CIVIL LIABILITY LEGISLATION AMENDMENT (CHILD SEXUAL ABUSE ACTIONS) BILL 2017

Second Reading

Resumed from an earlier stage of the sitting.

HON MARTIN ALDRIDGE (Agricultural) [7.51 pm]: Just before we were interrupted by the dinner break, I was not far off concluding my remarks on the Civil Liability Legislation Amendment (Child Sexual Abuse Actions) Bill 2017. I was talking about clause 2(b) of the bill and I read it for members. I will not repeat what I said before the break, but I referred to the thirty-fourth report of Standing Committee on Legislation on the Sentence Administration Amendment Bill 2017, which expressed some concern about how increasingly common it was that drafters and governments were including clauses in bills that would effectively allow the executive to proclaim a bill on a day of its choosing rather than on a day after receiving royal assent. The committee report states that these clauses "should be avoided unless absolutely necessary". That is a direct quote and it referred to issues that the Standing Committee on Uniform Legislation and Statutes Review of the Legislative Council has pointed out on other occasions. The bill before us contains one of these clauses that give the executive this control. In looking at the information on this bill on the parliamentary website, I noted that it was declared urgent in the Legislative Assembly under standing order 168(2) on 28 November 2017. For members' reference, the bill was introduced into the Assembly on 22 November 2017, declared urgent on 28 November 2017, and subsequently—some three months later on 21 February 2018—was third read. So it spent some three months in the Legislative Assembly, despite its declaration of urgency. When I received the briefing on this bill last Monday, the adviser told me that the reason clause 2(b) is required is that the government was not yet prepared to enact the legislation and, indeed, that it needed some three months from that date. I received my briefing on 12 March, the day before the Legislative Council resumed for the 2018 sitting year, and the government was not yet ready to deal with this legislation coming into force. If that is the case, it strikes me as odd that the bill was declared urgent. Despite the passage of time from 22 November 2017, when it was first introduced into the Legislative Assembly, we will be dealing with that clause and I hope the government will be able to clarify for me the reasons that it is not ready to have this bill come into force once it receives royal assent from the Governor. I think that matter needs addressing, because I take quite seriously the recommendations and findings of the committees in their reports, which have added caution about the erosion of parliamentary sovereignty by allowing these clauses to creep more regularly into bills introduced into this place.

During the briefing I asked why we might need this clause and asked for further clarification about why the government was not ready. I was told it needed to further develop internal processes and guidelines. That strikes me as odd, because I would have thought that the state now, subject to the statute of limitations with respect to these offences, would from time to time have to deal with these issues. That is despite the fact that the statute of limitations exists with respect to these offences. Does that mean that the government is inadequately prepared to deal with allegations of child sexual abuse at the moment, or is it ill-prepared for the number of complaints that it may receive following the passage of this bill? There was some discussion of resourcing in the briefing, and I hope we will be able to ascertain that through the Committee of the Whole stage of this bill. The discussion was brief, but my interpretation of what I was advised was that resourcing could mean a number of things. It could obviously be resourcing that might be required by the State Solicitor's Office to deal with the number of complaints that might be received about child sexual abuse arising from the abolition of the statute of limitations, but it could also be financial resourcing for additional settlements, claims and judgements that might arise from the passage of this legislation. I put to the advisers in the briefing that I thought that these things would have been well canvassed by cabinet when it considered the impact of a policy of this nature. It is certainly clear from the briefing that these things had not been adequately considered in the usual cabinet process in preparation of the drafting of this bill, and perhaps the government is now scrambling, with the Legislative Council shortly proceeding to the committee stage of this bill, and it needs more time.

It is interesting that this is the case, because I spoke earlier in my contribution about some of the regrettable debate that occurred in the other place over a number of years about the statute of limitations and its application to child sexual abuse. In preparation for my contribution today, I reviewed some of that debate. Some quotes have already been used and I have already referred to the then shadow Attorney General's desire to have this bill passed within a month of forming a Labor government, which clearly did not happen and which I have already canvassed in my contribution earlier this afternoon. One contribution to the debate of Thursday, 20 October 2016 stood out for me. That was when the then shadow Attorney General moved to suspend standing orders to deal with a private member's bill, and that has been well canvassed in the debate so far today. The then shadow Attorney General, the now Attorney General, Hon John Quigley, said —

> The National Party has self-interest in voting for this bill. The National Party sought to dislodge the member for Albany at the last election. There are a lot of Katanning victims down there and a deep well of sympathy for the child abuse victims in Albany, so all over Albany will be plastered the names of any

> people who vote to protect paedophiles this morning, and if those people are in the National Party, so be it. The National Party tried to dislodge the member for Eyre at the last election. If National Party members vote to protect paedophiles this morning, they will have absolutely no hope of dislodging the member for Eyre—absolutely zero.

They were the words of the now Attorney General on 20 October 2016.

It seems extraordinary; I do not intend to go over all the debates that occurred because I think that they are regrettable.

Hon Alison Xamon: Where was that said?

Hon MARTIN ALDRIDGE: That was said in the Legislative Assembly.

It is regrettable that those things were said and those accusations were made. I think the Attorney General is now aware, having come to power and having been unable to deliver on his promise of passing a bill within one month of forming a Labor government, that the issue is a little more complex and a little more sensitive than he gave it credit for when he was parading with such ill-regarded and disgraceful comments in the other place about members on this side.

I want to conclude with a story. In this debate Hon Samantha Rowe read out some stories of the survivors of child sexual abuse. I want to read out a story from Scott. Scott's story was published in volume 2 of the interim report of the royal commission on child sexual abuse, which documented quite a number of stories which had arisen from the evidence it had received. I will conclude with Scott's story because we need to constantly remind ourselves that the victims of child sexual abuse should eternally remain our focus. Many members, including me, have raised a number of issues that could arise from the passage of this bill. However, every member who has risen so far has indicated their support, almost within their first sentence. This is Scott's story from the interim report. It states —

> When Scott was growing up in Western Australia, it was common for children from country areas to board in towns at state-run hostels, adjacent to the schools. Harold Fletcher was warden at the hostel where Scott was accommodated and over three decades, sexually abused many boys and girls, including 12 year old Scott.
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> Scott told the Commissioner that Fletcher's brother and sister-in-law also worked at the hostel, and as a former Citizen of the Year, Fletcher was held in high regard by the community. 'He controlled the town, he was that powerful. To anyone over 20, he probably looked like the nicest man in the world. There was no-one to tell about the abuse, and they wouldn't have believed you if you did.'
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> Within a few weeks of Scott's arrival in 1978, the hostel residents went on a camping trip. Fletcher shared a tent with Scott and during the night started fondling him. 'I didn't know what to do. I already knew that to be accepted, you didn't make waves. If you did, you'd get isolated, and then you were gone.' Over the next year, Fletcher regularly came to Scott's bed at night and tapped him on the foot. 'That meant you had to go to his room, and that's where he'd rape you. I couldn't go to school one day, because of what he'd done the night before. He said, "Your brother's coming soon, isn't he?" I felt so terrible that I couldn't protect my brother.'
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> Scott told the Commissioner that Fletcher abused many boys in his dormitory, though none of them ever spoke about it. He said Fletcher stopped abusing him after about two years. 'Once you were a bit older, you didn't get the tap on the foot anymore. He'd move on to the younger ones.'
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> In 2011, Scott learned that charges of child sexual assault had been brought against Fletcher by several past residents of the hostel. 'I was listening to the radio at work and when I heard it, I broke down. I thought I've got to fix this. It was eating me away, but I had kids and was paying a mortgage and working, and there was so much going on that I'd never had time to think about it.' Scott called the lawyer involved in the case and disclosed that he'd also been abused. More victims came forward and in 2013, Fletcher's existing jail sentence was extended to a total of 22 years. 'He pleaded guilty after lots of bargaining. I had to drop this charge and that, but there were six of us by then. And I couldn't bargain with what had happened to me.'
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> 'It damages something that's your core. It's what you are.'
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> Scott's wife told him that learning about the abuse made clear to her a lot of his past behaviour. He'd never felt comfortable touching or hugging his children and was still hesitant about showing affection to his grandson. 'It damages something that's your core. It's what you are.'
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> In 2012, the Western Australian Government announced a limited redress scheme for people who had been abused as children in hostels. Scott applied for and was awarded the maximum compensation amount of $45,000. He was disappointed that the scheme tended towards a bureaucratic process and that all types of abuse seemed to be given equal weight.

