NATIONAL REDRESS SCHEME FOR INSTITUTIONAL CHILD SEXUAL ABUSE (COMMONWEALTH POWERS) BILL 2018

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.

New part 6 —

Progress was reported after new part 6, as amended, had been partly considered.

Hon SUE ELLERY: Mr Deputy Chair, can you please give me a minute, because I have not had the opportunity to get advice. During question time, the advisers spoke with the Attorney General—who I think members would appreciate is dealing with a bill in the other place—and I now have a proposed amendment that addresses the issues raised by the government. I will sign that and ask that it be copied and distributed. The effect of the amendment would be that we keep new clause 18(1), and we delete new clause 18(2) and (3) and substitute new clause 18(2), (3) and (4). I therefore move —

To delete new clause 18(2) and (3) and substitute —

(2) Subsection (3) applies if —

(a) a scheme review is carried out; and

(b) a report is prepared by the person carrying out the review; and

(c) the Minister receives the report.

(3) The Minister must cause the report to be laid before each House of Parliament as soon as practicable after the Minister receives the report, but not later than 6 sitting days of the House after the Minister received it.

(4) If a report to which subsection (3) applies contains sensitive, confidential or personal information, the Minister may comply with subsection (3) by removing the sensitive, confidential or personal information from the report before causing the document to be laid before each House.

The proposed amendment is not ideal from the government's point of view, because the risk still remains that the issue is justiciable. The point was made to Hon Michael Mischin last Tuesday in an email, which states —

- IGAs are non-justiciable and thereafter it would be inappropriate to give legislative effect to the IGA, even via the possibility (albeit indirect) that a tabling provision might indicate in some way that the intention of the WA Government in entering into the agreement was that the agreement should not be non-justiciable. That is, it would be more appropriate not to jeopardise this IGA's non-justiciable status.

The government's concern is that that remains a risk. Nevertheless, in order to try to move this forward and to give effect to the intent, I have moved the amendment.

Hon ALISON XAMON: I thank the minister for moving that amendment to the amendment. I note that the amendment to the amendment addresses one of my principal concerns about the original amendment, namely the sheer number of documents that potentially would be sought for tabling, rather than focusing simply on the scheme review itself. However, I still want to flesh out the degree to which there might be concerns about justiciability. The issue is that it is simply calling for the tabling of a review, if there is one. It is not mandating a review or mandating the content of an intergovernmental agreement. In fact, it does not mandate doing anything with the content of the review; it just requires the tabling of the report of a review by the Attorney General. Who is the government concerned will take it to court, and for what reason? It is difficult to envisage a circumstance in which that would be a general issue.

Hon SUE ELLERY: It is a bit difficult to predict who might take the government to court. However, if someone were to take the view that in some way the provisions of the agreement had been breached, they might look for some mechanism by which they could challenge that. It poses a risk no less than that and no greater than that. I cannot give the member a prescribed, "It would happen in this particular circumstance or in that particular circumstance." A person might be aggrieved by the way in which the agreement has been implemented and might look for a mechanism by which they could draw attention to that, and this might be one of those mechanisms.

Hon ALISON XAMON: I thank the minister very much for that answer. It sounds like a pretty remote concern. I appreciate the amendment on the amendment that has been put in front of us. I am not sure that I am particularly concerned about the issue of justiciability.

Hon NICK GOIRAN: Is the government's position at the moment to support new clause 18(1)?

Hon Sue Ellery: With our amendment, yes.

Hon NICK GOIRAN: Why is the government now supporting new clause 18(1) when no less than an hour ago it was opposed to new clause 18(1)?

Hon SUE ELLERY: The chamber has amended new clause 18(1) to correct the technical issues that I identified earlier.

Hon Nick Goiran: And you voted against it.

Hon SUE ELLERY: Yes, and I am entitled to. However, in the intervening period when I was answering questions without notice, the advisers, acting in good faith and with due diligence, contacted the Attorney General and his office and drafted the proposal, which I think meets the concerns that honourable members raised and is drafted in a way that is acceptable to the government. If my amendment on the amendment is accepted, new clause 18 would include existing subclause (1), as outlined on the supplementary notice paper, and the government's subclauses (2), (3) and (4), and the government would support the addition of new part 6 and new clause 18, "Tabling documents relating to scheme reviews".

