SUITORS' FUND AMENDMENT BILL 2017
SUITORS' FUND AMENDMENT (LEVY) BILL 2017

Cognate Debate

Leave granted for the Suitors' Fund Amendment Bill 2017 and the Suitors' Fund Amendment (Levy) Bill 2017 to be considered cognately, and for the Suitors' Fund Amendment Bill 2017 to be the principal bill.

Second Reading — Cognate Debate

Resumed from 12 September 2018.

HON MICHAEL MISCHIN (North Metropolitan — Deputy Leader of the Opposition) [9.02 pm]: I rise as the lead speaker on behalf of the Liberal opposition to indicate our support for the Suitors' Fund Amendment Bill 2017 and the Suitors' Fund Amendment (Levy) Bill 2017. The suitors' fund amendment legislation reforms some provisions that have remained unchanged since the early 1960s. The Suitors' Fund Act 1964, the principal act, established the suitors' fund. The fund is essentially a contributory insurance policy controlled by the Appeal Costs Board, to which applications are made to fund the lost costs of certain litigants who have expended funds on litigation in which decisions in certain circumstances may be upset on appeal or proceedings before courts are rendered abortive through no fault of the litigants; for example, the death of a judge, the incompetency of a judge during the course of proceedings or a successful appeal. The legislation prescribes circumstances in which the litigants can claim their costs out of the suitors' fund. The fund is a pool of money acquired through a levy or a fee that is imposed on the filing of process by litigants in certain courts—the Supreme Court, the District Court and the Magistrates Court. When the fund was first set up in 1964, it was the princely sum of two shillings. With the passing of the Decimal Currency Act 1965, that reference was amended to a maximum amount of 20¢ and, as one of the great tributes to keeping costs under control, it has remained 20¢ since 1965. The result is that when claims are made against the fund, which are approved and directed by the board, the moneys that are paid are far in excess of what the suitors' fund holds and for many years now, the money has been subsidised out of consolidated revenue. Although there is provision that the moneys will eventually go back into consolidated revenue if there is a surplus in the fund, there has never been a surplus in the fund, not in living memory. There is a significant deficit in the fund, which is funded out of the small impost on litigation and the filing of process, that is not being met by the intended purpose, which is self-insurance, as it were—a contribution to the insurance scheme. We were told in the second reading speech that in November 2016, the suitors' fund received an increase of half a million dollars to the Treasurer's advance to make the total balance of $2.5 million owed by the suitors' fund. To give an example of the imbalance and deficiency that occurs, we were told that in the 2016–17 financial year, costs awarded from the suitors' fund amounted to $136 582, while funds raised at the rate of 20¢ per process came to $42 879. We are looking at something like less than one-third of the outgoings of the fund being raised in the manner prescribed by the legislation.

This bill had in fact been prepared by the last government and it is almost identical to one that I had drafted, as is the second reading speech, but did not manage to get through Parliament, so I am familiar with that area of it. However, what is interesting is the premise on which the bill is based. There is one material difference. Clause 4, which amends section 5 of the act, differs because it allows specifically for the setting of different rates of contribution to different types of process. We do not have any objection to that. What I would like to know in due course is what the intended fees will be set at. That will be done by regulation, which is quite sensible because it will allow changes from time to time in the same manner as filing costs at the court and the like. But when we were looking at it in about 2015 or 2016 we were looking to increase the fees from about 75¢ to $1 to meet the average annual outgoings of the fund. An increase of around $2 to $3 would enable the Treasurer's advance at that time, at any rate, to be repaid within five to eight years. I do not know what the government is proposing. I understand it may be significantly more than that. It is fine to repay the Treasurer's advance at a much more rapid rate, but, hopefully, that will not set the precedent of increasing the amount contributed to the fund in unreasonable amounts simply to create a surplus rather than enough to keep it solvent.

There is a deeper question here as well. A working party was created back in 2003 by Hon Jim McGinty when he was Attorney General to look at general reform of the suitors' fund legislation. I think the last meeting of that was in 2005. A significant amount of work has been done since then as well. There is a necessity for a general review of the act. When I was Attorney General, quite a number of proposed amendments were advanced. The trouble was that there was a variety of competing interests. The profession in particular had very diverse views, as well as the Appeal Costs Board, about how the act should be reformed and the extent of any reform to the legislation. One area of reform that I think would be quite worthy would be to expand the list of litigants who may potentially obtain benefit of the fund by contributing to the process. For example, the Family Court does not fall within the scope of the suitors' fund. At one point, because of illness on the part of judges and the retirement of judges due to incapacity from the Family Court, quite a number of cases had to be retried. Bearing in mind that it had taken some time for them to be tried in the first place, they had to be retried by fresh judges. The payment of the litigants' costs came out by way of ex gratia payments and the like.