> Scott told the Commissioner that he was glad the court case and negotiations with the Government were finalised, but continued to struggle with strong emerging feelings related to the abuse. 'I feel angrier now than I did before. Why did all those people who knew what Fletcher was doing keep protecting him? It was like going against the king. I hope that it wouldn't happen like that anymore, but in small towns it's hard. You need to make sure there's someone for kids to tell about what's going on.'

I hope we never forget Scott's story and that we remember that it is for people like Scott that we are here in this chamber tonight dealing with a bill of this nature. I commend the bill to the house.

HON SUE ELLERY (South Metropolitan — Leader of the House) [8.06 pm] — in reply: I thank all members who have contributed to the second reading debate today on the Civil Liability Legislation Amendment (Child Sexual Abuse Actions) Bill 2017. This is a complex piece of legislation. It makes a very significant change to a longstanding legal principle. It deals with a matter that we as a community have started to shine a light on only in recent years. We just heard from Hon Martin Aldridge a piercing personal account of what this will mean. We have heard from some other members as well.

Unlike much of what we do in here—despite the fact that we all think we are terribly important—there are people watching us in Parliament and online who are deeply invested in the outcome of this bill for both very practical reasons, in that it will assist them to take action, but also for more symbolic reasons such as ending another part of their journey. We have already heard tonight the personal testimony of some people involved.

Hon Nick Goiran mentioned that the last time Labor was in government I played a part in what was called the redress scheme. I was the relevant minister who introduced a scheme to provide financial redress, counselling and a range of other services to those people who had been abused in the care of the state as children. I am still in contact with many people I dealt with then. Indeed, I am friends with many of the people and survivors I met during that time and in our first period of opposition when I had that same portfolio and there was a campaign against some decisions that had been made by the government of the day about how that redress scheme would apply and the level of money that would be involved. In the course of those few years, I met a lot of survivors. I am still in touch with many of them. I want to touch on three of them.

I will step away from the way I normally do second reading replies because I want to put these things on the record. One woman was around about the same age as me. When I first started to put the redress program together as the minister, one of the things that shocked me was that I thought we would be dealing with people who were a lot older than me. The fact that a woman, who I think is a year younger than I, was at the same school as I attended while part of her life was being completely destroyed absolutely shocked me to the core—it could have been me. Somebody mentioned Bindoon. I met a man on a rally out on the front steps of Parliament House. He told me that one of the things that happened to them was that they had to make the instruments that they were then abused with. He described to me what they had to do to make those instruments. Again, I was absolutely shocked to the core. By that point, I thought I could not be shocked anymore by the stories that I heard, but I was genuinely shocked by what he told me. Another man lives not too far from me, so I see him probably once a fortnight walking around my suburb and at the shops. In the course of him disclosing to me what had happened to him, he made the point that he first contemplated suicide at six years of age. Again, that was absolutely shocking to me. I have met many, many more people and other members have all met them, not just in the course of their consideration of the Civil Liability Legislation Amendment (Child Sexual Abuse Actions) Bill, but also in their time as members of their communities. The people who have been in the gallery watching this debate include Kirsty Pratt, Jodie Greasley, Oaklee Greasley, Susan Jurkovic and Joseph Azzopardi, and we know that Jillian Beale is watching at home. There are many, many others but I wanted to place their names on the record. This is for them and to the extent that we can all assist them in dealing with this legislation, I want to thank all members for the contributions they have made to the debate.

Turning to the more technical issues of what a second reading reply speech should really be about, some issues were raised by Hon Michael Mischin around the resources that would be allocated to the State Solicitor's Office. I am advised that a budget allocation has been approved to resource the State Solicitor's Office and recruitment has already commenced. Regarding the government liability and the money that will need to be set aside for that purpose, we will honour all the liability. The financial exposure of the state is estimated to be between $70 million and $647 million. A question was asked about why physical abuse is not included. The jurisdictions around Australia are split on this; I think five include physical abuse and four do not. A question was asked about what the government intends to do about removing limitation periods for other forms of abuse. The bill that is before us tonight reflects the commitment that we gave before we were elected. Some jurisdictions have legislation that refers to sexual and physical abuse, others to just sexual abuse, and others to sexual, physical and related psychological abuse. It has not been dealt with uniformly in each jurisdiction. Indeed, the Royal Commission into Institutional Responses to Child Sexual Abuse dealt only with child sexual abuse, and its work was invaluable in providing some of the research behind this bill.

A question was asked by Hon Michael Mischin about the definition of "sexual abuse". Indeed, it is referred to in the second reading speech. There is, quite deliberately, no definition of "sexual" abuse in the bill because the policy intention is to give the court the latitude to determine the meaning using the ordinary meaning of the words. It is anticipated that the court would require a sexual element to be evidenced, but no limits are set by defining the term. Hon Michael Mischin also raised the issue of exposure of organisations and their potential liability. A question was raised about why the bill would hold organisations responsible for sexual abuse that occurred historically when the organisation now has a completely different form. The policy behind the bill is that there must be, at the very least, some relevant connection between the current institution that is held liable and the historical one. Regarding regulation-making powers to identify the proper defendant, this is limited by its application within the context of only child sexual abuse cases. It is also limited by the requirement that the relevant minister must reach the view that there is some relevant connection between the current and historical institutions. That could be subject to judicial review. Finally, of course, the regulation would be a disallowable instrument. Hon Michael Mischin also raised a question about the caps on legal fees. Our view is that we have the policy setting right. It is sound and it will not negatively affect the victims' ability to obtain legal counsel, but I am happy to have a conversation with members about that in the course of the Committee of the Whole stage.

Hon Alison Xamon raised questions about whether the trust provisions apply to incorporated institutions. Proposed section 15E does cover incorporated institutions. The member also raised a question about prior cases that have failed on the back of a lack of assets. We are not aware of any of those cases in Western Australia. There may well have been, and I think the advice was that there have been in other jurisdictions, but not in Western Australia. Hon Alison Xamon also asked a question about when further amendments will be made. Other amendments recommended by the royal commission are under current consideration by the government as part of a whole-of-government approach to the royal commission's recommendations. Regarding amendments relating to an institution doing the right thing, the Attorney General has said that amendments to compel institutions to utilise assets held in trust may be implemented in the future if institutions do not respond to community sentiment accordingly and settle child abuse liabilities.