Hon NICK GOIRAN: Earlier the government was very concerned that the use of the language and having any amendment to new clause 18 would create the risk that the intergovernmental agreement might become disputed in the courts, yet whatever weight the government gave to that an hour ago has now evaporated and the government is asking us to support an amendment on the amendment to do the very thing that it said an hour ago would be a great problem. It is difficult to follow the train of thought of the government at the moment when it says that it received secret advice from the State Solicitor's Office. We cannot find out what questions were asked or what answers were given. We cannot be given any information. The only information that we can get is that the State Solicitor's Office was consulted on this issue. In some vague fashion, we are told that the concern is that the intergovernmental agreement could appear before the courts, yet we are unable to get from the government an articulation of the circumstances in which the intergovernmental agreement would suddenly appear before the courts and, if it were to appear before the courts, what the issue would be. What would be the dispute in question? Would it be that somebody was taking the matter before the court to argue that the intergovernmental agreement was not provided to Parliament? I do not think so. What would be the circumstances? The reason that I labour this point at this time is that only last week the government said in a written response to some members of this place—not all members—about my amendment that the government could not see any circumstances foreshadowed by the amendment that would mean any survivors would be worse off under this bill. It was adamant a week ago that under no circumstances would any member support that amendment because the government, on the advice it received, said that it could not foresee any circumstances whatsoever. The roles have now been reversed and we are asking the government to identify one circumstance in which this might occur, but the government has been unable to provide it. An hour ago, it was a matter of grave concern, so much so that we had to have a division. Now it is no longer a concern and we are being asked to support it. It is very hard to understand the logic being used by the government on this bill, let alone on the latest amendment. It now seems that the reasonable concerns that have been identified by Hon Michael Mischin, which had their genesis in the report of the Standing Committee on Uniform Legislation and Statutes Review, have now been conceded by the government and we might be able to make progress.

Hon MICHAEL MISCHIN: I welcome the fact that the government has now, albeit reluctantly and at a very late stage, turned its mind to how to make the policy consideration that I raised, which the government had been alerted to about two weeks ago, a reality, to make it practical and to make it work. There are a couple of things that I would like to raise about the government's proposal, however. Firstly, all the objections that were raised by the government last Tuesday in the memorandum to me from the Attorney General's office focused on the problems of an intergovernmental agreement being identified in this bill. That was all. It made no mention of any problems surrounding the disclosure to Parliament of the statutory review under section 192 of the national act. The entire enumerated series of objections, problems and speculations as to justiciability, precedent setting and all sorts of things were focused on an intergovernmental agreement being mentioned in this bill, but none as to the statutory review. The government now seems to be prepared to accept that both the statutory review report and any review of the operation and objectives of the intergovernmental agreement can be revealed to Parliament, and I welcome that. But there is another element quite apart from just the manner of drafting, and that is my new clause 18(2)(b), which provides that, if there is no report—I will leave aside the reference to "or other document"; I will take that out of the equation for the moment—but a review has taken place, the minister must prepare a report in a form suitable to present to Parliament. That does not involve revealing cabinet-in-confidence or legal advice. It is a report that the minister has the ability to craft into an informative document that steers clear of sensitive, confidential, personal information and questions of public interest immunity and legal professional privilege. That is not contained in the government's proposal.

I welcome and appreciate the fact that the government is prepared to go some way towards this. I am surprised and dismayed that it has taken so much time and effort to get to this point, when it could have all been solved a week ago and any time in between. I would like the government to address one element, and that is the question

of whether, if no report is received, the minister is prepared to prepare some report to advise Parliament of the results of the statutory review and the results of the review of the IGA. Those would seem to be of lesser risk of compromising the national scheme, but I think it does cover an eventuality when no actual report is received because whoever has prepared it has done it by way of other sorts of communication. I would not like to see that a review of the national scheme's intergovernmental agreement has come up with certain recommendations by way of correspondence to the minister, and the minister then says, "That's not a report; therefore, I don't have to tell Parliament about it", or that it comes up with a statutory review which says, "As a result of our review, we, the commonwealth, plan to do certain things; we've found these things out and this is what we are planning to do about it", and the minister says, "I'm not going to reveal that because it is not a formal report". I attempted to go around and cover that problem with my reference in new clause 18(2) to "a report or other document is prepared as a result of the scheme review". I understand from discussions behind the Chair with Hon Alison Xamon—I hope I am not embarrassing her by mentioning it—that she has had some discussions and she has taken the point that the extension of it to other documents may create some difficulties for government. I am prepared to entertain an amendment to my amendment to remove those references to "other document" and focus on the preparation of reports or the submission of reports. I am quite happy with the government's proposed amendment, provided that there is also an inclusion of a responsibility along the lines of my clause 18(2)(b). I inquire whether the government is prepared to supplement its proposed amendment in that regard. Alternatively, would it be prepared to accept my amendment but with the excising of the references to "other document"? Perhaps the minister can assist with that and we can get this out of the way and solved to the satisfaction of the chamber, to provide an opportunity for the transparency and accountability that I feel is necessary in this case and that I hope members are also concerned about. There appears to be at least some concern in that regard, but we may be able to come to an accommodation between us that will achieve, at least in part—perhaps not perfectly—the policy objectives that I have attempted to reflect in my proposed amendment.

