johnson
Mr P. Papalia	Mr R.S. Love
Mrs M.H. Roberts	Mr I.C. Blayney

New clause thus negatived.

Clauses 88 and 89 put and passed.

Title put and passed.