Thursday 21 November 2019

The President, **Mr Farrell**, took the Chair at 11 a.m. and read Prayers.

LEAVE OF ABSENCE

Member for Hobart

Motion by **Mrs Hiscutt** agreed to -

> That the member for Hobart, Mr Valentine, be granted leave of absence from the service of the Council for this day's sitting.

GAMING CONTROL AMENDMENT (WAGERING) BILL 2019 (No. 51)

INLAND FISHERIES AMENDMENT (ROYALTIES) BILL 2019 (No. 46)

RESTRAINT ORDERS BILL 2019 (No. 29)

Third Reading

Bills read the third time.

JUSTICE LEGISLATION AMENDMENT (ORGANISATIONAL LIABILITY FOR CHILD ABUSE) BILL 2019 (No. 36)

Second Reading

[11.05 a.m.]

Mrs HISCUTT (Montgomery - Leader of the Government in the Legislative Council - 2R) - Mr President, I move -

> That the bill be now read the second time.

The Justice Legislation Amendment (Organisational Liability for Child Abuse) Bill 2019 fulfils the Tasmanian Government's commitment to implement the Royal Commission into Institutional Responses to Child Sexual Abuse's recommendations aimed to improve civil litigation outcomes for survivors of child sexual abuse.

The Tasmanian Government is committed to providing improved avenues for justice and, in turn, creating institutional environments that protect our vulnerable children. The work of the royal commission continues to help shape future reforms to achieve organisational change both within government but also in non-government settings.

This bill is just one of the many significant systemic and legislative reforms we will implement to continue to work towards a safer Tasmania for our children.

On 15 December 2017, the royal commission handed down its final report which was the culmination of the royal commission's work over its five-year inquiry. Comprising 17 volumes and its earlier reports on specific areas, the final report contains a total of 409 recommendations and provides a road map for implementing reforms that will prevent and respond to child sexual abuse in institutions.

On 20 June 2018, the minister tabled the Government's response to the royal commission's final report and earlier working with children checks, redress and civil litigation, and criminal justice reports. This included the Government's commitment to implement recommendations to strengthen institutional liability for child sexual abuse.

On 1 November 2018, the Tasmanian Government commenced participation in the National Redress Scheme for Institutional Child Sexual Abuse.

The National Redress Scheme is an important pathway for some survivors to achieve justice without the need to undertake the complexity of civil law proceedings if they wish, and the Government has committed $70 million towards the state's involvement in the scheme.

Many Tasmanian survivors of institutional child sexual abuse have already made applications to the National Redress Scheme and the Tasmanian Government is responding to those applications within the statutory time frames set by the Australian Government to ensure those survivors' applications can be progressed as quickly as possible.

The National Redress Scheme, however, applies only to past abuse. It does not provide a framework for organisational liability for child abuse that may occur in the future. The royal commission therefore concluded that reforms to civil litigation are required in Australian jurisdictions to provide justice to survivors past, present and future.

These civil law reforms will ensure that survivors have a number of pathways to access justice.

This Government is committed to ensuring that all survivors of child sexual abuse are able to seek justice. Every survivor of child sexual abuse addresses their abuse in different ways and at different times. A decision to attempt to seek justice either in a criminal or civil proceeding is incredibly courageous and a personal decision which must be supported.

In the Redress and Civil Litigation Report, the royal commission noted -

> Because of the nature and impact of the abuse they have suffered, many victims of child sexual abuse have not had the opportunity to seek compensation for their injuries that many Australians generally can take for granted. While it cannot now be made feasible for many of those who have experienced institutional child sexual abuse to seek common law damages, there is a clear need to provide avenues for survivors to obtain effective redress for this past abuse.

However, it is also clear that reform is needed to reduce the current barriers to individuals in seeking damages for child abuse through civil litigation, as the very nature and impact of institutional child sexual abuse can work against the survivors' ability to seek damages through existing avenues.

The royal commission conducted extensive work to consider this area of the law. Its findings and recommendations are the result of issues papers, roundtable consultations, the Redress and Civil Litigation Consultation Paper and submissions to it, and a specific public hearing.

A statement of Justice McHugh, 'The Law-Making Function of the Judicial Process - Part II', *Australian Law Journal*, vol. 62 (1988), p.116-127, adopted by the royal commission in its Redress and Civil Litigation Report, illustrates the need for laws to be under constant review -

> Law is a social instrument - a means, not an end. As society changes, so must the instruments which regulate it. The unprecedented rate of change in Australian society in recent years has meant many of the rules of law and, indeed, the wider principles that lie at the back of them are unjust or inefficient. Moreover, rapid change means that conflicts arising from novel situations and which call for adjustments by the judicial process are often not covered by the existing rules. If law is to serve its purpose, its rules and principles must be periodically examined and, if necessary, amended.

Mr President, the work of the royal commission has unequivocally demonstrated that it is time for such examination and amendment.

The Justice Legislation Amendment (Organisational Liability for Child Abuse) Bill 2019 addresses a number of recommendations made by the royal commission, particularly in the area of civil litigation. It also makes an amendment that complements the work of the royal commission regarding previous settlements.

This bill enacts significant reforms that remove legal barriers identified by the royal commission, and enables and enhances access to justice for survivors of child abuse.

Specifically, the bill amends the Civil Liability Act 2002 and the Limitation Act 1974. I will now address the proposed amendments in turn.

The bill amends the Civil Liability Act 2002 to impose a statutory non-delegable duty upon all organisations who exercise care, supervision or authority over children to prevent an individual associated with their organisation perpetrating child abuse.

The rationale for this amendment arises from the royal commission's findings which identified that survivors of child sexual abuse have significant difficulty in bringing civil law actions against organisations as a claimant must establish that the organisation owed them a duty of care and the breach of that duty caused their damage.

To mitigate this issue faced by survivors of child abuse, the royal commission specifically recommended that:

> State and territory governments should introduce legislation to impose a non-delegable duty on certain organisations for institutional child sexual abuse despite it being the deliberate criminal act of a person associated with the institution.
>
> - Recommendation 89, Redress and Civil Litigation Report.

This bill imposes a clear duty of care that survivors can point to as forming part of a cause of action in negligence. It is a fault-based duty and is 'non-delegable', meaning that where a child's care has been delegated to another organisation, each organisation retains responsibility for that child.

The statutory duty applies to 'child abuse', which is now defined in the Civil Liability Act 2002 to mean sexual abuse, or physical abuse, of the child; and any psychological abuse of the child that arises from the sexual abuse or physical abuse - but does not include an act that is lawful at the time at which it occurs. This definition now makes clear the scope of an organisation's duty to protect children.

Our Government is committed to a consistent application of the law. This bill will now ensure that the definition of child abuse is broadly consistent with the Limitation Act 1974 - which was previously amended by this Government to remove the limitation period in relation to child abuse.

The duty itself requires an organisation to prevent an individual associated with the organisation perpetrating child abuse against a child for whom they are responsible. An individual 'associated with an organisation' includes, but is not limited to including, an individual who is an office holder, officer, employee, owner, volunteer or contractor of the organisation and also includes -

- if the organisation is a religious organisation - a religious leader (such as a priest or minister) or member of the personnel of the organisation; and

- any individual that is prescribed or who is within a class of organisations that is prescribed.

The categories of individuals associated with an organisation draws on recommendation 92 of the royal commission's Redress and Civil Litigation Report, which is as follows:

> For the purposes of both the non-delegable duty and the imposition of liability with a reverse onus of proof, the persons associated with the institution should include the institution's officers, office holders, employees, agents, volunteers and contractors. For religious organisations, persons associated with the institution also include religious leaders, officers and personnel of the religious organisation.
>
> - Recommendation 92, Redress and Civil Litigation Report

Under the duty, an organisation that has responsibility for a child must take reasonable precautions to prevent an individual associated with the organisation who, by virtue of being associated with the organisation, has -

- authority, power or control over a child; or
- the trust of a child; or
- the ability to achieve intimacy with a child -

from being able, by virtue of that authority, power, control, trust or ability, to perpetrate child abuse on the child.

The bill allows an organisation to rebut the duty by establishing that the organisation took 'reasonable precautions' to prevent the abuse, which was recommended by the royal commission, specifically:

> Irrespective of whether state and territory parliaments legislate to impose a non-delegable duty upon institutions, state and territory governments should introduce legislation to make institutions liable for institutional child sexual abuse by persons associated with the institution unless the institution proves it took reasonable steps to prevent the abuse. The 'reverse onus' should be imposed on all institutions, including those institutions in respect of which we do not recommend a non-delegable duty be imposed.
>
> - Recommendation 91, Redress and Civil Litigation Report.

The royal commission recommended shifting the onus of proving reasonable precautions to organisations to ensure organisations implement the current best practice to prevent and respond to allegations of child sexual abuse.

In determining whether an organisation took 'reasonable precautions' to prevent child abuse, a court may take into account a variety of factors. These are:

- the nature of the organisation;
- the resources reasonably available to the organisation;
- the relationship between the organisation and the child;
- whether the organisation has delegated in whole or in part the exercise of care, supervision or authority in respect of a child to another organisation;
- the role in the organisation of the individual who perpetrated the child abuse;
- the level of control the organisation had in respect of the individual who perpetrated the child abuse;
- whether the organisation complied with any applicable standards (however described) in respect of child safety;
- any matter prescribed by the regulations; and
- any other matter the court considers relevant.

An organisation's resources and level of supervision over the individual who perpetrates the child abuse will be taken into account by the court in determining what precautions are 'reasonable' for that organisation to take.

A reversal of the onus of proof means that an organisation must demonstrate its policies and procedures that ensure it is a child-safe organisation. Therefore, this reform has the capacity to effect much needed cultural change. On this point the royal commission noted that:

> Reversing the onus of proof has the potential to encourage higher standards of governance and risk mitigation in institutions, both through their own efforts and through their compliance with the requirements of their insurers.
>
> - Page 494, Redress and Civil Litigation Report.

In particular, the royal commission argued that insurance requirements and reduction of premiums will assist to promote and regulate better practices in organisations.

> The significant financial consequences that may flow if the standard is not met create powerful incentives for institutions and their insurers to take steps to ensure that abuse is prevented.
>
> - Page 494, Redress and Civil Litigation Report.

It is important to note that the new statutory non-delegable duty is prospective only, which is a specific recommendation of the royal commission's Redress and Civil Litigation Report (Recommendation 93).

This recognises the great difficulty that organisations would face in attempting to prove that reasonable steps were taken if the duty was to have retrospective application. It would be extremely difficult for an organisation to defend their practices in relation to historical claims where the need to retain records or implement policies to prevent abuse was not anticipated. On this point, the royal commission noted that:

> If the liability was left to the development of the common law and applied retrospectively, in combination with the removal of limitation periods we recommend in Chapter 14, relevant institutions would face potentially large and effectively new liability for abuse that has already occurred, potentially over many previous decades. Even if it were possible to obtain insurance in respect of retrospective liability on such a scale, the insurance would likely be unaffordable for many institutions. No institution could now improve its practices or take steps to prevent abuse that has already occurred.
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> - Page 492, Redress and Civil Litigation Report.

The bill also amends the Civil Liability Act 2002 to extend vicarious liability for organisations for the perpetration of child abuse by individuals that are 'akin to employees', as well as regular employees.

An individual is 'akin to an employee' of an organisation if their role within the organisation:

- is for the aims or purpose of the organisation; and
- gives the individual authority, power or control over a child or enables the individual to achieve intimacy with, or the trust of, a child.

However, an individual is not 'akin to an employee' if the individual's role within the organisation is carried out for a recognisably independent business of the individual or of another person or organisation.

Vicarious liability reforms in other Australian jurisdictions have sought to codify the High Court's approach in the case of Prince Alfred College Incorporated v ADC (2016) 258 CLR 134. This approach analyses the apparent performance by the employee of a role in which the organisation placed the employee supplying the occasion for the perpetration of the child abuse by the employee. The employee must then take advantage of that occasion to perpetrate the child abuse on the child.

This test was included in the consultation version of the bill and was met with some confusion by stakeholders. Given this feedback, the test in section 49J of the bill was modified to provide for greater clarity while achieving the same policy intent.

The bill provides that an organisation is vicariously liable for child abuse perpetrated against a child by a person who is an employee of the organisation if, at the time the abuse was perpetrated -

(a) the person, by virtue of being such an employee, had -

(i) authority, power or control over the child; or
(ii) the trust of the child; or
(iii) the ability to achieve intimacy with the child; and

(b) the person was able, by virtue of that authority, power, control, trust or ability, to perpetrate the child abuse on that child.

This new test makes it clear that an organisation will be vicariously liable for an individual who perpetrates child abuse if their offending is facilitated by their employment with the organisation.

It should be noted that new statutory duty and vicarious liability are distinct causes of action:

- The statutory duty is the basis of a claim of negligence and is fault-based, allowing an organisation to discharge a presumption based on the reasonable precautions test and applies to a broad range of individuals associated with the organisation.

- The test for vicarious liability is confined to employment or 'akin to employment' relationships and is a strict liability (liability despite fault or criminal intent on behalf of the organisation). It allows a court to conduct a qualitative assessment of the case before them by examining the employee's role within an organisation and whether that role facilitated their offending. It cannot be definitively stated whether certain categories of employees will or will not be captured under vicarious liability; instead, the assessment, will appropriately be determined by the court on a case-by-case basis.

The bill also amends the Civil Liability Act 2002 to enable child abuse proceedings to be brought against unincorporated organisations, such as church groups, that were previously unable to be sued due to a lack of 'legal personality'.

The royal commission identified that one of the key challenges faced by claimants is identifying a proper defendant to sue. This can be because the relevant organisation no longer exists or, if unincorporated, does not possess legal personality and, therefore, cannot be sued at common law.

Unincorporated organisations have previously escaped liability for child abuse because they lack what is called 'legal personality'. This is a technical argument that prevents these organisations being brought before the court as, unlike corporations for example, they are not legally acknowledged entities that can be sued.

This is commonly known as the 'Ellis Defence' and this bill will abolish that defence in Tasmania.

The Ellis Defence arose in the difficult case of Mr John Ellis, who was abused as an altar boy at Christ the King Catholic Church at Bass Hill in Sydney by Father Aidan Duggan. Mr Ellis sued Father Duggan, the Archbishop of Sydney and the Trustees of the Roman Catholic Church Trust for the Archdiocese of Sydney.

The abuse occurred in the 1970s and proceedings started in 2004. Father Duggan died during the proceedings, and the court held that the archbishop was not responsible for a predecessor's actions. The court found that the trustees were not liable as they had no powers over priests within the Archdiocese.

In 2007 the New South Wales Court of Appeal found that the Church did not legally exist because its assets were in a legally protected trust.

These findings prevented Mr Ellis from seeking justice and prevented him from seeking compensation, even though the Church did not dispute that Mr Ellis was the victim of terrible abuse and had suffered profound damage.

Mr Ellis' action could not proceed because there was no proper defendant for the proceedings.

In response to this legal barrier, the royal commission specifically recommended that:

> State and territory governments should introduce legislation to provide that, where a survivor wishes to commence proceedings for damages in respect of institutional child sexual abuse where the institution is alleged to be an institution with which a property trust is associated, then unless the institution nominates a proper defendant to sue that has sufficient assets to meet any liability arising from the proceedings:
>
> a. the property trust is a proper defendant to the litigation;
>
> b. any liability of the institution with which the property trust is associated that arises from the proceedings can be met from the assets of the trust.
>
> - Recommendation 94, Redress and Civil Litigation Report.

The bill allows an unincorporated organisation to, with the consent of an entity, appoint an entity or an associated trust with sufficient assets to satisfy the claim as a proper defendant for the organisation at any time. However, where an unincorporated organisation fails to appoint a proper defendant within 60 days of the initiation of proceedings, the plaintiff may ask the court to appoint a proper defendant for the unincorporated organisation.

A trust is an 'associated trust' of an unincorporated organisation if one or more of the following apply:

- the organisation has, either directly or indirectly, the power to control the application of the income, or the distribution of the property, of the trust;

- the organisation has the power to obtain the beneficial enjoyment of the property or income of the trust with or without the consent of another entity;

- the organisation has, either directly or indirectly, the power to appoint or remove the trustee or trustees of the trust;

- the trustee of the trust is accustomed or under an obligation, whether formal or informal, to act according to the directions, instructions or wishes of the organisation;

- the organisation has, either directly or indirectly, the power to determine the outcome of any other decisions about the trust's operations;

- a member of the organisation or a management member of the organisation has, under the trust deed in relation to the trust, a power of a kind referred to above, but only if the trust has been established or used for the activities of the organisation or for the benefit of the organisation.

Once appointed by either the court or the unincorporated organisation, a proper defendant acts on behalf of the unincorporated organisation and is responsible for conducting the proceedings as the defendant.

The bill also amends the Limitation Act 1974 to allow courts to set aside a previous settlement between an organisation and a survivor if 'it is in the interests of justice to do so', enabling a survivor to commence civil litigation against the organisation. Though not a recommendation of the royal commission, this important reform complements work that is being undertaken in response to other recommendations, particularly relating to limitations reform.

The royal commission observed that survivors of child sexual abuse are unlikely to report their abuse for a significantly longer period than other victims. In 2018, the Tasmanian Government removed the limitation periods in relation to actions for child abuse in recognition of those findings.

One of the impacts of limitation periods is that survivors of child sexual abuse were generally prevented from pursuing civil law claims for their abuse. Given the operation of limitation periods, the settlement payments that were offered survivors of child sexual abuse were low. This amendment seeks to remove these barriers for survivors, allowing the commencement of civil litigation in pursuit of a settlement.

