COURT JURISDICTION LEGISLATION AMENDMENT BILL 2017

Committee

Resumed from an earlier stage of the sitting. The Deputy Chair of Committees (Hon Dr Steve Thomas) in the chair; Hon Sue Ellery (Leader of the House) in charge of the bill.

Clause 1: Short title —

Committee was interrupted after the clause had been partly considered.

Hon SUE ELLERY: I asked the advisers, in the period that we were dealing with question time, to provide me with some advice on the arson issue, which the honourable member had raised in his contribution to the second reading debate and to which I was unable to respond in my second reading reply. I am not able to provide the member with statistics—that is not available to me—but I can advise that the effect of the bill is to permit an arson indictment to be prosecuted in the District Court if that is appropriate. It enlarges the prosecutor's ability to bring cases in an appropriate forum. That is desirable, even if it is used in only one case. What is undesirable is to fudge the situation and require what should properly be charged as arson to be charged as criminal damage in order to keep it out of the Supreme Court. This measure enlarges the ability to prosecute arson offences in an appropriate court.

Hon MICHAEL MISCHIN: That raises more questions than it answers. I refer back to the letter that the minister tabled from the then Chief Justice of Western Australia, Hon Wayne Martin, AC, dated 16 October 2012. We are looking at quite some time ago—half a decade. It is written to the Director of Public Prosecutions and is headed "Prosecutions for Arson". It says, as the minister started off mentioning —

> The purpose of this letter is to inquire whether there are guidelines within your office with respect to the exercise of the discretion to prosecute the offence of arson.

The Chief Justice then makes mention in the letter of the case of Chester, where some five items of underwear were burned in the rear yard of a house. The estimated value of the underwear was $200 and the offender was fined $500. The Chief Justice says —

> I would have thought it fairly clear that the culpability of the offending conduct could have been adequately covered by an appropriately framed charge falling within the jurisdiction of the Magistrates Court.

He was not saying that the jurisdiction should be changed so that arson is charged regarding burning underwear; he was saying that other, more appropriate charges are available on the evidence, having regard to the culpability of the conduct, that can be charged in the Magistrates Court and should have been charged in the Magistrates Court, given that the ultimate punishment was a fine of $500. He went on to say —

> It seems to me, with respect, that bringing a charge which brought the offender within the exclusive jurisdiction of the Supreme Court, facing a potential maximum penalty of life imprisonment, was plainly inappropriate.

I would have to agree with that. The letter continues —

> I would therefore be grateful for your advice as to whether there are guidelines used within your office to ensure the appropriate exercise of the discretion to prosecute in this area.

It seems to me that that is not a statement that arson is so broad an offence that it needs to be taken out of the Supreme Court; rather, it was telling the DPP to use commonsense when charging an offence to ensure that, having regard to the seriousness of the conduct and the penalty available, the offence is charged in the appropriate jurisdiction—you do not use a sledgehammer to crack a peanut. That is the same sort of thing as charging someone with an assault doing bodily harm when the bodily harm is a bruise, and indicting in the District Court when it can be dealt with by a magistrate. It is a question of the appropriateness of the charge and the jurisdiction that deals with it. It is a question not of distorting the system by charging an offence not appropriate to the circumstances, but of picking an offence appropriate to the circumstances. When we look at an offence of arson—that is, setting a fire with certain consequences and with the elements provided in the Criminal Code, where it carries a penalty of life imprisonment—of course we would not indict in the Supreme Court for the burning of a pair of underpants. It is more a reflection on the quality of the prosecution at that time. Quite legitimately, the Supreme Court was concerned that there was an overcharging going on here. We do not have the response as to whether there were any guidelines. Perhaps the minister can assist as to whether there were any. I suspect what has happened in this case is that a lack of appropriate supervision over the indictment drafter has resulted in an absurd overcharging of the offence in the wrong jurisdiction. That is not an argument for changing the jurisdiction in which offences are to be indicted or committed to; it is a question of picking the right charge by using commonsense. I will be interested if there was a response. I would have thought that there are at least internal guidelines, or, if there are not, it would fall under general prosecution principles of ensuring that the charge fits the circumstances. I suspect

the response would have been along the lines of an admission that a mistake had been made—"Sorry, Your Honour; it won't happen again. We've drawn it to people's attention and put some processes in place to see that it doesn't occur again."