Hon Nick Goiran raised a question about the relationship between this bill and the Criminal Injuries Compensation Act. The government has made the decision to review the Criminal Injuries Compensation Act and that decision is in the process of being implemented. We will look at what goes on in other jurisdictions and then make recommendations about an appropriate scheme for Western Australia that, in its processes, is both effective in timeliness and in costs to government. We are of the view that amendments to the Criminal Injuries Compensation Act should properly be considered as part of consideration of whatever that review recommends to government. To that extent, we are not of the view to amend section 21 of the Criminal Injuries Compensation Act in the bill before us today. Section 68 of the Criminal Injuries Compensation Act was also raised by Hon Nick Goiran, and we can have a broader conversation about that in our discussions in Committee of the Whole. I have asked for some advice.

A couple of members raised the issue of the commonwealth redress scheme. Obviously, that is a live matter. It is the subject of discussions between the state and commonwealth governments as we speak. We are hopeful that we will get a resolution that is satisfactory to everybody. Hon Martin Aldridge raised the issue of commencement provisions when a bill has been declared urgent. We can have another conversation about that when we are in committee but, in particular, I think the work that is still required to be done includes ancillary work on legal costs and finalising the recruitment to the State Solicitor's Office.

A number of other members contributed to the debate and all expressed their support for this legislation. I want to thank them for their contributions as well. I am proud to commend the bill to the house.

Question put and passed.

Bill read a second time.

Committee

The Deputy Chair of Committees (Hon Robin Chapple) in the chair; Hon Sue Ellery (Leader of the House) in charge of the bill.

Clause 1: Short title —

Hon NICK GOIRAN: Will victims of child sexual abuse who have their limitation period removed by this bill be subject to section 21(1) of the Criminal Injuries Compensation Act should they lodge a claim?

Hon SUE ELLERY: That particular provision is exercised in a discretionary fashion, so yes, on some occasions, they might be. However, I am advised that the practice is that that discretion is exercised generally in favour of a victim who was a child at the time.

Hon NICK GOIRAN: On what basis does the minister say that the practice is that it is exercised "in favour of a victim who was a child at the time"?

Hon SUE ELLERY: I think I said "generally". The advice that is provided to me is that, on the basis of the observation made by the person giving me advice, that has generally been the practice.

Hon NICK GOIRAN: Is the person giving the minister the advice the Chief Assessor of Criminal Injuries Compensation or not?

Hon SUE ELLERY: The member knows that he is not, but he has consulted with that person.

Hon NICK GOIRAN: What was the outcome of the consultation with the chief assessor?

Hon SUE ELLERY: The advice I am given is that she expressed the view that she would generally exercise that discretion in favour of the person who was a child at the time that they were a victim and that given that the whole legislative regime was to be subject to review, she wanted to retain the provision as it was until the outcome of that review.

Hon NICK GOIRAN: Was that view expressed by the chief assessor in the form of something in writing?

Hon SUE ELLERY: No.

Hon NICK GOIRAN: What we have in this chamber is a minister who does not have the conduct of the bill overall; this minister represents the Attorney General, who has responsibility for the bill. The members of this place who are asked to make a decision, which I am absolutely confident is going to make things worse for victims of child sexual abuse because of section 21, have to rely on the verbal advice given to this representative minister by someone else who has spoken to the chief assessor. I do not know how many members played that game Chinese whispers when they were kids, but my experience of that game is that when one message is sent to the next person over time, inevitably something goes wrong. My experience in this jurisdiction is that consistently the chief assessor asks people to be subject to section 21. The suggestion that generally the practice is that the exercise is in favour of the victim who was a child at the time is inconsistent with my experience. I am giving this evidence to the chamber as a person who has practised in that area of law and has pursued those cases. What the chamber does not have the benefit of this evening is the chief assessor sitting in front of us and saying, "Whatever the experience of Hon Nick Goiran might be, I am the chief assessor and I am telling you that my general practice is this." We do not have the benefit of that tonight and we are not going to get the benefit of it because we know perfectly well that this bill will not be referred to a committee for review. The Standing Committee on Legislation, or whatever other committee members might have liked to refer the bill to, would have been able to summon the chief assessor, get her to sit in the chair, answer those questions and tell us exactly what the practice is. I have just asked the minister whether that has been put in writing to the government and I was told that no, it has not. This is totally unacceptable. We are all of one mind that we want the legislation to pass. I will quote section 21 of the act for the benefit of members, because I am confident that most members will not have had the opportunity in their busy schedules to look at that section of the Criminal Injuries Compensation Act 2003. Section 21 of the act states —

> (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 —
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> > (a) has reasonable grounds for taking proceedings independently of this Act to obtain compensation or damages for all or some of the claimed injury and any claimed loss; …
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> > …
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> the assessor may require the victim to take proceedings to obtain the compensation, damages or payment and may defer the application pending the determination of those proceedings.

My experience, members, is that that happens frequently. The suggestion this evening that generally the practice is exercised in favour of the victim who at the time was a child is not my experience. Maybe my clients were just really unlucky and it just so happened that the cases that I brought before the Chief Assessor of Criminal Injuries Compensation were not the ones that she decided to exercise her discretion on in accordance with her general practice.

I remain deeply concerned, as I was when I gave my contribution to the second reading debate, that what is going to happen after this bill becomes law—we have heard the reply from the government and it is not interested in entertaining an amendment to this bill, so as there will be no amendment, the bill will not need to go to the other place, but we will get to the proclamation and other clauses in a moment—is that a victim of child sexual abuse will take their application to the criminal injuries compensation assessor. At the moment, if the incident happened after 2003, the maximum payment is $75 000 for one incident. The person will take their application to the assessor, who will then say, "Sorry; in my view, because the Legislative Council concurred with the government in the Legislative Assembly and said, 'We're lifting the limitation period, so there is no limitation period for you

anymore', under section 21(1), you have reasonable grounds to take proceedings independently of this act, so I require you to take those proceedings and, until such time as you do, I am deferring the application that you have given me." It is common practice already, members, but the issue at the moment is that it is not a particular problem for these victims of child sexual abuse because they do not have reasonable grounds for taking proceedings because they are barred from action. The limitation period has long expired, so they have the opportunity to go to the assessor. Incidentally, members might want to know that the Criminal Injuries Compensation Act effectively has an unlimited period of time for people to make an application. If members look at the act, technically there is a three-year limitation period, but there is this wonderful, excellent section in that legislation that allows the assessor the discretion to extend the period of time indefinitely. I can confirm it is the general practice of the assessor to exercise that discretion in favour of a victim, particularly a child. That is true. She or he, when the assessor is a he, will extend that discretion in favour of the victim if they were a child with regard to the application being lodged, but they do not do that with respect to section 21(1).

If we allow this to go through in its current form, that is precisely what will happen. I have no doubt I am not going to change the minister's mind this evening, but I am definitely not letting this one go away too quickly. My question to the minister is: when did this consultation happen with the chief assessor?