In the amendment to the Limitation Act 1974, the definition of 'child abuse' differs slightly to the same definition used in relation to the organisational liability introduced under the Civil Liability Act 1974. Here, child abuse means sexual abuse, or serious physical abuse, of a child and any psychological abuse of the child that arises from the sexual abuse or serious physical abuse of a child - but does not include an act that is lawful at the time at which it occurs.

This definition is consistent with the existing reforms to the Limitation Act 1974 and ensures that organisations are not liable for actions that were considered appropriate discipline at the time they occurred.

To be clear, it is intended to operate as a threshold for previous settlements for physical child abuse so that they are only set aside where the physical abuse was serious physical discipline beyond the community standards of the time.

The bill provides the court with a non-exhaustive list of matters to which it may have regard in determining whether it is in the interests of justice to set aside an agreement effecting a settlement in respect of a relevant right of action. These matters are:

- the amount of the agreement;
- the relative strengths of the bargaining positions of the parties; and
- any conduct, by or on behalf of the organisation to which the agreement relates, that -
    - relates to the cause of action; and
    - occurred before the settlement was made; and
    - the court considers to have been oppressive.

It should be emphasised that this list of matters is not exhaustive and enables a court to regard any other factor that it determines to be relevant in the specific case.

During consultation, it was suggested by some stakeholders that the 'interests of justice' test for setting aside a previous settlement should be amended to mirror the approaches of Queensland and Western Australia.

These two jurisdictions allow a previously settled cause of action to be set aside by a court on the grounds that it is 'just and reasonable to do so'. In Western Australia, the 'just and reasonable' test has been interpreted narrowly as being satisfied by the existence and removal of a limitation period in relation to child sexual abuse.

This interpretation of what is 'just and reasonable' for the purposes of setting aside a previous settlement is considered to be far too simplistic and may not account for other relevant factors that a court should consider on a case-by-case basis. The proposed approach of setting aside a previous settlement 'if it is in the interests of justice to do so' allows a court to maintain appropriate flexibility to take into account factors it deems to be relevant, in addition to those factors provided in the bill.

This bill represents another important step made by the Tasmanian Government to implement a number of the royal commission's recommendations, and in doing so, provides a number of important reforms to assist some of the most vulnerable Tasmanians finally achieve justice, as well as protections that will ensure organisations take better steps to protect children in the future.

The bill was previously the subject of extensive consultation, and I would like to take this opportunity thank to those who took the time to provide a submission on the draft bill. The valuable feedback provided by stakeholders resulted in a number of amendments to the draft bill that led to simpler drafting and a clarified approach to the subject matter of the bill.

The royal commission's recommendations recognise that governments, institutions and the broader community share responsibility for keeping our children safe. All institutions providing services for, or functions involving, children must do everything they can to ensure that their institutions engage in the best practices to keep children safe from abuse.

The Justice Legislation Amendment (Organisational Liability for Child Abuse) Bill 2019 continues this Government's strong commitment to implementing the recommendations of the royal commission and follows the recent Criminal Code and Related Legislation Amendment (Child Abuse) Bill 2018 that the minister previously introduced. That bill addressed a number of royal commission recommendations in the area of criminal justice, as well as mechanisms to improve child safety through the reporting of concerns relating to children at risk.

All Tasmanians have been appalled by the prevalence of child sexual abuse that have emerged from the Royal Commission into Institutional Responses to Child Sexual Abuse and equally dismayed by the significant difficulties that survivors have experienced trying to bring those responsible for their abuse to justice.

I again wish to acknowledge the enormous courage of people affected by institutional child sexual abuse who shared their stories with the royal commission. The bravery of those survivors and the families of victims and survivors cannot be quantified. Without their assistance and commitment to the truth, we would not have the benefit of the vast work of the royal commission - not just that work contained in its final reports, but also that work that can assist us to address the evils of child sexual abuse derived from the royal commission's case studies and enormous body of commissioned research.

I commend the bill to the House.

[11.42 a.m.]

Ms FORREST (Murchison) - Mr President, I commend the Government for continuing to act on the recommendations of the Royal Commission into Institutional Responses to Child Sexual Abuse. It is an area that has received significant attention and rightly so.

I reiterate the Leader's comments in the second reading speech - the royal commission's recommendations recognise governments, institutions and the broader community share responsibility for keeping children safe.

The more I learn about and understand the very real ongoing and soul-destroying impacts of child sexual abuse, the more it is clear that not only prevention must be our clear goal, but also that past abuse and, of course, current and ongoing abuse may lie at the heart of many other social challenges individuals are facing.

Ongoing societal-wide acknowledgement of the horrific lived reality for many victims and their families and the need for lifelong support and care for many victims must be central to our actions and decisions in this place to - as much as we can - facilitate redress for past victims and prevention of future and ongoing abuse.

The Leader stated at the conclusion of her speech - and I also wish to acknowledge - the enormous courage of people affected by institutional child sexual abuse who shared their stories with the royal commission. The bravery of those survivors and the families of victims and survivors

cannot be quantified. As the Leader said, we would have a much-limited awareness of the full impacts without those testimonies.

The full impacts of the harm caused to these children cannot be fully quantified; as the Leader mentioned, without the assistance and commitment to the truth of these very courageous individuals we would not be able to be standing here today and doing some of the things we are doing.

I - and, I am sure, many others - have been dismayed by the significant difficulties survivors have experienced trying to bring those responsible for their abuse to justice. The reliving of the experiences. The fear of not being believed. The horrendous cover-ups that have gone on and on all add to this.

The Justice Legislation Amendment (Organisational Liability for Child Abuse) Bill 2019 seeks to improve civil litigation outcomes for survivors of child sexual abuse. The Government's response to the royal commission's final report and earlier working with children checks, redress and civil litigation and criminal justice reports included the Government's commitment to implement recommendations to strengthen institutional liability for child sexual abuse.

Last year, the Government commenced participation in the National Redress Scheme for institutional child sexual abuse. While I acknowledge this is an important and crucial step, I will not re-prosecute the fact that our scheme falls short of many other jurisdictions with regard to access to compensation. It does provide a pathway for some survivors to achieve justice without the need to undertake the complexity of civil law proceedings, if they wish. The National Redress Scheme applies only to past abuse. It does not provide a framework for organisational liability for child abuse that may occur in future.

The royal commission concluded that reforms to civil litigation are required in Australian jurisdictions to provide justice to survivors past, present and future. These civil law reforms will ensure that all survivors of child abuse have a number of pathways to access justice. Survivors of child sexual abuse address their abuse in different ways and at different times, sometimes many years following the abuse. The decision to attempt to seek justice either in a criminal or civil proceeding is incredibly courageous and a personal decision that must be supported.

The royal commission makes it clear that reform is needed to reduce the current barriers to individuals in seeking damages for child abuse through the civil litigation. These barriers relate to the very nature and impact of institutional child sexual abuse and can work against the survivors' ability to seek damages through existing avenues. This bill seeks to address some of those barriers. The bill also makes amendments that complement the work of the royal commission, providing previous settlements, and this is also a welcome inclusion. Some people accepted what was available at the time, which was anything but reflective of the harm they had suffered.

I note the bill mirrors many provisions very closely with the recent New South Wales legislation, particularly the amendments to the Civil Liability Act 2002, and imposes a statutory non-delegable duty upon all organisations that exercise care, supervision and authority over children to prevent an individual associated with their organisation perpetrating child abuse. The royal commission's findings identified that survivors of child sexual abuse have significant difficulty in bringing civil law actions against organisations, as a claimant must establish that the organisation owed them a duty of care and the breach of that duty caused their damage. The royal commission recommendation 89 of the Redress and Civil Litigation Report recommended that -

> State and territory governments should introduce legislation to impose a non-delegable duty on certain institutions for institutional child sexual abuse despite it being the deliberate criminal act of a person associated with the institution.

I note this bill imposes a clear duty of care that survivors can point to as forming part of the cause of action in negligence. That is, a fault-based duty and it is non-delegable. The bill inserts provision in the Civil Liability Act 2002 to now include a specific definition of child abuse. Child abuse includes all types of abuse, all sexual abuse or physical abuse and all psychological abuse that arises from the sexual or physical abuse. This definition now makes it clear that the scope of an organisation's duty is to protect children but does not include an act that is lawful at the time when it occurred. There was some comment about this during the consultation and I will come back to that.

The duty itself requires an organisation to prevent an individual associated with an organisation perpetrating child abuse against a child for whom they are responsible. This is a very important inclusion as we saw from so many reports of institutionalised sexual and other abuse of children, the repeated cover-ups by others in the organisation. Now, an individual associated with an organisation includes, but is not limited to, an individual who is an office holder, officer, employee, owner, volunteer or contractor of the organisation and also includes, if the organisation is a religious organisation, a religious leader, such as a priest or minister, a member of the personnel of the organisation and any individual that is prescribed or who is within a class of organisation that is prescribed.

This will make the breadth of the responsibility really clear and that is so important. These categories of individuals associated with an organisation draws on and reflects recommendation 92 of the royal commission's Redress and Civil Litigation Report. Provisions in the bill provide that, under this non-delegable duty, an organisation that has a responsibility for a child must take reasonable precautions to prevent an individual associated with an organisation who, by virtue of being associated with that organisation has authority, power or control over a child or the trust of the child or the ability to achieve intimacy with the child from being able by virtue of that authority, power, control, trust or ability to perpetrate child abuse on the child.

Children are generally naturally trusting, especially when they see adults appearing to trust each other. We know in the past and still now children are not always believed when they often reluctantly disclose inappropriate, threatening and/or abuse actions to another. It is often later in life, sometimes when another incident in their life takes them back to that abuse, despite access to education and sex education that covers issues of personal safety and consent. For some loving, supportive families who are genuinely unaware of the abuse, when that moment occurs we need to remind ourselves of the vulnerability of that person as a child and support and act to seek redress.

We do not know what event will take them back. I have seen this happen for women in labour, when they are birthing their baby sometimes the sensations that occur during a birth take them back to the abuse and it is really, really hard. When you have not been there to see that impact and if you lack awareness, you could completely miss what is going on and the really intense support a woman needs at that time. I will not share any stories about some of those experiences, but I have had them with women I have cared for to the point of having full-on panic attacks. Absolutely horrific reliving of those experiences at a really crucial time in their lives.

We do not know what has happened in people's lives. We do not know what has happened in their background. We do not know what the trigger might be that takes them back to one incident,

those many incidents, but we should not judge people's behaviour at a certain point in time because we do not know what might be lying behind that.

I note the bill allows an organisation to rebut the duty by establishing the organisation took reasonable precautions to prevent the abuse, which was specifically recommended by the royal commission recommendation 91 of the Redress and Civil Litigation Report. I will repeat the sections from the Leader's second reading speech on this matter.

The royal commission recommended -

> Irrespective of whether state and territory parliaments legislate to impose a non delegable duty upon institutions, state and territory governments should introduce legislation to make institutions liable for institutional child sexual abuse by persons associated with the institution unless the institution proves it took reasonable steps to prevent the abuse. The 'reverse onus' should be imposed on all institutions, including those institutions in respect of which we do not recommend a non-delegable duty be imposed.

The Leader further stated the royal commission recommended a shift in the onus of proving reasonable precautions to organisations, to ensure organisations implement the current best practice to prevent and respond to allegations of child sexual abuse. This is really a forward-focused approach to ensure there can be no excuses in the future.

It is vital for the future and one could ask why it has not always been the approach adopted in the past. It really should not have taken so long and so much pain and misery of children - many now adults - to realise this was the right approach to take. I agree it is right for a court to be able to determine whether an organisation took reasonable precautions to prevent child abuse taking into account the nature of the organisation; the resources reasonably available to the organisation; the relationship between the organisation and the child; whether the organisation has delegated in whole or in part for the exercise of care, supervision or authority in respect of a child to another organisation; the role of the organisation or the individual who perpetrated the child abuse; the level of control the organisation had in respect to the individual who perpetrated the child abuse; whether the organisation complied with any applicable standards, however described in respect to child safety and any other matter prescribed by the regulations and any other matter the court considers relevant.

It is important to give the court the opportunity to consider all matters that may be relevant. It is important to have in there the size and resources available to the organisation. Some of these really small organisations involved with the care of children do not have the same level of resources as the churches and the money the churches do, conveniently tied up in a little trust. Anyway, I will not go down that path. Some of this information has been a challenge trying to understand why this should not be retrospectively applied, which I will come to in a moment.

A reversal of the onus of proof means an organisation must demonstrate that its policies and procedures ensure it is a child-safe organisation. One hopes this will lead to real change and reform in the way many organisations have operated in the past and will hopefully lead to much-needed cultural change.

We talk about what culture is. Culture is the way we do things around here. When you have a culture that has allowed and perpetrated child sexual abuse, has covered it up and moved the

perpetrator to somewhere else to start all over again - that is culture. It takes a while to change that culture, but it has to change.

As the Leader suggested, the insurers of these organisations will be, no doubt, doing their own risk assessments before agreeing to provide insurance. As the royal commission noted on page 494 of the Redress and Civil Litigation Report -

> Reversing the onus of proof has the potential to encourage higher standards of governance and risk mitigation in institutions, both through their own efforts and through their compliance with the requirements of their insurers.

and suggesting that -

> The significant financial consequences that may flow if the standard is not met create powerful incentives for institutions and their insurers to take steps to ensure that abuse is prevented.

I know the work that organisations like the Australian Institute of Company Directors do when they talk about good governance models and risk management. When you are in an organisation that has responsibility for the care of children, this is one of the very real risks, and insurers rightly will be looking very closely at what an organisation is doing before they consider insuring them.

I more than hope - I expect - this will raise the standard and make sure organisations put in place proper mechanisms to ensure the safety of children. Having documents in a folder sitting on a shelf, notionally read as each staff member appears and not being adopted or followed through, is completely useless. It has to be the lived, cultural way we do things around here.

Insurance companies might look for the document - I do not know how they check the culture of the organisation but that is a matter for them. The document is only the first step. I assume insurance is required before such an organisation can operate - this is a question the Leader may like to address - and work with children and other vulnerable people.

Is it a requirement these organisations have insurance before they can operate?

I note the reasons for the prospective nature of this section. The Leader stated she recognises the great difficulty organisations would face in attempting to prove reasonable steps were taken if the duty was to have retrospective application.

I will reiterate what was said by the Leader in her second reading speech. She said -

> It would be extremely difficult for an organisation to defend their practices in relation to historical claims where the need to retain records or implement policies to prevent abuse was not anticipated.

On this point, the royal commission noted, on page 492 of the Redress in Civil Litigation Report, that -

> If the liability was left to the development of the common law and applied retrospectively, in combination with the removal of limitation periods we recommend in Chapter 14, relevant institutions would face potentially large and

> effectively new liability for abuse that has already occurred, potentially over many previous decades. Even if it were possible to obtain insurance in respect of retrospective liability on such a scale, the insurance would be likely to be unaffordable for many institutions. No institution could now improve its practices or take steps to prevent abuse that has already occurred.

I have read some of the submissions into the draft bill. They are all on the Justice website, which is really helpful to enable us to prepare for these debates, and I also considered other, similar jurisdictions' legislation, including that of New South Wales.

The Australian Lawyers Alliance raised concerns regarding the vicarious liability provisions and prospective nature of some provisions of this bill. In the submission from the Australian Lawyers Alliance, concerns were raised regarding the vicarious liability provision initially proposed for Tasmania being expressly prospective, arguing that without a saving provision it could be argued that it would take away many existing retrospective common law vicarious liability rights. They stated in their submission that -

> …the best remedy - in addition to preserving the common law - is to make the provisions relating to vicarious liability expressly retrospective. This would accord with the undertaking given by the Archbishops of Melbourne and Sydney as announced by the Hon. Justice Peter McClellan AM on 15 July 2015 that it is the:
>
> > '… agreed position of every bishop and every leader of a religious congregation in Australia that we will not be seeking to protect our assets by avoiding responsibility in these matters ….'
> >
> > and that:
> >
> > '… anyone suing should be told who is the appropriate person to sue and ensure that they are indemnified or insured so that people will get their damages and get their settlements.'
>
> 17. Clearly, the Catholic Church intended by this statement to accept vicarious liability retrospectively in respect of clergy and volunteers. The Tasmanian Parliament should do no less. At the very least, it should not take away existing common law remedies under the *Prince Alfred College* decision and in accordance with *Scott v Davis*.

I note an amendment was made to section 49J(2) in the bill before us to deal with preservation of the common law but the question of retrospectivity remains. The second reading speech informs us that vicarious liability reforms in other Australian jurisdictions have sought to codify the High Court's approach in the case of the Prince Alfred College decision.

This approach analyses the apparent performance of an employee in a role in which the organisation placed the employee supplying the occasion for the perpetration of child sex abuse by the employee. The employee must then take advantage of that occasion to perpetrate the child abuse on the child. The new test enshrined in the bill makes it clear that an organisation will be vicariously liable for an individual who perpetrates child abuse if their offending is facilitated by their employment with the organisation.

It should be noted that the new statutory duty and vicarious liability are distinct courses of action. The statutory duty is the basis of a claim of negligence and is fault-based, allowing an organisation to discharge presumption based on the reasonable precautions test and applies to a broad range of individuals associated with the organisation. A test of vicarious liability is confined to employment or 'akin to employment' relationships and is a strict liability - liability despite fault or criminal intent on behalf of the organisation. It allows a court to conduct a qualitative assessment of the case before them by examining the employee's role within an organisation and whether that role facilitated their offending. It cannot be definitively stated whether certain categories of employees will be captured under vicarious liability. Instead, the assessment will appropriately be determined by the court on a case-by-case basis.

I ask the Leader to provide further explanation as to the decision to apply proposed new sections 49H and 49J prospectively, particularly in light of her earlier comment that the Government aims to improve civil litigation outcomes for survivors of child sexual abuse and implement royal commission recommendations to strengthen institutional liability for such abuse. I note that survivors have access to the redress scheme but it seems two major revisions of this important reform do not apply to past abuse. I raised this at the briefing; I have some understanding of the rationale behind it, but it is important to put clearly on the record why it does not apply retrospectively.

