CIVIL LIABILITY LEGISLATION AMENDMENT (CHILD SEXUAL ABUSE ACTIONS) 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 2: Commencement —

Committee was interrupted after the clause had been partly considered.

Hon NICK GOIRAN: Before the interruption of the business of the committee for questions without notice, Hon Michael Mischin asked the minister about what work needs to be done and why the government would not be in a position to proclaim the legislation at the time of assent. The answer provided by the minister was that work needs to be commenced by the Legal Costs Committee. Can the minister indicate to the house what work needs to be done?

Hon SUE ELLERY: I am advised that to do the cost determination—the member may be aware of this already—a compulsory 30-day consultation period is built into the legal practitioners' Legal Profession Act. The Legal Costs Committee is an independent statutory authority established under the Legal Profession Act 2008. The committee has the discretion to consider and decide upon the appropriate determination in the context of the matters before it, including whether a determination should apply to the plaintiff's and the defendant's costs, and exactly how appropriate capping should be achieved. Proposed section 15L of the bill will trigger the requirement for the Legal Costs Committee to make a cost determination in regard to child sexual abuse actions, and the consultation requirements are set out in the Legal Profession Act that I just referred to. The submission period must be at least 30 days. Once a cost determination is made, the committee must report to the Attorney General and publish the report in the *Government Gazette*, at which time the determination may come into force. This process could take a few months, which explains why the legislation could not commence immediately. The Attorney General does not interfere with the committee's work in this regard; they are independent experts in these matters.

Item 35 of the schedule to the Legal Profession (Supreme Court) (Contentious Business) Determination 2016 applies to motor vehicle personal injury claims and is a good example of a cost determination that was made for a specific purpose.

Hon NICK GOIRAN: Does the Legal Costs Committee meet at regular intervals?

Hon SUE ELLERY: I am advised that the committee does meet at regular intervals, but once this legislation achieves assent, the committee will be asked specifically to do this bit of work as a matter of priority.

Hon NICK GOIRAN: Is it the intention of the Attorney General to immediately write to the Legal Costs Committee at the time of assent requesting that it meet and commence the necessary work to make a cost determination under section 252 of the Legal Profession Act 2008?

Hon SUE ELLERY: The committee will be contacted. I do not know whether it will be in writing, but I assume so. The committee is independent, but the Attorney will ask it to undertake this work.

Hon NICK GOIRAN: The Attorney General has no control over whether the committee even meets at all, but he will write to it and one can reasonably assume that the committee will promptly take action and meet. The minister indicated that there is then a 30-day consultation period and also a 30-day period for submissions. Is that one and the same 30-day period or are they separate?

Hon Sue Ellery: They are one and the same.

Hon NICK GOIRAN: The minister then indicated that this whole process might take a few months. Can the minister not be more specific about how long this process will take? I accept that the Attorney General and the government cannot control when the committee meets, and there is no need for the minister to elaborate on that point, but if we assume reasonably that the committee meets promptly after the request from the Attorney General, why does it then take a few months and not just a little longer than the 30-day consultation period?

Hon SUE ELLERY: It may. I do not think I said "it will"; I said "it may". It may take 31 days or it may take 42 days. I do not know how long it will take and I am just guessing. We do know that the period for receiving submissions is prescribed at 30 days.

Hon NICK GOIRAN: Is it the case with the consultation and submission periods that a draft cost determination is sent out for consultation and submissions?

Hon SUE ELLERY: I can answer the question in a limited way. We are not able to find any provisions in the legislation that the committee is required to send out a draft, but I cannot give an answer about whether it has its own internal practice or set of guidelines or whatever that it has established itself. I do not know whether that is the case.

Hon NICK GOIRAN: Is the minister in a position to advise the house how long this process ordinarily takes from the first meeting of the committee to the sending out of consultation? The minister indicated that that is finalised at the gazettal process, so how long does this ordinarily take from start to finish?

Hon SUE ELLERY: I am not in a position to get advice on that.

Hon NICK GOIRAN: I will conclude on this point. It is unfortunate that the chamber cannot be informed about this. I accept that this is a provision for which the government wants to await a cost determination to first be issued. The reason is simply that the government's view is that any solicitor acting for a victim of child sexual abuse ought to be restrained by a cost determination for the amount of fees that the client might be charged. That is a perfectly legitimate policy position for the government to take, which it is seeking to enshrine in clause 15L of the legislation. But not to be told how long the process will take will be a source of frustration for victims of child sexual abuse. I think a lot of people expect that as soon as the bill passes this place, the limitation period will be lifted. Of course, that is not the case because the matter will have to return to the Legislative Assembly and I hasten to add that I support that. The legislation will be the better for it and the outcome for victims of child sexual abuse will be better if the chamber moves an amendment that goes to the Assembly. There is no criticism whatsoever on my part about that. I think the frustration will then be, once the bill passes the other place, that there will still be an unspecified period in which a cost determination needs to be drawn. We do not know how long that is going to be. It does not need to hold up the passage of the legislation today but it is unfortunate. I hope that by the stage the Attorney General announces the passage of this legislation, in the media release that I can guarantee will be issued at that time, it gives an indication of how long it will be before the government is in a position to proclaim the legislation. I would hope that it will be a specific time because, by that stage, the Attorney General will have had a conversation with whoever is the chair of the Legal Costs Committee. Incidentally, can the minister indicate to the chamber how many members are on the Legal Costs Committee and who is the current chair?

Hon SUE ELLERY: We are about to cause offence to somebody because we cannot remember the name of the chair. However, I am advised that it is probably a senior legal practitioner or a judge. I apologise to whomever that person is that we cannot remember their name. I am advised that there are approximately eight part-time members.

Hon MICHAEL MISCHIN: Hon Nick Goiran has covered much of what I was interested in with this commencement clause. To clarify, there is a 30-day period for the Legal Costs Committee to receive submissions. I take it that it will advertise that it is seeking submissions on a particular determination; is that the way it works?

Hon SUE ELLERY: That is correct.

Hon MICHAEL MISCHIN: There may not necessarily be a draft because it will be doing something unique here. It will draw on the way that the profession considers is a workable means of setting a variety of fees that it will be entitled to charge. Although there is a 30-day period in which to receive submissions, it may very well take several months of consideration after that by the Legal Costs Committee to formulate a draft determination. Would that be correct?

Hon SUE ELLERY: It may, and when I gave the answer, maybe 15 minutes ago, I said that it may take several months.

Hon MICHAEL MISCHIN: Indeed it may be that a draft prepared by the Legal Costs Committee will then be circulated to interested parties for consultation, the sort of thing that has not happened to this bill. The committee may send it around to the Law Society for example, the Western Australian Bar Association and other bodies concerned with acting for litigants in respect of these matters.

Hon SUE ELLERY: In the realm of the hypothetical, they may.

Hon MICHAEL MISCHIN: We can be certain that after the date of assent it will certainly not be less than 30 days but it could be as long as four, five or six months even before the Legal Costs Committee comes up with a determination.

Clause put and passed.

Clause 3: Act amended —

Hon NICK GOIRAN: On clause 3 of the bill, I simply would like to make a statement rather than ask the minister any question because clause 3 is entirely self-explanatory. This goes to matters that the minister and I have had a dialogue at length on about the provisions of the Civil Liability Act 2002. I have no problem whatsoever with the government's intention to amend the Civil Liability Act 2002. I have a problem with the government shifting its position since last week. Last week the government's position was to acknowledge that there was a gap. The position it now takes is that any suggestion of a gap is a theoretical possibility, to use the words of the minister, and not a real possibility. Collectively, we need to take responsibility for this. I indicate to members my disappointment that we as a chamber are not taking the opportunity this afternoon to guarantee that there is no

victim of child sexual abuse who is capable of launching a legal action pursuant to this legislation that will not be caught out by the language set out in section 3A of the Civil Liability Act 2002. It is plain reading to any member that the choice of words used by those honourable members inserted into table item 1(b)—by whichever number of Parliament it was that inserted that, most probably in 2002—were used with intent. We as a house, 35 voting members this afternoon, are with intent ensuring that the definition of child sexual abuse that the government wants to insert into the Limitation Act is not the same as the words used in table item 1(b).

We are doing that with intent this afternoon; the government is doing it with intent. The government has had the matter brought to its attention. The government concedes that there is a theoretical possibility. It says that it is not a real possibility on the advice of one human being—an exceptional individual. Nevertheless, on the advice of one person, the government is intent on not moving an amendment that would require the insertion of no more than a dozen words, and we, as a chamber, are accepting that. I have great difficulty with that. I think that it is not beyond us—to use a phrase I used earlier this afternoon—to put our political weapons to one side for a moment, to work on a collegiate basis, to recognise that there is a theoretical gap and to insert the necessary few words that will guarantee that no victim of child sexual abuse will fall through this gap. It will be traumatic, to say the least, if only one Western Australian victim of child sexual abuse were to launch their action, which is currently out of time, only to find that they are captured by this intentional act by this chamber on the advice of the government. It troubles me.

It is pointless moving an amendment because the government has made it clear that it has sought advice and it will not support an amendment. I am saddened by that, because I can see no cogent, logical reason to not do it. I accept that the advice provided to the government is that the adviser could not contemplate a set of circumstances in which a victim of child sexual abuse would fall through this gap. I accept that; a large part of me agrees with it. But, equally, if we know that there is a possibility of a gap, why would we not move an amendment to insert a dozen words to guarantee that there is no gap? It is beyond me why the government has taken that position.

