Legislative Council

Wednesday, 28 October 2009, Page 3736

VICTIMS OF CRIME (ABUSE IN STATE CARE) AMENDMENT BILL

The Hon. A. BRESSINGTON (17:14): I move:

That this bill be now read a second time.

First, I will note the facts in relation to the victims of abuse in state care. Children were abused in state care at the hands of the state. The Mullighan inquiry was extensive in support of the claim that parents and their children were ignored for many years while they complained about what was going on with children in state care. Victims' needs are not being met. We apologised. The Premier made a shallow promise on the day of that apology, and victims of abuse in state care are struggling to overcome the trauma set upon them by the state.

Another fact is that this is still happening, and there is enough evidence to show that the department that was originally responsible for inflicting this abuse and putting kids at risk is still left unaccountable and not reined in at all. Unlike the previous bill passed by this place, which established a separate statutory scheme, this measure seeks to assist the Attorney-General in using his discretion under section 31(2) of the Victims of Crime Act when compensating victims of abuse in state care.

As the Attorney announced in the *Sunday Mail* of 18 October 2009, he plans to utilise this section to establish such a scheme. While the Attorney-General talks in flowery words of a generous and compassionate scheme, this bill attempts to ensure that in giving with one hand the Attorney-General does not take with the other.

Currently, one can only predict what restrictions upon access might apply, as the Attorney-General is yet to release the eligibility guidelines. That he went public with his intention to establish a compensation scheme prior to the eligibility detail being finalised, and hence ready for release, typifies the government's approach to providing redress for victims of abuse in state care.

I have received literally dozens of calls from former state wards since the Attorney-General made public his intentions in the *Sunday Mail* and all expressed utter confusion about their legal entitlements. While my officers have endeavoured to clarify this where possible, in the absence of eligibility guidelines this has been understandably difficult. However, the Attorney-General's premature announcement created not a fraction of the confusion of the deceitful promise made by the Premier on 2 April 2008, when he stated:

'Any person who was sexually abused while in care, is eligible to immediately seek compensation through the Victims of Crime Fund that has $22 million available for victim compensation,' Premier Mike Rann said.

'Victims of sexual abuse while children in State care are eligible for a payment of up to $50,000 without having to suffer again by being dragged through the court process.

'And this fund is available to survivors now.'

Part 4 of the Victims of Crime Act 2001 is subject to several limitations that apply to statutory compensation under the act, the most obvious being the requirement of

section 18(2) that a victim must apply for compensation within three years of the commission of the offence. However, it is my understanding that, even if this limitation were set aside (as has occurred in some circumstances), any compensation awarded could not exceed the statutory compensation available at the time of the offence.

The present maximum of $50,000 has been available only since 1990, meaning that any former state ward who was seeking redress for abuse prior to this would access the $50,000 promised to victims by the Premier. For those abused between 1988 and 1990, $20,000 is the maximum sum payable. From here, it tapers dramatically, with $10,000 available between 1978 to 1987, $2,000 between 1975 and 1977 and, finally, $1,000 between 1969 and 1974.

For those wards who were abused prior to 1969, no compensation would be paid. As such, compensation was not available to the great majority of victims on the Premier's promise and, 18 months on, it is still not available. While the Attorney-General yesterday in the other place made a great attempt to excuse the Premier's wilful deceit, stating that the act always has granted him the broad discretion under section 31(2) to make payments to victims (and this is technically the case), to argue this in the context of the Premier's announcements is questionable.

It is my knowledge that, in the 18 months since the Premier's promise, not a single payment has been made under section 31(2) to a victim of abuse in state care. In addition, until Sunday 18 October, this government has made no indication that it would establish a scheme reliant upon section 31(2). In fact, I have been informed that the Attorney-General's office did not even start to prepare the eligibility guidelines for access to compensation under section 31(2) until early this year.

So, to argue that the Premier in early 2008 was referring to the possibility of a payment under this section is, as I said, a desperate attempt to excuse that the Premier would have known full well that the Victims of Crime Fund was not accessible to the majority of victims of abuse in state care.