Hon SUE ELLERY: No, we cannot agree to that. The first part of the member's original subclause (2)(a) states that if a scheme review is carried out, the minister must, if there is a report or other document, cause that to be laid on the table. Subclause (2)(b) states that if a scheme review is carried out, the minister must, if there is no report or other document, prepare a report about the scheme review, even though they may have no information because no report or other document applies. The member is asking the minister to prepare a report and table that report when the minister may not have all the relevant information to make that report meaningful in any way. That is why we cannot agree to that. Indeed, there may be some reason that there is not a report or other document prepared as a result of this scheme.

Hon MICHAEL MISCHIN: I thank the minister. I take her point on that, but I think we can actually work our way around that. The reason I say that is that my amendment, as reflected on the supplementary notice paper, says that if a scheme review is carried out, and if a report—I will leave out the question about "other document" for a moment so we do not confuse the issue—is prepared as a result of the scheme review, the minister must cause it to be tabled yadda yadda yadda. Paragraph (b) then says, in context, that if a scheme review is carried out, the minister must, if there is no report—to which paragraph (a) applies—prepare a report about the scheme review and cause it to be laid before each house. It may very well be that the relevant minister in Western Australia, who is presently, I suppose, the Attorney General but may be someone else in due course, hears of a statutory review under the national redress act or a review of the operation and objectives of the intergovernmental agreement but is not provided with a report. Now, if he or she is not provided with a report, the requirement is then that the minister prepare a report about the scheme review. That may mean providing as much information as the minister has at his or her disposal. It could be saying, "Look, I have been informed by the commonwealth that there has been a scheme review of the operation and objectives of the intergovernmental agreement, or I have heard about the statutory review of the act. At this point I have not been provided with any report on that and the commonwealth has indicated that it does not intend to report on it, but it has provided me with some information." The minister can then disclose that to Parliament. The minister is doing his or her best to provide Parliament with an update of this statutory review or the review of the intergovernmental agreement. It may not be particularly informative, but if it is something that the minister is able to turn his or her mind to, at least Parliament knows what is going on. It may be that it includes some reference to the submissions made by the government of Western Australia as to the operation and effectiveness of the intergovernmental agreement or of the operation of the national scheme within the scope of the review under section 192 of the national act. I think something worthwhile can come out of it, even if it is a report that is relatively short that tells us that the minister has not had the benefit of being told by the commonwealth, but at least Parliament will know about that. I would have thought that some sensible information could be revealed nonetheless, even if no formal report is supplied to the minister arising out of it. I invite the government to have another think about that. I know that it is far from ideal, but what I am attempting to achieve here is some measure of accountability to Parliament in consideration of it having referred its powers and, to a large degree, sacrificed its sovereignty and oversight of laws in this state for the benefit of the public good nationally and in this state. I think with some ingenuity, the government and its advisers can come up with something that will cover that eventuality.

However, while that is being considered, and if it gives any comfort to the government, I propose to move a number of small amendments that, frankly, I have obtained from some collaboration with or advice from Hon Alison Xamon. They consist of the following: in line 1 of new clause 18(2)(a), to delete "or other document", and in line 2 to delete "document" and substitute "report".

The DEPUTY CHAIR (Hon Dr Steve Thomas): Honourable member, can I just check that you are foreshadowing that you will move those amendments?

Hon Michael Mischin: Yes.

The DEPUTY CHAIR: Because you are dealing with the amendment of the minister and you are going back to the original amendment, you can foreshadow that you will move those amendments, but you cannot at this point move those amendments.

Hon MICHAEL MISCHIN: Okay; I take that point. I will foreshadow the moving of those amendments. In new clause 18(2)(b), I will move to delete "or other document" in line 1; in line 2, I will insert "comprehensive" before "report"; and in line 1 of new clause 18(3), I will remove "or other document". I foreshadow modifying what I propose in that regard. I would appreciate the government considering whether that goes some way towards meeting its concerns but still accommodating the policy direction that I hope will provide a greater level of accountability. Alternatively, is the Leader of the House prepared to give consideration to supplementing her amendment to deal with the lack of a report being provided to our minister and for our minister to be able to report that fact alone, and hopefully a little bit more, to Parliament so we know what is going on with this national scheme?

