

**COURTS LEGISLATION AMENDMENT BILL 2017**

*Assembly's Amendments — Committee*

The Deputy Chair of Committees (Hon Dr Steve Thomas) in the chair; Hon Sue Ellery (Leader of the House) in charge of the bill.

The following amendments made by the Assembly now considered —

No 1

Clause 8 — To delete the clause.

No 2

New clause 8

Page 6, after line 2 — To insert —

**8. Schedule 1 clause 9 amended**

(1) In Schedule 1 clause 9(2):

(a) delete “magistrate —” and insert:

magistrate a person who meets the qualification requirement set out in clause 2(2)(a).

(b) delete paragraphs (a) to (c).

(2) In Schedule 1 clause 9(3)(a) delete “appointment; but the period must not extend beyond when the appointee reaches 70 years of age; and” and insert:

appointment, which cannot exceed 12 months; and

(3) After Schedule 1 clause 9(3) insert:

(3A) A person appointed under subclause (2) is eligible for reappointment.

**Hon SUE ELLERY:** I move —

That amendment 1 made by the Assembly be agreed to.

I will explain the process, because we do not do this all that frequently. We have not done it for a while. This bill has been returned to us from the other place with an amendment to clause 8. Members will recall that clause 8 was originally amended during Committee of the Whole in August to provide for the appointment of acting magistrates beyond the age of 70. I am advised that the Attorney General has been in contact with Hon Alison Xamon, as the mover of the original amendment, to advise her of the reasons behind the amended clause 8 that we are dealing with today.

Clause 8 as amended in this place was loosely modelled on the provisions for appointment of auxiliary judges in the Supreme Court Act 1935 and the District Court of Western Australia Act 1969. It provided that a qualified person may only be appointed as an acting magistrate for a period of no more than 12 months, but that this could be extended in blocks of no more than 12 months at a time. The previous clause 8 went on to provide that any person who met the qualifications for appointment as a magistrate could be appointed as an acting magistrate, even if they had retired or were beyond the retirement age of 70.

Parliamentary Counsel identified a substantive issue that may inadvertently undermine the policy intention and it was determined that a replacement clause 8 should be inserted into the bill while it was considered in the other place. The intended policy is that any person who meets the qualification in clause 2(2)(a)—that is, five years’ legal experience—is eligible to be appointed as an acting magistrate. Proposed clause 9(2)(c) of schedule 1 of the act in the former clause 8 of the bill was at the very least unnecessary, as it was covered by existing clause 9(2)(a). There was also a risk that in order to give some meaning to clause 9(2)(c) of the act, it would be interpreted as limiting the scope of clause 9(2)(a) so as to prevent retired magistrates over 70 years of age from being appointed as acting magistrates.

The amended clause 8 we are dealing with now clarifies that a person qualified under clause 2(2)(a) of schedule 1 of the Magistrates Court Act 2004 may be appointed as an acting magistrate for discrete periods of 12 months at a time, no matter their age. At the same time, some small drafting improvements have also been made by this amendment, such as using simpler, more contemporary language. The policy intention of the legislation remains the same.

**Extract from Hansard**

[COUNCIL — Tuesday, 30 October 2018]

p7390b-7394a

Hon Michael Mischin; Hon Alison Xamon; Hon Sue Ellery

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**Hon MICHAEL MISCHIN:** Perhaps rather than going into any detail, I would ask whether the minister is prepared to table that document and call upon her to do so. We can then consider it over the dinner adjournment.

**Hon SUE ELLERY:** I will table my speech.

[See paper 2119.]