Hon SUE ELLERY: Before I answer that, I think I need to put something on the record. I do not mind the member having an argument with me or even with the Attorney General, but I do think it is not entirely reasonable to suggest that the advice I am being given at the table is a case of I think what he described as Chinese whispers. I am advised at the table by the manager of legislation in the Department of Justice, who, I am advised, had the conversation directly with the assessor. The member may disagree with the advice that I have been given but I do not think it is reasonable to cast—"astertions" is what my mother would have said!—aspersions on the public servants. I do not think that is a reasonable thing to do. The question was when did the consultation occur, and I will just check that. My advisers are not able to recall the exact date, but it was about two months ago.

Hon MICHAEL MISCHIN: I have to say the minister's comments about not casting aspersions on public servants is refreshing given the manner in which the Attorney General, when he was shadow, was quite happy to ridicule and criticise in the other place the then Commissioner for Victims of Crime and her motives. I think he had a lot to say about her CV and how she could brag that one of her big achievements was she had closed down specialist courts. He made the most outrageous and cowardly comments under parliamentary privilege about a public servant who had achieved an enormous amount in the role of Commissioner for Victims of Crime. It looks as though the government's attitude has changed, but perhaps it is just this minister who is a little more sensitive to the proprieties than the person who is instructing her on this bill.

Getting back to the point Hon Nick Goiran raised, I want to tease out a little more information on this. If I understand it correctly, the advice that the minister has is that in the exercise of discretion under section 21(1) of the Criminal Injuries Compensation Act, the chief assessor will exercise her discretion in favour of an applicant who was a child victim at the time of the offence occurring—is that correct?

Hon SUE ELLERY: I am sorry to be difficult. I am going to ask you to ask that question again because I was just dealing with a matter for Hon Nick Goiran.

Hon MICHAEL MISCHIN: If I understood it correctly, the advice the minister has is that in exercising her discretion under section 21(1) of the Criminal Injuries Compensation Act, the chief assessor will favour or act or discharge her discretion in favour of the interests of an applicant who was a child at the time of the offence giving rise to the application—is that correct?

Hon SUE ELLERY: She has said generally that is what she will do. She has not said in every case, but she said generally that is what she will do.

Hon MICHAEL MISCHIN: By "generally", what factors will the chief assessor take into account in making a decision? Since it is not a blanket exercise of discretion one way in every case, there must be factors that the chief assessor takes into account and weighs in deciding in particular cases to act in that fashion.

Hon SUE ELLERY: I am advised there was not a discussion about the kind of factors that she would apply. The view she expressed is that is what she would generally do. I am told that she explicitly said she was not supportive of making changes until the review of the whole of the act had been conducted.

Hon MICHAEL MISCHIN: I accept that. That is fine; that is her view and she prefers that. I can understand why, but if there is a general review of the statute under which she draws her powers, responsibilities, commitments, obligations and the like and rather than a piecemeal modification to suit particular circumstances, a general review and a holistic approach to it is wise. I entirely respect that. The advice, however, is that generally she will exercise her discretion in that particular way. The minister is not sure about the circumstances that might exercise her mind to do it that way as opposed to against the interests of the applicant. Does the minister happen

to know, or is her adviser able to assist, whether the age of the matter that has been the subject of the application has a bearing on it?

Hon SUE ELLERY: I am sorry; I cannot help the member with that. As I said earlier, they did not canvass the particular factors that she would take into account. The language that I am told was used was that it was with respect to people who were children at the time that they were victims.

Hon MICHAEL MISCHIN: Do we know whether the assessor deals with many cases that are very old claims or only relatively recently? By "very old" claims, I mean when the abuse that has given rise to the application has been many, many years in the past. Are we able to say anything about those cases?

Hon SUE ELLERY: The short answer is no. The long answer is that that is a function of the way that the historical records were kept. It is not possible to go back and use a particular phrase, I suppose, or title of the file—or a search term. It is not possible to go back and get a consistent one of those on the historical records.

Hon MICHAEL MISCHIN: I thank the minister for that. I can understand that, because the assessor's database probably has not been geared to that sort of information, but the assessor should be able to give some idea of the matters that exercise her mind as to whether she will exercise her discretion in favour of or against a particular case. That is what I am trying to tease out here. I understand that the minister has limited information, and it is not a criticism of those who are doing their best to advise the minister, but I am interested to know about that because I think that Hon Nick Goiran has raised a very pertinent point. I recall that before the last election he raised this point during the course of the consultation being conducted by our little working group on behalf of cabinet in order to determine what matters might need to be attended to when we draft legislation to this end. It is something that I would have hoped the government, given the time it has had to craft this bill and the urgency with which it says it needs to be passed, would have taken into consideration, rather than leaving it at large that, generally, the chief assessor does one thing, but the government cannot say the basis on which she does it or why she might do it in this case and not in some other case. It is a matter of some relevance and importance and something that victims—potential plaintiffs—might have an interest in to know where they stand with these matters.

We are left with Hon Nick Goiran's experience, albeit, I hesitate to suggest, perhaps some eight years out of date. But that was his experience of the way it was being dealt with. We have the minister channelling the advice that she has been given saying that there is a particular practice since the new assessor has been in office. I am not sure that she was in office at the time Hon Nick Goiran practised. She was one of the assessors, but I am not sure that she was the chief assessor at that stage—I may be wrong.

Hon Nick Goiran: She's been there a long time.

Hon MICHAEL MISCHIN: Okay, maybe she was. Maybe her practices have changed. I would like to know a little more about that and I am not sure whether we will get through all of this tonight. Perhaps the minister would be good enough to try to explore a little more how the assessor exercises her discretion, because a factor will be introduced that was not there before. When this bill passes, the assessor will be dealing with not just applicants whose only source or recourse may have been a small amount of criminal injuries compensation, because their ability to take action had expired through effluxion of time, but also people who will have access to potentially significant sums of money by way of damages that would eclipse any compensation that might be granted to them. I do not know the sorts of cases in which she has been exercising her discretion. It may have been those that were only a year out of date. It may have been cases that people were still able to sue on. It may be the case of a person who was 21, but was a child at the time of the abuse a matter of years before and who could have received a significant sum in criminal injuries compensation that was at least certain and may have funded any litigation that might have still been pending. It may have been people whose limitation period had expired. I do not know and it would be useful to know that, because this is going to change the playing field and the landscape, and she may, for very good reasons, choose to exercise her discretion generally in a different fashion afterwards for very sound reasons. I am not making a judgement as to whether exercising her discretion in favour or against is a good thing or a bad thing; she will have her reasons for it, bearing in mind her responsibilities under the act, which are very different from those of litigants. I would appreciate some further advice on that subject if the minister is willing, because I think it is a factor that ought to be taken into account.

Hon SUE ELLERY: The minister is willing. I will not be able to provide it tonight. I hope that we can still progress as far as we can go tonight and I give an undertaking that through the Attorney General's office—I am fairly confident that I will get that—we will chase whatever information we can get and I will make it available to the house tomorrow.

