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

Committee

Resumed from 21 March. The Chair of Committees (Hon Simon O'Brien) in the chair; Hon Sue Ellery (Leader of the House) in charge of the bill.

Clause 1: Short title —

Progress was reported after the clause had been partly considered.

Hon SUE ELLERY: When we last dealt with this matter, I undertook to raise further matters in the course of an exchange between Hon Nick Goiran and myself. I am advised that subsequently there were discussions—I do not know whether we would call them behind the Chair; they were not really behind the Chair—between the Attorney General's office and Hon Nick Goiran about whether the government would consider the matters the honourable member laid out in respect of item 1 in the table in section 3A(1) of the Civil Liability Act 2002. The honourable member had raised the potential for child sexual abuse that occurred after 1 December 2003 to fall outside the exemptions in that particular section. The government has considered the matters that the honourable member raised. The Civil Liability Act excludes certain types of damages from the operation of various parts of the act including the thresholds and monetary limits imposed under the section 3A(1) table item 1. It states —

> 1. Damages relating to personal injury caused by —
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>   (a) an unlawful intentional act that is done with an intention to cause personal injury to a person, whether or not a particular person; or
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>   (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.

This exclusion means that in the cases in which a court makes an award against a defendant as a result of child sexual abuse, which is undefined in the Limitation Act 2005, and the abuse occurred after 1 December 2003 when the section 3A(1) table item 1 came into operation, the court would need to determine whether that abuse falls within the definition of (a) or (b) of item 1. The theoretical possibility that sexual abuse in the civil proceedings would not be within the exclusion for sexual offences or unlawful sexual conduct is not a real possibility. It has been suggested that this theoretical possibility could be fixed by amending item 1 to ensure that it covers all child sexual abuse. The government considered this potential issue during the drafting process and in cabinet, and has considered it since we were last here. It is confident that the current provisions of the bill will operate as intended. Advice sought on the question raised by Hon Nick Goiran clarified that item 1 of the table under section 3A(1), which has operated since 1 December 2003, is sufficiently wide to encompass sexual abuse under the bill. Furthermore, as has already been discussed, the lack of a definition of child sexual abuse in the bill currently before the house is a policy decision by the government.

Hon NICK GOIRAN: I thank the minister for providing a response to one of the matters that she undertook to take away and bring back to advise the house on. I will come to the other matters at a later stage today. Let us deal with this matter first. I am at a loss to understand the government's thinking on this issue. As I recall, when we looked at this issue last week it was not considered a theoretical possibility by the government. The government conceded that this was an issue. I do not have the uncorrected *Hansard* from last week—it is probably corrected now anyway—but there was certainly a dialogue between the two of us about this issue. To the extent that there was a meeting of the minds, there was an acceptance that there is a gap. For the chamber now to be told that it is a theoretical possibility but not a real possibility is a shift from where we were last week. I accept that it is open to the government to shift its position and its view on these matters, but as a member it is somewhat frustrating because if it were not for the decision by the government to consider this matter for a few days over the end of last week and the weekend, the chamber would not be informed about the position of the government that this is no longer a real possibility. I am somewhat disturbed by that revelation, but that will take us nowhere this afternoon anyway. Let us get to matters on which there might be some progress. I would like to understand the government's thinking in not moving an amendment. If the position of the government is that this is just a theoretical possibility and not a real possibility, why would it not move an amendment? I think the government and the opposition agree that the wording is not identical. In the event that this bill passes, child sexual abuse will be framed in the Limitation Act 2005 under new section 6A, which states —

> ***child sexual abuse***, of a person, means an act or omission in relation to the person, when the person is a child, that is of sexual abuse;

That is the definition the government has chosen to use in the Limitation Act, leaving it to the courts to decide what all that might mean. Of course, that is a different form of words to those in the Civil Liability Act 2002, which, as

the minister quite rightly pointed out, came into effect on 1 December 2003—at least with respect to this provision. The words that are used in the act are —

> 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.

Those are two different forms of words, which is okay, but if the government accepts that it is a theoretical possibility but not a real possibility, I do not understand why we would not mirror the words. Two options seem to be available. One is to add words to item 1(b) or, alternatively, we can look at the definition of "child sexual abuse" that the government is proposing so that they are identical. With those brief words, can the minister help the chamber understand why the government is opposed to moving an amendment if it accepts that it is a theoretical possibility?

The CHAIR: Members, before I give the call to the minister, I point out that we have been debating clause 1 for in excess of four hours. That in itself is not a problem; we can sit here and do that until next pancake Tuesday if that is the will of the chamber. However, it occurs to me that some of the matters that are now being very specifically canvassed might be more beneficially canvassed at the relevant parts of other clauses. I know that the honourable member who has just resumed his seat is capable of relating complex matters to clause 1. I am sure that there is no exception there. However, I remind members that specific clauses deal with definitions, for example, and it might be better to consider these matters when debating other clauses. Minister, we are still on clause 1, if you care to address that.

Hon SUE ELLERY: I will provide a response to the honourable member and then, if the chamber is of the view to move beyond clause 1 and to tackle further issues on which I have received advice since we last sat, I would be pleased. I am advised that serious consideration was given to the issues that the honourable member raised and advice was sought from the Solicitor-General about whether an amendment ought to be considered. To share the details of the advice from the Solicitor-General is not our practice, but I am able to say to the honourable member, and ask him to take me at my word, that serious consideration was given to this matter. However, the advice from the Solicitor-General is that the government ought not to proceed to either draft or accept an amendment as it would not be necessary. I think the expression used was that the Solicitor-General could not contemplate—I am advised that is the language used—an example that might warrant the kind of amendment that was canvassed.

Hon NICK GOIRAN: I accept that the Solicitor-General could not contemplate a set of circumstances in which that theoretical gap might occur, but is that good enough for us here? We have an opportunity to insert a few words that will eliminate any prospect of a gap whatsoever. That is one option available to us. The other option is to leave it as it is and to have everyone recognise that the language is not the same and that it is, to use the government's words, a theoretical possibility. Because the Solicitor-General cannot contemplate a set of circumstances in which the theoretical possibility might become a real possibility, we will leave it at that. I could understand the government's position if this was the only matter before us. Frankly, if this were the difference between passing the legislation today and it becoming law, I would probably concede the point. The government's amendment on the supplementary notice paper is a good one and guarantees that, if passed, this matter needs to proceed to the Assembly. I cannot understand why the government would resist taking the opportunity to put the sealant in the gap so that there is no prospect of anything getting through.

The Solicitor-General is an exceptional individual and there is no issue at all on my part that he cannot contemplate a set of circumstances in which this will be a problem, but for the sake of the victims of child sexual abuse, whom everyone is concerned about, why do we not add the extra protection that is open to us to do—we have the power to do it—just in case the Solicitor-General failed to contemplate a set of circumstances that would be before us? I am interested to understand the government's thinking and why there is this resistance. I accept that there is the advice; it is cogent advice and it makes a lot of sense. Why is the government resisting a few extra words being inserted? I cannot contemplate what the government is doing there.