*Sitting suspended from 6.00 to 7.30 pm*

**Hon MICHAEL MISCHIN:** I thank the Leader of the House for providing an explanation about the rationale for this amendment to the amendment. I indicate that having considered the proposed amendment before this bill was intended to be brought on, the Liberal opposition will support what is proposed. I should add, however, our disappointment about the manner in which the government has dealt with this unfortunate exercise. Members need to recall that apart from the government's excessive delay in bringing on this bill, it was shrouded in comments by the Attorney General. I put it quite frankly—notwithstanding the Attorney General's denials on this subject—that the Attorney General had suggested to magistrates that this bill was being obstructed by the Liberal opposition. We have had a bit to say about this, and I have also asked questions during question time. I was eventually able to tease out what the Attorney General had said on, I think, 2 August at a meeting with representatives from the Magistrates Society of Western Australia. The Attorney General had a bit to say about this when the bill was being dealt with in the other place. However, the substance of his comments to the Magistrates Society was that the bill had been passed by the Legislative Assembly and was awaiting passage through the Legislative Council. The suggestion that was picked up by the magistrates was that the Liberals were being obstructive in not facilitating the passage of the bill. The Attorney General denied that he had said that. He said that he had misspoken and it was all a big mistake; he had confused this bill with all the other legislation he has put through. In answer to a question, the Attorney General listed 22 bills for which he claimed credit. In fact, one of those bills was the Constitution Amendment (Demise of the Crown) Bill. That was the Premier's bill. The Attorney General had nothing to do with that bill in either this chamber or the other chamber.

We are getting used to the inaccuracies, exaggerations and posturing from the Attorney General. This is another example of that. When this bill eventually got to the other place, the Attorney General said the following about the proposed amendment —

However, advice from Parliamentary Counsel's Office is that clause 8 is at risk of not achieving the policy intention. With that advice in mind, I foreshadow that I will seek to move an amendment to clause 8 during the consideration in detail stage.

The Attorney General never explained why the amendment proposed by Hon Alison Xamon, which all members of this chamber had agreed to, with the exception of the government, was inadequate. Not once did the Attorney General explain, in the level of detail that fortunately has been expressed in this place, why that amendment would have failed to give effect to the policy that Hon Alison Xamon had crafted. We need to bear in mind that that amendment, too, was drafted by parliamentary counsel, and that we had been waiting for some 11 months for some indication from the Attorney General about whether he would support it. We need to bear in mind also that any delay in the passage of this bill has been due solely to inadequate information being presented by the government and obstruction on the part of the Attorney General. The Attorney General then said, and I quote —

The last thing I will say about the retirement age of magistrates is that we opposed the Greens' amendment in the Legislative Council—that is a matter of record—because we did not see the need for it. However, the Council, in its collective wisdom, decided to bring about that amendment and voted for it. After it went through, —

After it went through! This amendment had been on the supplementary notice paper for ages. Various iterations of this amendment had been proposed, had presumably been considered by the government on its merits, and had been dismissed on the basis that it did not fit within the scope of the policy that the Attorney General wanted—and, in any event, it should wait until some jurisdictional changes had been made in the courts, which has got nothing to do with anything. He went on to say —

After it went through, I was advised by the Department of Justice that the wording used would not give effect to the intent of what the Legislative Council was trying to achieve, so I could either remain mute and let the amendment stand, and it would be totally ineffective, or fix it up on behalf of the Council in accordance with the advice I received from the Department of Justice.

What a guy! How generous of him!

He continues —

I chose the latter course to keep faith with the opposition and the Greens, who wanted the amendment.

This is the best he can do after obstructing the passage of the amendment and contributing nothing to it. You will recall, Mr Chairman, that I pointed out that of all the objections that had been raised by the government against the amendment, not one commented on the merit of the amendment and not one made mention of any technical problems with the amendment, saying that it would cause confusion, it would not be effective and something was technically wrong with the drafting. We wasted all that time because the Attorney General was too pompous and stubborn to assist. He did not want to do it. Then he was finally pushed into a corner. We had to have a division on this, if you do not mind! He had a lot of other things to say in his usual fashion, criticising the former government and telling a lot of falsehoods, I should add. I will get to those at some stage. This is not the time to do it but perhaps I will entertain members with a member's statement at some point and go through the usual antics of the Attorney General in distorting history. He is as funny as a rubber chicken and just about as ridiculous.