The bill also amends the Civil Liability Act 2002 to enable child abuse proceedings to be brought against unincorporated organisations, such as church groups, that were previously unable to be sued due to a lack of a legal personality. I understand this is commonly known as the Ellis defence. The Leader indicated that this bill will abolish this defence in Tasmania and I asked the Leader to provide further comment on this aspect of the bill.

I had some discussions with Mr Andrew Morrison QC, both by email and on the phone. He is the Australian Lawyers Alliance spokesperson on institutional child abuse. He presented to the royal commission on behalf of the Australian Lawyers Alliance, and he is very passionate about this area and an expert in the field.

This organisation contacted me and I got back to them. I note their submission again, which I referred to earlier, and it stated on this point -

> The third element of the Ellis defence was the proposition that because priests are not strictly employees, there can be no vicarious liability. It is worth noting that in the NSW Parliament, the Attorney General (AG) undertook to remove the Ellis defence and said in his Second Reading Speech:
>
> > '… it means that no matter when the abuse occurred survivors will now be able to sue a proper defendant with sufficient assets to satisfy a claim.'
>
> … Unfortunately, and while the changes in relation to whom to sue and the availability of assets were made retrospective, the provision for vicarious liability in respect of those in employment-like positions (priests and volunteers) is only prospective. Accordingly, the NSW legislation does not match the expressed intentions of the NSW AG. The Tasmanian Parliament should not make the same mistake.

In reference to the Ellis defence, I note that in 2007, the New South Wales Court of Appeal found that the Church did not legally exist because its assets were in a legally protected trust.

As the Leader stated, these findings prevented Mr Ellis from seeking justice and preventing him from seeking compensation, even though the Church did not dispute that Mr Ellis had been the victim of terrible abuse and had suffered prolonged damage, and legal action could not proceed because there was no proper defendant to the proceedings.

You can only imagine the pain that would be ongoing as a result of that. Not only did he suffer the abuse, but then he had to go through reliving all that only to be told there was no proper defendant. How many times can this poor man be traumatised?

In response to this legal barrier, the royal commission made recommendation 94 in the Redress and Civil Litigation Report, stating that -

> State and territory governments should introduce legislation to provide that, where a survivor wishes to commence proceedings for damages in respect of institutional child sexual abuse where the institution is alleged to be an institution with which a property trust is associated, then unless the institution nominates a proper defendant to sue that has sufficient assets to meet any liability arising from proceedings:
>
> a. the property trust is a proper defendant to the litigation
>
> b. any liability of the institution with which the property trust is associated that arises from the proceedings can be met from the assets of the trust.

This bill provides a process such that once a proper defendant has been appointed, either by the court or the unincorporated organisation, a proper defendant acts on behalf of the unincorporated organisation and is responsible for conducting the proceedings as a defendant.

The provisions to amend the Limitation Act 1974 to allow the courts to set aside a previous settlement between an organisation and the survivor, if it is in the interests of justice to do so, thus enabling a survivor to commence civil litigation against the organisation, is a welcome and important inclusion.

I note, as the Leader said, this did not flow from the royal commission, but rather complements work the Government is undertaking in response to other recommendations, particularly to limitations reform. I sincerely commend the Government for including this change in the bill.

I could not watch, listen to or read much of the evidence received by the royal commission. I again commend and thank those engaged in such a gruelling and important task. We know from the reports, and the reports through other avenues, that survivors of child sexual abuse are unlikely to report their abuse for a significantly longer period than other victims.

In 2018, this Government removed the limitation periods in relation to actions for child abuse in recognition of these findings. So many children, years ago, did raise concerns but they said they were not believed, and it was never followed up. Once you have been told once before as a child you are not right or it is not true, it is very difficult to continue to raise it.

As the Leader stated, one of the impacts of the limitation periods is that survivors of child sexual abuse were generally prevented from pursuing civil law claims for their abuse.

Given the operation of limitation periods, the settlement payments offered to survivors of child sexual abuse were low and, in many ways, provided little tangible support for the victims.

This does give those victims a chance to have some more meaningful compensation and redress but nothing, no amount of amount of money, will ever make up for the harm these people have suffered.

While this amendment seeks to remove these barriers for survivors by allowing them to command some civil litigation in pursuit of a settlement, we need to remember the harm can never be removed from these individuals.

The Leader said in her comments that in the amendment to the Limitation Act 1974, the definition of child abuse differs slightly to the same definition used in relation to the organisational liability introduced under the Civil Liability Act 2002. Here child abuse means sexual abuse or serious sexual abuse of a child or any psychological abuse to the child that arises from sexual abuse or serious physical abuse of a child, but does not include an act that is lawful at the time when it occurs.

This was something that was also raised by a number of people in their submissions to the draft bill. When you first read it, you think child abuse is child abuse and it should not be that serious, but I do understand that 20, 30, 40, 50 years ago, when this abuse was going on, community standards were a little different. I still believe they were wrong, but it is difficult to hold people who lived those years ago to today's standard.

This definition is consistent with the existing reforms to the Limitation Act 1974 and ensures organisations are not liable for actions considered appropriate discipline at the time they occurred.

You look back and children were disciplined back then in some horrific ways. I do not know where you draw the line. It really is difficult for me to hear about beating a child repeatedly with something like a belt with a buckle on it or all sorts of things, and the physical harm that does to a child's body must surely be serious. It is serious, but at the time was it deemed reasonable? Anyway, that is a matter for the court and they will make those determinations.

To be clear, it is intended to operate as a threshold for previous settlements for physical child abuse. They are only set aside where the physical abuse was serious physical discipline beyond the community standards at the time. The challenge in my view is: how do you define the community standards at the time?

I know this definition was raised with some concern by the Tasmania Law Reform Institute in its submission -

> Second, the definition of 'child abuse' uses terms that are ambiguous and inadequately defined. The definition is:
>
> **child abuse**, in relation to a child, means -
>
> (a) sexual abuse, or serious physical abuse, of the child; and

(b) any psychological abuse of the child that arises from the sexual abuse or serious physical abuse -

but does not include an act that is lawful at the time at which it occurs.

Neither 'sexual abuse' nor 'serious physical abuse' are defined. These terms are vague, uncertain and consequently open to inconsistent interpretation. To begin with the word 'abuse' maybe interpreted by some as importing notions of continuous conduct, a course of conduct or systematic conduct. Because this is not the Bill's legislative intent, it would be wise to provide further definition or interpretive guidance of what is meant by sexual and physical abuse. With regard to 'sexual abuse' it is suggested that the definition in the Victorian *Wrongs Act 1958* be adopted;

'"sexual abuse" means sexual abuse or other sexual misconduct'.

Where physical abuse is concerned, redress and liability should not be limited to cases of 'serious' sexual abuse. This limitation is out of step with the approach taken in New South Wales and Victoria (see ss 6F (5) and 6H (4) of the *Civil Liability Amendment (Organisational Child Abuse Liability) Act 2018* (NSW) and s 88 of the *Wrongs Amendment (Organisational Child Abuse Liability) Act 2017* (Vic). In this regard, Tasmanian law should maintain consistency with that in NSW and Victoria. Further, and most importantly, Tasmanian law should not condone any form of physical abuse of children. Additionally, the term '*serious* physical abuse' is vague and thus open to inconsistent interpretations. It is indeterminate and open to highly subjective interpretations. What is serious physical abuse to one person may seem trivial to another. No guidance with respect to the meaning of this term is provided in the Bill, for example, whether seriousness attaches to the degree of force used, the nature of any injuries caused, or both.

For all these reasons and particularly because no form of physical abuse of children is justifiable, the word 'serious' should be removed from the definition of child abuse wherever occurring. Instead it is suggested that the approach in NSW and Victoria be adopted and 'child abuse' be defined as 'sexual abuse or physical abuse perpetrated against a child'.

It may be that redress and liability for physical abuse have been limited in the Bill to '*serious*' physical abuse in an attempt to exclude liability for reasonable physical correction of children (see s 50 *Criminal Code 1924* (Tas)) or other lawful applications of force, such as that used in effecting a lawful arrest. Such applications of physical force are covered by the exclusion contained in the proviso in ss 49H(5), 49J(3) and 49L that child abuse 'does not include an act that is lawful at the time at which it occurs'. This proviso obviates the need to limit child abuse to 'serious' physical abuse. Nevertheless, this exclusion is vague and unnecessarily broad. It applies to both sexual and physical abuse. A clearer, narrower and, accordingly, preferable limitation is provided in s 88 of the *Wrongs Amendment (Organisational Child Abuse Liability) Act 2017* (Vic), which limits the exclusion to physical abuse. This section provides that 'physical abuse':

> 'does not include an act or omission committed in circumstances that constitute -
>
> (a) a lawful justification or excuse to the tort of battery; or
> (b) any other lawful exercise of force'.
>
> It is recommended that the definition of 'child abuse' in the Tasmanian Bill be revised to conform more closely to the Victorian and NSW approaches. Such a definition might be:
>
> ***child abuse*** means sexual abuse or physical abuse perpetrated against a child but 'physical abuse' does not include an act or omission committed in circumstances that constitute -
>
> (a) a lawful justification or excuse to the tort of battery; or
> (b) any other lawful exercise of force.
>
> This definition limits the exclusionary proviso to 'physical abuse'. Currently, the general exception in the Tasmanian Bill applies to both physical and sexual abuse. In this regard it excludes liability for sexual acts that were 'lawful at the time' at which they occurred.

On that point, I do not think sexual assault, the Leader might like to clarify this, has ever been lawful against a child but, again, it comes down to what the definition of sexual assault is. Going back to the TLRI submission -

> The meaning of lawfulness 'at the time of the conduct' in this context is likely to be highly contestable. Of most concern is that it may be arguable in historic cases of child sexual abuse and, where found to be applicable, defeat the Bill's exclusion of limitation periods for such conduct. The lack of certainty in the operation of the exclusion where child sexual abuse is concerned supports the revision of the definition of 'child abuse' in the terms suggested.

That was a long quote, Mr President, but it was all relevant to the definitions in this bill. I would like the Leader to provide much further clarity and explanation as to why the drafting was not changed to reflect what I see as legitimate and real concerns regarding the definition of child abuse in the section. I raised it at the briefing, so I am sure her advisers will be able to provide her with some further information on this.

I acknowledge the comments made regarding the proposed approach of setting aside a previous settlement if it is in the interests of justice to do so. It does provide flexibility to the courts, with a non-exhaustive list of matters to which a court may have regard in determining whether it is in the interests of justice to set aside an agreement affecting a settlement in respect of a relevant right of action. It is important to facilitate the court's role in determining other factors to be relevant in this specific case.

I worked for a number of years with a constituent of mine who was a victim of the most horrific abuse. The church was involved but many others were involved as well. It was not only her, it was her siblings, and some of them were not her blood siblings, but I worked with her for a long time. The first time she had ever told her story and was believed was when she told it to me. We do not know exactly how old she is because she has no record of her birth, no birth certificate.

She put in a submission to the Senate inquiry. I wrote it for her because she is illiterate. I listened to her story; we wrote it all down, and I said to her before I put it in -

> This is the first time you are telling your story. Your children don't even know about this. Your husband doesn't know about this. We can put it in as completely confidential, we can put it in as a confidential submission from me or we can put it in as an open submission from you.

I sent her away to think about it because the abuse described in this was horrendous. The impact on her life has been horrendous and some of the things that happened to her were not believed by those who were caring for her.

I had some members of a particular church order meet her in my office after they had told me that a certain thing had never happened to her. I said, 'Well, I have a piece of paper here that tells me quite clearly it did. I can send you a copy if you want'. I read out this document that I had that clearly indicated that what she told me was true. It took me months and months to find this document. When we did it was like finding gold because it validated some of the terrible things that had happened to her. This member of the church order met with her in my office. She had been refused access to our state redress scheme - children abused in state care - because she did not have a birth certificate. She was not eligible.

We fought and we fought and we got her some compensation, but that scheme did not provide for very large payouts. Someone like her now has ongoing health problems, significant health problems, costs she cannot afford. Her husband is no longer with her. He passed away. Her daughter died young. These sorts of things will hopefully open another avenue for her, even though she has had a payout. She only received a payout from the state, she did not receive a payout from the other religious organisation.

Mr President, until you have sat with someone and listened to them through this - and it took several meetings for her to go through all of it - you cannot understand the horror. I do not understand the horror. You cannot try to appreciate the horror some people in our communities have lived with. I cannot understand it. I have never been exposed to anything like that, but there are people out in our communities who are living through this, and we do not know. They might not have told anybody but, if they do, that person needs to believe them. When they come forward, that person needs to be believed.

I wanted to raise that as one of many but a very clear example. We still have not been able to find out who she is, really, where she came from, where she was born or the date she was born. We have indications of her age. She has a certificate to say she has no birth certificate. I managed to get that for her. Imagine what that must be like. I do not think anyone can really imagine it.

I commend the Government for the timely and proactive action to address recommendations of the royal commission and hope the enactment of this bill provides more accessible access to justice to survivors of horrendous abuse. I also acknowledge the work that the departmental officers have done in this, particularly Amber Mignot. I think she has put her heart and soul into this, but listening to the testimonies of the royal commission, reading through all those reports must be harrowing too. I acknowledge the work she has done on this.

I support the bill. I am glad to see it here and I would appreciate further comments regarding those few areas I have raised as genuine concerns during my contribution.

[12.25 p.m.]

Ms WEBB (Nelson) - Mr President, I am pleased to support such important legislation. I congratulate the Attorney-General and the Government for their continued work to put into place recommendations of the Royal Commission into Institutional Responses to Child Sexual Abuse. In addition to the work of this Government, it is always good to remember and acknowledge, too, the work of former prime minister Julia Gillard and the commissioners who made the royal commission a reality.

However, it is clear to all of us in the Chamber that we would not be debating this bill today if it were not for the strength shown by the survivors who shared their stories. It is because of them that we are making progress to improve the care of children in this state and others. What the royal commission revealed was an abhorrent breach of trust by adults entrusted with caring for our children. By the thousands of letters, calls and private sessions presented by the survivors, the abuse that was uncovered was on quite a horrific scale. Of course, with the royal commission over, the job of addressing its recommendations is not yet completely done; from a legislative point of view we still have work to do. We also know that it can take decades for survivors to report their abuse, meaning that we will no doubt hear many more cases of institutional abuse in coming years.

That is why I am glad the bill we are looking at today is geared towards the future with a focus particularly on access to justice and better protections. I will not speak in detail on all elements of the bill as others have done so already, and I thank them for that. I particularly appreciate the detailed contribution just now from the member for Murchison and the particular matters she has raised for further clarification by the Leader; I look forward to hearing some of those answers.

I will note briefly, and particularly to support, the major aim of this bill, which is to reduce barriers for survivors of abuse to seeking justice through civil litigation. Of fundamental importance in this bill is the imposition of a statutory non-transferrable duty on all organisations responsible for our children to prevent individuals associated with their organisations from perpetrating child abuse. This is an essential recognition that responsibility cannot be shirked by organisations. It will require all such organisations to establish robust and accountable processes to ensure child safety and prevent and respond to child abuse.

Another barrier I will note briefly that has been removed by this legislation is that cases can now be brought before the courts even if the perpetrator or the organisation no longer exists or does not have a legal entity. This loophole, which had allowed institutions to avoid liability, known as the Ellis defence, was established in a case against the Catholic Church brought by abuse survivor John Ellis. In that case the Church managed to avoid being sued for abuse simply because the perpetrator had passed away. This was despite clear knowledge and acknowledgment that the abuse had taken place. This is a particularly positive change that this legislation brings about, and I am sure it aligns with most people's expectations that legal technicalities such as those should not stand in the way of abuse survivors seeking and gaining justice.

These are all vital steps in improving how we as a community can do better and will do better by this state's children. This bill not only improves their safety but it also helps victims pursue justice in the future. I am pleased to support the bill.

[12.29 p.m.]

Mrs HISCUTT (Montgomery - Leader of the Government in the Legislative Council) - Mr President, I thank the member for Murchison for those questions. They are quite lengthy in nature so I will make my way through them.

The first one starts with some queries raised by the Australian Lawyers Alliance. I will read it. You talked about the vicarious liability especially being prospective.

The ALA remains concerned the bill does not introduce retrospective operation of the extension of vicarious liability to people who are akin to employees. Its submission remains predicated on the proposition the common law will not operate in relation to claims made under vicarious liability for abuse occurring prior to the amendments.

Proposed new section 49(J)(2) of the bill expressly saves the common law in relation to the operation of vicarious liability, ensuring that the bill does not reduce the existing rights of people affected by child abuse.

In the bill, the reforms to vicarious liability have been made expressly prospective for two critical reasons and they are -

(1) It is a general principle of law not to punish persons for a breach of the law that did not exist at the time of the breach. There is an inherent unfairness in retrospectively imposing legal obligations.

    Vicarious liability is a liability that arises on an occasion without the need to prove fault. It is, in effect, a strict liability that cannot be defended by organisations regardless of the level of supervision of their employees.

    Plaintiff lawyers support retrospectivity in relation to amendments to vicarious liability and not the imposition of the statutory duty because defendant lawyers cannot defend against these matters on the matters of their good conduct or child safe practices.

(2) If the liability was not posted retrospectively, many 'innocent' organisations, that is organisations without claims for child abuse, undertaking child-related services will pay high insurance premiums because of the potential increased risk of liability.

Ms Forrest - That would be a general insurance thing where they would all hike it up, for all organisations.

Mrs HISCUTT - Yes.