I recognise that the minister with carriage of the bill in this place is not the minister with the overall conduct of the bill and that she is in a difficult position. She has been, in my case, very accommodating. She has gone back to the minister with the overall carriage of the bill on multiple points on multiple occasions and, for that, I remain grateful. The criticism here is not with the minister with carriage of the bill in this chamber; the criticism is with the government's position. I cannot comprehend why we would not move from an acceptance of a theoretical gap to fixing the gap to make sure that there is no chance of there being a problem. I hope that all this comes to nothing and that no victim of child sexual abuse falls through this gap. I think every member knows that law reform moves incredibly slowly, so even if there is a gap and even if one is identified and a person misses out, by the time any law reform fixes that gap, an enormous amount of time will have passed. That person, and potentially multiple victims of child sexual abuse, will be worse off because of a refusal to move a simple amendment of a dozen words.

I am disappointed. I am sad that we have not been able to resolve this particular point, which really should be a minor point. What surprises me is that of all the points I have raised in this debate, this one is probably the most simple to deal with, because, if I am wrong, all it means is that the insertion of the extra words is unnecessary. The worst thing that could happen is that the Civil Liability Act 2002 will have a few more words than is necessary. That will be the worst-case scenario. That troubles me. Nothing is going to shift on that. I am not for a moment suggesting that clause 3 should not be supported, but, for the record, I take the opportunity to express my disappointment and sadness that we have not been able to resolve this point, which really should not be a point of difference between any members in the chamber.

Hon MICHAEL MISCHIN: I take a slightly less generous view of the way this bill has been managed. Hon Nick Goiran, for example, said that we have been assured by the government that the point he has raised is simply a theoretical one. That is not the way it was put last week. The minister stated —

> There will be very few cases for which the court will find that the child sexual abuse is not unlawful.

That is not a theoretical possibility. That is a minister telling us on advice that there will be a small cohort—let us put it a little less robustly, a realistic prospect of a very small number of cases in which this problem will be faced. Hon Nick Goiran has raised the matter and it has been debated at length. The minister assured him that it would be considered. We were told that it was considered over the weekend. We were told that advice had been taken on it at a higher level and a decision made that the manner in which the government was dealing with it in the bill is satisfactory. We have not been told of the reasons an amendment would create a problem or, indeed, if it would create a problem and what the consequences might be. We have not had that disclosed to us but, with respect, that is typical of the way this minister has dealt with this bill so far. We had other undertakings last week that were quite specific; for example, to find out how the criminal injuries assessor deals with her discretion and what factors she takes into account. We were assured that the minister would go and ask but it has turned out that she did not ask that at all and that she asked a totally different question. That has been proffered to us as meeting an

undertaking. That is not providing an answer! That is asking the wrong question and giving us an answer that is irrelevant to our inquiries. Yet that is the best the government can do to explain this complex legislation, which will alter rights into the future and the past in the most dramatic way. That is not being helpful. That is not entertaining improvements to this legislation. That has been combined with the lack of any worthwhile distribution of this bill for comment by those who will be acting in this area, whether for plaintiffs or for defendants.

Quite apart from the problem that Hon Nick Goiran identified, there is the other problem that I have been discussing and trying to tease out some answers to. That was unsuccessful as well. All we got was, "Well, we've decided." That is the best that this government can do! It does not consult. It changes the law. All it wants to do is tick off an election commitment and say, "Look at what we've done. Aren't we wonderful! We've lifted the limitation period and fiddled around with some other things. Aren't we pioneers? Pat us on the back!" There will be a media release and a few shouts but will we be seeing whether this is working properly or whether it has unforeseen consequences for even half the problems that we have pointed out? No, we will not. There will be no continuing monitoring of it. Notwithstanding that the minister assured us last week —

> The advice I am given is that the policy setting for these purposes was around that cohort of historical cases and that a decision has been made to come back and revisit this in the future.

That was false too! It is apparent that there is no intention to monitor the course of this bill, let alone to try to fix anything. The work is done! The government thinks that the election commitment has been fulfilled; it can tick that box and move on to something else. This has the potential to create enormous problems. We might have extensive litigation trying to decide which side of item 1(b) of section 3A of the Civil Liability Act some matters fall. We might have extensive legal argument about the value or the liability created by an apology when an agreement is set aside and someone now sues after they have made comments that they thought were outside a limitation period. None of that seems to be of interest to the government. It is not interested in even exploring it or getting advice on it. We are told that that is the way it is. It is simply scandalous that something as critical as this could be dealt with in such an offhand fashion. I do not think it is surprising that in the circumstances I do not believe anything the minister has assured us about regarding the operation of this act. She cannot even meet her own undertakings and ask the right questions when she says that she will.

Last week it was a real possibility for a small number of cases. Now it is simply a theoretical possibility. We have the potential for considerable litigation. I hope there will not be, but there is the potential for considerable litigation to argue abstruse areas of law that could be settled quite easily now. We have no mechanism to review and fix these things in a timely fashion should problems be exposed. Indeed, the government has no appetite for or interest in those. I suggest that part of that is because this government has chosen to go much further than it needed to. I am not suggesting that changes to the Civil Liability Act to change the exposure of organisations and the like to judgement in relevant cases is inappropriate or would not be in the future, but the government has chosen to take a simple proposition of lifting limitation periods and abolishing them in a small number of cases and go further with it in its usual half-baked fashion. I hope that problems will not arise, but noting the way in which this government has dealt with things, I doubt that we would be told anyway. I think we can move on because some questions need to be asked, not that I value the answers that I will be getting, on other more operative clauses.

Hon SUE ELLERY: I think I have been pretty patient. I will just say this: with every word from Hon Michael Mischin in that last contribution, I grow fonder of Hon Nick Goiran.

Clause put and passed.

Clause 4: Section 8 amended —

Hon NICK GOIRAN: Can the minister explain to me the necessity of clause 4, which seeks to amend section 8 of the Civil Liability Act 2002 by treating part 2A differently from any other part of the Civil Liability Act 2002?

Hon SUE ELLERY: As it stands before the bill amends it, section 8 provides that —

> This Act does not create or confer any cause of civil action …

However, part 2A of the act as amended will do just that.

Hon NICK GOIRAN: Which provisions at the end of proposed part 2A will do just that?

Hon SUE ELLERY: Proposed sections 15B and 15D.

Hon MICHAEL MISCHIN: Originally, section 8 of the Civil Liability Act was to ensure that the act could not be construed as creating or conferring any right of action in its own right for the recovery of damages, turning instead to common law torts, causes of action or any that are established by other discrete statutory instruments. Is that correct?

Hon SUE ELLERY: I am not sure we understand the question.

Hon MICHAEL MISCHIN: Before this proposed amendment, section 8 of the Civil Liability Act 2002, reads —

> This Act does not create or confer any cause of civil action for the recovery of damages in respect of an injury or death caused by the fault of a person.

Presumably, that was to make quite clear that the Civil Liability Act does many things but does not create causes of action itself. Correct?

Hon SUE ELLERY: That is correct.

Hon MICHAEL MISCHIN: To look for a cause of action we would be looking either at common law; for example, tort of negligence, nuisance, assault and battery or contract law or to some specific statutory instrument at Parliament and the like creating a cause of action. Correct?

Hon SUE ELLERY: Yes. Does the member want to explore a particular issue?

Hon MICHAEL MISCHIN: Why was it thought proper to include something utterly contrary to the initial purpose of this act such as creating a cause of action within the bounds of the Civil Liability Act by way of proposed part 2A? If we are creating causes of action and the like, should it not properly be a standalone statute that deals with these things rather than warping the intention of the Civil Liability Act by changing it from a particular type of act, defining things but not creating liabilities, into one that is now creating a liability?

Hon SUE ELLERY: We are kind of going right back to the policy of the bill. In any event, a view was held that a piece of existing legislation deals with the issue of civil liability, and a judgement was made that this was a sensible place to pursue this particular issue. Frankly, a decision could have been made to do a completely separate statute, but that was not the judgement of the drafters. The advice they gave to the government was that we have an existing piece of legislation that deals with civil liability issues and that the appropriate course of action was to amend that.

Hon NICK GOIRAN: Minister, rather than amending section 8 of the Civil Liability Act, was consideration given to deleting section 8 completely?

Hon SUE ELLERY: No, it was not.

Hon NICK GOIRAN: So, minister, what would be the consequences of simply deleting section 8 rather than the amendment proposed by the government?

Hon SUE ELLERY: The drafters did not want to disturb any other areas of the law that are otherwise applicable separate to the child sexual abuse provisions. As the non–legal person sitting at this table and the only non–legal person participating in this debate, it appears to me that a judgement was made. A judgement probably could have been made to do it in a separate standalone statute, but that path was not taken.

Clause put and passed.

Clause 5: Part 2A inserted —

Hon NICK GOIRAN: Clause 5 will do various things, one of which is address under division 3 the issue of prior compensation payments and the insertion of proposed section 15K. Would payments made under the national redress scheme be captured by proposed section 15K?