I am pleased to say that the Attorney General has finally decided to act like a statesman in this small matter, no doubt because he is faced with something that will be not a credit to him unless he fixes it. It is gratifying to see that he finally has. Perhaps he will learn a lesson out of this. It is much easier and much more respectful for this chamber if he assists the process and communicates with members. I refer to the lack of courtesy shown to Hon Alison Xamon. Let us not quibble about it; we are from different parties and have different philosophies. But when there is merit in an amendment, let us give it due consideration. To treat any party, whether it be a crossbench party, an Independent, the opposition, the Nationals WA or whatever, with that sort of contempt and let something sit around for 11 months, give no reason why it will not be supported and then ring around the other parties the night before and say, "Hey, oppose the amendment for some reason" rather than engaging with Hon Alison Xamon, reasoning with her and trying to persuade her, is simply contemptible behaviour. It is typical, as we have seen. If we go through the history of the questions that I was asking about the magistrates, members will see the nature of that contempt.

**The CHAIR:** Hon Michael Mischin.

**Hon Sue Ellery:** On the matter before us.

**Hon MICHAEL MISCHIN:** It is on the matter before us because, in fact, this was all raised in the debate downstairs and it is directly germane to the matter before us. But we are not going to stand in the way of the passage of this legislation. I mean, we cannot. We want this amendment to work but the whole process could have been cut short by weeks rather than leaving magistrates in the lurch, allowing some to have retired by the operation of law because this legislation is not in operation and they now have to become acting magistrates rather than simply have their term extended. If the Attorney General has anyone to blame, he ought to be looking in the mirror. I doubt that he will have the spine to take that sort of responsibility.

We support the amendment. We hope—we will have to take the government on its word—that it will do what it claims it will do. It appears to. It is certainly more elegantly drafted. It is unfortunate that it could not have been dealt with on 13 September or early October when this bill was debated in the other place. We could have taken to that chamber a properly crafted amendment with just a little bit of cooperation, a little bit of respect for this place and a little bit of respect for other parties in this Parliament that have been voted for and elected by members of the Western Australian community. This government continually needs to be reminded that this is not a one-party state and it does not have 99.9 per cent of the vote yet, although I am sure that it will work to amend the system to ensure that that happens in due course.

**Hon ALISON XAMON:** I rise on behalf of the Greens to indicate that I will also be supporting this amendment. I agree with so much of what was just said by Hon Michael Mischin in his contribution. I agree that the amendment as it is crafted before us is more elegant than the one that we previously passed. I am pleased, having reviewed it, that it appears to have the same policy outcome that this chamber originally intended with the passage of the previous amendment. I also wish to stress that we would not be considering this amendment if some basic courtesy had been given when I originally proposed the policy of my amendment about a year ago, which is when the issue was first raised. I will refresh members' memories. The feedback that I got at the time was that the government had no fundamental problem with the policy of the amendment that I was proposing; in fact, the Acting Chief Magistrate had expressed support for the proposed amendment. At the time, I was advised that it was not able to be seriously contemplated because of the apparent lack of time that would be available for further consultation on the bill. At that point, we were advised that the government was seeking to pass it by the end of 2017. As members well know, that never occurred and this piece of legislation sat on the notice paper for another 11 months.

I want to be very clear that in no way do I pass any judgement on the very competent and capable advisers who did their very, very best to try to deal with the amendment at the last minute in the way that they did. It was discovered at the time that the amendment that I had put forward, which had been sitting on the notice paper for months and months, did not quite meet the policy intent that I wished. So, there was some hurried activity outside the chamber, where the very competent advisers attempted to craft something that would meet the policy needs.