Hon SUE ELLERY: I cannot give the member any more information than I have given him. We had a lengthy discussion about this when the matter was last before the house. The member asked and after lengthy discussion, I gave an undertaking that the government would review it and the government did and sought further advice from the Solicitor-General—on top of the advisers I had at the table with me. I cannot give the member a further explanation than I have given him. I can accept that that is not satisfactory to him but he is asking me to provide further explanation. I am not able to give him a further explanation. The matter he raised was given serious consideration, serious enough to seek advice from a higher level, if you like. That was contemplated and I have reported back to the house the outcome of the undertaking that I would pursue the matter for him.

Hon NICK GOIRAN: I hasten to add that I thank the government for the good grace in which it has dealt with the concern I raised last week; I thank it for taking it seriously; and I thank it for seeking supplementary advice and for giving it further consideration. Frankly, if I take the opportunity, some of what happened last week restored my faith in the legislative process and the benefits of having a review chamber and the capacity of political foes

to temporarily put down their political weapons and work together in a collegiate fashion to get a better outcome. I thank the government for all that. My question is: in the event that a victim of child sexual abuse makes a claim and it is found that the definition in the Limitation Act is broader than the exceptions in item 1(b) of the table in the Civil Liability Act and, therefore, the victim of child sexual abuse is subjected to all these other provisions, will the government contemplate an ex gratia application by that person?

Hon SUE ELLERY: I think the honourable member would appreciate that I am really not in a position to answer that question. I am the representative minister in this place. In any event, I am sure that the honourable member is aware that even if the Attorney General found himself in a set of circumstances in which he needed to consider that, it would go before cabinet. I appreciate the point the honourable member is trying to make, but I am not in a position to answer that hypothetical question.

Hon MICHAEL MISCHIN: To pick up on that point, I can understand the minister's reticence about it. One of the factors that is taken into account by government in the question of ex gratia payments is whether the consequences, unfortunate as they may be, are in fact the way the law has provided that matters be dealt with. If we are dealing with someone who happens to fall into an anomaly of the type that has been identified, I would have thought that it would be very unlikely that there would be a basis on which the State Solicitor's Office or the Solicitor-General could recommend to the Attorney General and hence to government that the law has been defective in that circumstance, particularly when it has been dealt with exhaustively, as has been done here.

I have a number of matters. I accept what the minister said about clause 1, but I do not think they can really be conveniently dealt with in other clauses—if I can, I will. This question of section 3A of the Civil Liability Act 2002 has a number of elements to it that can, I think, be dealt with only in the context of clause 1, since it is not the subject of an amendment by the Civil Liability Legislation Amendment (Child Sexual Abuse Actions) Bill 2017. It can be addressed only in the context of the insertion of a new regime or a new part in the Civil Liability Act. Hon Nick Goiran focused on one element of the current section 3A—the table and particularly item 1(b)—but even without any amendment to that provision, it seems to raise a number of complications. Perhaps I can explain it. It will take some time because it is a complicated matter, so I ask the minister to bear with me on this. At the moment, section 3A of the Civil Liability Act provides for certain damages that are excluded from the act, and subsection (1) starts —

> The provisions of this Act specified in the third column of an item in the Table to this subsection do not apply to damages of a class specified in the second column of that item or to claims for, or awards of, such damages.

Hon Nick Goiran has already gone through item 1—"Damages relating to personal injury caused by"—which has two paragraphs. We can, I think, dismiss paragraph (a). That concerns unlawful intentional acts calculated to cause harm to another person. Paragraph (b) is more vexing, and reads —

> 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.

Section 36A of the Evidence Act defines sexual offences as meaning certain specific things under sections 186 or 191 of the Criminal Code, and various offences under the Prostitution Act, under chapter XXXI of the Criminal Code under a repealed code section, and attempting to commit any of those offences and the like. It is quite comprehensive as to the sorts of offences that are regarded as intentional acts, the doing of which is a sexual offence, hence certain provisions in the Civil Liability Act do not apply. Sexual conduct that is otherwise unlawful is a much broader concept, presumably, and perhaps I could start by asking whether the minister is aware of any case law—any authority—that might assist us in understanding what that involves, and I will then move on to the next part of the proposition.

Hon SUE ELLERY: No.

Hon MICHAEL MISCHIN: Thank you. We have two operative provisions—concepts—that exclude a number of provisions of the Civil Liability Act from operating in those particular cases, one of which is fairly clear; the other one, we do not know what it means but it presumably goes beyond being a sexual offence as defined in section 36A of the Evidence Act. It is unclear how far that concept—sexual conduct that is otherwise unlawful—might go. The government is now proposing to introduce a third concept—sexual abuse action—by way of an amendment to the Limitation Act 2005. The starting point for this policy, before we get into the duties, obligations and consequences under the Civil Liability Act, was simply to lift the limitation period for certain types of cases. In this bill, the government has chosen to go beyond that by introducing the concept of child sexual abuse in proposed new section 6A of the Limitation Act 2005, which provides the following definitions —

> ***child*** means a person under 18 years of age;

> ***child sexual abuse***, of a person, means an act or omission in relation to the person, when the person is a child, that is sexual abuse;

That is a bit circular —

> ***child sexual abuse action*** means an action on a child sexual abuse cause of action;
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> ***child sexual abuse cause of action*** means a cause of action that relates, directly or indirectly, to a personal injury of the person to whom the cause of action accrues, where the injury results from child sexual abuse of the person.

We are told that this has been deliberately kept vague to enable the courts to determine whether child sexual abuse is of such a character that it gives rise to a child sexual abuse cause of action. That begs the question: in a particular cause of action, will section 3A(1), item (1)(b), of the Civil Liability Act 2002 exclude from operation—because it is sexual conduct that is otherwise unlawful—certain types of sexual abuse action taken by survivors of child sexual abuse, but not others? We are now looking at three concepts, two of which are at large—that is, sexual conduct that is otherwise unlawful, and child sexual abuse. Does a child sexual abuse action come within the exclusionary rule set up by item (1)(b) as being an intentional act, the doing of which is a sexual offence as defined in the Evidence Act? The minister may be able to help unravel that by telling us where the boundaries will be drawn.

Hon SUE ELLERY: I am not sure that I will be able to do the teasing apart that the honourable member wants because I am not sure that that will get us anywhere. The government has considered and sought advice, including from the Solicitor-General, about possible permutations and intersections of the sort that the member has just explained and, having considered all of that, is still of the view—I explained earlier why the government would not consider any amendments to section 3A—that we do not need to make any amendments to section 3A. It is not the reason for it. But part of the thinking during that examination of the issues that were raised in the debate earlier was about other jurisdictions, and included in the thinking was that similar provisions to item 1 apply in other jurisdictions in Australia, and, thus, also similar monetary thresholds and gaps, and in no case have their equivalent limitations sought to amend their version of schedule 1.

Hon MICHAEL MISCHIN: I understand that the minister is having to deal with—I am sorry; I do not mean this as patronising—concepts with which she is not familiar because she is acting as a proxy for the Attorney General. This area troubles me because the purpose of the Civil Liability Act was to clarify certain duties, obligations, limitations and the like. We really did not even need to go into the Civil Liability Act to achieve the purpose that the government had taken to the election.

Hon Sue Ellery: Except, of course, that we have, and the policy that included that going into the Civil Liability Act has been settled already by the chamber.