Many organisations operating important services for children are small with minimal resources for increased insurance premiums. This impact may reduce the market for child-related services, particularly those smaller specialist services such as Family Day Care and sporting associations.

The breadth of the reforms and impact on smaller innocent organisations has been an issue of concern for the Law Society of Tasmania and the Commissioner for Children and Young People who specifically raised concerns about the impact on innocent organisations providing child services in Tasmania.

The ALA recommendation (2) makes the extension to those in employment-like positions, such as volunteers and priests, retrospective. Over recent years, the courts have been increasingly willing to extend vicarious liability to employment-like arrangements. An example of this is the High Court case, as I stated earlier, the *Prince Alfred College Incorporated v ADC* 2016, Volume 258, *Criminal Law Reports*, page 134.

As stated above, proposed section 49(J)(2) expressly preserves the existing common law in relation to matters that arise before these legislative amendments, but ensures the extension of vicarious liability to employment-type arrangements in the future and clearly identifies the nature of the liability for organisations so they can take appropriate steps to protect children and, in turn, themselves from liability.

The Government recognises that offending organisations have failed to act appropriately in relation to child abuse and failed to implement appropriate policies to protect against child abuse. It is important to remember that many organisations undertaking child-related services that have undertaken services appropriately and implement a protection for children will also be affected by these reforms.

The impact on reforms to organisational liability on organisations that conduct themselves safely in respect of children now and in the past will face increased costs by insurers, simply by participating in the child-related services market. These increased costs will affect the market for services in Tasmania and is likely to push a number of smaller innocent organisations out of the market. This is not the intention of these reforms, which are to ensure that offending organisations are accountable.

The royal commission did not see the need to make amendments to vicarious liability in order to ensure people are appropriately able to seek justice in relation to organisational abuse. The royal commission critically assessed in its four-year inquiry the barriers for people affected by child abuse seeking justice through civil litigation and concluded that these laws do not need to be applied retrospectively. It is important to note that offending organisations are able to be sued for negligence. Examination of the basis of those claims being defended has, historically, largely arisen not from the failure to meet the threshold for negligence but because of a number of the other technical defences that are addressed in this bill and/or have been addressed in prior legislative reforms. For example. proper defendant or the abolition of limitation periods.

ALA recommendation (3), 'in addition (or at the worst, in the alternative), expressly preserve the common law', so this recommendation has been accepted. The common law vicarious liability has been expressly preserved in proposed section 49J(2) of the bill. ALA recommendation (4) simplifies the provision for identifying and suing a defendant in an unincorporated association. This recommendation has been partly accepted with a reduction in the time that an organisation is allowed to nominate a proper defendant. In proposed section 49P(1)(a) of the bill, the time limit of 120 days has been reduced to 60 days to speed up the process for survivors of child abuse.

The Western Australian approach has not been adopted due to the possibility of an organisation not having a current senior office holder with appropriate personal protection who can be sued. This presents another political legal loophole that is avoidable by the bill's drafting and allows the court flexibility to make a case-by-case assessment of the organisation's arrangements.

The TLRI consultation was adopted in the final bill in relation to the definition used in the Civil Liability Act 2002. The question was asked: why is the definition of child abuse in the Limitation Act 1974 different from the definition of child abuse in the Civil Liability Act 2002? In the amendment to the Limitation Act 1974, the definition of child abuse differs slightly to the same definition used in relation to the organisational liability introduced under the Civil Liability Act 2002. Here, child abuse means sexual abuse or serious physical abuse of a child or any psychological abuse of the child that arises from the sexual abuse or serious physical abuse of a child, but does not include an act that is lawful at the time at which it occurred.

The definition is consistent with the existing reforms to the Limitations Act 1974 and ensures that organisations are not liable for actions considered appropriate discipline at the time they occurred. The member for Murchison went into that in more depth in her contribution. It is intended to operate as a threshold for previous settlements for physical child abuse so that they are only set aside. That is, where the physical abuse was serious physical discipline beyond the community standards at the time. The drafting of the determinations as they are is to maintain consistency with other Tasmanian legislation. The Government is confident that the definitions achieve the same policy outcomes as the alternative definitions raised by the TLRI.

We talk about what constitutes 'child abuse'. The statutory duty applies to child abuse which is defined in the Civil Liability Act of 2002 as meaning the sexual abuse or physical abuse of a child and any psychological abuse of the child that arises from the sexual abuse or physical abuse, but does not include an act that is lawful at the time at which it occurs. Sexual abuse has never been lawful for these purposes.

The member also asked whether organisations engaged in child services are required to insure, but that is a difficult framework to cover. Basically, government agencies are self-insured. Funding agreements with governments for non-government child services require insurance under those arrangements. Independent schools report insurance to the school's registration board, so it has to be covered somehow, but it is a very difficult framework.

Thank you, Mr President, I think I have covered all those things.

Bill read the second time.

JUSTICE LEGISLATION AMENDMENT (ORGANISATIONAL LIABILITY FOR CHILD ABUSE) BILL 2019 (No. 36)

In Committee

Madam CHAIR - For members' information before we start, clause 6 will be broken up into subclauses because that is where a lot of the detail is, and doing so will enable members who wish to ask questions on those subclauses separately. I will call two or three clauses together so be ready to go.

Clauses 1 to 5 agreed to.

Clause 6 -
Part 10C inserted

Proposed sections 49C to 49E agreed to.

Proposed section 49F -
Organisations responsible for children

Mr DEAN - Madam Chair, proposed section 49F relates to organisations responsible for children. There was some discussion on this in the briefings. I thank the Leader for those briefings and for the officers delivering the briefings and for this document. It is an important document and

I sometimes wonder whether it ought to be attached to the bill in order to be tabled because it gives a good explanation to anybody looking at the bill.

The situation here -

> An organisation is responsible for a child if it (including any part of it) exercises care, supervision or authority in respect of the child, or purports to do so or is obliged by law to do so.

Sporting organisations, scouts and others, have raised this question: what liability rests with the organisation in relation to travel? At what time do they pick up that responsibility for a child? Is it from the time the child leaves home to get to the organisation and then is returned from the organisation to their home? Does any liability rest with the organisation in that situation? Reading from the notes, it refers to the nature of the organisation, the level of control the organisation had over the individual that perpetrated the abuse. If I could have some explanation on exactly what the situation is in that regard.

Mrs HISCUTT - It is when the organisation takes control of the child. Once the child is in the vehicle of the organisation, it would then be responsible. If the parent were driving the child afield, of course the organisation is not responsible for that. It is at the point where the responsibility is exchanged. It is once the parents are out of it - or the carer or whoever delivers the child - and the actual organisation takes over. If the bus were to pick up the child from the door of their home, once the child is in the bus, that is the exchange of the responsibility.

Mr DEAN - Thank you for that explanation. So there is absolute certainty about this, if a parent, for instance, sends another person to the organisation to pick up that child, I take it the organisation is responsible until such time as that child gets into that other vehicle. Once the child is in that vehicle, there is no further responsibility or liability resting with the organisation.

Mrs HISCUTT - Yes.

Mr DEAN - I accept that if the organisation were to arrange that transport, then yes, it would accept liability.

Mrs HISCUTT - Yes, the member has it summed up.

Proposed section 49F agreed to.

Proposed sections 49G to 49S agreed to.

Clauses 6 to 9 agreed to and bill taken through the remainder of the Committee stage.

LONG SERVICE LEAVE (STATE EMPLOYEES) AMENDMENT BILL 2019 (No. 47)

Second Reading

Mrs HISCUTT (Montgomery - Leader of the Government in the Legislative Council - 2R) - Mr President, I move -

That the bill be now read the second time.

The purpose of this bill is to amend the Long Service Leave (State Employees) Act 1994 to clarify the long service leave entitlements of persons covered under the act and to address an inequity between persons appointed under the Parliamentary Privilege Act 1898. The amendments also contemporise the act to better support modern employment in the Tasmanian public service, which is more flexible and family friendly than when the act was originally introduced in the early 1990s.

The definition of 'employee' will be amended with the effect that any person appointed under the Parliamentary Privilege Act will now be an 'employee' for the purposes of the act. This is more inclusive than the current definition, which, in relation to persons appointed under the Parliamentary Privilege Act, only includes those appointed as 'officers' under section 3 of that act. This means that currently persons appointed as sessional and temporary employees under section 4 of the Parliamentary Privilege Act are not entitled to long service leave under the act. This gives rise to an obvious inequity between persons appointed under the Parliamentary Privilege Act.

Transitional provisions regarding the long service leave entitlements of persons appointed under the Parliamentary Privilege Act will be inserted to validate previous calculations.

The current definition and use of the term 'Secretary' in relation to disputes and record keeping is prohibitive for employees appointed under the Parliamentary Privilege Act who do not have a secretary. The amendments will replace the term 'Secretary' with the more inclusive term 'relevant manager', which will include provision for employees appointed under the Parliamentary Privilege Act.

Currently, only employees with a 'relevant Minister' can apply to seek permission to retain and, if granted, be credited with an entitlement to a period of long service leave in excess of 100 days. Not all employees under the act have a 'relevant Minister' as currently defined. This creates an obvious inequity between employees under the act.

The amendments will remove the term 'relevant Minister' and replace it with the term 'relevant authority'. 'Relevant authority' has been defined more inclusively. Where an employee does not have a minister who administers the government department or state authority in which they are employed, the minister responsible for administering the act will be the relevant authority, unless the employee is a person appointed under the Parliamentary Privilege Act. The relevant authority for those employees will be their prescribed authority.

Long service leave is currently calculated in accordance with section 12 of the act. As it stands, section 12 does not accommodate modern working arrangements well, with differing interpretations causing confusion and leading to unfair outcomes between employees. The act was introduced at a time when the vast majority of public servants worked a standard 7.6 hours per day, but now there are many circumstances where that is no longer the case.

This bill will better accommodate modern working arrangements by varying the basis upon which long service leave entitlements are calculated from days to hours. Further, the calculation of long service leave in section 12 will be simplified, such that there will be a single equation that can be used to calculate the long service leave entitlement of any type of employee over any period of continuous employment not exceeding one year.

References to old industrial entitlements will be updated. References to the term 'sick leave' will be removed and replaced with the term 'personal leave' to reflect the majority of modern Tasmanian public sector awards, in which the term 'personal leave' is defined to include more than only leave provided for personal illness or injury.

The term 'sick leave' under the act has, prior to these amendments, included only personal leave provided for personal illness or injury, and not for other reasons such as those common in the modern Tasmanian public sector awards. The purpose of these amendments is to clarify, not change, entitlements. As such, where it is intended that a provision relates only to personal leave provided for personal illness or injury, it will be reflected in the amendments, which can be seen in paragraphs (d),(e), (m) and (p) of clause 8 of the bill.

Mr Dean - Clause 7?

Mrs HISCUTT - I will clarify that.

Mr Dean - It must be an amendment - no, it's probably an error in your -

Mrs HISCUTT - If you look in the bill we have before us today, it is clause 8.

Any other references to 'personal leave' in the bill - namely, clauses 7, 10 and 13 - will encompass other elements of personal leave found in modern Tasmanian public sector awards, for example, personal leave provided to employees:

- to care for members of their immediate family or household who are sick and require care or support;

- to care for members of their immediate family or household who require care due to an unexpected emergency; and

- an employee who is experiencing family violence to attend to health issues or legal, financial, housing, child care or other issues arising from family violence.

It is clear from the extrinsic material for the act that section 11(2)(d) refers to entitlements for maternity leave as 'sick leave' taken because of pregnancy and childbirth. This outdated reference to maternity leave as 'sick leave' will be removed in amendments to section 11(2)(d) of the act, which will also clarify that paid maternity, adoption and partner leave will be able to be included in the calculation of a period of continuous employment. This will better reflect modern industrial entitlements.

Most references to the term 'length of employment' will be replaced with terms like 'calculation of a period of continuous employment'. This use of consistent terminology will clarify how section 11 interacts with other sections of the act.

Outdated references will be updated. The reference in section 5 to the Long Service Leave (Construction Industry) Act 1971, which is no longer in force, will be removed and replaced with the Construction Industry (Long Service) Act 1997, which is currently in force.

The outdated references to the Stanley Cool Stores Board in Schedule 1 will be removed.

During consideration of the bill in the other place, the Government moved an amendment to the bill with respect to State Service employees in receipt of a higher duties allowance. As a result of this amendment, in appropriate circumstances, employees will no longer revert back to their substantive classification for any periods of long service leave.

These amendments will be of benefit to both employees and employers, with greater certainty and clarity -

Sitting suspended from 1.00 p.m. to 2.30 p.m.

QUESTIONS

Tasmania Police - Domestic Violence Trends

Ms FORREST question to LEADER of the GOVERNMENT in the LEGISLATIVE COUNCIL, Mrs HISCUTT

[2.30 p.m.]

With regard to incidences of domestic violence and abuse -

(1) Does Tasmania Police monitor trends in the incidence of domestic violence related to specific events, including -

(a) Major sporting events such as AFL Grand Final and the Rugby World Cup finals, Melbourne Cup et cetera?

(b) Local major sporting events, such as local football league grand finals?

(2) If so -

(a) Are observable increases in responses to domestic violence and abuse recorded?
(b) Please provide supporting data.

(3) Has Tasmania Police observed any other trends identifying spikes in reporting of domestic violence and abuse related to other factors, and, if so, what factors are identifiable?

ANSWER

Mr President, I thank the member for Murchison for her question.

(1) Tasmania Police does not routinely monitor trends in family violence specifically relating to major or local sporting events.

(2) An increase in family violence matters is attributed to a reduced level of tolerance by the community and victims and greater community and victim awareness and confidence in family violence responses and services.

As more family violence orders are served on offenders by police and the court, 40 per cent of the overall increase in family violence incidents in the last six years is due to a breach of an order.

(3) Statistically, alcohol maybe a factor, as at least one in five incidents indicated at least one party was affected by alcohol in family violence incidents attended by police in 2018-19.

However, over the last four years, there has been a decline in the number of family arguments and incidences where one or both parties were affected by alcohol. Other trends of note are a tendency for family violence episodes to increase on Saturdays and Sundays and to drop off mid-week. Also, they tend to increase during holiday periods, with a peak in December and January.

These trends are stronger among family arguments and low-risk family violence incidents rather than high-risk incidents. In 2018-19, 269 family violence incidents were classified as high-risk, which is a 12 per cent decrease compared to 2017-18.

Reduction in Surgical Services

Ms ARMITAGE question to LEADER of the GOVERNMENT in the LEGISLATIVE COUNCIL, Mrs HISCUTT

Would the Leader please advise -

(1) Despite the Government's claims of record funding growth resulting in 'the second highest rate of any state in Australia', why has there been a reduction of 17 per cent in surgical services in Tasmania during 2019?

(2) As a corollary of the first question, the reduction in surgical services has caused a commensurate rise in waiting lists. What is the Government's plan to address the elective surgery waiting list, when it is clear that allocating greater portions of the state budget does not seem to be addressing the problem?

(3) The Launceston General Hospital has lost training accreditation in medicine and emergency medicine in recent years. With the reduction of surgical activity and only complex cases being performed, as opposed to the more typical cases from which trainees can best learn, there is concern over ongoing training accreditation in the very near future. What is the Government's plan to ensure no additional training is lost in Tasmania?

(4) What specific plans does the Government have in place to leverage opportunities being presented to the health sector in northern Tasmania, given the significant health and training projects that are underway, such as the University of Tasmania redevelopment and the hospital co-location project?

(5) What are the Government's plans to attract and retain talented and able health professionals to Tasmania in the years ahead?

ANSWER

Mr President, I thank the member for Launceston for her question. This answer is lengthy in nature and probably would have been best put on the Notice Paper. I have some answers; I hope that you are satisfied with them.

Ms Armitage - Thank you. With respect, I did want an answer sometime this year. That was the reason I did not put it on the Notice Paper.

Mrs HISCUTT - They are very intricate.

Ms Armitage - I appreciate that, but questions do stay for some time on the Notice Paper on occasion.

Mrs HISCUTT - The answers are as follows -

(1) and (2)
We are delivering a record $8.1 billion over four years, which is $2.3 billion more than when we came to Government. Each year, the department and the Tasmanian Health Service plan the level and type of activity for the Tasmanian health system, including the type and volume of elective surgeries, emergency department presentations and admissions to hospital for complex medical care based, on demand and available funding.

Investment for Health has increased to 32 per cent of our budget and we know there is increasing demand across the health system that needs to be met, including increased demand for admission and emergency departments and need for colonoscopies and other diagnostic procedures. We acknowledge these competing funding priorities must be balanced and we will continue to roll out our $757 million plan for Health, which includes almost 300 additional hospital beds, with more staff and more funding, which will boost the level of surgery we can provide over coming years.

(3) The Government values the important role that medical trainees provide in our health system. Trainees provide valuable services to patients and they are training to be the specialty workforce of the future. We also know that investing in training locally means that the Tasmanian community is more likely to be able to recruit the medical specialty workforce. The Government will continue to work through the Department of Health and the Tasmanian Health Service on issues of accreditation to ensure we have the balance right between providing services and training and educating of the workforce of the future.

Ms Armitage - Sorry, with respect, you have not answered any of my questions.

Mrs HISCUTT - With respect, I did say it would take quite a while to get these figures together and they should have been on the Notice Paper. Would you like me to continue?

Ms Armitage - You can continue, and I may put these questions on the Notice Paper because these are general rather than specific answers.

Mrs HISCUTT - You are welcome. That is right, because it takes a lot of time to find the answers to the questions you asked -

Ms Armitage - Not if you knew what you were doing with Health -

Mrs HISCUTT - Would you like me to continue or did you want to put your question on the Notice Paper?

Ms Armitage - No, no, keep going.

