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Statutes Amendment (Attorney-General's Portfolio) (No 2) Bill

Thursday, 19 October 2017 | [See full session on Hansard](#)

Adjourned debate on second reading.

(Continued from 28 September 2017.)

The Hon. A.L. McLACHLAN (15:44): I rise to speak to the Statutes Amendment (Attorney-General's Portfolio) (No. 2) Bill. I am speaking on behalf of my Liberal colleagues and indicate that the opposition is supporting the second reading of the bill. This is an omnibus bill but it also has somewhat controversial amendments which have made the front page of The Advertiser. For the benefit of members, I might go through the less debatable amendments, if I could put it that way, and then address some of the amendments that relate to changing the nature of criminal sexual offences.

The bill itself, without amendment, corrects minor errors and deficiencies that have been identified in various pieces of legislation within the ambit of the Attorney-General's portfolio. The amendments are relatively minor in nature, and I am excluding, of course, the substantive amendments that have been tabled and subsequently filed in this chamber.

Firstly, the bill amends the Cross-border Justice Act 2009, which governs the approach to criminal justice on the NPY lands. The NPY lands is an area that spans the central desert region of South Australia, Western Australia and the Northern Territory. The extant legislation enables correctional facilities and youth training centres to be regulated according to the state in which that particular centre is located. The relevance of this is that each centre can apply the same set of rules to all inmates, regardless of where the particular inmate might have committed an offence, been arrested or usually lives.

This bill contains amendments that are consequential to the passing of the Youth Justice Administration Act, to specify that it will only apply to youths detained in South Australia but not the other participating jurisdictions in the cross-border scheme. The amendment is straightforward and the Liberal opposition supports the same.

The bill also amends the Justices of the Peace (Miscellaneous) Amendment Act 2016, which has been assented to but has not yet commenced. The government has advised that when the act was passed in 2016, it failed to take into account the changes made to section 11 by the Judicial Conduct Commissioner Act, which at the time had not yet commenced operation. Section 11 confers the power to take disciplinary action against a justice of the peace from the Governor to the Attorney-General. The bill corrects any inconsistencies in section 11 to ensure that it operates as was intended.

The bill also amends the Real Property Act to remove any potential unintended consequences following the passing of the Aboriginal Lands Trust Act 2013. Finally, an amendment to this bill was moved by the government in the other place and passed with Liberal Party support. This amendment resolved a technical issue identified within the Surveillance Devices Act. The act prescribed the Police Ombudsman as the relevant review agency for South Australia Police. However, in September of this year, the Ombudsman was dissolved following the passing of the Police Complaints and Discipline Bill. The amendment replaces it with the reviewer under schedule 4 of the Independent Commissioner Against Corruption Act 2012, and we are advised that the Hon. Kevin Duggan AM QC has been appointed as a reviewer until 4 March 2020.

The bill in its raw form is one that requires, I would suggest, little debate. Subsequently, the government has, under the cloak or justification of urgency, filed further amendments, which relate to persistent sexual exploitation of a child. These amendments involve complex law, and it is the Liberal Party's view that these amendments require proper debate. This has been debated in the public forum ahead of today's debate, but it was the Liberal Party's view that proper debate would better test this bill to ensure that we do not have the situation we are now facing, where there needs be further amendment with retrospect provisions providing for retrospective application.

The justification for the amendments were the result of a High Court case, in shortened title of *Chiro*. The effect of that case was to say that because there was no special verdict—which means that there was a course of behaviour that the individual was found guilty of, but no special verdict on the particular aspects of the offending was taken from the jury—in the sentencing the most minor of the range of offending had to be taken into account and not the other, perhaps more serious, aspects of the case.

In essence, the bill seeks to rectify that and adopt a model clause that was articulated in the criminal justice report of the Royal Commission into Institutional Responses to Child Sexual Abuse. That report was released prior to the High Court delivering its judgement in *Chiro*. There was another associated case called *Hamra*, but the main focus seems to be on the case of *Chiro* in briefings, I understand. These provisions before us, I understand, relate to implementing that model, and I would like to explore the aspects of that model when we enter into the committee stage immediately after the second reading.

I understand there has been limited community consultation, but I am appreciative of the South Australian Bar Association managing to provide a letter by email. Because we are dealing with this bill with some urgency, I intend to read it out. Members will be relieved that it is only two pages. It begins with the usual salutations. The letter is addressed to myself by email and dated 19 October 2017. I sought their views. The signature block is from Ian Robertson SC, the President of the South Australian Bar Association:

I refer to the letter from the Attorney General to you dated 17 October 2017 and to the Statutes Amendment (Attorney-General's Portfolio) (No 2) Bill 2017...

I observe that the Bill was not provided to this Association for comment by the Government. In the plethora of Bills provided to the Association in the last month, this Bill and the Statutes Amendment (Recidivist and Repeat Offenders) Bill 2017 were notable omissions.

This Bill was forwarded to the Criminal Law Committee of the Association for comment. In the little time available to consider this Bill, the Criminal Law Committee have formed the view that the proposed amendments it sets out to make appear to be largely a knee jerk response to defects in legislation which is arguably flawed to begin with.