Hon MICHAEL MISCHIN: That is right and I do not have a problem with that, but I am pointing out some difficulties in its execution. If it creates complications that have not been thought through, this is the time to try to address those. I accept that the minister has received advice that there should be no amendment, but I am seeking some clarification, because others will, about how this is meant to operate. Perhaps I will take it again step by step. I will take a theoretical but probably not untypical example. In the case of a child having been firstly sexually assaulted, say, 50 years ago and at the same time —

Hon Sue Ellery: Can I stop you right there? Go back and look at the 2003 reference in the table. It's not 50 years ago.

Hon MICHAEL MISCHIN: No. That is a good point. There is a bias in the act that if there is an indeterminate time as to whether it started before or after the commencement of the legislation, it is taken to have commenced after the legislation. I think there is some provision in one of the sections of the Civil Liability Act regarding certain duties and the like. We will take a circumstance that falls within the operation of the act: a child is sexually abused by way of an actual sexual assault—let us say touching of the genitals. There could be a number of different offences, but it plainly would be one of the number that are embraced by an intentional act, the carrying out of which is a sexual offence as defined under section 36A of the Evidence Act 1906. Would that be correct?

Hon SUE ELLERY: Yes.

Hon MICHAEL MISCHIN: Then we have the same child also being caned on the buttocks by the same perpetrator. That might or might not be sexual abuse—would that be right?

Hon SUE ELLERY: We canvassed this kind of discussion earlier in the debate and my recollection is that we contemplated context matters. In some circumstances that act by itself might not be sexual abuse, but in other circumstances, when a whole bunch of other evidence is before the court about what else might have happened and the consequences of that act, it might be. I am advised that, in any event, it would fall within paragraph 1(a) of the table under section 3A of the Civil Liability Act.

I am happy to help the member if there is something specific that I can answer, but if the endgame, if I may be so bold, is to convince the government that we need to make an amendment to this section, I have already indicated

to the house that since we last debated this matter—I think last Wednesday—I specifically sought advice on these issues. The government gave serious consideration to them and sought advice from the Solicitor-General. Having considered all the things that went into the debate on this issue to that point, the government took the view then and holds the view now that we will not move nor support an amendment to this section.

Hon MICHAEL MISCHIN: I appreciate that the government has chosen to take a particular position on this, but again, I am trying to understand the operation of the legislation.

The minister says that the caning example may or may not be an unlawful intentional act done with the intention to cause personal injury. Let us say, for example, it is ambiguous whether there was an intention to cause personal injury but that it may be sexual conduct that is otherwise unlawful, but we cannot tell, and it may be child sexual abuse within the meaning of the proposed amendments, but again we do not know. It may happen to be one of those small number of cases that the minister has acknowledged; that is, in the same writ alleging particulars of abuse we might have some that exclude, by operation of table item 1(b) under section 3A, the operations of certain parts of the Civil Liability Act, and others that do not, or perhaps it cannot be clearly decided whether they exclude them or not. They both involve personal injury as a precondition, otherwise no action can be taken, but some, as a matter of policy—a very broad and loose definition of what constitutes "sexual abuse"—might trigger the operation of items 1(a) or (b), and others might not. That is hardly helpful to either a victim or, indeed, to organisations. Again, I stress that I do not have any sympathy for perpetrators but I do have some concerns for organisations that have inherited these sorts of problems and have to deal with them in the future. We might end up with a case in which parts of the act are omitted from use and parts are not. Is that not the case? If it is not, I ask the minister to please explain it.

Hon SUE ELLERY: I guess we have to go back to first principles; that is, this is about lifting the limitations for a particular set of offences. The court will have to examine the question of whether child sexual abuse occurred in order to deal with the matter at all. In the circumstances that are presented to it, the court will have to work its way through what triggers the first question, which is about lifting the limitation.

Hon MICHAEL MISCHIN: That is right but that relates only to lifting the limitation period. This provision goes further; it deals with how that case may be dealt with. If it is not child sexual abuse, the limitation period will not be lifted. If it is a contentious issue and the court decides in favour of certain items of conduct being arguable—debatably, child sexual abuse—we might have a trial but we still have the question of whether certain provisions of the Civil Liability Act apply partly or wholly to that case. Would that not be correct?

Hon SUE ELLERY: I am at risk of repeating myself because I do not know another way to express this to the member. It is worth remembering that we are talking about that specific date of 1 December 2003. I need to say again that we do not accept that there is a gap. We contemplated whether a gap needed to be filled and sought advice from the Solicitor-General. The advice is that no gap needs to be filled and there is no need for an amendment. I do not know how else to express it. I am not trying to be difficult, obtuse or obstructionist to the member's line of inquiry, but I am not sure that I can give him any other answer than the one I have already given.

Hon MICHAEL MISCHIN: Perhaps it is me then, because I am not talking about a gap that needs to be filled; I am simply pointing out that an action might be brought to the court by someone who says that they are the victim of child sexual abuse that the court determines prima facie is for the sake of a trial but involves a number of elements. Some of them, quite clearly, would result in the provisions of the Civil Liability Act not applying and others potentially applying. Is that a possibility or not? If we can get past that, it may help answer the question.

Hon SUE ELLERY: Essentially it comes down to this: we do not accept the proposition that the court will find that some parts of the abuse—which it has already tested whether it exists, because that is what triggers whether the question of the limitation is lifted—will be captured by those provisions in item 1 of that table and others will not be.

Hon MICHAEL MISCHIN: I wish I had the same sort of confidence as the minister does as to what the courts will find, because we even have an Attorney General who has told us that it will be up to the courts to decide whether something is child sexual abuse. Does the minister appreciate the consequences of some of these provisions not applying? Part 1A of the Civil Liability Act 2002 is excluded by table item 1(b). It is listed under the heading "Provisions that do not apply". Part 1A is headed "Liability for harm caused by the fault of a person" and sets out the principles of duty of care in section 5B. Subsection (1) states —

> (1) A person is not liable for harm caused by that person's fault in failing to take precautions against a risk of harm unless —
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> (a) the risk was foreseeable (that is, it is a risk of which the person knew or ought to have known);
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> (b) the risk was not insignificant; and
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> (c) in the circumstances, a reasonable person in the person's position would have taken those precautions.

The factors that a court would take into account are set out section 5B(2). I would have thought that those provisions are of interest, particularly to organisations that may be held vicariously liable for serious actions of those who were not authorised but were employees or officers or agents of that organisation. Now we are looking at holding them responsible financially for things that they did not condone and did not know about, and they are being excluded from the application of the sorts of principles that would otherwise apply and would apply to other defendants. Section 5C concerns general principles of causation for which a person can be held liable, which will be excluded, too. Section 5D provides —

> In determining liability for damages for harm caused by the fault of a person, the plaintiff always bears the onus of proving … any fact relevant to the issue of causation.