Hon NICK GOIRAN: Noting that the minister will report back to the house on this topic in due course, I have a range of other questions I want to get to, but I want to finish on this section 21 issue. If it is the case that we are unable to conclude proceedings this evening, for what it is worth, I ask the minister to go back to the Attorney General once again and ask him whether he would consider a section 21 amendment.

Hon Sue Ellery: I have some advice on that issue. I sent the member a note about what the Attorney General can agree to, but I would be misleading the member if I said that he had not thought about the proposition for an amendment to section 21. He has thought about it, and the answer is negative.

Hon NICK GOIRAN: The answer is that the government wants to wait until the review.

Hon Sue Ellery: The answer is negative to an amendment.

Hon NICK GOIRAN: An amendment today, but the government wants to wait to see what happens with the review of the whole act.

For what it is worth, I want to let members know and get on the record that this is a matter that I have been pursuing since Dr Graham Jacobs brought his bill into Parliament. To support that, I will now read from a confidential document, which is a briefing note from me to Dr Graham Jacobs on 27 October 2016. On this particular point, I say this to my friend Graham Jacobs about his bill —

> Most victims of offences that occurred in Western Australia since 22 January 1971 are able to make an application for compensation under the provisions of the Criminal Injuries Compensation Act 2003 … The CIC Act 2003 was the work of the last Labor Attorney General in WA, Hon Jim McGinty. Amongst other things, this Act repealed and superseded the previous legislation and compensation schemes for victims of crime. A significant number of flaws were created by this new Act which remain a cause of great injustice to victims of crime. It is outside the intended scope of this briefing note to set out those flaws. Rather, this briefing note highlights a critical section of the CIC Act 2003 which will have a perverse effect on victims of child abuse if the Jacobs Bill is passed in its current form.
>
> Section 21(1) of the CIC Act 2003 provides that:
>
> *21. Applicant may be required to enforce other remedies*

I go on to quote the section of the act that we have just been discussing. My note to Dr Jacobs goes on to state —

> This section has generally not proven to be a stumbling block for victims of child abuse for several reasons, including because more often than not their claim for compensation has been made after the limitation period has expired for them to pursue a civil claim.
>
> However, if the Jacobs Bill were to become law the assessor could defer some or all claims by victims of child sexual abuse on the basis that they now have an unlimited period of time in which to pursue a civil claim. This would be a severe blow to victims of child sexual abuse and would have the perverse outcome of seeing them at a significant disadvantage in their pursuit for compensation in comparison to other victims of crime.
>
> An amendment is needed to prevent the assessor from using section 21 to defer the compensation claims of victims of child sexual abuse.

My briefing note refers to a range of other things. I raise that briefing note, which I have never raised before, to hopefully provide some context to members on why the well-intentioned bill by Dr Graham Jacobs did not just speedily pass through the Legislative Assembly in one day at the behest of people. It was because other well-intentioned and good-spirited people who supported the intent of the bill could see that there could be a problem with what the good doctor was proposing, and that section 21 of the Criminal Injuries Compensation Act was an issue in Dr Jacobs' bill, just as it is in the bill now before the house.

The government is indicating that at least at present, it is not prepared to consider an amendment to this bill. Ever the optimist, I am hopeful that view will change overnight and that tomorrow the government will be willing to make a simple amendment to section 21 to put into practice what the chief assessor is telling us through the loop of advice is general practice anyway. I fail to understand why the government would have a problem with inserting an amendment to this act to enshrine what the chief assessor is saying is general practice. I have a different view. I do not concur with the chief assessor that it is a general practice that she or any male assessors would exercise in favour of a victim who happened to be a child at the time, at least not in respect of section 21. That is okay. That is my opinion. Let us run with the scenario that what the chief assessor is telling us is correct. Why not enshrine that in the legislation to ensure that this will not be a problem and that no victim of child sexual abuse will be worse off as a result of this bill? Of all the matters that I have raised about this legislation, and of all the matters that we will raise in due course, this is the most important. This will have the perverse effect of shunting some of these people into an adversarial civil litigation system. These people will potentially be fighting with institutions and perpetrators in the District Court for years. We will be forcing these people to be proofed ad nauseam, provide discovery, plead proceedings, and get ready for trial, just because the chief assessor has decided to exercise section 21(1), and just because we as a chamber have decided that we will wait for the review. We will wait for the review, only to be told that this is general practice. I cannot understand it. I know that we will not get any

further on that tonight, minister, so I will not pursue it further, but please forgive me if I decide to raise it again tomorrow.

I now move to section 68 of the Criminal Injuries Compensation Act, which is the second item that I have raised. This is a slightly different issue. If I have any sympathy for the government's position, it is because, at least on the first item, the assessor can exercise discretion. We might have a difference of opinion about how that discretion has been exercised and whether there should even be that discretion. The problem with section 68 is that there is no discretion whatsoever. Section 68(1) states —

> If —
>
> (a) a compensation award is made in respect of any injury or loss suffered by a victim or a close relative of a deceased victim; and
>
> (b) 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; and
>
> (c) that amount is not deducted under section 42(3) or (4),
>
> an amount equal to the lesser of —
>
> (d) the amount awarded to the victim or close relative under the compensation award; or
>
> (e) the amount referred to in paragraph (b),
>
> is a debt due to the State by the victim or close relative or by any person who holds the amount referred to in paragraph (b) on behalf of the victim or close relative.

It does not state that it is at the discretion of the assessor, at the discretion of the Attorney General, at the discretion of the Leader of the House, or at the discretion of Premier McGowan. It is not at the discretion of anyone. The law of Western Australia states in section 68(1) of the Criminal Injuries Compensation Act that it is a debt due to the state by the victim.

I mentioned this afternoon the perverse situation that may apply to a person who has sought criminal injuries compensation. The person may have made an application last year and has been awarded $50 000. The offence occurred 15 years ago. After the passage of this bill, the limitation period will be removed, so the person decides to pursue the institution and the perpetrator. The person is awarded $200 000. However, the court determines that because of the Quigley bill, it cannot award the person $200 000, because the government has stated in its legislation that—in my words—the person cannot double dip. Therefore, because the person has already received $50 000 in criminal injuries compensation, the court makes a judgement in favour of the plaintiff for $150 000. No problem. So far, so good. However, unfortunately, then comes section 68 of the Criminal Injuries Compensation Act, under which there is no discretion. It is an enshrined statutory provision that dictates that a debt is due to the state. The debt due to the state is the $50 000 that the court, quite rightly, did not award to the plaintiff in the first place. Therefore, suddenly the person ends up with only $100 000. That is not what anyone intended. I am interested to know whether the minister can advise the house whether the government is prepared to entertain an amendment to section 68 of the Criminal Injuries Compensation Act.

Hon SUE ELLERY: Yes, honourable member, we are. I just happen to have an amendment that was prepared earlier. This is what happens when parliamentary counsel is sitting at the table with me! I appreciate that we are now dealing with clause 1 of the bill. However, if you will indulge me, Deputy Chair, I will read out the proposed amendment. We will need to make two amendments, because we will also need to amend the long title of the bill to refer to the fact that we are also amending the Criminal Injuries Compensation Act 2003. The essential part is to add a new part 2A, "*Criminal Injuries Compensation Act 2003* amended". The proposed amendment is as follows —

> 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 section (1)(b) was reduced to take into account the compensation award referred to in subsection (1)(a).