With respect, the Attorney General's position misses the point highlighted in *Chiro*. *Chiro* was a case about an

unfair and lazy use of s 50 of the Criminal Law Consolidation Act 1935 by the prosecution. The type of charge which is permitted by s 50 was never intended to become a run of the mill offence to be commonly utilised in prosecutions relating to sexual misconduct against children. It was intended to be a charge of last resort only, and then, primarily in regard to young children who could not particularise the offending conduct in the usual way. It seems that the section is routinely used in most child sex cases, including cases where the complainant is not a young child and is capable of properly particularising the instances of offending conduct in the usual way.

Encouraging charges relying on s 50 tends to encourage lazy and, we would argue, unfair prosecutorial tactics. Indeed, this was highlighted as a problem in *Chiro*.

The offence created by s 50 is a significant compromise on the usual common law principle requiring the prosecution to properly particularise the case that the accused has to meet at trial. There is perhaps a justification in appropriate cases for resort to be had to s 50, for example, where a child cannot distinguish one occasion of offending from another. The need to modify the common law was based on resolving the practical difficulty (in some cases, the impossibility) of the victim being able to remember material particulars, or to provide the dates or the exact detail or circumstances of an alleged offence. Justice Kirby has observed in *KRM* (2001) 206 CLR 221 (at [80]) that the offence is a modification of the requirements of the common law which insisted upon a high degree of specificity in the proof of criminal offences, generally.

So, in *Chiro*, where persistent sexual abuse in breach of s 50 was charged, the acts alleged by the prosecution hugely varied. They ranged from kissing to unlawful sexual intercourse. If a single verdict of guilty was returned, as it was in that case, for what misconduct was the accused convicted? The High Court held the sentencing judge could not guess. Hence, the need to sentence the accused on the basis most favourable to him.

The proposed amendment will, we contend, relieve the prosecution of thinking about what is the appropriate charge. It will encourage inexactness and promote laziness. If passed, that amendment would enable the prosecution simply to allege a range of unlawful sexual acts (ranging from the minor to the egregious) and the accused will have no way of knowing what conduct the jury has relied upon to convict. A long, unwarranted and unjust sentence may result, even though the jury may have convicted on the basis of the least serious offending conduct.

Further, the amendments appear to permit that the jury is no longer required to be satisfied beyond reasonable doubt of both unlawful sexual acts in the event of more than two acts being alleged.

The association contends that any amendment to these provisions should commence from the standpoint that the intention for the charging of offences of this type is a circumstance of last resort, namely where the complainant cannot give appropriate particulars. These amendments are self-styled by the Attorney's letter to you as proceeding on quite a different, and we, argue, misconceived basis.

This Bill will be conducive of laziness in prosecutorial practices and inevitably will lead to serious unfairness and miscarriages of justice.

The Association recommends that consideration of this Bill is deferred so that its ramifications can be determined, including its effect, if any, on the ratio of *Chiro*. That case is scheduled for further consideration by the Court of Criminal Appeal on Friday 20 October 2017, the contemporariness of which cannot help but be remarked upon.

I thank the Bar Association for providing me with that submission under difficult circumstances. I was going to ask the minister for a couple of topics to be addressed in his second reading summing-up, but it would probably be more appropriate at clause 1 since he will have the opportunity for an adviser to sit alongside him.

I would like the minister, who has tabled his second reading speech, at clause 1 to set out formally for the benefit of the Hansard the reason for the urgency; the extent of consultation, particularly after the royal commission report, because the royal commission report is providing the model for which these legislative changes are based; and whatever cases are being impacted, which I know has been the subject of some of the briefs to the Liberal Party.

I would like to put to honourable members that the Attorney-General on many occasions has expressed his particular dislike of the Legislative Council chamber. I would like to point out to the Attorney-General in the other

place that on many occasions this chamber corrects errors that have appeared in bills and more often than not improves them, and that is why this chamber exists, not only to have its own legislative initiatives but also to review the work of the House of Assembly.

The shadow attorney-general has asked the Attorney-General on a number of occasions to debate this bill in the House of Assembly first. This has been rebuffed. The Attorney-General's new tack is to try to reduce this chamber to a rubber stamp, using urgency to justify limited examination and consultation. What concerns me is that we may end up in the same set of circumstances as we find ourselves now with ill-considered law and having to then legislate for retrospective provisions, which anyone should feel distinctly uncomfortable about, and we will get to those in the committee stage.

What I find a little galling is that the Attorney-General in the other place expects us to fall on our knees in awe of his demands for urgency when he got it wrong in the first place. How can we trust that this version is any better? I reiterate, poor law comes from a limited opportunity to debate.

I was going to attempt to move an adjournment but I know that I do not have the numbers so I am not going to proceed down that path. My final comment is to reiterate that the Liberal Party is genuinely concerned that the urgency of the passage of this bill through the two chambers will impact on the quality of the legislation and undermine the aspects of the bill which provide for community safety. The Liberal Party does not have an issue with the policy objective but it does have concerns that the urgency may well result in unintended consequences.

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