Much of this might reflect the common law, but the whole point of this act is to regularise certain things and to remove them in certain cases, such as offences in which someone is found guilty, but in this legislation other organisations that were not necessarily directly responsible, or did not even condone the behaviour, will have responsibility extended to them. Some of the provisions do not seem particularly relevant, such as contributory negligence and the like. Part 1C, which is also excluded, deals with liability relating to public functions. Part 1C, section 5AB(a) refers to emergency medical assistance. Part 1D deals with good Samaritans. Part 1E is particularly interesting and relevant. Part 1E, which is also excluded by the table, deals with apologies. Section 5AH provides that for any incidents that have happened after the commencement date of the Civil Liability Act, an apology —

> (a) does not constitute an express or implied admission of fault or liability by the person in connection with that incident; and
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> (b) is not relevant to the determination of fault or liability in connection with that incident.

Subsection (2) states that it cannot be admitted as evidence of fault or liability in relation to the incident. So, churches and other groups that may have felt contrite about the manner in which their organisations under previous management, and through neglect, had dealt with children and might have issued apologies for that suddenly find that potentially that is going to be held as an admission of liability against them, contrary to the spirit of the provisions in the Civil Liability Act. Is that what was intended by the government? Perhaps we can just focus on that one question. Was it the government's intention that any apologies after the commencement of the Civil Liability Act would, by operation of this legislation, potentially be considered admissions of liability on the part of organisations?

Hon SUE ELLERY: We have done a bit of a quantum leap here. The honourable member has just described the current situation and we are not proposing to change that. The broader issue he raises about institutions and to what extent they accept liability in their modern form for something that happened in previous times is part of the policy of the bill, and that was set by the house when we did the second reading. I do not see the point in us, and we are in fact prohibited from, reviewing the policy of the bill that the house has already set. I am not sure that I can add anything further to the debate about the table in section 3A of the Civil Liability Act. I do not think there is anything I can add to satisfy the issues that have been raised to date in respect of that particular table, and in any event some of the matters that the honourable member was just canvassing were matters that were set when we set the policy of the bill.

Hon NICK GOIRAN: When we considered this matter on Tuesday last week, we did not really get to come back to it on Wednesday because we got caught up in the issues with the table in section 3A. On Tuesday, the minister said she would take on notice the possibility of an amendment to ensure that a victim of child sexual abuse is not prevented from seeking compensation for physical and psychological injuries. Can the minister update the house on the government's position on the matter?

Hon SUE ELLERY: Maybe the member could clarify things. We certainly proposed an amendment and it is on the supplementary notice paper. Is the member talking about the Criminal Injuries Compensation Act?

Hon NICK GOIRAN: On Tuesday, we covered a range of issues. We looked at the issue with section 21 of the Criminal Injuries Compensation Act and we looked at the issue with section 68. One of the other issues we looked at was the fact that when a victim of child sexual abuse makes a claim, they have an unlimited period in which to claim, but only in respect of a case of child sexual abuse. That person would not be able to claim for something they have suffered that is not child sexual abuse—for example, physical abuse only. We accept that that is the position of the government. The minister explained that and we looked at other jurisdictions and so on. I think the minister said that about 50 per cent of jurisdictions in Australia take a different approach and I explained that I had a different view, but we were not going to settle that in this debate and that was fine. My issue was that once a victim of child sexual abuse has been able to lodge a claim, can they also claim under this legislation for the other abuse they were subjected to? A victim of child sexual abuse might not have just suffered child sexual abuse; they might also have suffered physical abuse at or around the same time. My position is that we need to be clear about whether these people can claim a range of damages because the philosophy behind this whole legislation is that a victim of child sexual abuse is not in a position to be able to bring forward a claim for many years afterwards.

We are all in agreement about that, but once victims are there, surely they should be able to claim everything that is available to them, not only compensation for child sexual abuse. A victim of child sexual abuse has effectively been paralysed for a period and that is what prevents them from bringing forward their claim in a reasonable time. If we are accepting, as lawmakers, that victims have effectively been paralysed for that period, should they not be able to claim everything that is available to them? The minister was going to go away and look at that matter. I invite an update from the government.

Hon SUE ELLERY: The short answer is, no.

Hon Nick Goiran: Sorry? I asked for an update; what does the minister mean by no?

Hon SUE ELLERY: The start of the member's question was whether victims would be able to claim everything that was available to them, and the answer is no. Victims can bring a claim for consequential harm but only that caused by child sexual abuse, so the ordinary principles of causation would apply. Part of the matter was whether the government has reconsidered its position that this legislation should deal with more than child sexual abuse and the answer is that the government has not reconsidered its position. The bill will only be about child sexual abuse. I said in my second reading reply that I appreciate and know that other jurisdictions have looked at the outcome of the royal commission and taken a different path; I think four jurisdictions have and five have not. The Western Australian government has chosen to take the path of following the recommendation of the Royal Commission into Institutional Responses to Child Sexual Abuse, which went to lifting the limitations for child sexual abuse, so that is the policy of the bill.

Hon NICK GOIRAN: Minister, the aspect that troubles me about this is that we could have a situation in which a victim of child sexual abuse is sexually abused on day one. On day two, they are beaten to within an inch of their life, which would not be considered a consequential injury from the child sexual abuse on day one. Consequential injury as a result of the abuse on day one might be the psychological harm the victim suffered. The advice to the chamber is that that would be able to be claimed, but not the second incident on day two, which I say is intrinsically connected with day one. The despicable perpetrator was not happy enough with what happened on day one so proceeded, on day two, with another form of abuse and it seems to me that victims are not going to be able to claim for the abuse suffered on day two because the legislation is limited—albeit that it is not explicitly defined—to actions of child sexual abuse. The trouble I have with that is that the child sexual abuse that happened on day one triggered the paralysis for the victim that made them unable to deal with their claim for potentially decades. When they are finally in a position of being able to say, "This perpetrator needs to be held to account and the Western Australian Parliament has lifted the limitation period", the defendants will be in a perversely advantageous position of being able to say, "Sorry; no. We are happy to compensate you for day one but actually, most of your injury, suffering, loss of enjoyment of life and so forth was attributed to the event on day two when you were beaten within an inch of your life. So we're not going to compensate you for that." That was what I hoped the government would reconsider over the last few days, not necessarily in changing its policy—I am not asking for that; I know the government is not going to change its policy—but I want to clarify for the record whether that scenario would be captured by this legislation or not. I invite the government to clarify that.

Hon SUE ELLERY: I am not sure that I can give the member a precise answer. It will depend on the evidence that is presented to the court. That is what was contemplated when the undefined provision about sexual abuse was included. It will depend on the evidence that is presented to the court and, as the member would be well aware, the court is used to using its resources, and the evidence and assistance it gets from the officers of the court, to plough its way through that information. But, in any event, if the point the member wants placed on the record is whether the government has contemplated that this legislation should include abuse other than sexual abuse, the government has contemplated it and decided not to do that.