I have a question regarding the letter of 29 October 2018 as well. Perhaps the minister can ponder both at the same time. What prompted that letter? It seems remarkably coincidental that a letter has been sent from the Supreme Court of Western Australia to the Attorney General pointing out the importance of this legislation being passed as soon as possible. How did it come about? Did the Attorney General or someone from his office invite some submission that could be tabled in order to encourage this place to expedite its consideration of the bill? Or is it just a happy coincidence that the Chief Justice noticed, looking at the *Daily Notice Paper*, that this bill was likely to come up this week and decided to volunteer his views to the Attorney General?

Hon SUE ELLERY: I will deal with the second one first. I would have thought that dealing with this piece of legislation was quite germane to the Chief Justice. I do not have any advice as to whether there was any motivation other than the first sentence of the letter, which says —

> I write in relation to the … *Bill* … which I am advised is again before Parliament this week.

I am not sure that I can take that much further. On the shift from the Supreme Court to the District Court, I think we are having a discussion about appropriate charging guidelines. That is somewhat tangential, I suppose, to this. I do not have any advice. I am sorry, but I cannot give the member any advice on whether there are charging guidelines. However, I can tell the member that in respect of the shift from the Supreme Court to the District Court, about 15 to 20 per cent of the approximately 250 non-homicide cases being considered for transfer are property damage, environmental pollution and arson cases. I cannot split that any further to break down that arson component. That of itself is a considerable slice of the work and goes to the thinking around how it was determined which cases would be considered for transfer.

Hon MICHAEL MISCHIN: Getting back to the letter from the Chief Justice, it reads —

> I write in relation to the *Courts Jurisdiction Legislation Amendment Bill* 2017, which I am advised is again before Parliament this week.

It seems pretty plain that someone told him, and the question is whether there was an invitation to make some submission that would assist the passage of the bill. The minister tells me that she cannot help, but it seems remarkably coincidental that today is the 30th and on the 29th the Chief Justice saw fit to browse through the business before Parliament, having an interest in this bill, and thought that he better write to the Attorney General and update him on the problems they are having.

Anyway, one thing that emerges from the letter is that six judges sit full time in the criminal jurisdiction and the government is taking away 300 cases; is that right?

Hon Sue Ellery: It is 240, honourable member.

Hon MICHAEL MISCHIN: It is 240. So the government will take away four-fifths of the court's workload, but six judges will still be sitting full time in the criminal jurisdiction. It will perhaps take a little bit of time to clear the backlog, but when is the backlog expected to be cleared, because, all of a sudden, the 240 cases that are pending, many of them listed for trial, will suddenly be shunted down to the District Court. Would that be correct?

Hon SUE ELLERY: There are two components to the answer to that question. The first is that it depends on whether the cases that are before the Supreme Court continue to be flushed through the Supreme Court. The second part is that there are two additional District Court judges. If a determination is made that a matter needs to be dealt with by the Supreme Court, we will still need Supreme Court judges there. To a certain extent, we have to let time take its course to see whether—this is my language, not the advisers' or the Attorney General's—the proportions are right and how the split occurs with the ones that can be transferred. To a certain extent, it is an imprecise science, but I think that the Attorney General has said publicly—I think it was in the second reading speech—that we need to take some time to see how this pans out and whether it is the most efficient way to do it or whether it needs to be tweaked further. That is my language. That is not the Attorney General's, but I understand that we are anticipating that in about a year—but that is not precise either—we might have a better view of the degree of efficiency that this has created.

Hon MICHAEL MISCHIN: That is what I am trying to determine. I understand that it is a tricky business and it is one of the things that I struggled with enormously—the balancing of what is asked for in an ideal world and what is practical and cost-effective. Here we are told that the number of Supreme Court judges is too low, yet we have just appointed an extra one in Hon Gail Archer and we will take four-fifths of the Supreme Court's workload and send it to another court, even though six judges sit full-time in the criminal jurisdiction. We are losing one of them and it appears a temporary justice will replace her—one of the deputy registrars, as I understand it—so there will still be six judges floating around there in the criminal jurisdiction. Now 240-odd cases suddenly will not

appear on the Supreme Court lists—potentially not, anyway. I would have thought we would move those cases down to the District Court as soon as practicable. We are replacing, let us see, six judges, 50 cases a piece —

Hon Sue Ellery: Honourable member, if we think about those 240 cases, if we deal with them in the District Court, we will need additional resources to deal with them. If some or all of them stay within the Supreme Court, we will need the existing cohort of Supreme Court judges to deal with them. Although we cannot be precise, if a significant proportion of those cases are shifted to the District Court, the District Court will need those additional judges that it has.

