

DECLARED PLACES (MENTALLY IMPAIRED ACCUSED) BILL 2013

Consideration in Detail

Resumed from an earlier stage of the sitting.

Clause 3: Terms used —

Debate was interrupted after the clause had been partly considered.

Dr A.D. BUTI: I am seeking clarification about the mentally impaired accused. Under clause 3, the definition of “mentally impaired accused” states that it has the meaning given in the Criminal Law (Mentally Impaired Accused) Act, and the definition of “declared place” states that a declared place means a place that is a declared place as defined in section 23 of the MIA act. We can quite clearly see that the bill before us has a very significant interaction with the MIA act. I am not saying that this is what I think the effect is here, and that has also been highlighted by the Commissioner for Children and Young People, but I am not sure whether this is what the government intended. Section 23 of the mentally impaired accused act states —

mentally impaired accused means an accused in respect of whom a custody order has been made and who has not been discharged from the order;

Section 24(1) of the MIA act states —

A mentally impaired accused is to be detained in an authorised hospital, a declared place, a detention centre or a prison ... until released by an order of the Governor.

The Commissioner for Children and Young People made an interesting observation in her submission on an earlier version of the bill. She refers to the definition of a declared place in clause 3 of the bill —

declared place means a place —

- (a) that is a declared place as defined in the [CLMIA Act] 28 section 23; and
- (b) that is controlled and managed by or on behalf of the Commission.

The commissioner then refers to the Governor and the order being published in the *Government Gazette*. Her submission continues —

Further, it appears that the intention (as expressed in the material available on the Disability Services Commission website) is for the two disability justice centres to only accommodate mentally impaired accused who have been found unfit to stand trial.

I assume that the intention is that these declared places are to accommodate people who are found to be unfit to stand trial, which, of course, is a very laudable motivation. Is that correct?

Ms A.R. MITCHELL: That is subject to the amendments.

Dr A.D. BUTI: Is that the parliamentary secretary’s amendments?

Ms A.R. Mitchell: Yes.

Dr A.D. BUTI: The commissioner’s submission continues —

However, the provisions of the Bill do not reflect this intention. Clause 79 —

The commissioner is referring to an earlier version of the bill, so this is actually clause 66 of the current bill. The commissioner’s submission continues —

of the Bill amends section 24 of the CLMIA Act. Section 24 of the CLMIA Act deals with the *place of custody* for mentally impaired accused (ie, both mentally impaired accused who have been found unfit to stand trial —

That is the government’s intention for these declared places. The submission continues —

and mentally impaired accused who have been acquitted on account of unsoundness of mind).

A footnote to that states —

Under section 23 of the *Criminal Law (Mentally Impaired Accused) Act 1996* (WA) a mentally impaired accused is defined as an accused in respect of whom a custody order has been made and who has not been discharged from the order ... a custody order may be made in relation to an accused person who has been found unfit to stand trial as well as an accused person who has been acquitted on account of unsoundness of mind. The defence of unsoundness of mind is set out in section 27 of the *Criminal Code* (WA) and applies if at the time of doing the act or making the omission the accused was in such a state of mental impairment as to deprive the accused of capacity to understand what he or she

was doing, or of capacity to control his or her actions, or of capacity to know that he or she ought not to do the act or make the omission. Mental impairment is defined in section 1 of the *Criminal Code* to mean ‘intellectual disability, mental illness, brain damage or senility’.

The commissioner’s submission goes on to state —

There is nothing in the proposed section 24(5A) —

That is the amendment under clause 66 of this bill —

that requires the Mentally Impaired Accused Review Board to restrict the option of a declared places established by the Disability Services Commission to mentally impaired accused who have been found unfit to stand trial. I agree with this approach and consider that declared places should potentially be available to both mentally impaired accused who are unfit to stand trial as well as mentally impaired accused who have been acquitted on account of unsoundness of mind.

The commissioner is supporting what she considers to be the plain reading of the legislation we have before us, but her reading seems to differ from the government’s view. Is the commissioner’s interpretation of the bill correct? It appears to make sense.

Ms A.R. MITCHELL: I believe that the member is referring to an earlier draft of this bill, and that is not relevant. There is also a great deal of focus on the Criminal Law (Mentally Impaired Accused) Act at the moment and I believe we are actually on clause 3 of this bill. Madam Acting Speaker, I ask if the debate could be brought back to clause 3.