It is significant that six of the seven parties in this chamber decided that they agreed with the policy intent in the same way that they agreed with the Acting Chief Magistrate's original determination. I am still very clearly of the view—and I believe through the original passage of the amendment—that that was the majority will of the chamber as well. I am still pleased that the amendment has gone through. It is important and one that will ironically make the Attorney General's life just that little bit easier because it gives the Attorney General additional options. It is extraordinarily disappointing that 12 months later we finally have a properly crafted amendment that will achieve the policy end that was quite clearly the will of this chamber and should have been appropriately considered in the first place.

I would also like to advise members that until very recently, despite a paper that was tabled in the other place, my office had no joy trying to access parliamentary drafters when we wanted to consider amendments. According to a paper tabled in the other place, that house was advised that apparently all members in this place—the Greens included—have access to the parliamentary drafters for the purposes of amendments and also for simple bills. This was news to me because in the 18 months that I have been in this place in this term of government, my experience of dealing with Parliamentary Counsel in this regard has not been that. In fact, the situation that I have encountered is that, apart from one bill, I have effectively been left to craft my own bills and amendments. My office is frequently told that we are not to be given priority, there is simply not the capacity to do it, and that because that area is understaffed, we cannot possibly have access to it. So I think it is very interesting, and indeed heartening, that since that amendment was passed by this place and we were forced into the position of trying to craft an amendment to meet the policy outcome on the run, my office has had a remarkably different experience in dealing with parliamentary drafters. As a result, we have upcoming legislation I have been able to consult with them on, and I have received some beautifully crafted amendments that members will in due course consider. That also means that members can feel fairly confident that we should not be put in that situation again. I really hope that —

**Hon Michael Mischin:** Can we borrow them sometime?

**Hon ALISON XAMON:** — will be the case for the rest of this Parliament.

I have my criticisms of the previous Barnett government—that is true—but I had ongoing, ready access to parliamentary drafters. For that I am grateful, and when reintroducing a couple of my bills into this place, I was able to use the previous legislation because it had been appropriately crafted by the parliamentary drafters during previous terms. There has been a notable difference in the term of this government in not having access to those basic resources.

As Hon Michael Mischin said, I am just as elected to this place as every other member. I have a duty to ensure that I do the best job I can in this place, and that ideally I scrutinise and amend legislation when appropriate and acquit my role effectively. Members know that I attempt to engage quite heavily in parliamentary work. I take my responsibility as a legislator very seriously. It is highly problematic if a government of the day in any way restricts my capacity to undertake that duly elected role to which I am entitled.

I am certainly hopeful that in the future I will not be faced with a situation like this when I, in good faith, put forward an amendment, and there was a complete failure to engage with me in good faith. It was left till the very last minute—in fact, rudely enough to not even engage with me the night before, while everybody else was contacted. Instead, it was up to me to, on the floor, persuade the members of this chamber of the policy merits of my proposal. Unfortunately, I thought that the very, very capable advisers were put in an invidious situation of then on the run attempting to try to craft something to meet that policy intent. That should not happen if we can avoid it. Occasionally, issues will come up at the very last minute and it can be very difficult to avoid, but in this instance we had 11 months to try to get it right. All it would have taken was a bit of courtesy, a little less, as has been said, arrogance, and a bit of recognition that the government quite simply does not have the numbers in this place. That means that the government will always have to engage in good faith with all members from all parties because, frankly, it cannot take anything for granted.

For members who contacted me to ask whether I am satisfied that the amendment as crafted meets the original policy intent, from my perspective I feel confident it does. As such, the Greens will be supporting the amendment as presented.

**Question put and passed; the Assembly's amendment agreed to.**

**Hon SUE ELLERY:** I move —

That amendment 2 made by the Assembly be agreed to.

I outlined the reasons in my initial comments.

**Question put and passed; the Assembly's amendment agreed to.**

*Report*

**Extract from *Hansard***

[COUNCIL — Tuesday, 30 October 2018]

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Resolution reported, the report adopted, and a message accordingly returned to the Assembly.