Hon NICK GOIRAN: To conclude on this particular point, I remain troubled by that. It appears that we are being asked to pass this legislation in circumstances whereby we cannot be sure whether that scenario I unpacked earlier would or would not be captured by this legislation. The government's response, which is fair enough, is that it will depend on the circumstances of each individual case. That is true in every circumstance. In the absence of an amendment, the chamber has to operate on the basis that that scenario will not be captured. I say that because I cannot make a case for the day two scenario, which I unpacked earlier, being described as sexual abuse. Maybe that will be tested in due course, but in the ordinary reading of what we propose to insert as section 6A(1) of the Limitation Act, a physical beating within an inch of a person's life will not be deemed sexual abuse. There may be an exceptional case in which there is a particular or a peculiar set of circumstances and the government could somehow bring that in, but ordinarily the severe physical abuse of a person is not going to be considered sexual abuse. In the absence of clarification in the legislation, the fact that it happened the day after a sexual abuse incident is not going to help. That troubles me because, as I described during my contribution to the second reading of this bill, cases that I have been involved in often included a mixture of child sexual abuse, or what would be described as sexual abuse, and physical abuse. In fact, I would almost go so far as to say that it was more often than not the case. The ones who immediately come to mind are those clients who were victims of abuse within institutions,

because in almost every instance there would be a combination of those things. I remember it got to a point that I was taking instructions from some new clients and they only told me the name of the institution, and before the words came out of their mouths, I thought, "These are the next five things this person is going to tell me happened to them." Sure enough, without fail, not necessarily in that order, those types of instances of abuse were then disclosed. As I said, it was often the case that there were serious incidents of physical abuse. I do not want to trivialise any form of physical abuse, but I am not talking about something innocuous, inconsequential or minor; I am talking about the most despicable form of serious physical abuse that members could imagine. I do not think that is what we want. I do not think we want to be saying to victims of child sexual abuse, particularly in those institutions, the WA Parliament is now, albeit belatedly—I think the opposition has recognised that—lifting the limitation period and giving victims of child sexual abuse the hope that they will be able to pursue a civil claim, only to find that a whole range of instances that they were subjected to will not be captured.

I can charitably make a case for the government and its policy decision to not include severe physical abuse as an isolated category. Some of the explanation for that has already been provided by the government, saying that not every jurisdiction is doing that. In fact, I think we had a discussion last week that confirmed that it was not necessarily a specific recommendation of the royal commission. A case can be made for that. But it is submission that if we are conceding that victims of child sexual abuse are ordinarily not in a position to pursue a claim because of what I am describing as a form of paralysis—members can describe it however they like; if they want to call it some kind of legal paralysis or whatever it is—on their part, such that they are unable to bring their claim within the ordinary limitation period for a child, which is six years, then that same paralysis applies to the other incidents. If it were not for the sexual abuse that they suffered on day one, they most likely, according to the way we are thinking, would have been in a position to be able to launch their claim for the serious physical assault that they suffered. But because of day one, they are under a paralysis, in my words, and we are not dealing with that situation in this legislation, and that troubles me. I am not asking a question of the minister on this because we have explored this. I understand the minister's position who has said that it is subject to a case-by-case basis and the circumstances of the case, but I put it to members that we have to be clear about what we are passing here. We are passing a piece of legislation that will ensure that some victims of child sexual abuse will not be able to seek compensation for the serious physical injuries that they suffered on or around the time of the child sexual abuse. I think that is wrong. I know an option is available for us to fix that and I know we are not going to do that, and I am sad about that.

I want to go to one other matter on which the minister said she would seek some further direction from the Attorney General. This is that section 21 issue on criminal injuries compensation. We had a very important dialogue on that last week. One of the things the minister was going to do was check whether the Attorney General has power to direct the Chief Assessor of Criminal Injuries Compensation about this section 21 discretion. I ask for an update on that.

Hon SUE ELLERY: There is no power to direct.

Hon NICK GOIRAN: Is the minister able to advise whether there has been any further consultation with the chief assessor since the progression of this bill?

Hon Sue Ellery: What progression?

The CHAIR: Minister, do you seek the call?

Hon SUE ELLERY: Yes—to respond not frivolously to the honourable member.

There has been discussion with the chief assessor about the matters that have been canvassed in the debate, but I am not able to disclose anything further than that.

Hon NICK GOIRAN: Is the minister in a position to disclose whether the chief assessor has agreed to develop any guidelines on the use of the discretion in section 21?

Hon SUE ELLERY: That was not the topic of the conversation.

Hon NICK GOIRAN: Again, this troubles me because we had a useful dialogue last week about this section 21 issue. Some victims of child sexual abuse may be worse off because of this legislation, which none of us wants, if the chief assessor does not exercise her discretion in the general fashion she ordinarily does, as she has advised through the advisers and through the minister to the chamber. The last time this matter was before the chamber was Wednesday; it is now Tuesday, and almost a full week has passed. I would have thought that the last few days would have been an excellent opportunity to talk to the chief assessor and say that this is a matter that concerns the government. I assume it is a matter that concerns the government. It is certainly a matter that concerns me. The chief assessor has asked that this matter be left to the review that the government will do. The review has not started, has no terms of reference and we do not know who the reviewer will be, but the chief assessor has asked that that matter be left to the review. That is fine. The chief assessor is entitled to ask the Attorney General for

that, and the Attorney General has agreed, but in the interim I would have thought there has been a good opportunity to develop some guidelines on this. I know that the minister has advised the chamber, and I agree with her, that the Attorney General does not have the power to direct the chief assessor. My question is: does the chief assessor have the power to direct the other assessors within the Office of Criminal Injuries Compensation on the use of the section 21 discretion?

Hon SUE ELLERY: She is the ultimate decision-maker and she makes all decisions. I am advised that she does not direct others because the ultimate decision is hers.

Hon NICK GOIRAN: I strenuously disagree with the minister on this. I invite the minister and anyone who is inclined to assist her to look at section 21. Section 21(1) does not state, "if a chief assessor dealing with a compensation application", it states, "if an assessor". The minister knows that there is a chief assessor in Western Australia. To the best of my recollection, there are at least two assessors. The language in the Criminal Injuries Compensation Act 2003 is very clear. Section 21(1) states —

> 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 independently of this Act to obtain compensation or damages for all or some of the claimed injury and any claimed loss; or
>
> …
>
> 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.

In Western Australia, some awards are not made by the Chief Assessor of Criminal Injuries Compensation. Some of them are, but some of them are made by assessors who are not the chief assessor and sometimes the decisions made by those assessors are appealed. I ask the minister to have another look at this. I revert to my original question: does the chief assessor —

Hon Sue Ellery: Can I interrupt the honourable member because I am going to correct myself?

Hon NICK GOIRAN: I am nearly finished. So that we are clear about the question, I ask: does the chief assessor have the power to direct the other assessors on the section 21 discretion?

Hon SUE ELLERY: I was incorrectly advised; the honourable member is correct that assessors other than the chief also make decisions. When I said earlier that ultimately every decision is the decision of the chief, I was incorrect and I apologise to the member and the chamber for doing that. The original question was whether the chief assessor has the power to direct. I do not have any advice on that question immediately available to me.

Hon NICK GOIRAN: I thank the minister for that. I do not know where that leaves us because this is a really important issue. I note that the government has foreshadowed an amendment at a later stage to insert a new part 2A into the Criminal Injuries Compensation Act. I would be quite happy to desist my line of questioning on this issue if some attempt could be made to get further advice on this point so that we could then get an answer when we get to the government's amendment.

Hon Sue Ellery: I am seeking further advice on whether the chief assessor can direct.

Hon NICK GOIRAN: I appreciate that the minister is not going to get that advice in the next 30 seconds. If we can agree that we will pick this up when we get to the government's amendment, I am satisfied with that.