Hon SUE ELLERY: We understand that as part of the national redress scheme, applicants are required to sign a deed of release, acknowledging that they are giving up their rights to take further action—to sue—but redress payments would be deducted as part of any court award. I think I need to provide a bit of clarification. If we are talking about the national redress scheme that is being negotiated now, it does not make sense for me to say that they have to sign a deed of release and then talk about any payment they might have received, because if they have signed a deed of release, they would not be pursuing action under this clause. However, if they have received another form of redress payment, such as a payment under the former Redress WA scheme, or a settlement they might have reached with a church or other institution, it would be deducted.

Hon NICK GOIRAN: That is most helpful, minister. It is necessary for victims of child sexual abuse to be on notice that if they pursue compensation under the proposed national scheme, they will not be able to pursue compensation under this regime. A victim of child sexual abuse might be able to seek compensation from more than one person. They might seek compensation from the state of Western Australia, and, rather than pursue a writ, they might make an application under the national redress scheme and be granted compensation under that scheme. As I understand the minister's advice to the chamber, if they do that, they will have to sign a deed of settlement and release the state from further liability. Would that also prevent the victim of child sexual abuse from pursuing the perpetrator?

Hon SUE ELLERY: If the honourable member is referring to a perpetrator in the sense of a single individual, that single individual would not be captured as part of the national redress scheme.

Hon NICK GOIRAN: I want to make sure that it is clear. My original question was: will any payments made under the national redress scheme be captured by proposed section 15K? A victim may obtain compensation under the national redress scheme and subsequently decide to pursue a writ against their abuser, as distinct from an institution, the state or someone else who might have some form of liability to the victim. Under proposed section 15K, would any compensation that is payable to the victim by the perpetrator or abuser be reduced to the extent of the payment made under the national redress scheme?

Hon SUE ELLERY: The answer is yes. I am advised that the court looks at the total amount of compensation paid, not whom it has come from.

Hon NICK GOIRAN: Minister, it seems a bit unfair to the institution, the state or the taxpayer, or whoever is paying, that the primary perpetrator is in effect required to pay a lesser amount of compensation because of the generosity—I hesitate to use that word—of the national redress scheme.

Sitting suspended from 6.00 to 7.30 pm

Hon MICHAEL MISCHIN: I have a number of questions about clause 5 because it is really the sharp end of the amendments to the Civil Liability Act. The way I understand it, one of the important features of the clause is to not only remove limitation periods, but also extend the operation of the scheme to address some of the legal difficulties in suing entities, whether incorporated or unincorporated, that may be the successors in title of organisations that had the care of children who were abused. Specifically, the second reading speech states that there are provisions—I assume that they are in new part 2A—that will overcome what is termed the lack of perpetual succession in unincorporated institutions as identified in the New South Wales Court of Appeal decision of Trustees of the Roman Catholic Church for the Archdiocese of Sydney v Ellis and Another. Before we get into the specifics of how that is to be addressed, I would appreciate it if the minister would outline what the mischief is in the Ellis case that these are intended to cure.

Hon SUE ELLERY: Two scenarios create difficulty in identifying who can be sued for historical child sexual abuse. The first is the situation in which the office holder of an unincorporated institution who would have been liable is no longer in office; the second is the situation in which an unincorporated institution has since become incorporated. Proposed sections 15B and 15D try to address those situations.

In the Ellis example, Mr Ellis commenced legal proceedings in the Supreme Court of New South Wales in 2004 against Cardinal Pell, who was then Archbishop of Sydney, the trustees for the Catholic Church Archdiocese of Sydney, and a parish priest, Father Duggan. Mr Ellis pleaded causes of action in tort and breach of fiduciary duty arising from allegations of sexual abuse by Father Duggan between 1974 and 1979. Father Duggan died soon after proceedings commenced and Mr Ellis decided not to pursue the claim against his estate. As a result, the proceedings remained on foot against Cardinal Pell and the trustees only.

In that case, the New South Wales Court of Appeal held that neither the trustees nor Cardinal Pell were proper defendants to the proceedings. The Court of Appeal held that even if Mr Ellis established his factual claims, Cardinal Pell could not be liable for Mr Ellis's abuse, which occurred before he had been appointed archbishop. As the office of archbishop does not have perpetual succession, any liability borne by his predecessor in office did not carry over to Cardinal Pell as the incumbent and the court left open the question of whether the archbishop at the time of the abuse could be held liable for that abuse. The Court of Appeal held that the trustees could not be liable for injury caused by Father Duggan's sexual abuse because under the New South Wales Roman Catholic Church Trust Property Act 1936, the trustees were given no role in appointing, managing or removing priests.

Hon MICHAEL MISCHIN: I thank the minister for that. I think that is very useful in helping the chamber to understand how the problem arose.

Can the minister take us through the provisions of proposed part 2A that will overcome the several problems posed by this case—firstly, the lack of continuity in succession; secondly, access to the funds held in trust by the Catholic Church; and, thirdly, how the original office holder would have been held liable? Without limiting it, can the minister take us through how these will overcome the problems and allow someone in Mr Ellis's position to succeed, should they sue in Western Australia?

Hon SUE ELLERY: If proposed section 15B were to be applied to the facts in the Ellis case, it would have the effect that Mr Ellis could have sued the current office holder, being Cardinal Pell, in the name of the office, the Archbishop of Sydney, in respect of any cause of action arising from the sexual abuse by Father Duggan. The criteria in proposed section 15B(1)(a) to (f) would be satisfied as the alleged perpetrator of the sexual abuse, Father Duggan, was a person associated with the Roman Catholic Archdiocese of Sydney. That is proposed section 15B(1)(a). It was arguable that Mr Ellis had a cause of action in tort or equity arising from personal injury suffered as a result of sexual abuse against the Archbishop of Sydney, who held an office of authority in the institution at the time that the cause of action accrued, being the time of the abuse—that is, 1974 to 1979. That is proposed section 15B(1)(b). Mr Ellis's cause of action against the archbishop was founded on the responsibility that the archbishop had as an

office holder for the associated person, Father Duggan, and for the institution generally. That is proposed section 15B(1)(b). At the time of the accrual of the cause of action, the Roman Catholic Archdiocese of Sydney was an unincorporated association. That is proposed section 15B(1)(c).

At the time of the accrual of the cause of action, the Roman Catholic Archdiocese of Sydney was an institution that exercised care, supervision or authority over children. That is proposed section 15B(1)(c). The Roman Catholic Archdiocese of Sydney is currently not incorporated. That is proposed section 15B(1)(d). The archbishop at the time the cause of action had accrued—that is, 1974 to 1979—no longer held office because he had died. That is proposed section 15B(1)(e). Mr Ellis could have maintained an action on the cause of action against the previous archbishop if he had still held office. That is proposed section 15B(1)(f). Any liability that the former archbishop would have had in respect of the cause of action would be taken to be held by the current office holder—that is, Cardinal Pell. That is proposed section 15B(3). This would have allowed for the enforcement of the judgement as against Cardinal Pell as the current office holder and, in turn, provides for the availability of assets held by or for the archbishop or the Archdiocese of Sydney as contemplated by the provisions of proposed section 15C.

Hon MICHAEL MISCHIN: I have a couple of questions. First, I thought that the minister told us earlier that in Ellis's case, the archdiocese was unincorporated but has since been incorporated. Is the minister now saying that it is unincorporated still?

Hon SUE ELLERY: When I provided the answer earlier, I started by referring to two scenarios. The first one is Ellis. The second one is when an unincorporated institution has since become incorporated. I said that both of those are dealt with in proposed sections 15B and 15D.

Hon MICHAEL MISCHIN: That is my mistake. It is taken as an assumption here then that the Archbishop of Sydney or the archdiocese, or whoever the defendant was, was responsible for this Father Duggan. On what basis would the minister say that those entities—any or all of them—would be responsible for Father Duggan? Was he an employee? Was he acting in the capacity of an agent? What was the nature of that liability?

Hon SUE ELLERY: There are two points to the answer I gave earlier. Firstly, Mr Ellis's cause of action against the archbishop, if these provisions had been in place—this is all hypothetical—would have been founded on the responsibility that the archbishop had as an office holder for the associated person, Father Duggan, and for the institution generally. That is in proposed section 15B(1)(b). Secondly, Mr Ellis could have maintained an action on the cause of action against the previous archbishop if he had still held office, which would be under proposed section 15B(1)(f). In any case, that is what would be argued, and ultimately the court would make a determination about whether it accepted it. But in terms of the way that the bill is drafted to address those issues, we say that that addresses those issues.

Hon MICHAEL MISCHIN: Is it fair to say that the bill does not create a liability in the current Archbishop of Sydney using those factual circumstances; it simply transfers, or allows to be carried by the current archbishop, the liability, if any, that the archbishop back in the day would have had? The legislation does not create a vicarious liability of any kind; it simply states that if there was one back then, this is the guy who can be sued now.

Hon SUE ELLERY: The basis of the liability would still need to be proved, but essentially the member's description is correct. The legislation allows that liability to be carried to the new person.

Hon MICHAEL MISCHIN: So that I understand it, it was never established in the Ellis case, because the court never needed to consider it, whether, back in the day, the archbishop, or the archdiocese, was actually responsible for Duggan's behaviour.

Hon Sue Ellery: That is correct.