Dr A.D. Buti interjected.

The ACTING SPEAKER (Ms L.L. Baker): Member for Armadale, we seem to have a bit of a problem with clarity. If you can just get some —

Dr A.D. BUTI: The clarity is in the legislation. Clause 3 states that a declared place means that a place is a declared place as defined in the MIA Act. That is why I am referring to section 23 of the Criminal Law (Mentally Impaired Accused) Act. Clause 3 of the bill also states —

declared place, in relation to a resident, means the declared place in which the resident is detained under a determination made by the Board under the MIA Act Part 5;

It is amazing. Further on, clause 3 states —

mentally impaired accused has the meaning given in the MIA Act section 23;

It is impossible to deal with the terms in clause 3 without referring to the MIA Act. I do not see why there is any worry about that. The parliamentary secretary said that I am referring to an earlier draft of the bill. No, I am not referring to an earlier draft of the bill. The earlier draft of the bill referred to a differently numbered section. I referred to clause 66. The Commissioner for Children and Young People mentions clause 79 that is in the earlier draft; under the current bill that is clause 66, which is the clause I referred to.

The ACTING SPEAKER: Member, what is your question?

Dr A.D. BUTI: The parliamentary secretary and the government have consistently stated that these declared places will be only for people who are unfit to stand trial, but the bill before us uses the definition of “mentally impaired accused” found in the MIA Act—let us leave aside the issue of mental illness; we are looking at intellectual impairment—and it takes the definition of a “declared place” as defined in the MIA Act. The Commissioner for Children and Young People’s submission is on an earlier draft of the bill. On my reading, her submission on an earlier draft of the bill does not change her interpretation of the bill before us. My question is: would it be possible for a person who has an intellectual impairment and was found unfit to stand trial to be held in these declared places, as is the government’s intention? Could the bill allow a person who has a custody order and has been acquitted on account of being of unsound mind to be held in these declared places? That is completely different. A person can have a mental impairment and be of sound mind—they can know what they are doing. The issue is that they may not be fit enough to stand trial, which is completely different. Often it is the same thing; a person may not be of sound mind and they may not have the ability to stand trial. A person who does not have the ability to stand trial, but who then does stand trial, may not have the defence of insanity et cetera that would be available in these other areas. I think it is an oversight by the government—unless the parliamentary secretary can show me something in the bill that I am missing that is different from the earlier version referred to by the Commissioner for Children and Young People—that the bill will not prevent people from being placed in these declared places if they have been acquitted on account of being of unsound mind. That is not that they are necessarily unfit to stand trial; that is a different issue. This is nothing to do with an earlier draft. I am dealing with the bill before us. It is impossible not to deal with the MIA Act, because clause 3 refers to it so many times. These are important questions for residents in the areas where these places

may be housed. It is important for the government to understand what it has engaged in with this bill. It may be the government's intention to house only people who are unfit to stand trial; however, the bill—unless the parliamentary secretary can show me otherwise—does not restrict it to those people.

Mr R.H. COOK: I cannot profess to understand everything the member for Armadale has said, but I am interested in what he has said.

Dr A.D. BUTI: This is really important, parliamentary secretary. I am not trying to be tricky or sneaky; it is just a really important issue. It was raised by none other than the Commissioner for Children and Young People and I do not think the clause that she was talking about has changed. The parliamentary secretary talked about an earlier version, but the earlier version of the bill that was around at the time the commissioner made her submission stated, under clause 79, which is now clause 66, that —

A mentally impaired accused is not to be detained in a declared places that is established by the Disability Services Commission under the Disability Services Act 1993 unless the Board is satisfied that —

- (a) the accused has reached 16 years of age; and
- (b) the predominant reason for the accused's mental impairment is not mental illness; and

Those provisions are exactly the same. Interestingly, though, the next paragraph states —

- (c) it is in the best interests of the accused having regard to —
 - (i) the care and support that the accused will receive at the place; and
 - (ii) the accused's age, maturity, gender, and cultural and spiritual beliefs; and
 - (iii) the extent to which the accused will be compatible with the other residents in the place.