Hon Stephen Dawson: By way of interjection, can I just confirm: did you just say that the Family Court should fall within the scope?

Hon MICHAEL MISCHIN: Yes. Well, it should be considered to fall within the scope. It is a state court. It does exercise federal jurisdiction as well. There are perhaps complications about whether the commonwealth ought to contribute in some way to it. I do not deny that there would be a fair amount of delicate work to be done to set the right balance there, but the inclusion of the Family Court ought to be considered, as well as perhaps other tribunals in which costs can be thrown away through no fault of the litigants. The funding of it can be by small amounts contributed as part of the filing fees. Some greater reform is worth considering with respect to the suitors' fund and the operations of the Appeal Costs Board, but that is for another day. One thing I am interested in, though, is what the government has in mind as the increase in the contribution to the fund. Given that it is looking at the potential for different fees for different processes, I would like to know what it has in mind. For example, will it be setting a different fee in the Magistrates Court, the District Court and the Supreme Court for civil matters, and will it differentiate between the types of matters and the like?

We support the bills as framed. We have a few questions about them, but otherwise this is a worthy amendment. It will help defray the costs out of consolidated revenue by way of Treasurer's advances and will hopefully enable the suitors' fund to be liquid and able to fund itself into the future.

HON ALISON XAMON (North Metropolitan) [9.12 pm]: I rise as the lead speaker for the Greens and indicate that we will be supporting the Suitors' Fund Amendment Bill 2017 and the Suitors' Fund Amendment (Levy) Bill 2017, which we are currently debating cognately. The Suitors' Fund Act 1964 established the suitors' fund. It might sound like a bit of a dry issue, but it is one of those bills that is actually quite important to sort out. It is not until someone has required the funds from the suitors' fund that they realise exactly how important it is.

Each time certain proceedings are issued in the Supreme Court, District Court or Magistrates Court, a small fee, which is currently between 10¢ and 20¢ as prescribed, is paid. This is the money that is credited to the suitors' fund. The current amount is 20¢. It has been 20¢ since 1965, when post–decimal currency legislation changed the specified two shillings to 20¢. It is hard to believe, but it is older than me!

The suitors' fund pays for the reimbursement of legal costs to litigants in circumstances specified in the act. Essentially, it is circumstances in which a litigant incurs legal costs through no fault of their own. When the suitors' fund funds are insufficient, under the act, the difference can be advanced by Treasury and the fund repays it when it can. But because the amount currently available to the fund is so low, the fund has been leaning on Treasury for more funds than it is likely to be able to repay, if it continues to raise funds at the current rate. To give members an idea of the sort of deficit we are talking about, in 2016–17, the fund paid out $136 582 but raised only $42 879. Treasury advanced $2 million until 30 June 2015, and in November 2016 that was increased by half a million dollars, making the total balance owing $2.5 million. Quite clearly, the fund is not going to be in a position to repay this unless the levy is increased. This is despite the fund being underutilised, because the cost of paying a lawyer to apply to access the fund can outweigh the payout from the fund, which strikes me as an extraordinary injustice, particularly when, as I remind members, the purpose of accessing this fund is when litigants have incurred legal costs through no fault of their own. In 2016–17, the fund paid out on three occasions under section 10, and that was a successful appeal on a question of law. All three parties were involved in the same case, and that came to a total of $6 000. On three occasions it paid out under section 14(1)(a), and that was for proceedings aborted by the death or protracted illness of the judge, magistrate or justice before whom the proceedings were had, or by disagreement on the part of the jury when the proceedings were with a jury. That came to a total of $119 000. On one occasion, the fund paid out under section 14(1)(d), when the criminal proceedings were adjourned by the prosecution without it being the fault of the accused. In that instance, there was a payout of $7 500.

The substantive bill aims to address the disparity between the fund's ins and outs by removing the cap on the levy, so that the levy will be whatever the amount is as set by the regulations. That bill also proposes that the levy be able to be tiered, so that different proceedings can attract different amounts. The explanatory memorandum indicates that the intention is to set levies that are proportionate to the quantum of costs in that jurisdiction, which seems like a fairer way to raise those funds. The Attorney General has stated that the intended figure is about $10 in the higher courts and $5 in the lower courts. That gives members an idea of the disparity between the sorts of moneys we are looking to raise and what is currently able to be raised. The second bill is required because the levy is a tax. Section 46(7) of the Constitution Acts Amendment Act 1899 requires a separate bill in order to impose a levy. The bill's approach to setting the levy is as recommended by the Appeal Costs Board; that is, the body constituted under the act to direct, control and manage the fund. This is a different approach from that recommended by the WA Law Reform Commission. The Law Reform Commission recommended that the levy be set as a percentage of the court fees collected. The Law Reform Commission proposed four per cent when it considered the matter way back in 1976. I ask the minister to confirm that the Appeal Costs Board considered, but obviously rejected, the approach recommended by the Western Australian Law Reform Commission. I understand the board considered the Law Reform Commission's approach; it thought that it was too prescriptive and not sufficiently

futureproof and felt that the approach taken in the bill was more likely to function appropriately, regardless of how court fees may be calculated in the future. I would like to know whether this was even part of the consideration.