Hon MICHAEL MISCHIN: Taking it forward to the present day, let us swap the Archbishop of Sydney for the Archbishop of Perth but leave all the other facts the same. If the Archbishop of Perth, or the Archdiocese of Perth, has no legal responsibility for the behaviour of one of the priests operating within the diocese, this legislation does not take us any further in finding a defendant for the unfortunate Mr Ellis. All it does is state that the current archbishop, as opposed to the archbishop back in the day, can be sued.

Hon SUE ELLERY: Yes, that is correct.

Hon MICHAEL MISCHIN: Mr Ellis could end up with exactly the same result as he got before, notwithstanding these provisions, except that he would under these provisions have Cardinal Pell's name instead of Cardinal Bloggs, from whenever he was abused, but otherwise the result would be the same.

Hon SUE ELLERY: We are not able to say that, because we do not know and the member is essentially putting a hypothetical proposition. The provisions of the clause we are talking about now were put in place in part to address some of those issues that arose in and that obstructed, if I can use that expression, the Ellis case—that is, to get over those obstructions if a similar set of circumstances presented in our jurisdiction.

Hon MICHAEL MISCHIN: Let us assume all that has happened and let us assume for the moment that a notional Mr Ellis has sued the Archbishop of Perth or the Archdiocese of Perth and the correct office holder for the abuse that was conducted by a priest. Leaving aside whether or not the office holder is in any way responsible for the actions of the priests, let us assume that the right person is being sued in accordance with proposed section 15B. Let us assume for the argument that the court says yes, back in the day the archdiocese or the archbishop would have been responsible for the behaviour of this priest, so the plaintiff is successful and gets a judgement against the current office holder. What then? How does it proceed from there? Which provisions will assist that plaintiff recovering the value of his or her judgement?

Hon SUE ELLERY: I take the member to proposed section 15C(1), which states —

> This section applies if a holder of an office of authority in an institution has a liability under a judgment —

We have established that has happened —

> in or settlement of an action on a child sexual abuse cause of action of the type described in section 15B(1)(b).

Proposed section 15C(2) states —

> The holder of the office may satisfy the liability out of assets held by or for the office or the institution, including assets of a trust …

Hon MICHAEL MISCHIN: The operative phrase is "the holder of the office may satisfy the liability out of assets held by or for the office or the institution, including assets of a trust". Proposed section 15C(3) states that the personal assets of the holder of the office cannot be used to satisfy liability. The current Archbishop of Perth, let us say, for want of a better notional defendant, says, "Okay, my predecessor back in the day would have been responsible for the misfeasance of this priest. The court has found that and has delivered judgement and awarded damages. I am not obliged to use it out of my personal property"—which is fair enough—"but I may satisfy the liability out of assets held by me or the institution of which I am an office holder, but I don't want to because I don't think it's fair." What happens then?

Hon SUE ELLERY: I think this was set out in the second reading speech. The member is quite right; proposed section 15C is permissive in that it uses the word "may". It is the policy that this legislation would not deal with enforcement measures, but, as set out in the second reading speech and I think said elsewhere by the Attorney General, if an institution followed the example that the member has just said, the government would re-look at the legislation.

Hon MICHAEL MISCHIN: That is part of what I am driving at. I just need clarification because that is very important. Leaving aside the fine-tuning, the second reading speech and the like, the expectations that have been built up since 2015 were that all we needed to do was lift the limitation period, make a few tweaks and these victims of child sexual abuse would be able to sue into the future and recover judgement and justice and their due compensation. In reality, it irons out a few of the wrinkles created by the Ellis case and the like, and provides victims with a potential defendant, but it provides them with no guarantee of any access to any compensation. Would that be correct?

Hon SUE ELLERY: I think we have canvassed this before. That is the legal reality. There is a broader social or moral—however we want to describe it—obligation that we think institutions will follow given the royal commission's weight over five years. The member's personal judgement on whether he will accept that as satisfactory is up to him.

Hon MICHAEL MISCHIN: I was not pretending to substitute my moral judgement in any of this and, whatever the royal commission might have found, the government found it necessary to change the law in this respect. The point was that the legislation offers no guarantee. It provides another possibility if the office holders do "the right thing" according to the government. What happens, for example, if there is a judgement against an office holder for—I will pick a figure—let us say, $100 000? I am not making a judgement of what a claim might be worth, but $100 000 is a nice, round figure. The office holder says, "My office and my part of this institution do not have access to any assets like $100 000. Will you take $50 000?"

Is it open then for the office holder to negotiate with the plaintiff, the claimant, and settle for a lesser sum?

Hon SUE ELLERY: I am not sure where this is going. If a judgement has been made, the obligation is for the person responsible to pay the amount of money that is set out in the judgement. Outside this case and outside the court process, it is open to anyone to negotiate with anyone and accept any alternative arrangement, if that is what they want to do. But the legal obligation is to pay the $100 000.

Hon MICHAEL MISCHIN: We have a situation in which after litigation or even after negotiation, the plaintiff and the office holder defendant are left with an obligation on the part of the defendant office holder of $100 000.

The office holder defendant says, "Okay, I wish I could pay that but I can't. Firstly, it's not right that it should come out of my assets. I don't have any anyway that could satisfy that and there is no legal obligation for me to take it out of my assets. But as for the institution itself, as an office holder, the most that our little branch of the church has is $25 000, and that's if we sell the car, which we use to drop off hot food in the park to homeless people, and a few chairs in the local hall. That's all the money we have." Is there anything in this that can trace assets further into church organisations; and, if so, can the minister point out that mechanism?

Hon SUE ELLERY: The legislation does not allow for assets to be traced.

Hon MICHAEL MISCHIN: Some of the information that I have received—I may be wrong about this; perhaps the advisers would have a better idea—indicates that some church organisations are arranged in a manner whereby the institution might be very wealthy but its affairs are structured, not to be taken too literally, in a pyramid-type arrangement in which sums of money are allocated and held in trust to certain levels of that organisation. It may very well be that the Roman Catholic Archdiocese of Perth, through assets held in a number of trusts and the like, can potentially have a very large pool of assets. It may own property that is held in a trust or a variety of other things. On the other hand, it may be that an archdiocese out in—I do not know; I am making this up—Kalgoorlie, Esperance or Bunbury, which may not have very large assets, and the office holder, who is the notional defendant, may not, even with the permissive arrangement and powers provided by proposed section 15C, be able to gain access to anything worthwhile to satisfy the judgement. It could be, if the office holder is able to call down from other parts of that church structure. Note that I mean that neutrally; I do not want it to be thought that I am talking about the Catholic or Anglican Church or any other church. But they may not have access to, and may not be able to call on, those assets to satisfy the judgement against him or her. Therefore, after an awful lot of effort it may be that a victim of child abuse, relying upon this to open up a civil suit many years in the future, will be no better off than they are now. Indeed, at that stage they may have even set aside as part of their litigation a settlement that already had been reached at some stage in the past. Is that a possibility?

Hon SUE ELLERY: We are talking hypothetically. I note that most of the examples have been about the Catholic Church. It is important to note that the Catholic Church is not the only organisation likely to be subject to the provisions of this law. I have made the point before that there is no provision within the bill to enforce. I make the point—I have made it before—that the context for this is a five-year royal commission. I think it would be extraordinary for any organisation that finds itself covered by this piece of legislation to not take all steps available to find a way to meet its obligations under the provisions of the act. I would find that really extraordinary. That is not to say that the point the honourable member is making will not happen. But if the point he is making is that in some way the bill is deficient because it does not include enforcement measures, that is his judgement to reach. If the member is trying to make the point that the bill is deficient because it does not foresee and does not put in place measures that will guarantee a way of tracking back money behind whatever structures those organisations have put in place, it is the member's judgement to make that the bill is deficient. We have drafted the legislation to cover the obstacles that have been identified to date to pick up the recommendation of the royal commission, which spent five years examining this and which came up with the recommendation for jurisdictions to go down the path that we are going down. It is his right to reach the conclusion that this bill is deficient, and he will do whatever he needs to do when the vote is taken. But I have made the point already that this is not a bill with enforcement or tracing provisions.

Hon MICHAEL MISCHIN: I am not making any judgement at all. The bill is what the bill is. Much has been said about its merits in the second reading speech and in the second reading reply and by some who contributed to the debate. I am trying to work out—what I think my responsibility is—the metes and bounds of the bill and what it does or does not do. As I pointed out, some of the expectations of victims might be very different. Maybe there were no expectations beyond what is in the bill. So be it. But with talk of achieving justice and the like, my understanding was that abuse survivors would have thought that once this has passed, not only will they be able to sue anytime into the future for abuse of a sexual nature inflicted upon them when they were children, but also that they will be able to sue institutions and have access to the moneys and assets held by those institutions, in the broad sense, in order to satisfy judgement. I concede entirely that there is a certain permissiveness that will be allowed by the legislation to empower office holders, but a lot seems to be taken on trust by the government that these institutions will do "the right thing". Having said that, the permission given to office holders is not to pull down assets to satisfy judgements against them from the wealthier parts of their organisation, it will allow them limited power to have access to assets or trusts to which they have access. At the lower ends of those organisations, which were the ones that were directly responsible for hiring and firing, for the supervision of children, and for the supervision of the perpetrators, those may not be at a very high level at all. There will be a bit of a gamble for child abuse victims. Mr Ellis might have to decide whether he will go to the local parish church and pursue the current office holder of the person who was in charge of a parish years before, who may have no assets at all and only have access to those that are entrusted to him by the church organisation for his operations; or gamble that he ought to sue the Archbishop of Sydney, who might have access to a whole lot more but may not have the legal

responsibility for the Father Duggan of the day. My point is simply that we need to be very clear about what this legislation will and will not do. It will not be the panacea that many might think it will be in lifting the corporate veil. It will have a very limited operation. I accept that the government has taken a modest approach to this but I think it needs to be made clear that this will not be the silver bullet for generations of child sexual abuse survivors. They will still have to look with considerable care at who they will sue, particularly if it is not the state. The state is a different thing. Certainly, church organisations and other non-government organisations might be a different proposition.