Hon MICHAEL MISCHIN: On the subject of the assessor's discretion, as I recall, the minister undertook to find out how the assessor exercises her direction in these sorts of cases, and what factors she takes into account in deciding one way or the other, and the minister said that she would get back to us on that.

Hon SUE ELLERY: The question that was double-checked with the assessor was how she generally applies her discretion and whether she generally applies it in favour of the applicant. She re-affirmed that that was her position and the original advice she gave that that is how she applies it. There was no further conversation from either the assessor or the person seeking her view to test or examine in any greater detail how she does it. I do not have the benefit of *Hansard* in front of me, but during debate we were asked to confirm it, because there was a question mark over whether that always happens. I think it might have been Hon Nick Goiran who asked, but he should forgive me if I am putting words in his mouth.

Hon Nick Goiran: I am happy to be blamed for that.

Hon SUE ELLERY: Hon Nick Goiran suggested that he was surprised—I think I can characterise it that way—by the chief assessor's advice that she generally applies it in favour of the applicant. That was what was tested and the chief assessor reconfirmed that that is how she applied it. Any further detail on that was not asked for and was not given.

Hon MICHAEL MISCHIN: I did actually explore that further back on Tuesday, 20 March when we went through how section 21 of the Criminal Injuries Compensation Act operated. At that stage, the minister assured us that the chief assessor exercised her discretion more often than not in favour of applicants. I asked how the assessor exercised her discretion in favour of or against an applicant in particular cases so that we could understand how it was done and whether people would be prejudiced if there were no amendments to this. The minister assured me that she would find out. I draw the minister's attention to *Hansard* of 20 March—the uncorrected proof, I grant her—which, from my recollection is accurate. I thanked her for some advice she had given and understood that because the assessor's database had not been geared to find out that sort of information and a number of cases and so forth could not help, I said —

> … 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.

Later I asked —

> 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.

To which the minister responded —

> 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 Sue Ellery: I tried.

Hon MICHAEL MISCHIN: I have not had any update on what came before that.

Hon SUE ELLERY: The question was put, the answer was given. That is the update.

Hon MICHAEL MISCHIN: Is the minister saying the chief assessor was asked about the factors that she applied in exercising her discretion but she could not assist?

Hon SUE ELLERY: No. The honourable member is putting words in my mouth. I gave an undertaking that I would try to get the information he requested. I did try. Contact was made with the chief assessor. Questions were asked about whether she generally applied in favour —

Hon Michael Mischin: That is not the question.

Hon SUE ELLERY: I am telling the honourable member what happened and I am telling him what I tried to do. I gave him an undertaking. I tried to do it. I responded with the information that was provided in response. I have no further information that I can give him.

Hon MICHAEL MISCHIN: With respect, that is not an answer.

Hon Sue Ellery: Yes, it is.

Hon MICHAEL MISCHIN: That is a fob off. The question the minister was being asked to ask the assessor was how the assessor decides these cases. What factors does the assessor take into account one way or the other before deciding whether to exercise her discretion in favour of or against an applicant? That is what the minister said she would ask. She has just told us that she asked whether she generally exercises her discretion in favour of applicants. That is not what we were after, so telling me that that is the answer when she has not asked the question is not particularly helpful and does not meet the problem. I wanted to know what factors the assessor takes into account and how she decides these cases, not whether she generally decides one way or the other. We knew that. The minister asked the assessor the wrong question. That has not met the minister's undertaking.

Hon SUE ELLERY: I gave an undertaking that I would try. I will not be verballed—I tried.

Hon MICHAEL MISCHIN: Is it just me?

Hon Sue Ellery: Yes, it is.

Hon MICHAEL MISCHIN: The undertaking was that the minister would chase some information specific to the question that I had posed her, not just ask the assessor any question that came to mind and say, "Well, there we go. I can't help anymore." Has the minister asked the assessor directly, or indirectly through someone else, how she exercises her discretion? What factors does the assessor take into account when trying to decide whether she will decide in favour of or against an applicant in these section 21 cases? Has the minister asked her that?

Hon Sue Ellery: I have nothing further to add.

Hon MICHAEL MISCHIN: I think the answer is no. Once again we are faced with what the minister has said is a complex piece of legislation that the government has not consulted on with anyone other than its small team of legal advisers, is patently unwilling to answer any questions on that might assist us in understanding how it might operate, and simply fobs us off by saying, "Well, I said I would try. I asked the wrong question, but that doesn't matter.

The answer is that I can't help you." Is that the best this government can do, minister? Seriously. Did the minister get around to fulfilling her undertaking to ask the Attorney General about his misstatements about the history and obstruction of this bill? Did the minister get around to doing that, or did she ask him the wrong question?

Hon Sue Ellery: Do you want to go back to where we started the debate?

Hon MICHAEL MISCHIN: No, I want to go back to getting some answers.

Hon Sue Ellery: We're not doing that.

Hon MICHAEL MISCHIN: I cannot help the minister. Seriously! Let us see whether we can get to some specificity, since the minister is not prepared to fulfil her undertakings to ask certain questions and obtain certain answers. Can we get back to the proposition of whether it was the intention of the government that with the passage of this legislation, organisations that had issued apologies since the commencement of the Civil Liability Act may turn out to have lost the protection available to them of the apology provisions in the Civil Liability Act by way of operation of item 1(b) and the extension of the limitation period to sue. Was that the government's intention?

Hon SUE ELLERY: Yes, it was. If I may, I think we are going back to the policy of the bill again. I thought we had got to the point whereby the honourable member engaged in this discussion had indicated that there was one particular matter that he wanted to pursue that could only be pursued in clause 1. We have pursued that matter, albeit unsatisfactorily from that member's point of view. But, Mr Deputy Chair (Hon Martin Aldridge), I ask for your assistance to move beyond clause 1 and to interrogate the specific provisions of the bill as we get through each of the relevant clauses.

Hon MICHAEL MISCHIN: Firstly, the fact that we agreed the policy of the bill has nothing to do with the operation of that particular provision. But now the minister has clarified that although it was not stated at any stage during the second reading debate, it was the government's intention that organisations that suddenly fall liable to this removal of limitation periods may find that they have had some of the protections under the Civil Liability Act removed from them. We have already heard that there has been no consultation.

Hon SUE ELLERY: I am advised that the provisions that apply now in respect of apologies are not proposed to be changed in respect of child sexual abuse. The arrangements that are in place now in respect of apologies will remain in place.

Hon MICHAEL MISCHIN: Yes, minister, but in many cases, those apologies may have been issued after the limitation period had expired. The organisations, although not legally exposed to action, because no timely action had been taken, might have felt sufficient moral obligation to apologise for the misconduct that was done in their name in the past, in order to give some recognition, solace and comfort to the victim. They might even have entered into a settlement. Those settlements may very well be set aside. However, regardless of that, those organisations might now find that those admissions are against their interests, because the extension of the limitation period means that they have potentially lost the protection that would be afforded to others. Those organisations had assumed that their apology had no legal effect. They now find that they are not afforded protection under the Civil Liability Act but have to fall back on the common law principles, and that their apology is an admission of liability that might be used against them. Would that not be the case, minister?

Hon SUE ELLERY: All those things that might have been done previously, like apologies, and like so-called settlements or act-of-grace payments, will be taken into account. However, the changes we are making to increase the limitation period will not mean that an apology in and of itself will be considered as accepting liability.