Mrs HISCUTT - To continue -

(4) The developing health precinct in northern Tasmania provides an opportunity to work more closely with the university and the private sector to build our training capacity in the north. We

know that attracting and retaining medical practitioners to live and work in regional centres can be difficult and that providing high-quality education and training opportunities is a key factor in improving this. Providing employment opportunities that allow medical practitioners to work across the public sector, the private sector and with the educational institutions can often be a drawcard and assist in the recruiting of specialty positions.

(5) The Government has established a health workforce planning unit, which is looking at how best to attract and retain the health professionals Tasmania needs and to continue to provide high-class health services to the community. Our objective is that the Tasmanian Health Service will be developed into a workplace of choice. To do that, we need to recognise the importance of Health leaders in driving a culture supportive of high-quality, safe, person-centred service delivery.

In addition, promoting and supporting the health and wellbeing of the Health workforce will be a priority.

The Department of Health, the Tasmanian Health Service and the clinicians meet regularly with University of Tasmania College of Health and Medicine staff to discuss ways to improve our medical school program. Similarly, there is an ongoing close dialogue with the medical colleges in relation to our training programs in Tasmania.

National Driver Licence Facial Recognition Solution

Ms WEBB question to LEADER of the GOVERNMENT in the LEGISLATIVE COUNCIL, Mrs HISCUTT

[2.39 p.m.]

In response to the Government's answer to the question put by the member for McIntyre on 31 October 2019 in relation to consent to the collection and storage of biometric data of Tasmanians for use in the National Driver Licence Facial Recognition Solution -

(1) What assessment was undertaken to ensure the collection of data for this purpose is compliant with the Personal Information Protection Act 2004?

(2) How is the collection and storage of biometric data for the purposes set out in the Intergovernmental Agreement on Identity Matching Services made between the Tasmanian Government and the Commonwealth, states and territories in October 2017 compliant with the Personal Information Protection Act 2004, in particular Schedule 1, clauses 1, 2, 5 and 6, noting that intergovernmental agreement-specified data is to be used not for vehicle licensing and driver identification but for preventing identity crime, general law enforcement, national security, protective security and community safety?

(3) Why did the Government not refer the terms of the agreement to a parliamentary committee or seek amendment of primary legislation through the parliament to support Tasmania's participation in the national identity-matching services regime?

ANSWER

Mr President, I thank the member for Nelson for her question.

(1) The Registrar of Motor Vehicles - the registrar - was satisfied there was legislative authority for the disclosure of driver licence images for identity-matching purposes. However, to give additional certainty, the relevant provisions of the Vehicle and Traffic (Driver Licensing and Vehicle Registration) Regulations 2010 were amended to specifically cover disclosure for this purpose.

The Personal Information Protection Act 2004 - PIP act - allows for the disclosure of personal information for the purpose for which it was collected, which includes national identity-matching services as noted in the personal information collection statement.

The PIP act also allows for disclosure for a purpose other than the purpose for which it was collected if that disclosure is reasonably necessary for law enforcement purposes, including the prevention and detection of identity crime.

(2) Clause 1 of Schedule 1 of the PIP act deals with the collection of personal information. The collection of photographs and other identifying information is a statutory requirement for the issuing and renewal of driver licences. There is no additional information collected for the purposes of identity-matching services.

Clause 2 of Schedule 1 allows for disclosure of personal information other than for the purpose for which it was collected if that disclosure is reasonably necessary for law enforcement purposes. On this basis, the provisions of the PIP act are not inconsistent with the specific provisions in the licensing regulations that permit disclosure for the purposes of identity-matching services and the two provisions can operate concurrently.

Clause 5 of Schedule 1 of the PIP act deals with documentation of policies for the management of personal information. The disclosure of personal information for the purpose of identity-matching services is clearly set out in the intergovernmental agreement. This agreement may be provided on request to anyone who asks for it, in accordance with section 5 of Schedule 1 of the PIP act. This information is also available via the Department of State Growth's Transport website at www.transport.tas.gov.au

In accordance with clause 6 of Schedule 1 of the PIP act, individuals may access their personal information held in the driver licence register by submitting a request to the registrar. Information regarding this process is available on the Transport website.

(3) The changes made to the regulations followed the national agreement at COAG in October 2017 for the establishment of national identity-matching services. The amended regulations were published in late December 2017, tabled in both Houses of parliament in June 2018 and examined by the Subordinate Legislation Committee later the same month. The Government has provided full public and parliamentary review of these changes, the legal provisions used and the reasons for doing so.

Interstate Heavy Vehicle Registration

Ms RATTRAY question to LEADER of the GOVERNMENT in the LEGISLATIVE COUNCIL, Mrs HISCUTT

[2.44 p.m.]

Due to a number of heavy transport vehicles contracted by a company operating in Tasmania and travelling on Tasmanian roads that are long-term Queensland-plated -

(1) What is the time frame that an interstate vehicle can operate in Tasmania before being required to register in our state?

(2) In regard to heavy vehicles, are all interstate-based companies operating in Tasmania required to comply with national heavy vehicle regulations with regard to registration where normally a newly registered vehicle in Tasmania has a number plate beginning XT?

(3) If they are required to comply, who is responsible for the compliance?

(4) If these vehicles have an arrangement with the Tasmanian Government, what are the details of that arrangement?

ANSWER

Mr President, I thank the member for McIntyre for her questions.

(1) Under the regulations an interstate vehicle being used in Tasmania for commercial purposes can operate on its interstate registration for a period of up to three months or a longer period approved by the Registrar of Motor Vehicles.

(2) While a nationally consistent heavy vehicle number plate has been introduced, vehicle registration is not part of the Heavy Vehicle National Law and Regulations. As such, operators are required to comply with state and territory vehicle registration laws.

(3) In July 2018, compliance activities for heavy vehicles in Tasmania transitioned to the National Heavy Vehicle Regulator. Under this arrangement, the NHVR undertakes heavy vehicle registration compliance activities on behalf of the Department of State Growth.

(4) The Registrar of Motor Vehicles has granted a short-term extension to the interstate operator. This extension has been provided as the vast majority of vehicles will be re-registered in Tasmania in the coming months as the vehicle registrations expires. Those remaining vehicles that are not staying in Tasmania are required to leave the state by the end of February next year. The Registrar of Motor Vehicles will continue to monitor the situation to ensure the operator complies with legislative obligations and if this does not occur, the matter will be referred to the NHVR to follow up.

Ms Rattray - I will be watching their plates as well.

Bob Brown Foundation - Tarkine Treetop Protests

[2.47 p.m.]

Mr DEAN question to LEADER of the GOVERNMENT in the LEGISLATIVE COUNCIL, Mrs HISCUTT

The reasons these questions are not put on notice is because it takes too long to get answers back, as the member for Launceston said. That is why we do it this way.

Mrs Hiscutt - That is the member's choice, but please do not expect a turnaround in 24 hours for it.

Mr DEAN - If the questions on notice were answered more quickly, we would take that course. I would, many more times than I do.

The Bob Brown Foundation has widely publicised the treetop protest actions it has taken in the Tarkine area. BBF campaign manager Jenny Weber stated on ABC radio on 23 October, 'We are hosting these actions'. They are holding weekly 'activist drop-in sessions' to train protestors and have solicited specifically for donations to fund the protests. Will the Leader please advise -

(1) As a registered charity with paid employees, is the Bob Brown Foundation required to comply with the Work Health and Safety Act 2012 (Tas.)?

(2) Has WorkSafe Tasmania taken any action to look into the work safety practices of the Bob Brown Foundation in the last couple of years?

(3) If so, what have been the outcomes, if any, and what is the status of any ongoing investigations?

(4) Is WorkSafe Tasmania aware of the treetop protests being conducted by the Bob Brown Foundation?

(5) If so, what action, if any, is WorkSafe Tasmania taking to ensure these actions comply with the Work Health and Safety Act 2012?

ANSWER

Mr President, I thank the member for Windermere for his questions.

(1) The Bob Brown Foundation is required to comply with relevant duties set out in the Work Health and Safety Act 2012 as are all persons who enter a workplace. Specific health and safety duties are set out in that act.

(2) Yes, the minister has been advised that WorkSafe Tasmania has received numerous complaints concerning the activities of forest protestors.

(3) The minister has been advised relevant inquiries are continuing, and as such it would not be appropriate to comment on ongoing investigations.

(4) Yes, the minister has been advised WorkSafe Tasmania has received complaints concerning treetop protests.

(5) The minister has been advised relevant inquiries are continuing, and as such it would not be appropriate to comment on ongoing investigations.

LONG SERVICE LEAVE (STATE EMPLOYEES) AMENDMENT BILL 2019 (No. 47)

Second Reading

Resumed from above.

[2.50 p.m.]

Mrs HISCUTT (Montgomery - Leader of the Government in the Legislative Council - 2R) - Mr President, these amendments will be of benefit to both employees and employers, with greater

certainty and clarity likely to bring more consistent outcomes between employees and reduce disputation between employees and employers.

The Tasmanian Government supports flexible working arrangements to ensure positive work-life balances and gender equity. These new working arrangements were not commonplace when the act was first introduced in the early 1990s. These amendments will ensure that the act better accommodates the modern working environment in the Tasmanian Public Service.

Mr President, I commend the Bill to the House.

[2.51 p.m.]

Ms FORREST (Murchison) - Mr President, this is eminently sensible legislation, which contemporises legislation that dates back to mechanisms put in place with the Parliamentary Privilege Act 1898. There was an earlier version. It must not have been in that version.

I do not have any issues with the intention or the motivation behind this. I would be interested to know when it was picked up. It has been there for a long time. Over the last couple of hundred years, we have seen women repeatedly disadvantaged in the workplaces by, initially, no access to superannuation, thus being in a much worse position entering into retirement or later part of their lives, and in non-continuous employment through having a child or other caring responsibilities that predominantly fall to women. It would be interesting to know more about how this was identified, when it was identified and the movement since.

I note the Government said it does, as it should, support flexible working arrangements to ensure positive work-life balances and gender equity. We often talk about flexible workplaces and flexible work hours, including part-time work or the ability to work from home as part of full-time work, as well as in another setting or workplace. It is generally thought that women will undertake those roles. The gender equity aspect is that we need to make it possible and normal for men to take flexible work hours in supporting their partners, their families and taking more of an active role in those caring responsibilities. We are seeing more and more of that. The last thing we need is legislation that makes it more difficult without even realising that it does. That is one of our challenges with legislation that was made many, many years ago - it was framed around men's work because that is predominantly what it was. I am pleased to see this has been contemporised along those means. It is interesting when you see how different employment processes are structured.

The Parliamentary Privilege Act is an interesting beast in that there did seem to be differences between the entitlements people had. It is right that everyone is treated equitably in this, regardless of who they work for - whether they are working for a minister or they do not have a minister, for example. This legislation tidies that up. It also reframes leave and how entitlements such as personal leave are described, and picks up on a range of other types of leave. It irked me that maternity leave was considered to be part of sick leave. Having a baby is not a sickness. It never has been and it never will be. It is a normal life event and it should be seen as that.

Mrs Hiscutt - You could get sick of it, but it is not a sickness.

Ms FORREST - This is why language is so important. When we use words like 'sickness' and 'childbirth' or 'childbearing' or 'maternity care', or that sort of thing in the same sentence, it says this is not a normal healthy state of being. Language is important and when we are updating legislation, we should always look out for these areas where language can be improved and gender inequality removed.

I commend the Government for fixing this legislation, for contemporising it in this way and ensuring all employers, male and female, employed under the Parliamentary Privilege Act are afforded the same entitlements.

[2.56 p.m.]

Ms ARMITAGE (Launceston) - Mr President, as has been pointed out, this bill brings the Long Service Leave Act up to current standards, simplifies the calculation of long service leave and amends the Long Service Leave (State Employees) Act 1994, which was clearly defined by the Leader in her second reading speech.

It is good to see, as the member for Murchison mentioned, the term 'sick leave' removed and replaced with the term 'personal leave', which is more inclusive because, obviously, personal leave covers a wide range, including carers leave, compassionate leave and family violence leave to name a few.

It is also good to see the term 'sick leave' has been removed when it refers to maternity leave and it has now been clarified that paid maternity, adoption and partner leave are to be included in the calculation of continuous employment.

I also note the Leader's comment that the Government supports flexible working arrangements to ensure positive work-life balances and gender equity. These amendments will provide certainty and clarity for both employees and employers. It is really important employees and employers are actually aware of the arrangements and, as it says in the second reach speech, that can avoid many disputes and feelings of unhappiness, which is the last thing you want in a working environment.

I am pleased to see the changes contemporise the bill and I am happy to support it.

[2.57 p.m.]

Mr DEAN (Windermere) - Mr President, I certainly support the bill. If you look at working conditions over the past years, they have changed significantly. The second reading speech correctly says the working day used to be 7.6 hours, five days a week. That was about it - Monday to Friday. Things have changed totally since those times in the State Service. People are working all sorts of different hours, job-sharing, working one or two days a week, working one or two afternoons a week and some working from home on occasion. I can see this is an area that will probably become much stronger over time. I think State Service people will be able work from home as technology gets better and technology changes et cetera; they will continue family relationships and working with families with children et cetera. I can see those changes, and therefore long service leave and other acts will have to change to keep up with all that. This issue has been evolving over a long time.

I availed myself of three-and-a-half lots of long service leave in my career. I always had an issue with long service leave and, yes, certainly, I accrued a lot of long service leave. This is referred to within this bill and in the second reading - to accrue over and above a hundred days, approval must be given by the head of the agency or the head of the organisation. That should be treated with absolute care because I know of employees previously, in my time - and as I said during the briefing, I make no bones about it, I was probably one of them - who, when their long service leave was due, their salary was, say, $500 a week, but if they banked or accrued their long service leave and took it 10 years later, they were then on a salary that was probably twice as much by the time they took the leave.

I have some concerns with that but it seems nobody else has, so it is not being discussed. It ought to be, particularly when it is not enforced. On occasion, a department will ask an employee to postpone their long service leave. It is very rare that happens because long service leave is to allow a person to recharge their batteries, to get away from the workforce, to de-stress and rest. That was the reason for long service leave, if you look at the historical background to it - to allow people to get away from the workforce. If you are accruing your leave, you are not getting away from the workforce. With stress being a big issue now, and with depression emerging more frequently, we need to be more careful with the way our people manage long service leave. It needs to be used at the time it arrives, unless there are strong reasons not to do so.

I thank the Leader for the briefing this morning. It covered some points and it was well done by the department. These briefing sessions are good because they allow us to go into some of the details we would otherwise have to do here, which might lead to further adjournments. It is a good process and I appreciate it very much. I support the legislation because it needs to be done to keep up with the times.

[3.02 p.m.]

Mrs HISCUTT (Montgomery - Leader of the Government in the Legislative Council) - Mr President, the only question I detected was the member for Murchison talking about how was it picked up. As mentioned in the second reading speech, the Clerks of both Houses had written in July 2019. The consultation with stakeholders also identified outdated references like sick leave, maternity leave and so on. The third avenue was that the Department of Justice maintains a register of issues requiring minor legislative amendments, and that was added to it.

Bill read the second time.

LONG SERVICE LEAVE (STATE EMPLOYEES) AMENDMENT BILL 2019 (No. 47)

In Committee

Clauses 1 to 6 agreed to.

Clause 7 -
Section 10 amended (Continuous employment)

Ms WEBB - I hope to clarify that people are not disqualified for taking certain periods of time out. Under which circumstances would people not be regarded as having continuous periods of employment in terms of leave taken, perhaps unpaid leave taken in addition to parental leave or those typical things that might have people away from their work, beyond paid leave periods?

Mrs HISCUTT - If the employee takes a period of approved unpaid personal leave to care for another person or takes time off as an approved leave of absence, in this scenario - leave without pay - their continuous employment will not be broken and they will continue to accrue long service leave for up to 20 days. That is in sections 10(1)(b) and (c) and 11(2)(i).

Madam CHAIR - Of the Long Service Leave (State Employees) Act?

Mrs HISCUTT - Of the Long Service Leave (State Employees) Act.

Clause 7 agreed to.

Clauses 8 to 16 agreed to.

Clause 17 -
Section 33 inserted

Mr DEAN - I refer to clause 17, proposed section 33(3) -

> If a new employee was credited with a period of long service leave under another Act in respect of a period of continuous employment, or otherwise lawfully compensated in lieu of such a period of long service leave, that period of continuous employment is not a period of continuous employment for the purposes of calculating an entitlement to a period of long service leave under this Act.

I can understand that. If someone is coming, say, from private enterprise or somewhere else where long service leave might be available for that person, it does not impact here.

I ask the question about the police and the State Service. The police have their own separate act. It is a government organisation. What is the position with a State Service member, for instance, who moves from the State Service and becomes a police officer or vice versa? It could happen the other way as well? Does that still apply because the police operate under their own, separate act and regulations? There are probably other areas. The Tasmania Fire Service has its own act and I think there are other areas where it also applies.

Mrs HISCUTT - Clause 17, proposed section 33(3), refers to new employees, and there is a definition there for new employees. The effect of this is that proposed section 33(3) applies only to persons appointed under the Parliamentary Privilege Act 1898.

Mr Dean - Sorry?

Mrs HISCUTT - Clause 17, proposed section 33(3) refers to new employees; 'new employee' is proposed section 33(4). The effect of that is proposed section 33(3) only applies to persons appointed under the Parliamentary Privilege Act 1898.

Mr DEAN - I am talking about a new employee credited with a period of long service leave, an employee transferring from the police department, a police officer - because state servants are subject to the State Service Act - who moves from that organisation into the State Service as a new employee.

Mrs Hiscutt - They are not a new employee.

Mr DEAN - They are a new employee in the State Service under the State Service Act.

Mrs Hiscutt - For the purposes of this act, this section, that is not a new employee.