I want to ask about the cap on legal fees but before we get onto that—maybe I am jumping the gun a little bit with this, but the setting aside of previously settled causes of action is, in a sense, touched on by clause 15K, but I think it is really a matter for proposed section 92 of the Limitation Act; would that be right?

Hon Sue Ellery: Let's wait till we get there.

Hon MICHAEL MISCHIN: I will just ask the minister about the cap on legal fees. The minister has told us that it could be some time—a few months, perhaps longer—before there is a cost determination that limits the amount of costs to be recovered. It was stated in the second reading speech —

> … to ensure that victims are treated fairly, the bill introduces a cap on the legal fees that may be charged in child sexual abuse cases.

Does this cap apply only to legal fees that are payable by a plaintiff to his or her legal advisers or is it also applicable to the legal fees that can be charged for services rendered to a defendant?

Hon SUE ELLERY: Section 275(2) of the Legal Profession Act, "Legal costs determinations", provides —

> A costs determination may provide that law practices may charge —
>
> (a) according to a scale of rates of commission or percentages; or
>
> (b) a specified amount; or
>
> (c) a maximum amount; or
>
> (d) in any other way or combination of ways.

It is for the Legal Costs Committee to determine how it will deal with this matter. I am not sure whether there was another part to the honourable member's question.

Hon MICHAEL MISCHIN: The way the second reading speech and, I think, the explanatory memorandum were framed was that capping the amount that could be payable by legal fees for services is a means of protecting victims. The sense that I received was that this is meant to be apropos victim and their lawyer. Is it meant to be also apropos defendant or perpetrator and their lawyer?

Hon SUE ELLERY: Proposed section 15L(2) provides that —

> An agreement must not be made for a law practice to receive, for appearing for or acting on behalf of a person in a child sexual abuse action …

It does not say that is for only the victim. It is "a person", whoever that may be.

Hon MICHAEL MISCHIN: Although it is not specified, I take it the idea is that the Legal Costs Committee will make a determination that will take into account potentially complex cases and things of that nature. But I raise a scenario to assist me to determine whether these will be bound by this protection. Let us say a claimant instructs a New South Wales lawyer who commences action for abuse conducted in Western Australia and instructs a firm as an agent here but enters into a cost agreement with the New South Wales firm. Is that New South Wales firm bound by a cap on legal fees under this provision or can that firm charge whatever the market will bear from its client notwithstanding this?

The DEPUTY CHAIR: The minister has just advised that she will not be standing up and down to answer the questions, if that is okay with the house. I am fine with that.

Hon MICHAEL MISCHIN: It is fine. I did not realise the minister was having trouble. It does not bother me.

Hon SUE ELLERY: I am advised that I am not able to get an answer to that question with the information that is available at the table now.

Hon MICHAEL MISCHIN: I think this is important because, once again, we are told that this is a protection for parties against the avarice of legal representatives. Plainly, unless that control is placed over lawyers outside this jurisdiction who are acting for clients, whether for defendants or plaintiffs, there is a loophole, if you like, as a means by which lawyers can get around the problem. It may very well be that a local law firm will enter into an arrangement with an eastern states law firm to act for its client, have its firm instructed as agents, allow the other firm to charge what the market will bear, be paid an agency fee for its work in Western Australia, and so, quite

lawfully, circumvent the cap. As I say, if the minister cannot give an answer at the moment, I would appreciate it if we could get some advice on this.

Hon SUE ELLERY: I am advised that if the proceedings are in WA, the provisions of our legislation that apply to the cap on costs will apply.

Hon MICHAEL MISCHIN: Let us say the client is not in Western Australia but is instructing a firm outside Western Australia. How does this provision prevent that firm, out of our jurisdiction, from charging what is lawful under the provisions in its state or territory and simply using a Western Australian firm as the agent on its behalf, which may be bound by this but then that cost agreement is not being settled with that firm; it is being settled by the interstate firm that is instructing the Western Australian firm? Likewise, an arrangement with expensive counsel from New South Wales being brought over, rather than local counsel being instructed who would be bound by this, and having one of the wise men from the east come over who charges whatever the market will bear.

Hon SUE ELLERY: Those wise men from the east, to use Hon Michael Mischin's expression, are appearing in a Western Australian proceeding. Our cost provisions apply if the proceeding is in Western Australia.

Hon MICHAEL MISCHIN: I need some clarification on that, because if they are being instructed from the eastern states—there is an arrangement with counsel there—how will they be bound by a costs agreement that is not entered into here? Maybe I have it wrong, but perhaps the minister can clarify the arrangements, how they will work and how these caps will apply here.

Hon SUE ELLERY: I am not sure whether I can add much further to what I have already said about the fact that the Legal Costs Committee will make a determination about how it applies the criteria open to it to apply in setting the costs regime.

Hon NICK GOIRAN: Minister, before the dinner adjournment we were dealing with proposed section 15K that will go into the Civil Liability Act 2002, and the division for prior compensation payments to be taken into account. We were dealing with the scenario of the national redress scheme. I apologise if the minister dealt with this matter during my absence on urgent parliamentary business, but would the minister clarify the situation for the chamber? It just strikes me as odd that the primary perpetrator would be able to benefit from a reduction in the judgement of the courts pursuant to proposed section 15K. Let us say, for example, that the person received $50 000 under the national redress scheme. Their damages have actually been assessed at $200 000, but the court, before issuing its judgement against the institution or some other person other than the primary perpetrator, says, "By a force of law, we need to take into account section 15K and so I deduct $50 000 from the $200 000 assessment of damages, and I award you $150 000." The victim would still have $200 000 altogether, so there is no issue there. But it seems unjust that the primary perpetrator is able to benefit from proposed section 15K in that situation. Before the dinner recess, I was curious to find out whether the government had received any advice on the capacity of an institution or the states to recover those funds from the primary perpetrator.

Hon SUE ELLERY: The answer is no. It is correct that if a victim sues a perpetrator and is awarded damages, the national redress amount—if Western Australia opts in—would be deducted by the court under proposed section 15K. This provision is based on the common law legal principle of avoiding overcompensation. It will ensure full and equitable payments to victims. The bill does not go so far as to include recovery provisions. The policy focus is on the award to victims, not punishment or recovery.

Hon NICK GOIRAN: The very first thing the minister said is, "The answer is no." Is that "no" to the question of whether the government has sought advice on that point?

Hon SUE ELLERY: I understood the question was not about whether we had sought advice. I am sorry about that. It has been considered by the government, yes.

Hon NICK GOIRAN: It has been considered by the government. It is what it is: there will be no surplus compensation for the victim of crime. That is right as a matter of principle. It is as it is: the perpetrator will benefit from this regime. That is unfortunate. I would encourage the government, when it is reviewing this scheme, to look at this issue. In effect, it goes to the issue that the government intends to fix by its proposed amendment to section 68 of the Criminal Injuries Compensation Act. The government has, quite rightly, recognised that we would not want the victims of crime to owe a debt to the state as a result of these arrangements. Again, that is right as a matter of principle and justice. However, in considering further reforms, it strikes me that the state of Western Australia and the institution should be able to recoup those funds from the primary perpetrator. I hasten to add that this assumes that the primary perpetrator has funds from which a payment can be made. Unfortunately, I suspect that, more often than not, that will not be the case. Therefore, that may be a moot point in any event. If a primary perpetrator is particularly wealthy, they should refund the state or the institution if a payment has been made under the national redress scheme. While we are talking about the national redress scheme, does the minister have any update on when the government will make a decision about whether to opt into that scheme?

Hon SUE ELLERY: No.

Hon NICK GOIRAN: If there is no update on that matter, is there a deadline by which the government needs to make a decision about whether to opt in?

Hon SUE ELLERY: Not that I am aware.

Hon NICK GOIRAN: I think the minister said not that she is aware. If I suggested to the minister that a decision needs to be made by 1 July this year, would the minister disagree?

Hon SUE ELLERY: I am not in a position to give the member an answer about a matter that is subject to live negotiations by the Attorney General. It is not that I do not want to; I am not in a position to give the member answers to those questions, because the negotiations are being conducted by the Attorney General, not by me.