That is the substantive amendment. As I have said, as a consequential amendment, we will also need to amend the long title. We will have that amendment dutifully prepared for members. I note that we are still dealing with clause 1, so I will not need to move that amendment yet, but that will give the member a sense of the amendment.

Hon NICK GOIRAN: First of all, minister, thank you for listening and for lobbying the Attorney General, and please pass on my thanks to the Attorney General. It is appreciated. I have followed the amendment that the minister has just read and I think it will achieve what we seek to achieve. Obviously, once the amendment has been typed and circulated in the fullness of time, I will have another look at it. However, from what the minister has said, I think it will achieve exactly what needs to be done.

Without wanting to sound like a broken record, I indicate to the minister that section 21 is at least as important as section 68. I congratulate the government on showing goodwill, because it will definitely result in a better piece of legislation. Given that, there is now a bit of extra time to get this other part of the legislation right. Forgive me if I raise it again tomorrow, minister, and I hope that by some miracle overnight there will be an amendment to section 21 as well.

I will perhaps move to a couple of other matters and take the minister to a matter that she touched on in her reply to the second reading debate. I realise that the government has a fixed view on the forms of abuse that will be captured by this bill, but it is important and necessary that we have this discussion at clause 1. If I recall correctly, the minister indicated by her count that there are four jurisdictions that do it one way and five jurisdictions that do it another way in when it comes to whether they include physical abuse. I note, reviewing the *Hansard* of the debate from the other place, that there was discussion about the royal commission making a recommendation with regard to "serious physical abuse", I think is the term.

Hon Sue Ellery: I am advised that the advice was checked and there was no such recommendation.

Hon NICK GOIRAN: I did not think there was either, but I read that in *Hansard* and I thought: "That was interesting."

Hon Michael Mischin: Who said it?

Hon NICK GOIRAN: I prefer not to go there, shadow Attorney General, because it was someone from our team. Nevertheless, the minister will appreciate that there are several jurisdictions—from memory the Northern Territory, Tasmania, Victoria and New South Wales— that have all said they are going to go above and beyond. The government, in its second reading speech on this matter, states —

> In some respects, the government's legislation will go further than any similar legislation in any other Australian jurisdiction to date.

Is the minister in a position to indicate to the house whether there is any reason, other than the fact that it was not an election commitment, that the government will not pursue physical and psychological injury as well as sexual injury?

Hon SUE ELLERY: It was a policy judgement based on the recommendation of the royal commission itself. In respect of the other point the member made reference to, in some areas it is above and in others it is the same. Effectively, we go above other jurisdictions when it comes to the provisions in our legislation about how to get a proper defendant and we are the same in the methodology about the lifting of the limitations.

Hon NICK GOIRAN: We are clear that this legislation does not include physical abuse and psychological abuse, even though four Australian jurisdictions do so, and the government is fixed on that. What happens for a victim of sexual abuse if, as part of the sexual abuse that was perpetrated against this person, there was also physical abuse that was perpetrated against them either at the same time as the sexual abuse or at a different time?

Hon Sue Ellery: Inevitably there may be.

Hon NICK GOIRAN: There could be. What happens with those victims and their capacity to bring claims under this legislation?

Hon SUE ELLERY: Because there is sexual abuse, the limitation is lifted, they proceed with the claim and they will get damages accordingly. The test for this legislation is whether it is sexual abuse or not sexual abuse and, as we said, we have not narrowed the definition of what sexual abuse means quite deliberately because, unfortunately, there is a horrendous range of things that could be incorporated in that.

Hon NICK GOIRAN: The gateway is that the victim has to have been subject to some form of sexual abuse, however defined, and that is going to be left up to the court. We might have a discussion around that in a minute. They get through the gateway, they are able to issue their writs against the perpetrator or the institution and they then say to the court, "This is my history; this is what happened to me." Will they still be able to get damages for the physical and psychological abuse that they suffered or will they be restricted to only the sexual abuse that they suffered?

Hon SUE ELLERY: Damages would be awarded to the person on the basis of the sexual abuse. Not that there are provisions in the bill before us about this, but in determining those damages, I am advised that it would be hard for the court to differentiate whether the physical abuse was linked to the sexual abuse and the psychological abuse was linked to the sexual abuse. They cannot necessarily pull them apart depending on particular circumstances. The court, in awarding damages, might take a particular view on a set of circumstances that incorporates its viewing of physical and psychological abuse because it was incorporated in the particular circumstances of the sexual abuse. It is the sexual abuse that triggers the damages.

Hon NICK GOIRAN: If it was a different bill on a different day and it was not such a serious matter, I would probably pursue a silly little game and ask a question that I already knew the answer to. Today is not the day for that. Instead of asking a question, I will make a statement.

In order for the court to make an assessment of damages, a key component is going to be the medical evidence provided. A key strategy by a defendant, whether that be a perpetrator or an institution, will be to deliver to the court a medical report that says, "No, I'm an expert psychologist, I'm an expert psychiatrist and I'm telling you that only a small proportion of this is to do with the sexual abuse which was one incident. All those other horrendous beatings that this person had is actually what most of their pain and suffering and loss of enjoyment is about." The defendant will produce that to the judge and the judge will need to make a decision on that. The judge will be compelled to unpick all that. If the judge does not, guess what the perpetrator and the institution will do? They will appeal. I do not want that and I do not think the government wants that. I do not think any of the 35 voting members of this place want that. One way to address that would be for the government to broaden the scope of this legislation to ensure that if a person is just subject to serious physical abuse, they would still be able to claim. That is my view. I know that is not the government's view, so I am not going to go there. If the person gets through the gateway, can we not have an amendment to state to the courts, "Thou shalt take into account all of the personal injury that has happened to the person"? They therefore would not carve out only the sexual abuse and leave the person in the horrendous situation at the end of a trial with a judgement that says, "Here is a pittance of compensation for you, despite the fact that you went through all of this and you had high hopes because the WA Parliament decided to lift the limitation period. I'm going to give you this pittance of compensation because on balance you had a lot of physical beatings, but you "only", in inverted commas, had one incident of sexual abuse." None of us want that. As I said, I would like there to be a full gateway available for these victims of serious child abuse, but that is not going to happen. Can we at least get an amendment so that if the person gets through the gateway, they are a victim of child sexual abuse, and we will not have this problem of the court having to try to unpick it? Is it something that the government would be willing to entertain?

Hon SUE ELLERY: I do not want to raise the member's expectations. I know that agreement to the amendment to section 68 of the Criminal Injuries Compensation Act has formed all sorts of possibilities in the member's mind. I will raise the issue, but I would be misleading the member if I said my expectation was that there would be an agreement to that.