That is different. It is interesting to note how those have been narrowed in the bill before us, but that does not affect the issue raised by the commissioner, as she states quite clearly in her submission, that it does not —

restrict the option of a declared places established by the Disability Services Commission to mentally impaired accused who have been found unfit to stand trial.

But it could allow —

... mentally impaired accused who have been acquitted on account of unsoundness of mind.

That is something that I do not think the parliamentary secretary has been able to clarify with regard to the bill before us.

Ms A.R. MITCHELL: The member is correct in that the provisions in the Criminal Law (Mentally Impaired Accused) Act 1996 are quite broad, and they refer to being “unsound”. But as I said to the member before, those provisions will be further constrained subject to the amendments that we have on the notice paper that will come up later in the bill.

Dr A.D. BUTI: Is the parliamentary secretary saying that the amendments that will come up later will restrict the provision purely to people who are unfit to stand trial? If that is the case, can we defer this discussion until that time? If the parliamentary secretary is making that commitment, it will be interesting to see whether it is complied with.

Mr R.H. COOK: I want to return to the definition of “declared place”, which makes reference to part 5 of the Criminal Law (Mentally Impaired Accused) Act. Section 23 of that act states —

declared place means a place declared to be a place for the detention of mentally impaired accused by the Governor by an order published in the *Gazette*;

Can the parliamentary secretary set out for us the actual process for identifying and declaring a declared place?

Ms A.R. MITCHELL: Can the member provide me a little snapshot, because I think we have picked up different things?

Mr R.H. COOK: In clause 3, the definition of “declared place” talks about a determination being made by the board. In the act it simply states that a declaration is published in the *Government Gazette*. Can the parliamentary secretary provide some more detail about the process of making such a declaration and determination for a declared place? What process will the board go through?

Ms A.R. MITCHELL: It is the gazettal of a site.

Mr R.H. COOK: What goes into the deliberations of the board to determine that a place is appropriate to be a declared place?

Ms A.R. MITCHELL: A declared place is defined under the Criminal Law (Mentally Impaired Accused) Act, and, as I said before, some amendments will follow that will constrain the provision related to a declared place.

Mr R.H. COOK: Therefore, later during consideration of this bill, some amendments will clarify this definition and we can return to this issue then.

Ms A.R. Mitchell: Yes.

Dr A.D. BUTI: I do not think I got an answer to my previous question. I have quickly looked at the government's proposed amendments and I do not see how they reflect or change the arguments being made by the Commissioner for Children and Young People, but if the parliamentary secretary assures me that they will, I am prepared to wait until we consider the matter. The amendments refer to clause 71, if I am reading it correctly on the notice paper, so I am not sure how those amendments will affect the question of people who have been acquitted because of unsound mind being housed in the declared places.

Ms A.R. MITCHELL: I have said before that when we refer to "unsound mind", we refer to a mental illness. This bill is not about mental illness; it is about intellectual disability and cognitive impairment. Therefore, as we said before, a person may have a treatable mental illness but it is not the main focus of a potential resident.

Dr A.D. BUTI: The act states that if a person has a cognitive impairment or intellectual disability, and if that is their main impairment, that person can be housed in a declared place. Clause 66 provides that if a person has an unsound mind because of mental illness but that is not the predominant impairment, they are not excluded from these declared places; however, it does not state that a person is excluded if they have a mental illness. A person's major impairment may be an intellectual disability and because of their unsound mind they have been acquitted, but there is nothing in clause 66 that would prevent that person from being in a declared place because they have the cognitive impairment that would allow them to be in that declared place. Proposed section 24(5A)(a) states —

is satisfied that the accused is a person with disability as defined in the *Disability Services Act 1993* section 3 and the predominant reason for the disability is not mental illness ...

It does not state that the predominant reason for being in the declared place is the mental illness. A person's mental impairment has to be the major impairment to qualify for a declared place, but it does not have to be the predominant reason for the person being placed in the declared place. The provision states that it is the predominant reason "for the disability", not "for being placed in the declared place", and there is nothing there that prevents someone with a cognitive impairment, but who has been acquitted because of unsound mind, from being placed in a declared situation.

The answer that should be given is that our policy requires that people who are unfit to stand trial should be placed here, but we understand that under the legislation there is room for people of unsound mind to be placed there. I do not think it is such a massive issue to concede.

Debate interrupted, pursuant to standing orders.

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