Hon NICK GOIRAN: The victims of child sexual abuse—the majority of whom will be in a better position and have more options available to them as a result of the passage of this legislation—are entitled to know where the government sits on the national redress scheme. As the minister identified earlier this afternoon, one of the arrangements under the national redress scheme is that a victim of child sexual abuse will be required to sign away, by way of a deed of release, any right to further litigation. I indicated in my contribution to the second reading debate that I think people should have those options available to them. I think they should have three legitimate options available to them: the civil lawsuit, the national redress scheme and the criminal injuries compensation scheme. But at present, we do not know what the government's position is on the national redress scheme, we are not in a position to get an update on it and we are not in a position to find out when it will make a decision. If I am charitable, I noted when we considered clause 2 that the proclamation of this legislation may take a few months. In actual fact, pursuant to the conversation we had, we can confidently say that it will take at least a few months, because the consultation period alone is 30 days. Any suggestion that it will happen in less than a few months does not marry with the information given to the chamber. Given that that process is going to take a few months, I hope that by then the government will have a fixed position on the national redress scheme and that victims of child sexual abuse will know precisely where they stand. The last thing I would want is a victim to brief their solicitor and incur costs. Nothing stops that from happening now; people could start the preliminary work now. They do not have to wait for a cost determination for that to happen. They are bound by the cost determination only once it comes into force. I would not want them to do that in the absence of knowing what will happen with the national redress scheme. It is an important issue that the government needs to clarify. Perhaps it is indeed a question for the opposition to ask tomorrow during question time of the Attorney General via his representative.

Hon Sue Ellery: Indeed, and you are welcome to do that. That would be more appropriate than on clause 5 of this bill.

Hon NICK GOIRAN: The minister says that but, with respect, clause 5 of the bill seeks to insert proposed section 15K, which deals with prior compensation payments being taken into account. We ascertained earlier that some of those prior compensation payments may well be national redress payments. It is entirely within the remit of clause 5 to understand whether the national redress scheme will be captured. The answer to that is yes; we have identified that. That will happen only if the government signs up to it. It would be useful for us to know so that we know exactly what will be captured by proposed section 15K. But we can pursue it tomorrow.

Hon SUE ELLERY: Rather than in committee on this bill with a representative minister, I think the better time for the member to ask that question is during question time.

Hon NICK GOIRAN: I most probably will.

The DEPUTY CHAIR: Hon Nick Goiran, just be wary that the minister is not rising, so the normal cues are not there. Just be wary of still seeking the call.

Hon NICK GOIRAN: Thank you, Mr Deputy Chair, and thank you for your patience with me this evening. With respect to clause 5, I want to ask the minister some questions regarding the linking of new and old institutions. I was away on urgent parliamentary business so if any of this has been covered, I ask the minister to please not hesitate to interject and I will leave it and review the *Hansard* this evening or tomorrow.

In her second reading speech the minister made the following comment —

> … it is possible that a particular set of circumstances arise that was not contemplated by the legislation, or an institution may request to be identified as the proper defendant. For this reason, the bill includes a regulation-making power whereby the Governor may, on the recommendation of the minister, provide in regulations that for the purposes of the act a current institution is the relevant successor of the earlier institution that existed at the time of the accrual of the cause of action. The regulation-making power is not unfettered. The minister cannot make a recommendation for the purposes of such regulations unless satisfied that the current institution has some relevant connection to the earlier institution, or the

> individual or body with overall responsibility for the current institution has agreed to the current institution being taken to be the relevant successor of the earlier institution.

The minister talked about the minister being satisfied; is that satisfaction of the minister to be objective or subjective?

Hon SUE ELLERY: It has to be subjective. The Governor may make recommendations only on the recommendation of the minister, who can make that recommendation only if satisfied that there is some relevant connection or if the head of the current institution agrees. The first one, which effectively is ministers satisfying themselves that there is some relevant connection, includes subjectivity.

Hon NICK GOIRAN: That takes me to my second question: what does the government mean by "some relevant connection"?

Hon SUE ELLERY: I am advised that the boundaries are the essential administrative law principles that cannot be unreasonable or capricious but, by the very nature of the point that the member tried to establish a few minutes earlier, will be subjective.

Hon NICK GOIRAN: This important provision has two components. The second component is a total non-issue because it requires the consent of the institution, so I do not think anyone could argue against that. The first is the one where we need to be careful, particularly—as the minister has indicated—as it will rely on some subjective measure by the minister. Will there be some form of appeal mechanism available to an institution in the event that it has neither consented nor agreed that there is some relevant connection to the former institution?

Hon SUE ELLERY: Yes. The basis of the minister's recommendation could be challenged by seeking judicial review of the recommendation, and I am advised that that jurisdiction is the Supreme Court.

Hon MICHAEL MISCHIN: I would like to explore further the concept of "some relevant connection". The other preceding provisions in proposed section 15G, although broad, nevertheless fasten on some temporal or structural connection between institutions and their successors for the purposes of determining that a current institution is a relevant successor of an earlier one. None of that seems applicable for proposed subsection (6). Proposed section 15G(5) states —

> The Governor may, on the recommendation of the Minister, make regulations providing that, for the purposes of subsection (1), a specified current institution is the relevant successor of a specified earlier institution.

The only limit to that is proposed subsection (6), which states —

> The Minister cannot make a recommendation for the purposes of subsection (5) unless satisfied that —
>
> (a) the current institution has some relevant connection to the earlier institution;

Or there is a consent. Let us leave aside the head of the current institution agreeing but having some relevant connection. How far does that go? Is it sufficient if they share elements of the same name? Does it need some kind of structural connection or historical connection? Can the minister help us out here? The minister seems to have a very broad power to decide that one body is the relevant successor on the basis of some relevant connection, which is not refined at all.

Hon SUE ELLERY: Two protection measures are in place. I cannot give the member any more information about what is meant by "some"; it is not defined. About five minutes ago I explained the general principles of administrative law. However, the two protections are: firstly, it is subject to judicial review; and, secondly, as a regulation, it is a disallowable instrument. I think it is also worth going back to the beginning of proposed section 15G(1), which makes it clear that the regulation-making power is not available when a current institution is the same or substantially the same as the earlier institution. Regulations cannot be made to override clear cases of continuity.

Hon MICHAEL MISCHIN: The clear cases of continuity are not the ones that bother me. The ones that trouble me are the ones in which there is no clear continuity but a minister is able to say, "I am satisfied that there is some relevant connection. That one is called a church and this one over here in the current day also has 'church' in the name so there seems to be some relevant connection. Hence, I nominate this current entity as being the successor of the earlier one, and if you do not like it, sue me." Can the minister tell us what the relevant administrative review avenues are? What needs to be done for an organisation that says, "Well, I don't think that that is a reasonable decision; it should not have been made"?

Hon SUE ELLERY: For the third time in the space of about five minutes, it is subject to two safety measures: judicial review to the Supreme Court; and then, of course, as a regulation, it is a disallowable instrument.

Hon MICHAEL MISCHIN: I will try again. How does that judicial review to the Supreme Court operate?

Hon SUE ELLERY: The person seeking to have the regulation reviewed would do so by making application to the court that the minister's recommendation was made invalidly because, for reasons X, Y and Z, it could not have been possible for the minister to recommend that there was some relevant connection.

Clause put and passed.

New Part 2A —

Hon SUE ELLERY: I move —

Page 14, after line 16 — To insert —

Part 2A — *Criminal Injuries Compensation Act 2003* amended

5A. Act amended

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

5B. Section 68 amended

After section 68(1) insert:

(1A) Subsection (1) does not apply if the amount referred to in subsection (1)(b) was reduced to take into account the compensation award referred to in subsection (1)(a).

Following exchanges during the course of the committee proceedings last week, a new part 2A is to be included in the bill. The new part 2A will make one amendment to section 68 of the Criminal Injuries Compensation Act 2003. Section 68 is a clawback provision that applies in cases in which a victim has received some sort of compensation payment after receiving a criminal injuries compensation award. It is automatic and there is no discretion. Consequently, the government was agreeable to making this amendment. The proposed amendment will mean that the clawback does not apply to those sorts of compensation payments in which the amount of the payment has already been reduced to take account of the criminal injuries compensation award.

Hon NICK GOIRAN: I have mentioned before that I thank the government for its good grace in bringing forward this amendment, which I support. My initial question on the section 68 amendment is: will it take into account any payments made under the national redress scheme?

Hon SUE ELLERY: The advice I have is that we are getting beyond what is envisaged in this bill. The member may be correct in that if we opt in, any redress payment may be considered under the provisions of section 68 of the existing Criminal Injuries Compensation Act. I suppose section 68(1)(b) is where we are saying it would be captured. It states —

> the victim or close relative also receives or recovers in respect of that injury or loss an amount under a contract of insurance or by way of damages or compensation, otherwise than under this Act …

It may be that there is nothing in the substantive amendments that the bill makes and nothing in the amendment to the bill that either triggers or any in any way impacts it.

Hon NICK GOIRAN: That is a problem. I do not understand the comment that we are now starting to go outside the bounds of the bill. The minister made an initial remark that maybe we are going outside the bounds of this bill or this provision and I do not understand what she means by that.

Hon SUE ELLERY: The member put it in the context of a scheme that we have not signed up to. We are not part of redress yet.

Hon NICK GOIRAN: That is true, and I accept that if the position of the WA government is not to sign up to the national redress scheme, this is a non-issue. I think that we need to work on the basis that WA is going to sign up, especially since the government is not in a position to update the house otherwise. In fairness to the Attorney General, I think there have not really been suggestions that the WA government is not willing to opt in. There have been some technical and important discussions taking place between him and others as to how this will work in practice and so forth.