Hon MICHAEL MISCHIN: Perhaps the nuances of what involves child sexual abuse and the like are better left to be dealt with in the debate on clause 8 of the bill, but since we are on the subject, I understand why the government might have a few concerns about broadening things out without some further work being done on the matter. It may very well be, from the findings of the royal commission and its experience, that children who are the subject of sexual abuse take a long time to come to terms with it—the humiliation of it and the like—and to be able to articulate their problems and come to terms with those problems in order to take action. With physical abuse, I do not know, but maybe that is also the case. I can see a potential danger in using that as the hook to allow a more general claim for damages, because that potentially encourages claims of some form of sexual abuse for those who are unscrupulous in order to be able to seek damages for merely physical matters. But it will involve some policy decisions down the track about how seriously the government regards physical and other forms of abuse and whether they ought to be compensable, notwithstanding that they may be very, very old claims for conduct that may have taken place generations or decades before. That then throws open the broader policy considerations that I touched on in the course of my contribution to the second reading debate about where the line is drawn. Why is there one form of justice for one particular group of adults? Why should they be treated differently from other adults who may have suffered serious harm but whose limitation period has expired? We will get to that perhaps a bit further on when we get to clause 8.

I would like to know who the government consulted in the development of the bill and the extent of that consultation. I know that when Hon Nick Goiran, Hon Liza Harvey and I were in turmoil over what we ought to be doing as a policy setting and how to craft some drafting instructions for a bill, we consulted fairly widely. We consulted abuse survivor groups, abuse survivors and the Law Society. We had the president of the Law Society and others who are skilled in this area come to visit us and speak to us. As I recall, we had representatives of law firms and even representatives of the insurance industry, as it tends to underwrite a lot of the risks for these

organisations. I would like to know who the government consulted with, when that consultation took place and the substance of what was provided to the government in that regard.

Hon SUE ELLERY: I do not have an extensive list, but I am advised that there were the criminal injuries compensation assessor, the State Solicitor's Office, the Solicitor-General and the Department of the Premier and Cabinet.

Hon MICHAEL MISCHIN: That is a pretty narrow group of people giving input. We are looking at the government's legal advisers, basically. Was there no consultation with those who the government is making liable for the payment of damages for these matters for which they had no reason, until the passage of this bill, to think that there was any liability and for which the government is changing legal rights and obligations not only into the future, but also retrospectively?

Hon SUE ELLERY: I do not have a list, so people are going off recollection. Before the bill was read into Parliament, the Department of Communities was also involved. After the legislation was introduced into the Parliament, there was discussion with representatives of the Catholic Church as well.

Hon MICHAEL MISCHIN: That again is not what one could call extensive consultation for something that involves a broad and far-reaching change of obligations, legal liabilities, responsibilities and the like not only in the future, but also retrospectively. Why was consultation limited to the Catholic Church? Why were no other church groups consulted?

Hon SUE ELLERY: I am not able to add any more to what I have said.

Hon MICHAEL MISCHIN: I asked why. Is the minister not able to say why?

Hon SUE ELLERY: I cannot give the member an answer; I do not have that advice.

Hon MICHAEL MISCHIN: As long as it is recorded that the minister does not have that advice. This is not a criticism of the minister; she does not know the answer because she does not have the information. Was the Law Society consulted at all about the government's plans and how it intended to address this issue of not only removing the limitation period but also allowing for the selection of defendants, and also the question of access to funds in order to pay damages claimed; and, if not, why not?

Hon SUE ELLERY: I have already told the member to the best of my advice who was consulted and the Law Society was not on the list. I am not able to add anything further to that nor do I have advice on why agency X was chosen and organisation Y was not chosen. I have provided the answer to the best of my ability about who was consulted. I am not able to add anything further to that.

Hon MICHAEL MISCHIN: What did the Department of Communities have to say? Can the minister give us an outline of the sort of advice that it provided, which informed the drafting of the bill?

Hon SUE ELLERY: To assist the debate, I wonder whether there is a particular bit of information the member was trying to establish. We might be able to provide him with it, because otherwise this is a fairly slow process. Was there something in particular that the member was looking for?

Hon MICHAEL MISCHIN: There are a few things. We have been told that there was consultation with the Chief Assessor of Criminal Injuries Compensation, who has given some broad advice that she exercises her discretion in particular ways. I do not know what else the criminal injuries assessor was asked about or what she gave her advice on. I do not know whether she was consulted about section 68 but, plainly, what Hon Nick Goiran has now raised has sufficient merit that the government, despite its professed desire to deal with this bill urgently and saying how it will entertain no amendments is now prepared to entertain an amendment to fix a problem. We have the advice of the Department of the Premier and Cabinet. I am not sure what expertise other than some broad policy advice it brought to bear on this. We have the advice of the Solicitor-General. I do not know quite what he advised on; maybe it was the drafting. Did he advise on the law in other jurisdictions or of any legal complications or potential loopholes in the legislation to cover specific areas that have been raised? I do not know about that—the State Solicitor's Office likewise. We have the Catholic Church being consulted, but we do not know anything about what it may have said about the legislation—whether it agreed with it in principle, whether it thought that it went too far, whether it thought that it could live with it and the reasons. We do not have very much information to go on.

Ordinarily, this is the sort of bill that cries out to be dealt with and analysed by a legislation committee or a select committee. I am not proposing that in this case because the government has told us that if this bill is delayed or held up, we will be protecting paedophiles, according to its Attorney General. Yet the government has gone ahead and, almost a year after coming to office, after telling us that the Jacobs bill was it-and-a-bit and could be passed in an afternoon and there was nothing further to do, has come along with something very different but cannot tell us anything about how it was structured and crafted or whether issues have been raised that need to be resolved.

Some information that I have been provided with suggests that the Ellis defence the minister raised during the second reading debate will not necessarily be overcome by this legislation. If that advice is correct, it would seem that the government did not consult widely enough or, perhaps, was deflected from addressing that matter as well as it could because it consulted with only one of the churches. Indeed, it was the church that had raised the Ellis defence in the first place. That is what I am driving at. I would like to know how much consultation took place that allowed the government to draft a bill and, with the best will in the world—I am not criticising the draftspeople involved, who work on the instructions that they are given—whether the government had at its disposal those who are practising in this area and are able to help formulate legislation to cover all the loopholes that may be available. That is what I am driving at. I will get to the specifics later, but can the minister give us some information about what was fed into the government, other than the legal advice of the Solicitor-General and the SSO, the policy advice, presumably, of the Department of the Premier and Cabinet, the criminal injuries assessor's advice about how she deals with criminal injuries compensation claims, which is only a peripheral and small part of this, the Department of Communities—I do not know what it did, but the minister can tell us—and what the Catholic Church had to say after it was introduced into Parliament?

Hon SUE ELLERY: I am not able to add anything further about consultation.

Hon NICK GOIRAN: This bill, at the moment, seeks to amend a couple of acts. One is the Civil Liability Act and the other is the Limitation Act. Hopefully, tomorrow it will also amend the Criminal Injuries Compensation Act—maybe more than one section of it. One of my concerns with the Civil Liability Act is whether claimants—victims of child sexual abuse—will be captured in their claims by part 2 of the Civil Liability Act. Can I ask the minister to inform the house whether any provision will protect these victims of child sexual abuse from being captured by part 2 of the Civil Liability Act?

Hon SUE ELLERY: I am advised that victims before 2003 will not be affected at all by part 2. Victims post 2003 will not be affected because of the exclusion of sexual offences.

Hon NICK GOIRAN: I think the minister has the same table as I do, which is under section 3A of the Civil Liability Act. When the minister says that they will not be captured because they are sexual offences, is she referring to section 3A(1) and the table at item 1(b)?

Hon Sue Ellery: Correct.