Mr DEAN - Okay, as long as that is perfectly understood.

Clause 17 agreed to.

Clauses 18 and 19 agreed to and bill taken through the remainder of the Committee stage.

BURIAL AND CREMATION BILL 2019 (No. 42)

Second Reading

[3.15 p.m.]

Mrs HISCUTT (Montgomery - Leader of the Government in the Legislative Council - 2R) - Mr President, I move -

That the bill be now read the second time.

This bill revises the Burial and Cremation Act 2002 in order to implement recommendations arising from the second stage of the Cemeteries Legislative Review. Last year, the parliament passed the Burial and Cremation Amendment Act 2018. These amendments were developed and introduced in a short time frame to address significant community concern following the Anglican Church's announcement that it would embark on a property divestment program, which includes the prospective sale of a number of cemeteries.

The 2018 amendments delivered on the Government's commitment to preserve, protect and, where appropriate, strengthen the rights of community members and obligations on cemetery managers. The community response to these amendments has been positive. The changes have given people confidence that cemeteries will be managed by appropriate entities and that there is a system in place to ensure accountability in the management of cemeteries. The review identified a number of other improvements to the existing act that are strongly supported by the community but could not be introduced in stage 1 last year due to timing pressures and the need for further consultation.

The bill before the House today refines the existing framework for the management of cemeteries, crematoria and businesses that handle human remains, making a number of important improvements that address the issues raised during stage 1. First, the bill provides a solution for individual cemetery managers who purchased cemeteries under the previous legislative framework and are concerned that the requirement to sell their property only to a body corporate could reduce the potential pool of buyers and impact the sale price for their property.

Two cemetery managers raised this issue during the stage 1 of the public consultation process and in the 2018 parliamentary debate, the Government committed to considering this issue during stage 2. Those two cemetery managers indicated that they had no immediate intentions to sell their properties. Since that time, another two individual owners have come forward to advise that they are actively trying to sell their cemeteries and have been impacted by the sale process. These four cemeteries are among a total of 16 cemeteries that have now been identified as being owned by individuals or natural persons. The changes in the bill will allow these individuals to sell their cemetery to a natural person, so long as that person meets the fit and proper person test and is approved by the regulator. This approach acknowledges what has happened under the previous legislation.

Although the 2002 act has always required cemetery managers to hold the land in trust for the purposes of a cemetery, some cemeteries were sold to individuals without the seller making proper provision for the trust and the role of cemetery manager. In some cases, no records were transferred and new owners were not informed of their obligations under the act. This is clearly inconsistent

with the obligation to hold the land in trust for the purposes of the cemetery. While some individual owners take great care in their role as cemetery managers, there are examples of individuals who have failed to fulfil their obligations under the act in relation to matters such as access, maintenance and road keeping.

Allowing a small number of cemeteries to be sold to natural persons provides an appropriate solution for individuals who purchased cemeteries under the previous framework, often without having clear knowledge of the obligations and requirements under the act. Many of these individuals have already converted church buildings into residences or have built a home on the land. Other aspects of the sale process will still apply, including the requirement that purchasers meet the fit and proper person test and are approved by the regulator. This ensures the regulator has oversight of these cemeteries and is able to ensure they are managed appropriately.

The evidence indicates that the amendments passed by the parliament last year were important to provide greater protection over cemeteries and this bill will continue them. Providing a very small number of individuals who now own cemeteries with an exemption from having to sell to a body corporate in the future strikes the right balance between preserving the greater protections that have been put in place with a need to recognise their specific circumstances.

Second, the bill increases protection for cremated remains by providing for exclusive rights of interment in monuments, such as columbariums; requiring access to public monuments; and introducing notification requirements if the remains are to be moved. The level of protection the bill affords cremated remains strikes the right balance between providing protection for ashes placed in a columbarium and the need for a more flexible approach that acknowledges that cremated remains are portable and may be retained or moved by families. The bill also aligns the requirements for crematoria and businesses that handle human remains, known as regulated businesses, with those for cemeteries. The bill does this by establishing the regulator role for crematoria and regulated businesses and introducing an application process to manage these businesses.

Penalties have been reviewed throughout the act and increased, where appropriate, to ensure they are both at a reasonable level that will promote compliance and consistence for like offences throughout the act. Importantly, the bill retains the strengthened sale and closure processes that were passed by the parliament last year and have been well received by the community.

Finally, the new structure in the bill improves the overall clarity and consistency of the legislative framework. Although no change to administrative responsibility for the act is planned at this stage, it is acknowledged that greater expertise may lie outside the Department of Premier and Cabinet's Local Government Division. The new structure of the bill would allow changes in administrative responsibility to the areas of government best suited to administer each part. This could be done while ensuring no duplication of processes or additional administrative burden for the community.

I will now outline the details of the bill. Part 1 sets out the preliminary provisions, including defining certain terms for the purposes of the bill. To support increased protection of cremated remains, columbariums are included in the definition of 'monument'. Businesses that handle human remains are now referred to as 'regulated businesses' rather than 'prescribed businesses', which reflects the fact that while such businesses are not listed in the regulations, there is an approval process to carry on such a business and certain responsibilities imposed by the act. This part does not otherwise reflect any significant change in policy from the existing legislation.

Part 2 deals with the overall administration of the act, providing for matters including: establishing the regulator position; powers of authorised officers; and certain powers of the director of public health. To support potential changes in administrative responsibility, the bill allows more than one regulator to be appointed under the regulations. The director of local government will continue in the regulator role at this time. The regulator will have the power to issue exemptions from a number of provisions of the act if reasonable in the circumstances. This will allow some flexibility in application processes under the act, so that the circumstances of each case can be taken into account, although essential provisions, such as a need for an approval, cannot be waived.

The bill allows the regulator to issue directions to ensure compliance with the act to any person carrying on a regulated business or managing a cemetery or crematorium. The director of public health may also issue directions if it is in the interests of public health or public safety to do so. The powers of authorised officers to enter premises and collect evidence have been retained from the existing legislation. These powers support enforcement of the act by allowing suitable persons to investigate potential noncompliance.

Part 3 sets out the requirements for the handling of a deceased person, starting from the initial notification of death through to the interment and exhumation. The framework allows traditional or natural burials in a cemetery or on private land, cremations and Aboriginal cremations. This bill also updates the definition of cremation to futureproof the legislation by allowing new or alternative methods for dealing with human remains to be prescribed. This part also provides the approval processes for persons to be approved to carry on a regulated business. The new application process streamlines the current notification process, which required the director of local government to lodge an objection in court if a person is considered unfit to carry on a regulated business.

Part 4 of the bill deals exclusively with cemeteries, including the approval of persons as cemetery manager and their duties and powers. It sets out how cemeteries are to be managed, established, bought, sold and closed. The new processes passed by the parliament last year through the Burial and Cremation Amendment Bill 2018 have had only minor changes to clarify the intent of the bill, reflecting the positive feedback from the community that these processes will ensure cemeteries are managed appropriately.

The sale process allows the regulator to ensure a cemetery is in compliance with the act before it is sold by requiring a certificate of compliance to be issued. New cemetery managers must be approved as a fit and proper person to manage a cemetery. The requirement for a new cemetery manager to be a body corporate with perpetual succession has also been retained, providing certainty as to the longevity of the entity that is to manage the cemetery. However, for cemeteries sold to individuals before the commencement of the 2018 amendments, the regulator may allow the cemetery to be sold to another natural person. This change acknowledges the loss that individuals may incur if their property, which may now be their home, could only be sold to a body corporate.

The closure provisions that were supported by the parliament and the broader community last year have also been retained. The minimum period of 50 years before a cemetery can be closed, and the power of the regulator to place conditions on the closure, ensure the right to honour the deceased is intergenerational. The bill also sets a default of 100 years since the last interment before a closed cemetery can be laid out as a park or garden. This could only be reduced to 50 years on application if certain criteria are met.

Part 5 of the bill sets out the framework for crematoria and the handling of cremated remains. The streamlined approval process for a crematorium manager removes the onus on the regulator to

object to a notification of a new manager, improving the process for consideration of whether a proposed manager is suitable. The duties and powers of crematorium managers, such as keeping the crematorium in good order, record keeping and providing reasonable access, have been retained.

An important change introduced in this part is the increased protection of cremated remains. Where cremated remains are interred in a grave or public monument such as a columbarium, the act provides that: access must be permitted free of charge; ashes cannot be removed without the notification to the senior next of kin; and exclusive rights of interment for cremated remains must be honoured. These changes acknowledge the feedback from the community that the placement of cremated remains should not be protected any less than for burials, while retaining a flexible approach which allows families to remove, retain or scatter ashes in a special place.

Part 6 of the bill includes other miscellaneous provisions that are necessary to support the effective administration of the act. This includes compliance powers of the regulator and certain offences. These provisions allow the regulator to be responsive to compliance issues within cemeteries, crematoria or regulated businesses, strengthening the powers under the existing act which currently only apply to cemeteries. The savings and transitional provisions clarify that approvals issued under the existing act continue to apply and outline how applications commenced under the existing act are to proceed.

Overall, this bill improves upon the current act by clarifying and strengthening the regulatory framework for cemeteries, crematoria and businesses that handle human remains. This bill ensures the regulator has adequate powers to oversee the management of burials, cremations and the handling of the deceased. The bill reflects feedback from community members that the 2002 act did not go far enough in protecting cemeteries and cremated remains, and that the new sale, transfer and closure processes for cemeteries are necessary to preserve and protect cemeteries, and ought to be retained.

Mr President, I commend the bill to the House.

[3.32 p.m.]

Ms RATTRAY (McIntyre) - Mr President, as we in this place know, particularly on behalf of our communities, there is strong support for protecting our cemeteries in this state. That was very evident most recently when the Anglican Church made the decision to sell off a number of its churches, and we know that many of them have cemeteries attached. I wrote in my notes from our previous briefing that there are 16 known cemeteries that will benefit from the legislation which I expect will be passed by this House and put into law.

When you read the fact sheet about the key changes, it includes -

- increasing protection of cremated remains by providing for exclusive rights of interment in monuments;

- requiring access to monuments and notification requirements if cremated remains in a monument are to be moved;

- aligning the requirements for crematoria and regulated businesses with those cemeteries by establishing a regulator role;

- strengthening compliance and enforcement powers by allowing the regulator to approve a person other than a body corporate to purchase cemeteries purchased by individuals under the previous legislative framework - that is, the 16 known cemeteries that will be able to benefit from this;

- clarifying that cemetery managers may lease the cemetery on publicly owned land;

- an exemption can be obtained from public land, another important aspect; and

- introducing minor amendments to improve the overall clarity and consistency of the bill.

These are all important features of protecting our burial grounds around the state. Our community has demanded we do this, and I am very supportive of it. I do not have to go over any of the information that was provided the last time when we discussed the time frame, which is not being changed now, for having a cemetery and not being able to reuse the cemetery. You know the Pyengana General Cemetery much better than I do, Mr President, because you were married in the church that sits alongside it - out the backdoor, actually, almost on two sides of that church. The Pyengana community - and more broadly the Break O'Day community - said it would not have that church being sold with no access to the burial ground.

I fully support what has been put forward. I congratulate the Government on getting on to this matter so quickly. Sometimes it can take some time for community sentiment to turn into legislation; that has not happened in this case. The Government has been very proactive in making sure the community's wishes and expectations have been met. I fully support what is being proposed and look forward to it going through the entire process of the parliament to make it law.

[3.36 p.m.]

Mr ARMSTRONG (Huon) - Mr President, as we heard in the Leader's comprehensive second reading speech, this bill builds on the Burial and Cremation Amendment Act 2018, developed in response to significant community concern following the Anglican Church's announcement it was going to embark on a property divestment program to fund the National Redress Scheme.

The limited amount of feedback I have received personally on the 2018 act has been positive, but I recall at the time it was acknowledged that, out of necessity, it was hastily put together and there was a need to improve it.

I do not intend to go through all the key changes from the existing act because they are well summarised in the fact sheet. Of those changes, I am pleased to note this bill will strengthen compliance and enforcement powers by allowing the regulator to request an audit of a cemetery, crematorium or related business.

It will require managers to notify the regulator if they become aware their business is not listed on the register held by the regulator, and it allows for new and increased penalties for noncompliance.

I also like the restructuring of legislation that allows the regulator to approve a person other than a body corporate to purchase cemeteries. Most importantly, the introduction of minor amendments improves overall clarity and consistency in the bill.

From what I understand, the bill has been broadly consulted.

Ms Rattray - There was a fairly good public consultation paper that outlined the issues; it is good to have it with our information.

Mr ARMSTRONG - I have no reason not to support the bill.

[3.38 p.m.]

Ms FORREST (Murchison) - Mr President, as other members have mentioned, this is basically completing the work started last year, which was quite rushed, when the Anglican Church made a decision to fund its obligations under the National Redress Scheme. It needed to free up some cash and so it thought it would sell off a few churches and, by necessity the graveyards and burial grounds that were attached to the churches.

This was the reaction by the Government at the time to try to stop the Anglican Church, or certainly make it harder for it - which it has.

The aim was achieved in that, but it has caught other people up in it and that has not necessarily been all positive. I have had a number of representations from people quite concerned about aspects of the bill now before us. I asked some questions of the Leader over recent months as the draft bill was out for consultation. I do not have any issue with the majority of the changes, and I have no argument with the fact that we need to ensure there is protection of cremated remains and burial grounds up to a point. Obviously, whether we like it or not, you are dead a long time and people do forget you over a period of time -

Ms Rattray - I am hoping not.

Ms FORREST - I can guarantee they will, given enough time. The sad reality of death is that time moves on, people move on.

There is increasing interest in having low-cost burials. Some people do not wish to be cremated, but to actually be buried, and there is a greater and emerging interest in natural burials where the land is used for a relatively short time and then can be turned back to production or farmland or whatever. This should be an option available to people. As we do in birth, we should be given a full range of choices in death. That is the point many of us have argued - from whether you want to talk about assisted dying or choices around your advance care directives and that period leading up to your death, and so, too, after your death.

Some people will choose cremation, some burial. Some will choose a very expensive coffin, some will choose a cardboard or homemade coffin. I went to the Live Well Die Well Expo in Wynyard a couple of weekends ago. They have a calendar made of people who have made their own coffins and some of them are quite interesting. One was a Viking coffin - it had Viking horns on it and they had to take the horns off before it went through the crematorium because it would not quite fit with those still on. People want to do their own thing. They want to make their death quite memorable. As the member for McIntyre is disappearing out the door, this will help people to maybe remember you for longer. I still remember the story about a Irish guy who wanted this recording played as his coffin disappeared into the crematorium through the curtains. They played and replayed a recording of him knocking, saying 'Let me out, let me out - I'm not done yet!' in his Irish accent. He thought it was funny; I am not sure of how many people at the funeral thought it was that funny. But people want to do their own thing and so we should give them a full range of choices as much as possible.

Cemetery managers being required to meet a fit and proper person test is not unreasonable.

What is being requested of me by a number of people from around the state - one of them is a constituent of mine, others live in other parts of the state - is the opportunity to be able to establish natural burial grounds not necessarily on public, state-owned or council land. Farmers often hive small sections off the edges of their properties for this purpose; they are willing to have a natural burial ground there and to basically covenant the land for a period. To me, it seems eminently reasonable. Land can change hands, but there is a requirement to disclose any easements or any other aspects that may limit its use or access of whatever, so why cannot we enable that to occur.

I asked the question about who owns the land at the Cornelian Bay Cemetery. That is owned by the Crown and leased by Millingtons on a 50-year lease. These people want to effectively establish a lease arrangement with a private landowner for the purposes of establishing a cemetery and not short-circuit any requirements regarding a cemetery manager. I intend to propose an amendment to give effect to this. The other point might depend on whether this amendment is successful or not. I have been asked to put that forward, particularly if that amendment is not successful. Basically those people are cut right out and unable to use public land. The question is: if private land was owned by a person willing to set the land aside for a burial ground - it might not be necessarily for natural burials but predominantly for natural burials - and they meet the requirements to be a cemetery manager and are willing to do the fit and proper person test and be the cemetery manager, could the landowner, and thus the cemetery manager, hire a person to manage the cemetery on a contract basis if that person also meets the requirements of a fit and proper person test? Could they use private land in that way? Again, you may still have the same concern if the land was sold. Surely, if the land was sold with this lease arrangement in place, it is trying to find a way to enable them to use private land where private landowners are willing and able, but do not necessarily want to be the cemetery managers themselves, because it is something that often requires a unique set of skills and knowledge.

The easiest way to deal with this, I believe, is to remove the requirement for it to be on public- or council-owned land and allow it to be on land. The cemetery manager, or whoever manages that burial ground, still has to go through all those requirements to meet the fit and proper person test and put in a proper application for a burial ground, which is all set out in the legislation.

I do not know if that amendment has been printed. I only sent it through a little while ago. It has arrived so I had better check it before it is circulated.

It is simply to remove that limitation to have a burial ground on public or council land. Again, it is a matter of coming back to the full choice.

I also asked a question in September this year to the draft bill, how section 35 of the Burial and Cremation Act 2002 is to be interpreted in relation to holding of land in trust being taken to mean that the owner of the land must also be the manager of the cemetery. This is getting to the point of private land ownership and who manages a cemetery.

The answer to the question I was given was -

> Section 35 of the draft bill provides the cemetery manager is taken to hold the land trust which requires the cemetery manager to deal with the land as if they were a trustee. Although it does not explicitly require that the cemetery manager own the land, in approving a person as a cemetery manager, it is open to the

> regulator to require the proposed cemetery manager to own the cemetery or land where the cemetery is to be established. To hold the land in trust for the purposes of a cemetery requires the cemetery manager to have effective and long-term control of the land. The final bill will clarify the land ownership requirements for cemetery managers.