Hon Sue Ellery: I was just trying to make the point that the member is asking a question about a set of circumstances that have not eventuated yet.

Hon NICK GOIRAN: Yes, that is right, but I suspect they may well eventuate by 1 July this year. It is almost 1 April and the legislation before the chamber is going to take several months before it is proclaimed, so I think all of this is going to collide at around the same time and I do not want the person caught up in the collision to be a victim of child sexual abuse, and I know the minister does not either. It troubles me that it appears the advice is that the amendment being moved by the government, in goodwill, to try to improve the legislation, for which I applaud it, is not going to capture the national redress payments. What we do not want, and I suspect none of the members here want, is a scenario whereby a victim of child sexual abuse is forced to pay back money to the state

because we did not get the amendment right. At the end of the day it is not my job to fix the problems for the government. We have identified that this is a problem and I guess the question to the minister is: what does the government propose to do about it?

Hon SUE ELLERY: We are not in a position to be able to draft something in anticipation of the detail of a scheme that we are not yet part of. I am not sure how much further we can take this. I understand the point made by the honourable member but I do not see how we can take this much further.

Hon NICK GOIRAN: I think we can, but it is a separate issue whether the government is willing to. I think we could carve out payments made to victims of child sexual abuse to ensure that they are not subject to the provisions of section 68 of the Criminal Injuries Compensation Act. If it wanted to, the government could shield victims of child sexual abuse from the provisions of section 68. The government might not want to do that or there might be implications and that is fine, but we could do it. I accept that Western Australia has not yet signed up to the national redress scheme and that it is a work in progress for the government. It troubles me that we cannot be provided with an update on the status of that and that the government is unwilling to fix a problem that we anticipate will occur in the next few months. I doubt very much that the government will rush in a piece of legislation on or around 1 July to deal with this situation. I could be wrong and I hope I am. Do not get me wrong; I support the minister's amendment and am grateful that she has moved it, but I can see that the amendment she has moved does not capture all the scenarios that we all want it to cover.

The minister has mentioned that the Attorney General has ordered a review of the Criminal Injuries Compensation Act. As I understand it, he made that decision in December last year. Would the government be in a position to ensure that the issue with section 68 be captured in that review?

Hon SUE ELLERY: Yes. It is also worth noting that we have not yet opted in to the scheme, but also some of the content of the commonwealth redress scheme for institutional child sexual abuse and the national redress scheme rules are still not settled. We might think that we have the perfect way to frame the amendment that is before us now but we do not know what is yet to be determined in those two commonwealth pieces of legislation and rules, so we are at a disadvantage.

Hon NICK GOIRAN: I agree with the minister. If we are just looking at the national redress scheme, there are complexities there, certain unknown factors, so we cannot deal with those with certainty. Whether it is the national redress scheme or any other scheme, we could still carve out protections for victims of child sexual abuse to shield them from section 68 of the Criminal Injuries Compensation Act. The minister has indicated that the government can include the section 68 issue in the review; that is great. I do not understand how the minister, as the representative minister, can agree to that without discussing it with the Attorney General, but cannot deal with my other questions that need to go to the Attorney General.

Hon SUE ELLERY: I can agree to it because the advisers sitting with me at the table have provided me with advice that that is the kind of thing that would be captured in the review of the act. To the extent that that section is a section of the act and the act is being reviewed, I do not think it is too hard to figure out that it would be canvassed. To what extent, and what conclusions will be reached, I would not know.

Hon NICK GOIRAN: Since last week, has there been any update from the Attorney General with the review? Have the terms of reference been set? Has a reviewer been identified? Is there a prospective deadline for when the review will be complete?

Hon SUE ELLERY: Other than confirming that the Department of Justice will conduct the review, there is no further update.

Hon NICK GOIRAN: It is difficult because what members are probably not aware of is that I have been asking questions of the Attorney General for some time, certainly over the past year, about the Criminal Injuries Compensation Act. Last year I received an answer from him after I asked the question, as best as I can recall, "Will you order a review of the act?" Much to my pleasant surprise, the response came back as yes. That was around September last year. I was grateful for that response. It is somewhat exasperating to now be almost a few minutes before midnight, effectively—we will be in April—and the extent to which the review has progressed is that the Department of Justice will be the reviewer. But we cannot change that this evening and we want to make progress.

I want to take the minister to the amendment before us, which seeks to insert a section 5A into this bill and that will seek to amend the Criminal Injuries Compensation Act 2003. As I indicated earlier, it has my support. We have previously dealt with this issue of section 21. Section 68 is not the only issue that needs to be addressed by an amendment to the Criminal Injuries Compensation Act; also, section 21. Earlier this afternoon the minister was hoping to get some advice on whether the chief assessor is able to direct the other assessors on how they are to use the section 21 discretion.

Hon SUE ELLERY: It is the same answer: no. The chief assessor does not have the power to direct other assessors in exercising her discretion under section 21.

Hon NICK GOIRAN: This highlights the problem. Whilst section 21 of the Criminal Injuries Compensation Act gives broad discretion to the assessor, whether the chief assessor or otherwise, to in effect force a victim of child sexual abuse to take independent proceedings—for example, adversarial civil litigation proceedings, as is contemplated by this piece of legislation—it is also deferring the non-adversarial application for criminal injuries compensation, pending the determination of those proceedings. That is a nightmare for a victim of child sexual abuse. There has been evidence that the chief assessor, in general practice, exercises discretion in favour of the victim of child sexual abuse in the event that that person was a child at the time of the abuse. To the extent that the minister correctly paraphrased me earlier today, yes, it is true I was surprised to hear that, because where I would agree that the discretion of the assessor meets that standard, it is when it comes to what I call the lifting of the limitation period for an application for criminal injuries compensation. Normally, an application needs to be made within three years, but there is discretion on the part of the assessor to allow an indefinite period after that. I am confident to say—the decisions of the assessor and previous assessors match this—that that is generally exercised in favour of a victim of child sexual abuse, particularly if that person was a child at the time. To that extent, I agree. Where I do not agree is that it is general practice that people are not asked to take other independent action available to them. That has not been my experience.

Some might say that I have been out of practice for near on nine years. What they might not know is that this member may have applied for his practising certificate on several occasions during the last nine years and has done some part-time work of that sort. As I say, that is not my experience. I make it a regular habit to keep in contact with people who practise in this area, given that it has been a longstanding area of interest. It troubles me that again we are identifying a problem. The discretion is being left with the assessors—beforehand, we thought it was just the chief assessor; now we realise it is more than one—and any one of them can require a victim of child sexual abuse to take independent proceedings. This can be fixed by an amendment. I understand and I acknowledge that the minister has raised this on several occasions with the Attorney General, but there is an unwillingness at the present time to move such an amendment. The view of the government is that this is a matter that should be left to the review. Members should understand my exasperation because this famous review, which has now become an infamous review, has not started. We had this discussion last week. To the extent that progress has been made, we know who is going to do the review and that is it.

In the end what is happening is that once again, as members of this place, we are supporting important legislation in the full knowledge that it has another flaw and in the full knowledge that the government is not prepared to seal or to fix that flaw, and we are doing nothing about it. That troubles me, because unlike in the earlier matter we dealt with, which is the section 3A civil liability theoretical gap, this is beyond theoretical. There is a discretion by the assessor and there is no question that the assessor from time to time requires applicants to take independent proceedings. We know that the Attorney General cannot direct the chief assessor and that the chief assessor cannot direct the other assessors. I take that to mean that it is therefore beyond the chief assessor's remit to issue guidelines to the other assessors to say, "Let's all get together and work out, as a matter of policy within our office, how we are going to deal with these section 21 matters." That troubles me. My question to the minister is: what avenues of appeal are available to an applicant in the event they are dissatisfied with a decision by an assessor under section 21?

Hon Sue Ellery: Didn't you say you were a practitioner?

Hon NICK GOIRAN: Yes, I did. That is a statement of fact. That is not untrue.

While the minister is taking advice I might make the point to the minister that it really does not matter whether I know the answer to the question. That is not the point here. The point here is that we need to get what will happen with this legislation on the public record for the benefit of the victims of child sexual abuse. It is not in a sense of the minister asking, "Are you a practitioner?" Yes, I am. But does the minister not think that the victims of child sexual abuse and, frankly, all the other members in this chamber have a right to know whether there is a right of appeal to section 21?

Hon SUE ELLERY: The advice I have is that in respect of section 21, because it is a deferment and not a decision to refuse—that is the advice that is available to me here—we then go to section 55, "Appeal lies to the District Court". That appeal is against an assessor's decision to make or to refuse to make a compensation award, or as to the amount of the compensation award. Given that section 21 goes to deferral and not refusal, the advice I have is no; there is no appeal.

Hon MICHAEL MISCHIN: I thank the minister for that advice. It goes to show that it was not a silly question after all, minister.

Hon Sue Ellery: There are a lot of things that are silly.

Hon MICHAEL MISCHIN: That is right; there are.

The DEPUTY CHAIR: Right. If we can keep it on track, that will be helpful.

Hon MICHAEL MISCHIN: I would like to know, given that the minister now has had a source of further information, if the minister is able to assist us any further with the factors that the Chief Assessor of Criminal Injuries Compensation takes into account in making a decision whether to defer an application?