Hon MICHAEL MISCHIN: Why not, minister?

Hon SUE ELLERY: I am advised that it is not in and of itself definitely an admission. It is a factor that the court may take into account, but of itself and by itself it is not an admission and the court will not deem it automatically—if I can use that terribly nonlegal expression—an admission of liability. But it is a factor that the court may take into account.

Hon MICHAEL MISCHIN: It may take it into account and it would do so under whatever common law principles were applicable before part 1E of the Civil Liability Act, which was inserted in 2003, regularised it. As I understood it, the whole point of inserting that part was to free potential defendants of the consequences of making expressions of apology as defined in the act—expressions of sorrow, regret or sympathy that do not contain an acknowledgement of fault by that person—and to relieve them of any implication that making such an expression would expose them to litigation on the basis that they have implicitly accepted responsibility for the harm that has been done to a claimant. I can understand why the government might want to exclude that in the case of offences under item 1(b) in the table and other matters, because they would often come by way of admissions against interests in the context of criminal cases. I can understand that in cases of vicarious liability, too. What I am troubled about here, though, is that we are operating retrospectively. People who, because of the effluxion of time, have thought, "I'm not really responsible for that, but I understand how this claimant feels. They need an acknowledgement of the suffering and harm that has been done to them. I'll get out there; I'm prepared to

wear it. I'll apologise. I'm really sorry that this happened under our watch" will suddenly find that not only has the limitation period been lifted and they are exposed to litigation that they had written off as a possibility, but also they were potentially foolish in having made that comment—one that was intended to give comfort but has now been turned back against them potentially by someone who is claiming money from them.

We have been told that this was the intention and that the government has weighed all of this up and has decided that no amendment to section 3A of the Civil Liability Act will be contemplated because it has all been worked out. What we have not been told is what the consequences or the harm might be if this particular problem were to be looked at and resolved in a way that was not unfair. We are told that there has not been any consultation on any of this with those who may be affected by it, which is unfortunate. But am I wrong in my understanding that this will expose these organisations to the potential that what they have said in good faith will be able to be advanced in a court and potentially used against them?

Hon SUE ELLERY: We started the discussion nearly two hours ago about whether the government would consider an amendment to section 3A of the Civil Liability Act, and I advised then that we would not. To the extent that I am being asked that again, the answer is still no. An apology is not an admission of liability. However, as a question of fact, it may go towards the question of liability at common law. It will be a factor considered by the court, but not a factor requiring amendment.

Hon MICHAEL MISCHIN: I thank the minister. That is more of a statement of position than an explanation as to why not, but history has shown us that that is about the most we can hope for.

I turn now to a few more general things that arose out of the minister's reply to the second reading debate. The minister mentioned that there had been some budget allocation for resources to the State Solicitor's Office and that recruitment had commenced. Can the minister tell us more about what sorts of resources have been assigned to the State Solicitor's Office to deal with the consequences to the state of this measure? What sort of recruitment—is the government looking at clerical officers or lawyers at a particular level?

Hon SUE ELLERY: In respect of the immediate set-up, the recruitment process is part way through now for two lawyers and one paralegal.

Hon MICHAEL MISCHIN: That is two lawyers and a paralegal. Roughly what resources are dedicated to this at the moment for dealing with historical or even current child sexual abuse cases within the ambit of this legislation whereby the state has a potential liability? What sort of resources are being drawn on as we speak?

Hon SUE ELLERY: It is four part-time lawyers and probably approximately two full-time equivalent positions.

Hon MICHAEL MISCHIN: What level are those practitioners? I take it they are not junior and are relatively senior? What level are we recruiting for?

Hon SUE ELLERY: With respect to the recruitment process that is now underway, it is mid to senior lawyers, so between five to 10 years' post-admission.

Hon MICHAEL MISCHIN: The minister mentioned that the financial exposure of the state was estimated to be between $70 million and $647 million. That is quite a range. Can the minister give us some idea of how that figure was arrived at? Was it based on an average of how much was being awarded in a particular case or the number of cases? Can we have some sort of breakdown so we can understand how we will be looking at something like a factor of nine attached to millions of dollars?

Hon SUE ELLERY: Treasury prepared the information on the setting of that range—the high and the low end of that range. I do not have a Treasury official sitting here but I am advised, from the information published by the royal commission, that it was looking at $2 750-odd at the high end and around $400 at the low end. At the low end, as well, it looked at other jurisdictions in Australia.

Hon NICK GOIRAN: I think there is only one matter about which I need to ask under clause 1; the rest of my questions can wait until the relevant clauses. In the second reading speech, the minister said —

> I anticipate that claims will be commenced for historical child sexual abuse against the state of Western Australia following the passing of this bill.

Which provisions of the bill will remove any current barrier to action against the state?

Hon SUE ELLERY: I refer the member to part 3 in general, because that is the part that amends the Limitation Act—in particular, proposed section 6A(3)(a). If we look at the bottom of page 15 of the bill and then over the page, on page 16, is proposed subclause (3)(a)—in particular, but that whole part.

Hon Michael Mischin: Is that clause 6, capital A?

Hon SUE ELLERY: I will add to that. I refer members to part 3 in general—in particular, proposed sections 6A(3)(a) and (b).

Hon Nick Goiran: We do not want to add anything more?

Hon SUE ELLERY: I am operating on the best advice that is available to me.

Hon NICK GOIRAN: Part 3, clause 8 of the bill seeks to insert proposed section 6A and indicates an intention to insert section 6A(2), which states —

> Despite anything in this or any other Act, no limitation period applies in respect of a child sexual abuse action.

Is section 6A(2) sufficient to ensure that any action previously prohibited against the state will be open to victims of child sexual abuse?

Hon SUE ELLERY: I prefaced my answer earlier by saying, "Part 3, in total, includes section 6A(1), (2), (3) et cetera." I did refer to the whole of part 3 and I particularly drew the chamber's attention to sections 6A(3)(a) and (b). I prefaced my answer by saying, "All of it", so, yes, that includes section 6A(2) as well.

Hon NICK GOIRAN: I think the minister misunderstood my question. I accept that. My question is whether section 6A(2)—forget about everything else—is sufficient to ensure that claims can be made against the state that previously could not be made against the state?

Originally, I would have liked to ask this question under clause 1, because my other questions can relate to another clause. The minister has helpfully identified that this question needs to be dealt with under clause 8, so I will defer my further questions on this to clause 8.

Hon MICHAEL MISCHIN: I have to be careful, minister, because I am not getting too many answers when I ask questions. I cannot even get an undertaking carried out, but there we go. I am doing the best I can with what I have here. The minister mentioned, and it has been repeated on several occasions, that sexual abuse is not defined and has been deliberately left at large. Is that term reflected in any legislation passed in other jurisdictions?

Hon SUE ELLERY: The best advice I am given is that Victoria has exactly the same approach as Western Australia.

Hon MICHAEL MISCHIN: When did Victoria adopt that formula as a criterion for its legislation?

Hon SUE ELLERY: It was 2015.

Hon MICHAEL MISCHIN: Have any cases been litigated in Victoria under these provisions in which it has been considered judicially?