That is what we are talking about here.

There are parts of private land set aside under covenants to protect natural species in forestry areas. There are plenty of farmers who have done this and they are paid to lock it up basically to protect a certain biodiversity on their land.

Mrs Hiscutt - There is a little cemetery on the back of Doctors Rock, going into Wynyard.

Ms FORREST - There are only one or two graves there.

Mrs Hiscutt - Do you know how that is managed? Are you aware of it?

Ms FORREST - No. It is probably an individual person. Obviously, it is if it is only one. My neighbour in Wynyard had himself buried on his own property. He dug his own grave only days before he died. You have to have council approval because you do not want to contaminate waterways and things like that, and there are a few other health and safety issues to consider. That can be done. It might be a couple of related family members or whatever, but you can be buried on your own property.

I do not really see what the difference is. There is a process to go through with the council, but what is the difference?

I will leave that matter to the Committee stage to prosecute further. It just provides a greater range of choice about how and where we can be buried.

[3.50 p.m.]

Mr DEAN (Windermere) - Mr President, I thank the department for the briefing we had quite a long time ago. I was trying to familiarise myself with some of the things that came out of that briefing and what I wanted to refer to, had I spoken shortly after that briefing.

The member for Murchison and others have mentioned the position that brought this matter forward - the Anglican Church wanting to sell off a lot of its churches and cemeteries to recoup the money it said it needed to pay proper compensation to victims of those terrible crimes. At the time of the sale of those properties, I was very much involved in saving one church, St Matthias' Church at Windermere, which is a heritage-listed church. I was very pleased they were able to save that for the people and the community. It caused a lot of angst for many people who were concerned about what was going on.

During the briefing, there was much discussion about access to these privately owned churches and cemeteries. I raised the position of how and when will those people who have loved ones buried in these cemeteries be able to visit their people when they want to and will the new owners be able to lock them out. Will the new owners say that they are having a function on Christmas Day or Good Friday and they do not want anybody in the cemetery during that time? We were given an answer in the briefing and I ask that it be placed on the record as well. That, to me, would be a

pretty ordinary situation. People want to visit their loved ones in these cemeteries on what might have been their birthday or the day on which they died. There are many reasons why people would want to visit these cemeteries. What right does the new owner have to block off access at any time? Do they have the right to fence the cemeteries and put locked gates on them? Will anybody visiting their loved one have to prearrange an appointment to access the cemetery? Those sorts of things need to be addressed and be made clear. It might upset many people if that were the case.

I drove through Levendale the other day - the member for McIntyre is not here - to look at the place I was born, bred and lived in for the first 15 years or so of my life until I went to high school. That church, St Chad's Church at Levendale, is now a private dwelling. I understand some burials took place there. It will be interesting to see what the position is with a place like that. I never thought that church would be sold. I am not sure what will happen to me when I finish up - my burial might be remembered because of the simplicity it will entail; perhaps a cardboard box, but it will have three colours. It will be one-third black and gold, one-third blue and white - the United Nations' colours - and it will be one-third police blue. That is all I am asking for.

Ms Forrest - Have you made it yet?

Mr DEAN - No, I have not made it yet, but I will.

Ms Forrest - Especially for your retirement, is it?

Mr DEAN - I will make it. It might be a good retirement project, you are right; I will probably make my own coffin.

[3.55 p.m.]

Mrs HISCUTT (Montgomery - Leader of the Government in the Legislative Council) - Mr President, I have a few answers still on the way, but I will start with questions from the member for Murchison on natural burials. This will cover what you asked plus a bit more, but I will get it on *Hansard* anyway.

Does the bill support the establishment of a dedicated natural burial ground? This bill allows for the establishment of a dedicated natural burial ground. The requirement that the cemetery manager become a body corporate and own the land or lease public land does not prevent an entity from establishing a natural burial ground.

Ms Forrest - But on public land, you just said that, if you are going to lease it. That is the issue.

Mrs HISCUTT - Or lease public land.

Ms Forrest - Yes, that is the issue.

Mrs HISCUTT - These requirements reflect feedback from the community that the legislation needs to provide for certainty and longevity in relation to the management of cemeteries.

Why are new cemetery managers required to own the land? The bill provides that a person may only be approved as a cemetery manager if they will own the land or will lease public land, as in section 32(4)(c).

As a trustee, it is important that the cemetery manager is able to exercise effective control over the land. It will be difficult for a trustee to exercise effective control if a landowner who has not been approved as a cemetery manager themselves were to place restrictions or conditions on the use of the land that are inconsistent with its use as a cemetery.

If land is owned privately but not by the cemetery manager, there is significant risk to the longevity of the cemetery. For example, if the cemetery manager abandons the responsibilities, the landowner is ultimately responsible despite the fact that they may not be an appropriate entity to be approved as a cemetery manager or have a desire to be the cemetery manager.

Ensuring that cemeteries are owned by the cemetery manager ensures that the manager has long-term effective control over the land that will be affected by changes in ownership and different owners' intentions in respect of the land.

An exception allowing cemeteries to be leased by the state or councils has been included to provide the appropriate level of flexibility. Public authorities are accountable to their communities. If a state government or council leases land for a cemetery, it is clear that the public intent for that land is for it to be used as a cemetery. This provides greater certainty that a cemetery manager can exercise trustee obligations over time.

I have more answers coming, which I shall seek.

The member for Murchison also asked if private land is owned by a person willing to set land aside for a cemetery and willing to be the cemetery manager, can they subcontract some of their tasks to another person. The answer is yes. The landowner would be the cemetery manager, assuming they meet all the requirements for the purposes of the land, and be accountable legally for all the obligations.

If they choose to subcontract out some of the tasks, such as lawn maintenance or record keeping, they can. However, they are the ones legally responsible still.

I have more answers to come.

If private land is owned by a person willing to set land aside for a cemetery and willing to be the cemetery manager, can they subcontract some of their tasks to another person? I think I just read that bit.

This one is the question from the member for Windermere: what does responsible access to a cemetery mean? The answer is: the bill requires that a cemetery manager must provide reasonable access to a cemetery. That is the case under the current act and there are penalties for not observing this. 'Reasonable access' is not defined under the act because circumstances can be different, but the onus is on the cemetery manager to provide reasonable access. This could be expected to be through most daylight hours of most days, so that would include major holidays such as Christmas. It is a reasonable expectation through the daylight hours, even on a Christmas Day.

Historically, there have been few complaints on access and these have generally been resolved with cemetery managers. For example, at least one cemetery manager fenced in the property, but once contacted and advised of their obligations, access was changed to ensure persons could access the cemetery.

Mr Dean - Where is the complaint made by a person if they feel they have not been given proper access? Who do they go to? Who takes the matter up on their behalf?

Mrs HISCUTT - It currently goes to Mr Alex Tay, the regulator.

Mr Dean - So it would be up to that department to investigate the matter and to either refer charges or not?

Mrs HISCUTT - What you are saying is correct and you will be able to question that further when we have the gentleman at the Table.

Thank you, Mr President, I think I have delivered all the answers.

Bill read the second time.

BURIAL AND CREMATION BILL 2019 (No. 42)

In Committee

Clauses 1 to 31 agreed to.

Clause 32 -
Approval of persons as cemetery manager

Ms FORREST - Madam Deputy Chair, the amendment has not arrived yet.

Madam DEPUTY CHAIR - You can speak to it now and put it around as soon as it arrives.

Ms FORREST - Yes, I am going to speak to it. This section is about the approval of persons as cemetery manager. To walk through clause 32(1) -

> A person must not manage a cemetery unless -
>
> (a) the person has been approved under this section to be the cemetery manager for the cemetery; or
>
> (b) the person is deemed under this Act to be the cemetery manager for the cemetery.
>
> (2) A person who proposes to manage a cemetery must apply to the regulator for approval to manage the cemetery.

Clause 32(3) describes the process for applying for the approval. Under subclause (4), the regulator may only approve a person as a cemetery manager under this section if the regulator is satisfied that the person can pass the fit and proper person test, which is defined earlier; and the person is a body corporate with perpetual succession, which is a problem for individuals. Clause 32(4)(c)(ii) is the part I am looking at, but I will read the subclause in its entirety -

> (c) the person -

(i) owns, or is to own within a reasonable period after the approval of the person as cemetery manager, the land on which the cemetery is located or is to be located; or

This is fine for the person who owns the land. If you own the private land, you can bury yourself - you might not bury yourself, but you can be buried on the land.

(ii) is leasing, or is to lease within a reasonable period after the approval of the person as cemetery manager, from the State, or a council, the land on which the cemetery is located or is to be located.

This is where it limits it to council or public land. A person who conducts a natural burial service might not want to or does not need to own the land because they have private landowners who are willing to set aside some land to be used as a burial ground and are willing to lease it to this person, potentially on a long-term lease. I understand the concerns that were raised about selling off the land and this need for long-term tenure and certainty. Bodies do not deteriorate quickly, obviously.

They cannot do it unless it is on state or council land. A lot of these grounds may well be on state or council land, where it is deemed by the state or council that it is a suitable burial ground, but I am aware of farmers who have land, a little bushed area that is not good for agricultural purposes, where a natural burial ground could be established. They can fence it off and lease it out to another person who can be appointed as a cemetery manager on another person's land who is willing to offer that for lease. It is private land, not a council- or state-owned piece of land.

That is the amendment I am seeking. I am happy to let the Leader speak to it without moving the amendment as yet, because I do not have it, and then we could postpone the clause until we have an amendment. Maybe that is the best way forward at this stage. That is what I am seeking here. There are people out there who genuinely have a desire to do this, had plans to do it, had landowners wanting to work with little private businesses that run natural burial services. That is the matter here, and the way this is currently worded prohibits them from doing it on private land.

Mrs HISCUTT - Would like me to speak to the amendment now?

Madam DEPUTY CHAIR - If you would like to. If not, we can move to -

Mrs HISCUTT - I am happy to speak to it.

As I put on *Hansard* before, I reiterate: the Government will not be supporting the amendment.

The bill provides that a person may only be approved as a cemetery manager if they will own the land or will lease public land. That is section 32(4)(c) of the bill.

As a trustee, it is important that the cemetery manager is able to exercise effective control over the land. It will be difficult for a trustee to exercise effective control if a landowner who has not been approved as a cemetery manager themselves were to place restrictions or conditions on the use of the land that are inconsistent with the use as a cemetery.

If land is owned privately, but not by the cemetery manager, there is significant risk to the longevity of the cemetery. For example, if the cemetery manager abandons their responsibility, the

landowner is ultimately responsible despite the fact that they may not be an appropriate entity to be approved as the cemetery manager or have a desire to be a cemetery manager. Ensuring that cemeteries are owned by the cemetery manager ensures that the manager has long-term effective control over the land and that will not be affected by changes in ownership and different owners' intentions with respect to the land.

An exception allowing cemeteries to be leased by the state or councils has been included to provide an appropriate level of flexibility. Public authorities are accountable to their communities and if the state government or council leases land for a cemetery, it is clear that the public intent for that land is for it to be used as a cemetery. This provides greater certainty that a cemetery manager can exercise trustee obligations over time.

What we have in our bill already exercises the proper processes to move forward and gives certainty to the public. Based on that, we will not support this amendment when it finally arrives.

Madam DEPUTY CHAIR - In the interests of moving on, is there anyone else who would like to speak? Otherwise we will postpone the clause and come back.

Ms WEBB - I have a question about the intent of the amendment. It is about how this issue may be dealt with in other jurisdictions. Can anybody provide me with an example where this is dealt with and that perhaps addresses some of the concerns and reasons the Government has not to support the intent of the amendment, so that we can have a bit of clarity about whether those things are dealt with in particular ways elsewhere that might be informative for how it could be dealt with here effectively?

Mrs HISCUTT - Madam Deputy Chair, other jurisdictions have different arrangements but, in most other jurisdictions, cemeteries are owned publicly or by cemetery trusts that effect control through ownership of the land. It would be wise to postpone this clause at this stage until we have something in front of us.

Clause 32 postponed.

Clauses 33 to 50 agreed to.

Clause 51 -
Person must not purchase cemetery without approval

Ms FORREST - Madam Deputy Chair, this clause reads -

> 51. Person must not purchase cemetery without approval
>
> A person must not purchase all, or any portion, of a cemetery unless the person has been approved under section 32 as the cemetery manager for the cemetery.

When you look at the definition of cemetery, it can be a place that has been lawfully used for the internment or placement of human remains. When you have, as I described - and the Leader also spoke of, one little grave in a paddock near Doctors Rocks, and you see them around the place -

Madam DEPUTY CHAIR - The Midland Highway.

Ms FORREST - Yes, there are a number. In that case, if you are purchasing the farm where this little grave or a couple of graves of relatives are in, it is a cemetery if it is a place used lawfully for internment, but do they need to be a cemetery manager and go through the fit and proper person test and so on? This is the issue of burials on private land; they are in many locations and they are not always well cared for.

We went to the lighthouse at Eddystone Point, which has been somewhat restored, but then you go to cemeteries in many parts of the state, such as the Williamsford-Rosebery Cemetery, which has been let to go to rack and ruin. You cannot see the headstones through all the weeds and that is a public cemetery. They are not always that well looked after. What is the responsibility? If someone wants to purchase land that has what could be classed as a cemetery, a place that is or was lawfully used for interment and placement of human remains, are we not talking about the same sort of thing - burials on private land that may or may not be natural burials?

Mrs HISCUTT - Under section 41 of the current act, clause 29 of the bill, burials can occur outside a cemetery if permission is obtained from the Director of Public Health, the general manager of the relevant council, and the landholder. Through the review process, it has been identified that burials that occurred on private land prior to the commencement of the act in 2002 were not grandfathered, and this land is technically a cemetery under the act. The bill provides the regulator with the power to declare that such land is not a cemetery, and that is under clause 73.

In making a decision, the regulator would consider factors such as the relationship of the people who have been buried, whether the land has been treated as private land or has been open for public access, and when the last burial occurred. In the vast majority of cases these are family burials on family estates, often in rural areas, and are distinct from communal burial grounds. The cemetery manager is entrusted by the community to maintain the cemetery to allow public access.

Ms FORREST - On that point, if a burial has happened and the regulator can say that it is not a cemetery, the property is sold and the new landowners do not particularly want that grave right outside the kitchen window, so they dig them up and toss them over a cliff, what is to stop that? That is not much respect for the dead.

Mrs HISCUTT - The answer seems that it is not a cemetery. While they would not be a cemetery manager, clause 30 of the bill sets out restrictions and conditions on the exhumation of human remains, including the requirement for the approval of the Director of Public Health. While those little graves we speak about do not have the protection of the act, they still cannot exhume the body because that is covered under the Director of Public Health, who has a bit of a say in it. You cannot dig someone up and throw them over the cliff, although those little cemeteries do not have the protection of the act.

Clause 51 agreed to.

Clauses 52 to 61 agreed to.

Clause 62 -
Effect of sale of cemetery

Mr DEAN - Madam Deputy Chair, I am not sure I know what I am talking about here but in clause 62, Effect of sale of cemetery, am I to understand this is where a person who has owned a cemetery or part of a cemetery wishes to sell that off? Because the new person wanting to buy a

part or all of that cemetery then automatically, on the transfer, becomes the cemetery manager. This is how I interpret it - the owner of the cemetery after the transfer is the cemetery manager for the cemetery. That regards the new person. Does that mean they must also satisfy the fit and proper person test and so on as a cemetery manager?

If that is the case, this could become discriminatory. If a person fits within the fit and proper person position, one must meet certain criteria and certain prior convictions mean history would stop them from meeting those criteria. What does it actually mean?

Mrs Hiscutt - Whilst the member is on his feet, are you asking can a criminal conviction or a conviction of sorts exclude a person?

Mr DEAN - I am in effect asking that. If you read the section -

> On transfer of the ownership of all, or any portion, of a cemetery in accordance with a contract to which this Part relates, the person who is the owner of the cemetery after the transfer is the cemetery manager for the cemetery.

What I am asking therefore is: does that person, who it seems to me would have to become the cemetery manager, have to meet certain criteria? This is what the member for Murchison has previously talked about and is the amendment in that area. Cemetery managers, where it says you have to meet certain criteria, have to be a fit and proper person or the person is a body corporate et cetera and all the rest of that.

If that is the case, if I am interpreting that right - and I will wait for the answer - I would see that as being somewhat discriminatory in the circumstances.

Mrs HISCUTT - The provision is to stop persons attempting to sidestep the sale process checks and balances. I will go through what a fit and proper person is now, which I think is what you are asking.

Mr Dean - No, I have that so you do not need to go through that.

Mrs HISCUTT - It means the Recorder of Titles cannot register the transfer if the purchaser has not been approved to be a cemetery manager. It also makes clear at the point of transfer when the responsibility for cemetery manager transfers to the new cemetery manager from the old.

You have obviously read what the fit and proper person test is.

Mr Dean - Yes, I have.

Mrs HISCUTT - If the person fits that fit and proper test, the sale can go ahead and all the other requirements that need to be approved with the sale.

Mr DEAN - Looking at the meaning of a fit and proper person, there are some fairly minor infringements, really - let us be realistic - and I suppose that one would say that any offence where imprisonment can be part of the penalty is probably not minor, but an offence of dishonesty - fraud, for instance - where the maximum penalty is a term of imprisonment of at least three months - it is not necessarily that they would serve the time, it is only the penalty that could have been imposed in the circumstances. I am looking at it as an offence of dishonesty, fraud or trafficking, where the

maximum penalty for the offence is a term of imprisonment of at least three months. The way I read that is that it does not necessarily mean the person has to have gone to prison for that time. In my view - and it could have happened in the last 10 years, I understand that - it stops that person from ever being considered to be able to purchase a part or all of a cemetery. I have some concern about that and I raise it to see if I am interpreting it correctly.