It seems that he has intentionally deceived these victims to get positive media on the day and to appease public anger over the horrific abuse perpetrated against these children as revealed by Commissioner Mullighan. Yet, by his deception, the Premier has re-abused these victims, and for this I call upon him to apologise yet again.

For some time, I have been aware that the Attorney-General was planning to utilise section 31(2) of the Victims of Crime Act 2001 to establish a scheme to provide compensation to victims of abuse while in state care. Currently, subsection 31(2) provides the Attorney-General with an absolute discretion to make a payment from the Victims of Crime Fund to a victim if, in the Attorney-General's opinion, it will help them to recover from the effects of crime or advance their interests.

It is my understanding that section 31(2) is preferable to other provisions of the Victims of Crime Act, as these previous limitations on access to the fund do not apply. From my understanding, there are currently no statutory limitations to a payment by the Attorney-General under the this section.

While this could allow the Attorney-General to provide compensation more generous than that permitted by other provisions, it would also allow him to impose harsh conditions upon the recipient of a payment—something that this bill in part attempts to prevent.

Members will be familiar with much of the language of the bill from the Victims of Abuse in State Care (Compensation) Bill 2009, which was passed in this place recently. However, unlike that bill, the bill I am introducing has at its essence the protection of these victims' rights. As an example, it has long been a concern of mine that the state government could use a form of ex gratia payment to abuse sufferers, similar to that foreshadowed by the Attorney-General, as a device to abrogate its broader liability to state wards. This would be done by making receipt of a payment conditional upon the claimant forgoing other legal entitlements, more specifically, the right to pursue the state in the civil jurisdiction for breach of a duty of care. That is, in effect, coercing a victim into relinquishing their legal entitlements.

The state, under the existing compensation provisions in the Victims of Crime Act, is unable to compel a victim to forgo another form of redress for the injury they have suffered. However, as stated, section 31(2) is not subject to such limitations, and hence it would be in the Attorney-General's power to do so. For those who fear double dipping, section 29(2) of the Victims of Crime Act would allow the state to partly or wholly recover any payment made under the Attorney-General's scheme if a state ward were to subsequently receive payment for a breach of duty of care or other form of compensation.

Current form suggests that this is unlikely, with no judgment presently recorded against the state for such a breach and out of court settlements being few and far between. This is in part due to the reluctance of the judiciary to find the state in breach on policy grounds. Other explanations lie in the difficulties of satisfying the requisite standard of proof, whether this be due to the destruction of documents or the fallibility of memory. However, given that section 29(2) provides for reimbursement to the Victims of Crime Fund, I ask: why we would deny victims the opportunity to later pursue the state for a breach of duty of care if these circumstances change?

For example, a victim may be fortunate enough to have released to them crucial documentation showing that the institution in which they were housed knew that it had a paedophile in its employment. Again, it is more likely that such documentation would be headed for the shredder, but again I ask: why deny a victim the right to pursue action at a later date if they were to be so fortunate? As I stated, coercing victims into forgoing their full legal entitlement is blackmail and totally unnecessary, and it must be prevented.

While not as likely but just as possible, there is the potential for the Attorney-General to use the ex gratia payments as a means of silencing these victims by imposing a gag order on victims as a condition of payment. While there has been no suggestion that this will occur, there is also nothing to prevent it. It is my fear that, due to the politically sensitive nature of the abuse and any payments made, attempts will be made to silence victims.

As members may recall, Ki Meekins, who was instrumental in working with the Hon. Andrew Evans in abolishing the statute of limitations and the establishment of the Mullighan inquiry, was subject for some time to a confidentiality agreement as part of an out of court settlement for his civil action against the state. Until this government committed to not initiating proceedings against him, Mr Meekins was severely limited in the advocacy he could undertake on behalf of other victims. In this bill we have the opportunity to prevent this from occurring again.

Quite simply, this part of the bill makes clear that the Attorney-General must not use ex gratia payments as an opportunity to advance the interests of the state. To do so would be to further disfranchise these victims. Receipt of a compensation payment must not be conditional upon a victim entering into a confidentiality agreement or forgoing other legal entitlements.