Hon MICHAEL MISCHIN: I entirely agree; the District Court may very well need additional judges.

Hon Sue Ellery: But we cannot predict how many of those 240 will shift.

Hon MICHAEL MISCHIN: We can. I would have thought the whole idea is to shift 240 cases out of the Supreme Court jurisdiction into a lower jurisdiction, the District Court. The whole point of this is to leave 60 cases in the Supreme Court at various stages of completion. That is the whole point of the exercise, and we are leaving six judges in the Supreme Court with four-fifths less work to do. Admittedly, it will accelerate the clearance of a backlog, but I cannot imagine that the Supreme Court will hang onto work that it does not need to do, especially if it is saying that things are fraught and it has a 36-week backlog. Of course, it does not mean that things are going to get to trial immediately anyway. There is always a lead-up time to a trial to allow the parties to get themselves sorted and ready for trial, to get the cases up, so it is not as though cases will be heard within a matter of a month or two. There potentially seems that there will be a surfeit of judges in the Supreme Court over the near future. Is that a prospect?

Hon SUE ELLERY: I think I need to clarify for the record what I said by way of interjection, because I do not think it was accurate. We cannot predict how many of the 240 cases—I think I made this point a few minutes ago—will work their way through the Supreme Court system and how many will be transferred to the District Court by way of administrative decision or process. It will take some time to see how that happens. The purpose of tabling the letter of the twenty-ninth was to demonstrate that the Supreme Court still has a significant amount of work that it is required to do. If the proposition that the member is asking me to comment on is whether there will be a surplus of Supreme Court judges who will be sitting around twiddling their thumbs, the expectation is no, that will not be the case.

Hon MICHAEL MISCHIN: Maybe not immediately, but sometime in the near future it seems that there will be less need for six judges in the criminal jurisdiction of the Supreme Court, notwithstanding that the number of judges in the Supreme Court has increased. It is my understanding that in fact under the previous government, we had more judges in the Supreme Court per head of population than did New South Wales give or take, but at any rate there will be a significant reduction in work for the Supreme Court justices, which is the whole idea of the exercise. Nevertheless, we will see how that pans out. I hope it improves the ability of the Supreme Court to cope, but I hope it is not at the expense of imposing an unbearable and insupportable burden on the District Court, which brings me to the next point about resources. How much of this has been planned by the justice pipeline modelling or has that not been finished yet? Presumably, the justice pipeline modelling will be able to tell us exactly what resources are required. That is what $850 000 was devoted to in the budget before last. Where is it? A year has gone by and we still do not seem to be able to provide more than fairly vague estimates of the consequences of this major jurisdictional change.

Hon SUE ELLERY: The justice pipeline of course is not referenced in the bill before us; nevertheless, it is currently in development and it is not yet at a stage at which it can be used to accurately predict the sorts of changes. I am not able to give the member any further information on that.

Hon MICHAEL MISCHIN: Notwithstanding that, can the minister say how many more judges the Attorney General expects to have to appoint to the District Court in order to cope with the remitting of cases from the Supreme Court and the expanded jurisdiction? We are told that another two are likely to be appointed. How many are there at the moment? How have the numbers increased since the McGowan government took office? How many more can we expect to be appointed?

Hon SUE ELLERY: It is not possible to be precise about how many more may be needed. Two more were appointed in January this year. The Attorney has agreed with the Chief Justice that they will monitor the impact of this legislation and then consider responses to that in due course, but I cannot be more precise than that.

Hon MICHAEL MISCHIN: Can the minister say how many more magistrates will be needed? What is the number of magistrates we started with? The minister never provided the information on how many District Court judges there were at the start of the McGowan government term and how many there are now. Can she provide that and can she also tell me the same information about magistrates? How many more is it expected will be necessary in order to cope with the workload that is going to be handed over from the District Court to the Magistrates Court?