The DEPUTY CHAIR: I will allow debate on the foreshadowed amendments. I do not normally like doing that, but these foreshadowed amendments are pertinent to the amendment moved by the Leader of the House on the amended amendment and so are critical to the ongoing debate. I will allow a little flexibility in the debate this evening.

Hon SUE ELLERY: The government is trying to deal with the issue of accountability so that this Parliament knows the content of a review of the scheme. I think it is impractical and not particularly sensible to include a provision as well that the relevant state minister must provide a report to the Parliament when the relevant state minister has not received any information to report. I do not think it is practical. It imposes a degree of investigation, I suppose, that may or may not provide anything helpful to the Parliament. I think the argument that is sustainable is that if there is a review of the scheme, the state minister ought to provide a copy of it, and that is in the amendment that came up while we were dealing with questions without notice. I am not of a view to try to insert the existing new clause 18(2)(b) into the government's amendment. Although I appreciate the change that the member is foreshadowing to take out the words "other document", I hope that will not be necessary, because I hope the government amendment gets up. If that is the case, the existing new clause will be deleted in any event.

Hon MICHAEL MISCHIN: I regret that there has not been greater opportunity in all the time that has been available for this and the foreshadowing of it over this time to give this proper consideration. I am glad that the government is at least prepared to turn its mind to its merits and come up with something that may be workable. I regret that we are not able to go further. This is at least a starting point that provides some acknowledgement of the desire for, and the importance of, accountability to Parliament. I will support the government's proposal and perhaps this is something that can be given further consideration in due course. I do not think it is quite as far as desirable or appropriate; however, I am conscious that it is at least an improvement on what was there before. The opposition and I are as anxious as the government to get this scheme in place, so in those circumstances I will accept the government's new clause 18(2), (3) and (4).

Amendment put and passed.

New part, as amended, put and passed.

New part 7 —

Hon SUE ELLERY: I move —

Page 13, after line 6 — To insert —

Part 6 — *Criminal Injuries Compensation Act 2003* amended

18. Act amended

This Part amends the *Criminal Injuries Compensation Act 2003*.

19. Section 42 amended

(1) In section 42(3) delete "received by way of compensation or damages, or under a contract of insurance," and insert:

received, whether under a contract of insurance or otherwise,

(2) In section 42(4) delete "amount by way of compensation or damages, or under a contract of insurance," and insert:

amount, whether under a contract of insurance or otherwise,

As I have outlined to the chamber before, this is absolutely critical. It is a new part that amends the Criminal Injuries Compensation Act 2003. There might need to be a numbering change, but the clerks can deal with that. New clause 19 amends section 42 of the Criminal Injuries Compensation Act, which relates to the payments that the assessor must deduct. I made my arguments for this when I introduced the package of amendments several hours ago. In addition to that, the amendments to section 42(3) and (4) are intended to address the interaction between section 42(3) and (4) of the Criminal Injuries Compensation Act 2003 and section 49 of the commonwealth National Redress Scheme for Institutional Child Sexual Abuse Act. It is not intended to otherwise affect the operation of section 42(3) and (4) of the Criminal Injuries Compensation Act 2003, including judicial consideration of the provision or the practices of the criminal injuries compensation assessor.

Hon NICK GOIRAN: I support the amendment moved by the Leader of the House. I understand that it will indeed be part 7 of the bill and be titled "*Criminal Injuries Compensation Act 2003* amended", and there will be new clauses 19 and 20. This is a very important amendment that goes with the package of amendments that the government has moved, as has already been discussed earlier this afternoon. I think that the recent remarks by the minister are very important that it is not intended in any way to create a situation of new categories of money being deducted from criminal injuries compensation claims. Indeed, from my perspective, what is already happening in our state with criminal injuries compensation claims and deductions is not desirable. I know the government is aware of the Baker and Cooper cases, which have caused much trouble. Nevertheless, that is the current interpretation of things. It is not intended that things change, but I am grateful that the government has already indicated that there will be a review of this within the next 12 months, so I indicate my support for this new part.

New part put and passed.

Title —

Hon SUE ELLERY: I move —

Page 1, after the 2nd bullet point — To insert —

- **to amend the *Criminal Injuries Compensation Act 2003*; and**

Amendment put and passed.

Title, as amended, put and passed.

Report

Bill reported, with amendments, and, by leave, the report adopted.

As to Third Reading — Standing Orders Suspension — Motion

On motion without notice by **Hon Sue Ellery (Leader of the House)**, resolved with an absolute majority —

That so much of standing orders be suspended so as to enable the bill to be read a third time forthwith.

Third Reading

Bill read a third time, on motion by **Hon Sue Ellery (Leader of the House)**, and returned to the Assembly with amendments.

Sitting suspended from 6.04 to 7.30 pm