Like the bill introduced by the Hon. Robert Brokenshire, this bill also provides for an individualised apology to victims that must refer to the circumstances of abuse or neglect suffered and must acknowledge that such abuse was allowed to occur because of the state's breach of duty of care. However, it is made clear that such an apology cannot be used against the state in later civil proceedings.

While such an immunity may at first seem repugnant to the notion of protecting the rights of these victims, logical thought suggests otherwise. Given that this bill makes clear that a victim cannot be compelled to forgo the right to later pursue the state for a breach of duty of care and then makes clear that the Attorney-General must acknowledge this breach, one can be sure that, if this bill were to pass without such an immunity, no compensation would be forthcoming.

Additionally, one could guarantee that the Attorney-General, if he were to subsequently utilise section 31(2), would be guarded in any apology given, with nothing more than the bare minimum required by the act resulting. For all the victims to whom I have spoken, a meaningful individual apology is their highest priority, and without such an immunity we would be preventing that from occurring.

The bill also provides that, in addition to any compensation paid, the Attorney-General is to provide payment for any legal costs reasonably incurred as a result of victims' application for compensation under the fund. This is most appropriate, and I note that the council voted for a similar provision in the Victims of Abuse in State Care (Compensation) Bill 2009. However, the bill I introduce also compels the Attorney-General to provide payment for reasonable legal costs arising from litigation abandoned to access the Attorney-General's compensation scheme.

Many victims are presently pursuing the state in the civil jurisdiction because at the time of commencing their action no alternative compensation was available. While the majority of victims with active claims will most likely continue to pursue settlement through the courts, I am aware of some for whom it will be more advantageous, due to the aforementioned reasons, to withdraw their civil claim and apply under the Attorney-General's scheme.

From talking to those victims it is clear that, if compensation were available in 2008, as was promised by the Premier, they would not have initiated civil action claims. These victims should not be liable for expenses incurred through this government's deceit and prevarication. Finally, this bill compels the Attorney-General to raise the maximum amount payable from the $50,000 foreshadowed in the aforementioned *Sunday Mail* article to $80,000. We can simply do better than the $50,000 proposed, and the victims deserve so much more.

In determining this figure I looked to Western Australia which had originally proposed $80,000 in a similar redress scheme. However, I now believe that under the guise of the global financial crisis the Liberal government has reduced this to $45,000. It is of interest to note that this has sparked outcry, including by the Labor opposition who has accused the Liberal government of being callous and putting the coffers before compensation. Things certainly change across borders!

As an aside, this is the value of introducing the redress scheme via legislation as opposed to policy, as was the case in Western Australia. Legislation provides the certainty that victims need to move forward. Policy is a promise that can so easily be broken.

Whilst some may see $80,000 as extravagant, it must be remembered that the payment is an alternative to compensation for a breach of the state's duty of care to wards who are unable to gain redress through the courts. We know from recent media reporting that a successful settlement in proceedings against the state can and does result in a large payout—one recently received in excess of $500,000. This is not the state compensating the victim of a crime in which it played no part; this is the state making amends for failing to protect our most vulnerable people. Any payment made needs to reflect just that.

I move this amendment knowing full well that the opposition in this place took advantage of a drafting error in the Hon. Robert Brokenshire's bill that reduced the $50,000 intended by the mover to $43,000. Despite the Hon. Robert Brokenshire moving an amendment to correct this error, the opposition denied its support. As a result, the opposition's credibility on redress to victims of abuse in state care will subsequently never recover, with the Liberal name (and, in particular, some particular members) now being mud amongst many victims. However, I am hopeful that the Liberals will endeavour to redeem themselves by now voting to increase the $50,000 foreshadowed by the Attorney-General to $80,000.

This is a sensible bill that both protects the rights of victims of abuse in state care and provides them with the level of compensation they deserve. I commend the bill to honourable members and indicate that I will be calling it on for a vote before the end of this sitting session.

Debate adjourned on motion of Hon. I.K. Hunter.