Hon NICK GOIRAN: I was hoping the minister would say that.

Hon Sue Ellery: In a good way or a bad way?

Hon NICK GOIRAN: Genuinely, in a good way. I just want to make sure that what the minister and I intend to have happen here will actually happen when these matters go before the courts. Item 1(b) states —

> 1. Damages relating to personal injury caused by —
>
> …
>
> (b) an intentional act the doing of which is a sexual offence as defined in the *Evidence Act 1906* section 36A or sexual conduct that is otherwise unlawful.

It is quite an extensive description, yet the type of claims we are talking about here—child sexual abuse—has the meaning given in section 6A(1) of the Limitation Act 2005, according to the bill. I want to make sure that that definition captures every aspect of the table at 1(b) in section 3A. I would not want a situation in which section 3A(1)(b) defines a particular type of sexual offence as defined in the Evidence Act 1906—a very narrow type of sexual offence—when our bill refers to child sexual abuse in a broader context because we have not defined it and suddenly we find ourselves with a category of victims who get through the gateway, go to court, then the court says, "Ha-ha! Guess what? You're not one of these sexual offences under the Evidence Act 1906" so they are whacked with part 2, which is a particularly draconian part of the legislation.

Hon SUE ELLERY: In theory, if the court found that there was sexual abuse that did not meet the terms as defined in the Evidence Act 1906 and the act happened after 2003, the cap could apply.

Hon NICK GOIRAN: I thank the minister and her advisers for the authenticity of the advice to the chamber and I hope that the minister understands the concern that I therefore have. I say again in all sincerity that I suspect that is not what the government wants and not what anybody wants. I think, for what it is worth, the solution is for the bill, when it defines child sexual abuse, to reflect what is outlined in table 1(b), but that would have the unfortunate effect of then reducing the scope of people who could have access to it, so in actual fact that would not help and we do not want that. Since people are contemplating amendments overnight, I wonder whether we can look at the table in section 3A(1)(b). I know I keep saying that these amendments are all very simple but I genuinely do not think that we are talking about extensive matters. I would have thought that table 1(b) could have the words added

"child sexual abuse actions", which is four words. If we add them to table 1(b), there would probably be the addition of five words because we would add the word "or" —

Hon Sue Ellery: Member, I think I can help you.

The DEPUTY CHAIR: Minister.

Hon SUE ELLERY: I understand the point that the member is making. I am advised that it was contemplated. It is a bit more contemplated than —

Hon Nick Goiran: Four words?

Hon SUE ELLERY: Yes. However, it will be looked at again overnight, but please be assured that it was considered. The thinking was that because it is post-2003, in fact, many of the cases that we are talking about would be outside that period. It was contemplated and the solution is perhaps a bit more complicated than the member is suggesting.

Hon NICK GOIRAN: Again, I thank the minister for the goodwill expressed and I hope for a good result overnight. Regarding her concluding points that some matters will now be post-2003, I think it is really important for us to understand that, sadly, an incident of child sexual abuse will probably occur somewhere in Western Australia tonight. Although that victim has the benefit of this legislation and it is post-2003 and all the rest of it, the reality for them is that they probably will not be in a position to deal with what has happened to them tonight until they are in their thirties or forties. If this is a child, which is what we are talking about here, we are talking about 20 years post hence. I think it is important to understand that we all have a lot of focus on historical cases of child sexual abuse, but the law will apply to future victims of child sexual abuse. We wish there were none but, unfortunately, there will be some, so we need to make sure that those people are also addressed in this legislation. I am appreciative of the fact that it was considered. I appreciate the advice that it is more complex than my off-the-cuff suggestion of adding just a few words. If it could be looked at overnight, that would be appreciated and we can look at it again tomorrow.

I will now turn to a different topic—the issue of stays of proceedings. The second reading speech states —

> In order to ensure that all parties receive a fair trial, the bill maintains the authority of a court to stay civil proceedings for historical child sexual abuse when the lapse of time has a burdensome effect on the defendant that is so serious that a fair trial is not possible.

My question is: has the government obtained advice on the likelihood of stays being granted for these cases?

Hon SUE ELLERY: I am advised that they did not get advice on specifically the question of likelihood but they did get advice on the issue of stays. The advice was that they should not remove them. I am told that the advice was linked to or generated by examples of a particular case. The advisers do not have that case with them tonight but they can get it for the member tomorrow if it would be of some assistance. It was an eastern states jurisdiction in a case related to child abuse.

Hon NICK GOIRAN: Minister, it might be the case of Connellan and Murphy—a Victorian case from 2017. On 22 May last year, the Supreme Court of Victoria's Court of Appeal looked at its legislation—there was a case before it—and proceedings were permanently stayed with regard to the alleged sexual assault of a minor from 1968. That has been the seminal case, if you like, that has created a lot of concern. It is a Victorian case of course, not a Western Australian case, because this legislation is not in place yet, but no doubt it will be considered in any application that will be made in a Western Australian court. A Western Australian court does not need to follow that decision made by the Victorian Court of Appeal, but it will be persuasive. It is important to recognise that in that particular case, at first instance there was no stay. It was the Court of Appeal—a higher court—that ordered the stay. The fact that it went to the higher court adds to the persuasive weight that would be given to this particular case. I know that a lot of people are concerned that, on the basis of that case, these stays will not be that difficult to get. Do not misunderstand me; when I say that they will not be difficult, that does not mean that they will be easy. Everything in court is difficult, but it will not be too onerous on a defendant to run an argument as happened in that particular instance. I know that the minister said that advice was sought on that particular case. The question that arises is: who did the government seek advice from after that case came down?

Hon SUE ELLERY: The drafting was done on the basis of State Solicitor's Office advice. I am also advised—I presume that the member is aware of this—that in the particular case that he is referencing, which was the case that I referred to before by interjection, the perpetrator also was a child. It is a very particular set of circumstances. I am advised that the advice came from the State Solicitor's Office.

Hon MICHAEL MISCHIN: On the issue that Hon Nick Goiran has raised about stays and the like, I take it that, notwithstanding that it is a Victorian case, the purpose of proposed section 6A(5) of the Limitation Act is to

preserve explicitly the current case law rather than to create any new impediment. I was going to save my comments on this matter until later.

Hon Sue Ellery: You are correct, if that helps you.

Hon MICHAEL MISCHIN: For the purpose of some assistance, just what are those principles that are hedged around the court staying proceedings for the effluxion of time and the like? I note the time and I know that the minister will have to ask the chamber to report progress. Given that we will not complete the debate on the bill tonight, I wonder whether the minister would be prepared to obtain some information on the extent of consultation that has been conducted on this matter, because it is germane to whether the bill covers the various elements, some of which I will raise tomorrow. It would be of assistance if she could obtain that information from the Attorney General or his office so that she can inform the chamber of what level the government has gone to in considering this.

Hon Sue Ellery: I am not able to advise you about State Solicitor's advice, if that is what you are seeking. I can't give you that.

Hon MICHAEL MISCHIN: I am not after the specific legal advice or anything under legal professional privilege. I want the thrust of the sorts of areas that advice was sought on so that we can be confident that the government has at least considered those elements. I would like the sorts of areas that were touched on by the Catholic Church and the Department of Communities.

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