Mrs HISCUTT - When it comes to the fit and proper person test, the very last thing is 'any other matter the regulator considers relevant'. It is in the assessment of the regulations as to whether someone is a fit and proper person. It is also a reviewable decision of the Magistrates Court if someone thought the regulator's decision was unfair - it is an appealable matter; there is the right of appeal. Is that the answer you were looking for?

Mr Dean - Yes, I am satisfied.

Clause 62 agreed to.

Clauses 63 to 98 agreed to.

Progress reported; Committee to sit again.

SUSPENSION OF SITTING

[4.38 p.m.]

Mrs HISCUTT (Montgomery - Leader of the Government in the Legislative Council) - Madam Deputy Chair, I move -

That the sitting be suspended until the ringing of the division bells.

Motion agreed to.

Sitting suspended from 4.38 p.m. to 4.57 p.m.

BURIAL AND CREMATION BILL 2019 (No. 42)

In Committee

Postponed clause 32 -
Approval of persons as cemetery manager

Ms FORREST - Madam Deputy Chair, I thank members for their forbearance. An IT glitch saw things floating around in funny directions in emails and not being delivered to my email inbox. Madam Deputy Chair, I move -

That clause 32(4)(c)(ii) be amended by leaving out 'from the State, or a council,'.

We have talked about this, and I have heard the Leader's position. This provides an opportunity for someone who owns private land to lease it to a person as the cemetery manager, who needs to

meet the requirements of the cemetery manager and fulfil all the other functions required of the cemetery manager. If private land were sold subsequent to that agreement, that would be part of the disclosure of what is on the private land when it is sold, because there is an arrangement there in place and a lease.

It allows a full range of opportunities for people to have natural burials in places that do not have to be public land or council land. It could be placed on private land in such a way they could be in different parts of the state that might be more suitable for that person to operate as a natural burial provider.

I urge members to consider this because it is another option. There are farmers willing to dedicate a little bit of their land, usually on the corner of a property, for this purpose and in natural burials, it does not tie it up forever; it only ties up for a period and then it can be returned to the normal agricultural use or whatever use it might be or a bush block.

Mrs HISCUTT - I can only reiterate what I said before: this will leave no control over the land. The bill provides a person may only be approved as a cemetery manager if they will own the land or will lease the public land. As a trustee, it is important the cemetery manager is able to exercise effective control over the land and this will not have effective control over the land.

I do not need to go into this again. I have read it into *Hansard* twice, but I certainly urge members not to support the amendment. This is a health issue that needs control and this will take it out of control.

Ms Forrest - No different from bodies being buried on private land.

Mr ARMSTRONG - Madam Deputy Chair, I am sure I will be corrected here if I am wrong, when I was in local government, it had a say over where a cemetery could go on property because it could be on a watercourse and that watercourse could feed into that municipality's town water supply.

I do not know whether I am on the right track but you have to have some control over it.

Ms Forrest - This does not remove those requirements.

Mr ARMSTRONG - That is where I stand on it, so I will not be supporting the amendment.

Ms Forrest - It does not remove the requirements of the Public Health Act.

Ms LOVELL - Madam Deputy Chair, we will support this amendment. There are enough protections in the bill that would put safeguards in place to ensure good governance regardless of whose name is on the title. In regard to future health issues or the on-selling of private land, those issues could equally be applied to state- or council-owned land if the state or council decided at some stage in the future they might want to sell that land on, as happens from time to time.

The regulatory controls in the bill will protect future buyers of the land and have those safeguards in place in terms of any health issues. We will support the amendment.

Mrs HISCUTT - All I can say is that the regulator's opinion is that this is not a good amendment. A similar amendment moved downstairs was defeated; it went through on the voices.

I am a little surprised that Labor is supporting this amendment. Honourable members, please be aware that the regulator is not in favour of this amendment because it means control is lost over the land and we need to keep control over burial cemeteries. It is not in keeping with the intent of this act, so I urge members not to support this amendment.

Ms FORREST - Keeping control of the burial; they do not have control of people buried on individuals' land. Bodies are buried on private land around the place.

To answer the member for Huon's question, councils do have a role to play if someone wants to be buried on their own land. They have to apply to council. I mentioned my neighbour who had to apply to council to be buried on his land. The council had to make a determination as to whether it would be suitable for a burial to occur and that it would not contaminate a nearby waterway or anything like that. If the member for Huon would like to look at clauses 20 and 21, they talk about the role of the Director of Public Health in this, and that would apply. The Director of Public Health has a role to play in determining how to handle disposed-of human remains and management of a cemetery or crematorium.

Further to that, as the member for Rumney alluded, there are plenty of safeguards within the legislation before us. Clause 43 talks about the approval required to establish new cemeteries -

> (1) A person must not establish a cemetery under this Act unless the establishment of that cemetery has been approved by the regulator under this Part.

Even a leased cemetery on private land would still require approval to be a cemetery that can be used. For a new cemetery to be established under this part, the person who intends to establish the cemetery must be responsible for the management of the cemetery. If the person meets the fit and proper person test and the other requirements to be a cemetery manager - there is a clause that talks about what the regulator has to do - and the regulator refuses to approve the establishment of a cemetery under clause 46, the regulator is to notify the person in writing of the refusal and the reasons for the refusal.

It may be, as the member for Huon raised, near a waterway or something like that. As the member for Rumney indicated, there are all these protections and provisions in there to enable this. This is not the big dangerous thing that could happen if we lose control of the land, because burials happen on private land now anyway through a process that will not change. This just has an option for a natural burial ground where it might not be the landowner being buried on their property or one of their children who died young. We see that happen - they bury a family member on the property, a grandma or whatever. That happens now and the state does not have control of that land.

It is the same sort of measure in a different scale with an opportunity for generally natural burials to occur on private land, public land or council land where it is approved. The same approval process would apply.

Mrs HISCUTT - I am seeking some more advice on this but, as I say, we will not be supporting the amendment because control is lost. The cemetery manager is then unable to exercise effective control over the land. This takes it out of control.

It would be difficult for a trustee to exercise effective control if a landowner who has not been approved as a cemetery manager were to place restrictions or conditions on the use of the land inconsistent with the use as a cemetery.

As the member for Murchison says, a grandma or child - if there is a change of landownership, you lose control.

Ms Forrest - As happens now and will continue to happen.

Mrs HISCUTT - Madam Acting Chair, the intent of the act is to enshrine protections that are afforded to buried remains in designated cemeteries. This is reflected in the duration of time that interred remains are protected, which is 100 years. That time period is not in keeping with lease arrangements and changing use of land over that tenure.

The broad feedback to the draft bill supported the intent including ownership. It acknowledged that a small number of interested persons, particularly those interested in natural burials, have a different view. Burials do and can occur on private land, but those burials are not in community cemeteries to which people are buried in those places. They entrust the cemetery manager to manage the cemetery, hence burials on private land are in their nature private and do not have the protections this bill puts in place for those who choose to be buried in a place set aside for public burials as access.

Members, I again urge you not to support this amendment.

Mr DEAN - When were you notified this amendment was coming through? What work has the department done in relation to this amendment to make the statement, Leader, that it is not within the intent of this bill?

You have gone into this in detail. Has there been sufficient time to study closely the amendment the member for Murchison is moving? I want to be satisfied this has not been some rushed issue, one that has not been properly considered in all the circumstances.

Can I be satisfied that is the case?

Mrs HISCUTT - The same amendment was moved in the other place, and the reasons given in this place are the same. It was moved by Ms O'Connor in the other place, and it was voted down on the voices.

In working with the Office of Parliamentary Counsel - OPC - in drafting this bill, the issue of ownership and the need to exercise effective control was carefully considered. The second reading speech also explains the reasoning for the requirement of ownership. I urge members not to vote for this amendment.

One last thing: the bill reflects feedback from community members that the 2002 act did not go far enough in protecting cemeteries and cremated remains, and that the new sale, transfer and closure processes for cemeteries are necessary to preserve and protect cemeteries and ought to be retained. This amendment would fly in the face of that.

Mr Dean - And it is identical to the one moved in the other place?

Mrs HISCUTT - The intent of the amendment moved in the other place was the same, but it was not drafted by OPC as they do not have access to OPC, whereas our members do. We are of the opinion that the words were the same.

Mr GAFFNEY - Madam Deputy Chair, this is a bit of a flaw in the system we have to work under. On one hand, we have an amendment that is quite fluent in its presentation because of the member's intricate knowledge, and she has looked into it; on the other hand, we have people here who are searching for answers to some of the points raised by the member for Murchison and then passed to the Leader, who is then trying to struggle to voice it.

I do not fully appreciate the Government's argument because of that lack of fluency. From my point of view, I do not hold weight that it passed or did not pass downstairs. That should not count here because downstairs they have the numbers. In my point of view, it is not part of the equation.

I think there is no urgency in this amendment, so I would not mind if we reported progress and had a briefing next week. That would give the officers a chance to sit down and go through it and present a solid case early next week. At this stage, I am leaning in one direction, but knowing the staff over here, for whom I have a lot of regard, I would like to hear more fully their explanation. Whether that is in the form of a briefing or a written response where they were addressing the concerns of the member for Murchison, I think that would be a better way to operate in this place because there is no sense of urgency.

At the moment, I am leaning towards the member for Murchison because I think that has weight. Some of the Government's arguments need to be aired more fully, so that I can understand those before I can make a decision.

Ms Forrest - The amendment is basically the same as the one moved downstairs but I did not know that was going to be moved downstairs. I have been dealing with constituents on this matter. If anyone wants to suggest this is me moving a Greens motion, they are completely wrong. I have been dealing with a constituent for some time, and other members around the state have raised this very legitimate issue -

Mr DEAN - Point of order, if the member has another call, I would have thought that the lectern is the place to make that statement. Questions of the member may be permissible but I have some concerns as to where this is going.

Madam DEPUTY CHAIR - The member for Mersey has the call. I take the honourable member's point, and the member for Murchison still has one call.

Mr GAFFNEY - Thank you, member for Murchison, that was really important to put on the record because it clarifies it. In this place, if a member wants to clarify something when they only have one call, there would be many people who have received the same treatment. People have acquiesced and let them do that, so I hear that.

I go back to the point that I am of this ilk, but someone is telling me there is a lot of information that has not yet come out as to why it should not go ahead. I do not agree that it passed downstairs and so it should pass up here because of the numbers. If we had two or three days and came back next week, giving the Government a chance to put a concise argument against it, we could debate it then. If I had to vote now, I would not be giving justice to the clause. It is important.

Mrs HISCUTT - In speaking to my advisers, I am happy to report progress and suspend the sitting here and now and have the briefing in the Chamber instead of moving to Committee Room 2. Madam Deputy Chair, I move -

Ms Forrest - No, you cannot. If there is a question before the Floor, you cannot. I have to withdraw.

Madam DEPUTY CHAIR - The question is that the motion be withdrawn.

Ms Forrest - No. Is this a call, when it won't withdraw the motion? If I can speak on the reasons, why seek leave to withdraw the amendment?

Madam DEPUTY CHAIR - I will allow that.

Ms FORREST - I hear what the member for Mersey has said and that is a fair and reasonable comment. Seeking leave to withdraw this amendment gives me an opportunity to have further discussion with the Leader and her advisers, if they are available. Not now, but later, and I do not want to do our briefing in the Chamber now because my constituents, who have been contacting me and raising very legitimate concerns, may perhaps like to have the opportunity to put forward their case to other members as well, so it is not only me.

Perhaps some other members, perhaps the member for Rumney, may have been contacted about this issue, too, about why it is important, and what other options there might be if this is not the option. In seeking leave to withdraw the motion, it is not so we can have a briefing now, it is so we can report progress and come back next week to finish this when people have had more time to look at it. Madam Deputy Chair, I seek leave to withdraw the amendment.

Leave granted; amendment withdrawn.

Mrs HISCUTT - Madam Deputy Chair, there are two private property owners who are actively in the process of selling their properties as we speak, which means they are constrained to selling to a body corporate. The passage of this bill is of interest to them, so there are other people besides your constituents who are concerned with the passage of this bill.

Ms Forrest - Yes, I have been contacted by some of them, too.

Mrs HISCUTT - So that they have the options to sell to another natural person. It is only 5.25 p.m., so I will put the motion. Madam Deputy Chair, I move -

> That we report progress and then suspend sitting to enable a briefing. We would do it here and then move back into this.

Mr DEAN - I understand the position put forward by the Leader. However, what difference is it going to make if this matter is deferred until Tuesday or Wednesday next week? I cannot see those few days making a difference. I was inclined to support the position of the member for Mersey. I think it is a good position. There is some further work I would like to do in relation to this matter. I support the member for Murchison. I do not see that taking Friday, Saturday, Sunday, Monday and Tuesday will make a significant difference to those sales the Leader has referred to. I will listen to further debate on this matter about whether the briefing occurs today, but at this stage

I am inclined to support this matter - the briefing occurring later and not coming back until next week.

Mrs HISCUTT - Madam Deputy Chair, we are discussing the progress of the bill. Our House would complete the second reading next Wednesday and do the third reading on Thursday. I would like to seek the advice of our Clerk. How will that affect the passage of the bill from the lower House? If there is an amendment, will it be able to accept that and progress with the bill to complete at the end of next week, or does it need more time than that?

Madam DEPUTY CHAIR - That is a matter for the Assembly. We do not have any control over the Assembly.

Mrs HISCUTT - Madam Acting Chair, I need to take advice on this from the minister or his chief of staff. I will be seeking advice as we speak, therefore we will have to wait.

Mr GAFFNEY - I appreciate the Leader's position on this but I hope the minister is listening. At this stage, I will be voting for the member for Murchison unless there is a bit of lenience. It is not about dealing with the issue here - as the member for Murchison said, there might be other people who want to contact members, to talk about this and air it before next week. If there is a briefing, as suggested, to happen here and we make the decision here, I will be passing. I will be voting for the member for Murchison. With all due respect to the people who want to sell their property, that should not affect legislation in this place and how we carry that. I suggest that there are ways and means for them to handle this downstairs if we deal with it on the Wednesday. I believe all members here would be saying if we have the briefing on Wednesday, we will deal with it on Wednesday as early as we can and then it will move on.

Ms ARMITAGE - I understand all the comments made. I cannot see why we cannot have a briefing now and see if it resolves anything. If it does not, we can continue it next week. My concern is, as you say, that we do not know what the lower House is going to do. We cannot see when it will deal with it if there is an amendment that goes through. I would hate to see this sit for the period when we do not sit any longer after next week until we come back at the end of March. I cannot see any reason we cannot have a briefing now.

As I said to you, Madam Deputy Chair, I cannot believe we would be called back for one bill. I do not see a problem with having a briefing now. If it does not resolve anything, it may allay people's minds and they find they can continue with it. What is the problem with having a briefing now and if it does not, carrying it forward to next week? I cannot see the problem with trying.

Mr GAFFNEY - I thank the member for Launceston for her contribution. The part she has missed out is that even if we have the briefing now, we will not have the opportunity to listen to some of the people who have contacted the member for Murchison to put forward their case. They may be listening to this.

As far as what happens downstairs, if we deal with this bill on Wednesday, if the Government wants to have the bill passed downstairs on Wednesday or Thursday, they are in control down there.

Ms Forrest - They have done it before.

Mr GAFFNEY - The minister, Mr Ferguson, would want this and carry that bill, and that is up to the House of Assembly. I do not think anybody here is going to delay the bill in the discussion

on Wednesday. It just means we need to make sure we have the appropriate information so we can make the best decision on this proposed amendment.

Mr DEAN - I am not going to reiterate what I said. The member for Murchison and I do not always see eye to eye with our positions.

Ms Forrest - I do support you from time to time.

Mr DEAN - The member is saying she would certainly like the opportunity to speak with these other people who have been advising her in relation to this matter. Who knows? It could be at the end of that, the member might even withdraw the amendment. Who knows if that further advice will be taken and so on? It is a possibility. Who knows what is likely to happen? If it is dealt with on Wednesday morning, it can be dealt with first up. I could not see it being a long process once that further advice is taken.

I urge the Leader to accept that position so we can proceed.

Mrs HISCUTT - For my own information, if it were to be deferred until Wednesday morning next week, would members be of a mind to allow me to skip Standing Orders for the third reading to have it down there on Wednesday so they can deal with on Thursday, if they need to?

Ms Armitage - Not unless you do my order of the day first.

Mrs HISCUTT - But I do not have the information I need on what the other House would do. Bear that in mind.

Ms ARMITAGE - I do not mind whether it is delayed or not, but I still think it would be beneficial to have a briefing today, because things might come up that might be worth considering over the next days. While we have the advisers here, I cannot see a reason not to at least have a briefing which might provide a bit more information when speaking to other people, if it comes back next week.

With regard to the Leader's question, I have been putting off orders of the day for quite a considerable time. I have an order of the day that will come after motions again so I am not sure I would be willing to support you bringing that forward Tuesday, when our order of the day for short stay was delayed this week and again next week.

Ms ARMITAGE - The Leader was talking about bringing it on Tuesday, I believe.

Mr Dean - No, Wednesday.

Ms ARMITAGE - Sorry, Wednesday. I thought she meant bring it on Tuesday, suspending Standing Orders. I will take that bit back, Leader. I still do not see why we cannot have a briefing now which might provide further information, with more discussion over the next few days, whether it comes back or not.

Progress reported; Committee to sit again.

ADJOURNMENT

[5.35 p.m.]

Mrs HISCUTT (Montgomery - Leader of the Government in the Legislative Council) - Mr President, I move -

> That at its rising, the Council adjourn until 11 a.m. on Tuesday 26 November 2019.

Motion agreed to.

The Council adjourned at 5.37 p.m.