Hon SUE ELLERY: I already answered that question earlier tonight. I appreciate that the honourable member was not happy with the answer. I have answered that. I have nothing further to add on that matter.

Hon Michael Mischin: Can you repeat the answer?

Hon SUE ELLERY: No.

Hon NICK GOIRAN: In respect of this issue concerning section 21 of the Criminal Injuries Compensation Act, so that we are all on the same page, the chief assessor and assessors can defer the applications for criminal injuries compensation for victims of child sexual abuse. They can do so for whatever reason they like and there is no mechanism for appeal. Is there any capacity for judicial review of the decision, rather than just by way of statutory appeal?

Hon SUE ELLERY: Yes, judicial review is available. We had a conversation about this matter earlier this evening. I cannot remember whether the honourable member was in the chamber at the time.

Hon Nick Goiran: That was in regard to the Attorney General making a determination for an institution.

Hon SUE ELLERY: I take the member to section 21 of the Criminal Injuries Compensation Act, which states, in part —

> (1) If an assessor dealing with a compensation application by or on behalf of a victim who suffered injury as a consequence of the commission of an offence is of the opinion that the victim —
>
> (a) has reasonable grounds for taking proceedings …

Et cetera. Then it goes on to subsection (b). I cannot add any more to define that in any finer grain than I already have.

Hon NICK GOIRAN: If the minister has the Criminal Injuries Compensation Act handy at her disposal, I draw her attention to section 58 of the act. The minister will see that that section refers to an additional power for the assessor —

> An assessor may refer a question of law that arises in relation to a compensation application or the interpretation of this Act to the Court of Appeal for determination.

Does the minister see how increasingly unfair this whole situation is to the victim of child sexual abuse? Everything goes in favour of the assessor when, really, what is it to them? It is not even the assessor's money. It is the money of the state, yes, but all the power goes to the assessor or the chief assessor. The assessor gets to defer the application. There is no statutory right of appeal to that. The poor victim of child sexual abuse is then obliged to go with independent adversarial proceedings, facing their perpetrator, potentially going to trial; all those things would be avoided if a criminal injuries compensation application was provided. Meanwhile, to top it off, the jolly old assessor even gets to refer a question of law. The assessor has all the power and all the mechanisms at their disposal, but the victim of child sexual abuse has nothing.

The government recognises that this is an issue so much to the extent that it has said that it will have this considered as part of the review, but it will not fix it when the matter is before the house. Almost to put more salt into the wound of everyone here, it is a review that has not even started and we do not know the terms of reference and when it will be complete. To say it is exasperating does not even cover it. I do not know what to do, minister, because it is just wrong. It is wrong that we all know this is a problem and we will not fix it. This is beyond the discussion earlier about what is a theoretical problem, what is not really a problem or possibility. That was in respect of the earlier issue. We all know this one is a problem and the government knows it is a problem, otherwise why would it send it to a review? To the extent an explanation has been provided—this was from last week—it was because the chief assessor requested it. When this was put to the assessor, she said that she wanted to retain the discretion, so the government said that it would put it in the review. It is not a basis to make a decision on, with all due respect to the assessor.

In fact, it was convenient for the government earlier this afternoon to use the Solicitor-General's language who, according to my notes, said that he could not contemplate a set of circumstances in which a section 3A issue would be a problem. If we use that same logic here, what set of circumstances is the government so concerned about that it wants to give the assessor the ongoing power to force a victim of child sexual abuse to take proceedings independently of this act? What circumstances have been contemplated?

Hon SUE ELLERY: We have canvassed this.

Hon Nick Goiran: Not this issue. I have never asked about this issue.

Hon SUE ELLERY: We have canvassed several times the question of an amendment to section 21 —

Hon Nick Goiran: Yes, that's true.

Hon SUE ELLERY: — which is the context of this debate. I have twice sought reconsideration from the Attorney General. I appreciate the argument the member has put, I appreciate his personal experience, and I appreciate the strength of his argument. I have asked the Attorney General twice to consider the points and whether we ought to pre-empt the review of the act by making amendments in this Civil Liability Legislation Amendment (Child Sexual Abuse Actions) Bill 2017. The response has come back twice that the government's preferred position is to consider these matters in a methodical fashion as part of a review of the entire act. I cannot add any more than that.

New part put and passed.

Clause 6: Act amended —

Hon NICK GOIRAN: Through clause 6, we are now dealing with the Limitation Act.

Hon SUE ELLERY: We are.

Hon NICK GOIRAN: I have a number of questions for the minister on the Limitation Act. During the second reading speech, the minister stated —

> At present under the Limitation Act 2005 of Western Australia, a claim must be brought within three years of the cause of action arising or, in the case of a child, by their twenty-first birthday.

Can the minister identify for the house which section of the Limitation Act says that a child has until their twenty-first birthday to bring a claim?

Hon SUE ELLERY: I will take the member to part 3 of the Limitation Act. If sections 30 and 31 are read together, section 30(1) reads —

> If a person is under 15 years of age when a cause of action accrues to the person, an action on that cause of action cannot be commenced if 6 years have elapsed since the cause of action accrued.

Section 31(1) reads —

> If a person is 15, 16 or 17 years of age when a cause of action accrues to the person, an action on that cause of action cannot be commenced if the person has reached 21 years of age.

Hon NICK GOIRAN: Okay, minister. But what then is the limitation period for a two-year-old? Can they issue a writ until they are aged 21?

Hon SUE ELLERY: Mr Deputy Chair, I am conscious of the fact that only 10 minutes is left for this debate tonight. The advisers are not able to give me an answer to that question immediately. We clearly will not be able to finish debate on this bill in the next 10 minutes, which is disappointing, I am sure. However, if the honourable member wants to canvass any other matters, we could canvass those.

Hon NICK GOIRAN: That is fine, minister. Clearly, that question will be taken on notice and the minister will get advice and report back tomorrow.

Hon SUE ELLERY: Yes, when we next deal with this bill.

Hon NICK GOIRAN: While the minister is getting advice and people are making notes, please understand that the context of the question is what the minister said in her second reading speech. I will quote it again —

> At present under the Limitation Act 2005 of Western Australia, a claim must be brought within three years of the cause of action arising —

That is true —

> or, in the case of a child, by their twenty-first birthday.

That is not true, but the minister is getting advice on that and will let us know. When I talk about a two-year-old, it is not a hypothetical case. I think most members would be sickeningly aware of the recent Northern Territory case involving a two-year-old, which, quite rightly, attracted national headlines. Therefore, we need to be clear that it is not the case that a two-year-old child, or any child, has only until their twenty-first birthday to bring a claim. I appreciate that the minister is taking advice and will let us know at the next opportunity.

The minister also said in her second reading speech —

> Limitation periods under the previous Limitation Act 1935 of Western Australia will apply to many historical child sexual abuse cases—when sexual abuse was suffered before 15 November 2005, a person had six years to commence a claim for personal injuries damages.

I do not know whether the minister is in a position to take advice on that point now. The minister maintains that it is correct that prior to 15 November 2005, a person had six years in which to commence a claim for personal injuries damages. Six years has obviously well and truly passed since 15 November 2005—indeed, that was 12 and a half years ago. That would mean that all such claims are now statute-barred. Is that the position of the government?

Hon ALISON XAMON: I just want to make a comment about this matter. I read the reference in the second reading speech to a limitation of 21 years as pointing out that 18 years is effectively when the clock starts ticking for people to have three years to seek remedy. I read the reference in the second reading speech to 21 years as effectively taking that into account. If we are talking about a child who has been abused, we are acknowledging that potentially two time frames can kick in—within three years of the abuse occurring or 18 years plus three years, which is 21 years. That is how I read it. I thought it was as straightforward as that. I did not think it was about trying to find 21 years old referred to specifically in the Limitation Act. I thought it was simply taking into account the age plus the three-year statute of limitations. I hope I can get clarity about that.

Hon SUE ELLERY: Hon Alison Xamon is not correct. The course of action accrues when the injury or, in this case, child sexual abuse occurs, so that can be under 18 years.

Hon NICK GOIRAN: To go back to my question, the second part of the second reading speech states that under the previous act, people had six years to commence a claim for personal injuries. In the case of a two-year-old, under the old act their time period expired at the age of eight. That is not right. The suggestion in the second reading speech is that under the current provisions a person has until the age of 21. That is not right either. They are two crucial parts of the second reading speech that deal with this limitation period. I think, in all sincerity, we need to get that right. We need to get some advice and make sure that everyone in the chamber is aware of the current provisions for children under both the current act and, should they be young enough, the act that was in place prior to 2005. I take it that the minister will be agreeable to taking advice on that and updating the chamber at the next opportunity.

Hon SUE ELLERY: Yes, I will.

The DEPUTY CHAIR (Hon Matthew Swinbourn): Members, the question is that clause 6 stand as printed.

Hon NICK GOIRAN: Mr Deputy Chair, I am not agreeable to us moving off clause 6 in circumstances in which I am confident that the information to the chamber in the second reading speech is wrong on two fundamental occasions. The minister understandably is not in a position to take advice from the chamber. She has indicated that she will take advice and report back to the chamber on the next occasion.

The DEPUTY CHAIR: I take your point, honourable member.

Progress reported and leave granted to sit again, pursuant to standing orders.