Hon Sue Ellery: Yes. If the member wants me to give him more details, I can find them, but the short answer is yes.

Hon MICHAEL MISCHIN: Has there been any judicial comment, discussion or analysis about what the term has meant that might assist us in understanding its metes and bounds in Western Australia; should Western Australian courts draw upon the Victorian experience for guidance?

Hon SUE ELLERY: I am advised that as far as we know there has not been any judicial decision on the meaning of that phrase. There are two cases referred to, but the particular circumstances in both of those are not helpful to the question that the member raised.

Hon MICHAEL MISCHIN: Leaving aside for the moment the question of lifting or abolishing the limitation period, are the amendments to the Civil Liability Act modelled on any particular jurisdiction or are they unique to Western Australia?

Hon SUE ELLERY: I am told that they are unique to Western Australia, so they were not modelled on any particular jurisdiction.

Hon MICHAEL MISCHIN: The minister mentioned, I think, last Wednesday when Hon Nick Goiran discussed with her potential amendments to section 3A of the Civil Liability Act, that the policy setting had been reached but a decision had been made to revisit that and other things in the future. The minister has told us about a review that has been flagged for the Criminal Injuries Compensation Act, but was my understanding of the minister's comments of the other day wrong when she said that that there was no plan to revisit this legislation periodically or to have any continual monitoring by a working group or otherwise?

Hon SUE ELLERY: I note that there is an amendment on the supplementary notice paper in the member's name, so if he is talking about a review of the act, we can deal with that when we get to that amendment. If I understood the member's question correctly and he asked whether the government intends to or has already established some kind of ongoing monitoring group to track the progress of matters that come to the courts under this legislation, the answer is no, there is not.

Hon MICHAEL MISCHIN: That brings me to foreshadowing the amendment. When the minister indicated that the Attorney General was going to consider, over the weekend, his appetite for amending the bill to take into account the several matters raised by Hon Nick Goiran, I raised with the minister behind the Chair to also invite

the Attorney General to introduce a review clause for the operation of this act when it becomes law. I have assumed—perhaps wrongly, because there has been no further amendment and the minister has indicated that there has been discussion and no amendments have been contemplated—that the Attorney General does not propose to introduce a review provision. Am I correct in that?

Hon SUE ELLERY: As I said earlier, there is an amendment in the member's name on the supplementary notice paper, so why do we not deal with this question when we get there?

Hon MICHAEL MISCHIN: I thank the minister. I am well aware of that, but I am simply trying to clarify whether it will be necessary. Plainly, there is a proposal and I will deal with it in due course.

I have one final point on clause 1 as a matter of general consideration. I have other questions, but they will wait until we consider the specific clauses. Is there not the potential in this legislation for those with criminal histories—indeed, sex offenders who have themselves offended against children—seeking damages in their favour against institutions and people who have sexually abused them, and recovering state money? Would that be correct?

Hon SUE ELLERY: Yes, as is currently the case. I do not know whether I mentioned it in my second reading reply speech, but I got some advice on research that was undertaken about the extent that those who are the victims of child sexual abuse then turn out to be abusers themselves. It is quite interesting research. I recommend that the honourable member look at it. From what I was able to ascertain from that research, there is a perception that the majority of victims of sexual abuse become abusers themselves but research out of the United Kingdom and Canada and some research in Australia indicates that it is actually about one-third of people, to the extent that research is able to be definitive about it. I thought that was interesting. If I did not mention it in my second reading reply speech, I meant to.

Hon MICHAEL MISCHIN: I recall raising the subject during the course of my contribution to the second reading debate. I do not think that the minister mentioned that in her reply. If she did, I missed it, but I do not think she did. I would be interested in seeing that research. Nevertheless, one-third is still a significant number of people.

Has any thought been given to how moneys recovered by those claimants—particularly if it is money recovered against the state of Western Australia, hence taxpayers' money—can be quarantined in order to ensure that those who have been harmed by those perpetrators will have some ability to recover funds from them? An example is a child who has been sexually abused grows up and abuses others—whether children or otherwise; it does not much matter—and recovers a significant sum of damages from the state, but meanwhile his victims have gone without adequate redress. They may have had to rely on criminal injuries compensation awards and small amounts of damages; they may have been deterred from suing because this perpetrator has been a man of straw for all his life. Has the government given any thought to whether, if there is an award of damages, the court can take that into consideration and quarantine those funds to ensure that any claims for criminal injuries compensation—for example, paid out by the state as a result of a perpetrator's misbehaviour or any damages that might be due other people for the harm that the perpetrator has done—can be made available for that rather than simply given to the perpetrator to spend at will? It seems to me that there is an element of entitlement if a person is harmed, but it also tends to rankle that taxpayers' money should be going to sex offenders, particularly if they have done harm to others in the meanwhile and those people have not been able to obtain damages and redress.

Hon SUE ELLERY: Outside the criminal compensation system, the policy of this bill does not differentiate between different categories of victims. I can understand the point that the honourable member is making, but this bill treats all victims the same.

Hon MICHAEL MISCHIN: I can understand that, because there is no provision in the bill for it, but has the government considered the dilemma or the problem? I will stop just there for the moment: has the government given any consideration to the issue?

Hon SUE ELLERY: No. The government did not consider this position at the time of drafting. I think the Attorney General has made some public comments subsequently about some of the debate with the commonwealth about its proposed redress scheme; but, on the bill before the chamber, no.

Hon MICHAEL MISCHIN: He has; my understanding is that it was more along the lines of how those with criminal histories, even if abusers of children, should also have access, like others who have been victims, to redress and the like. I can see that point of view. But will the government consider how it might recover moneys it has paid on behalf of some of these people to the victims of perpetrators when the perpetrators manage to recover money against organisations, and importantly the state, for the harm done to them? It seems to be wrong that a sex offender might recover significant sums of money for the harm done to him but not repay the criminal injuries

compensation that is being used to provide compensation for his victims for what might have been serious offences, or, indeed, be considered to be someone of sufficient substance that if victims want to sue him, they should not be allowed to do so to recover something from him? Will the government give some consideration to that and be able to advise us what its position is when we resume, if not in the next couple of days, perhaps when we resume in April? Is seems to be very wrong that victims have had to go without, relying on the state, rather than getting their due compensation from people who might in the future be paid out significant sums of money either by way of judgements or by way of settlements with the state.

Hon SUE ELLERY: I have been asked whether the government will consider something in the future. I am one minister representing the Attorney General. I cannot possibly provide the member an answer to that question. I hope that the reference to coming back in April is not because the honourable member thinks we will still be dealing with this bill in April. He asked whether the government will consider doing something in the future; I am not able to answer that question.

Clause put and passed.

Clause 2: Commencement —

Hon MICHAEL MISCHIN: Clause 2 relates to the commencement date of the bill, and states —

(a) Part 1 — on the day on which this Act receives the Royal Assent;

(b) the rest of the Act — on a day fixed by proclamation, and different days may be fixed for different provisions.

Can the minister explain why the whole act cannot come into operation on royal assent?

Hon SUE ELLERY: I am advised that time is required after assent to start and finalise the work of the Legal Costs Committee.

Committee interrupted, pursuant to standing orders.

[Continued on page 1329.]