Hon SUE ELLERY: Two additional District Court judges were appointed earlier this year in January and two were appointed to the Magistrates Court in the 2018–19 financial year.

Hon MICHAEL MISCHIN: Does the minister have the information available on how many District Court judges the McGowan government started off with in total and how many there are now in total?

Hon SUE ELLERY: I am advised that in the 2016–17 financial year, there were 25 FTE District Court judges and in the 2018–19 financial year, there are 27.

Hon Michael Mischin: What about 2017–18?

Hon SUE ELLERY: In 2017–18, there were 26.

Hon MICHAEL MISCHIN: Can the minister provide the figures for magistrates, please?

Hon SUE ELLERY: There were 47.5 FTE magistrates in the 2016–17 financial year, 47.5 in 2017–18 and 49.5 in 2018–19.

Hon MICHAEL MISCHIN: That is interesting because I recall reading in the *Hansard* of the other place that the Attorney General was whining that a certain magistrate had not been replaced—and it took him two years to do it. We are looking at just shy of 50 magistrates and we are looking at a whole raft of cases being handed from the District Court to the Magistrates Court. Can the minister say how many cases? She gave us a figure of 240 cases that will potentially be more suitably charged and dealt with in the District Court than in the Supreme Court. Can she say how many District Court cases will be able to be transferred to the Magistrates Court?

Hon SUE ELLERY: No, I am not able to. We do not have that data.

Hon MICHAEL MISCHIN: Is it accessible in some fashion? The minister may not have it immediately with her, but is it available?

Hon SUE ELLERY: I could take that on notice to the Attorney, but I am advised that it would have to be manually counted. I am not in a position to make a decision that I can allocate resources in the Attorney's portfolio. I can take it on notice and raise the issue with him.

Hon MICHAEL MISCHIN: Thank you; I would appreciate it if the minister would. Can she say whether any additional judges will be required in the District Court in addition to the 27 who are currently part of its strength in order to cope with the 240-odd cases that will be imposed on it or is it expected that that will be balanced out by relinquishing cases to the Magistrates Court?

Hon SUE ELLERY: The best advice that I have been provided with—I cannot give the member a predictor—is that we are going to have to make an assessment in about a year's time of what has happened and what the flow has been to determine whether a response to that needs to be provided.

Hon MICHAEL MISCHIN: There is some terminology that I would like clarified. The minister referred to the cases that will be relinquished by the Supreme Court as property damage and environmental pollution arson. What exactly does that mean? I think arson does involve property damage or destruction. I am not aware of an environmental damage arson.

Hon SUE ELLERY: The way that the data is categorised and broken up uses the Australian and New Zealand standard categorisation offence codes. Arson itself is picked up in the category "property damage and environmental pollution, Western Australian". It is captured in that particular category.

Hon MICHAEL MISCHIN: I think I understand; it is that type of offence for the purposes of statistics. A propos other resources, has any calculation been done on whether additional prosecutors will be required—by "prosecutors" I mean the Director of Public Prosecutions state prosecutors and legal practitioners—in order to manage the additional workload in the District Court, or will it mean no additional resources will be required because some of the District Court's jurisdiction will be referred to the Magistrates Court?

Hon SUE ELLERY: It is not envisaged. The DPP currently services, if that is a correct language to use, both jurisdictions, so we are not talking about a total, if you like, of additional cases. It is not envisaged that additional state prosecutor resources will be required.

Hon MICHAEL MISCHIN: A propos that issue, though, there used to be a prosecutor, perhaps a couple of prosecutors, assigned to assist police with police prosecutions. That secondment has ended, but we are dealing with a significant number of cases being transferred from the District Court's jurisdiction to the Magistrates Court's jurisdiction. Are any Director of Public Prosecutions prosecutors—a significant number of them—appearing in that jurisdiction to represent the state or the police?

Hon SUE ELLERY: I am advised not to our knowledge.

Hon MICHAEL MISCHIN: However, there will be an increase in the number of cases that can be dealt with by the Magistrates Court, and that will require prosecutors from the WA Police Force to manage those in the absence of state prosecutors from the DPP. Has any calculation been made of additional resources that would be required by the police prosecuting branch to accommodate those cases without it resulting in undue delay?

Hon SUE ELLERY: I am advised that the DPP was consulted and although the consultation was done by the previous Solicitor-General, the best advice available to me is that none of the issues that the member has raised was raised or identified as a potential problem. I do not have any information further down the line, if you like, for police prosecutors. I do not have that information.

Hon MICHAEL MISCHIN: I accept that the Leader of the House is acting as proxy here for the Attorney General, but it does surprise me, rather. We are told that $850 000 is necessary to set up a justice pipeline modelling regime that will allow the government to determine the impact of any changes to the criminal justice system. We are looking at a radical change of the criminal justice system whereby something like four-fifths of the current workload of the Supreme Court criminal jurisdiction is going down to the District Court, and the District Court is able to relinquish a significant proportion of its work, but we cannot say how much, to the Magistrates Court, and there is going to be a flow-on effect of all that, but we do not know how many more judges are likely to be necessary in either jurisdiction—either district or supreme. We do not know how many more magistrates are going to be necessary as a consequence of these changes, which hopefully will be introduced soon in order to have an immediate effect, but we do not know what that might be. We do not know whether it is going to result in justice delayed and hence justice denied—the old mantra that we have heard touted in the other place as an important principle of justice and why this legislation is so important. Apparently, justice delayed is justice denied in the Supreme Court, but if the Magistrates Court is overloaded and resources are not provided to prosecute those cases effectively, it is not a consideration that has been thought about, if I understand rightly, or at least we cannot be told about it. I find that surprising. We do not even have an estimate of how many cases are likely to increase in the workload. Are we able to break up the cases by jurisdictions in the country, metropolitan area or Kalgoorlie or are there any sorts of figures for how much work will be done by the Magistrates Court and how much more work will be imposed on police prosecutors at all? I accept that the minister is just relaying information—she is the proxy here—but can she provide us with any assistance about the consequences of this change?

Hon SUE ELLERY: The honourable member dramatises the situation somewhat, and I do not accept the assumptions in the comments he just made. I have provided as much information about these decisions as is available to me. I have already said that all the relevant heads of jurisdictions were consulted and the DPP was consulted and that we will monitor the impact. That point was made in the debate several times. I do not have another way of expressing it.

Hon MICHAEL MISCHIN: I did ask initially about consultation. Were any cons as well as pros identified by those consulted? Were any reservations or anything expressed by any of those consulted that informed the bill in its current form?

Hon SUE ELLERY: The issue of resources was flagged and that is why the Attorney General has said quite publicly that we need to assess how this rolls out in about a year's time to make a judgement about how those cases have either worked their way through the system or been allocated. That remains an open issue, if you like, about whether we have the resourcing right. That was the only issue that was raised.

Hon MICHAEL MISCHIN: Does that also include considering Legal Aid resources? Presumably, the transfer of cases from the Supreme Court to the District Court will make no difference because both courts deal with indictable matters and matters of seriousness. But cases before the District Court that are being shunted down to the Magistrates Court may very well fall foul of Legal Aid's priorities in assigning its limited fund of legal aid. Is it envisaged that an offender who is currently eligible for legal aid because their case is being dealt with in the Supreme or District Courts may find themselves without legal aid because their case will be dealt with in the Magistrates Court?

Hon SUE ELLERY: I am advised that Legal Aid has advised that it is not anticipating the requirement for additional resources. I will make the point again: the Attorney General is cognisant of the possibility of the requirement for additional resources and has said publicly that we will review the situation in about a year's time to see its impact and where the pressure points are, if any, and judgements will be made then about how the government will respond.

Hon MICHAEL MISCHIN: I thank the minister for the information she has provided about the number of full-time equivalent positions in the magistracy and the District Court. For completeness, is the minister able to provide similar information about the Supreme Court? How many Supreme Court judges were there in 2016–17, 2017–18 and 2018–19?

Hon SUE ELLERY: There were 21 FTE Supreme Court judges in the 2016–17, 2017–18 and 2018–19 financial years.

Clause put and passed.

Clauses 2 to 11 put and passed.

Title put and passed.

Report

Bill reported, without amendment, and the report adopted.

Third Reading

Bill read a third time, on motion by **Hon Sue Ellery (Leader of the House)**, and passed.