The bill does not restrict the amount of the levy that can be imposed by regulation. It is not capped. It is not set with reference to any criteria—for example, predicted draws on the fund or a proposed plan for a repayment to Treasury. Again, I note that because it is a tax, it is not cost recovery. The State Law Publisher shows precedent for both levy legislation without restrictions and levy legislation with restrictions. The Greens generally prefer that levy legislation contain a clear method of calculation, rather than being left unrestricted. However, I note that there are some safeguards in the legislation. The Attorney General has stated on the record that the intended quantum is about $10 in the higher courts and $5 in the lower courts. I note that the usual disallowance process will apply to the regulations that will prescribe the amount of the levy.

The fund is an agency special purpose account under section 4 of the parent act; in other words, the money raised does not go into consolidated revenue. The regulations prescribing the levy amount will have to be consistent with that special purpose.

As I said, it is important that we ensure that we have a fairer way for people to recover their moneys when court proceedings cease through no fault of their own. This legislation is long overdue. It is important that we look at mechanisms to ensure that funds such as these, which exist for good purposes, are not constantly left in the precarious position of having to go back to Treasury for top-ups. It is not a satisfactory way to operate. Hopefully, this will help to rectify that. With those few words, I indicate once again that the Greens will support this legislation.

HON RICK MAZZA (Agricultural) [9.22 pm]: I rise to make a few comments on the Suitors' Fund Amendment Bill 2017 and the Suitors' Fund Amendment (Levy) Bill 2017. The bills seek to address a funding deficiency by amending the act to remove the current cap on the levy to be prescribed for different originating processes or classes of processes. This will allow for greater flexibility in setting levy amounts that are appropriate to sustain the operation of the suitors' fund, while remaining proportionate to the quantum of costs in differing jurisdictions. The bills will ensure that the suitors' fund has ongoing financial sustainability. As has been pointed out by previous speakers, currently the suitors' fund levy has a cap of 20¢, which has been in place since 1965. The suitors' fund has raised a total of $42 879, which is a lot of 20¢ pieces, so a fair amount of litigation must have taken place over time. Certainly, there must be a fair number of cases for $42 879 to be raised from 20¢ payments. The amount of costs awarded from the fund has totalled $136 582. There is definitely a very big shortfall between the amount of money that has been raised and the amount of money that is required for, essentially, a safety net for suitors.

This cap has been in place since 1965 and we are only now looking at removing the cap to update this fund. The previous Attorney General was probably asleep at the wheel during his term in not making sure that this cap was removed some time earlier so that the fund was more sustainable and had sufficient funds to make sure that people were compensated as required.

I will support the bills. I think they are very sensible bills. They have obviously been a long time coming to bring us into line with modern day values. The fact that this may be extended to other court jurisdictions is also a very sound initiative. I would be interested to find out during the committee stage, if we go into committee, what the proposed charges will be for this fund.

HON NICK GOIRAN (South Metropolitan) [9.25 pm]: I rise to contribute to the cognate debate on the Suitors' Fund Amendment Bill 2017 and the Suitors' Fund Amendment (Levy) Bill 2017. This is a cognate debate. It is a matter whereby two bills are presently before the house for its consideration. I draw to members' attention in particular the second of the bills before us, the Suitors' Fund Amendment (Levy) Bill 2017. Why do we have two bills before us at the moment and we are dealing with a cognate debate? As is explained in the third paragraph of the explanatory memorandum, the government has advised us that the levy imposed by the bill amounts to a tax. I find it very interesting that the government has before the house a bill that, according to its own explanatory memorandum, amounts to a tax. I seem to recall that in February 2017, Hon Mark McGowan said to the people of Western Australia that if they elected him, there would be no new taxes and no increases in taxes and he would reveal all his revenue-raising initiatives prior to the election. I ask the minister, in the fullness of time when a reply is given to this debate, to indicate to the house on which day prior to the election Hon Mark McGowan revealed this revenue-raising initiative and indicated to the people of Western Australia that he would impose this tax. I once again reiterate to members that the government's own explanatory memorandum says that the levy imposed by this bill amounts to a tax. I remind members that the Premier specifically said prior to the election that people could trust him and that he would reveal all his taxes and revenue-raising initiatives prior to the election. I look forward to the minister with carriage of the bill advising us on which day prior to the election he revealed this to the electorate. If it is the case that that never, ever happened, we need another explanation from the government about why, yet again, it has gone back on its word and cannot be trusted with the most simplest of things.

Having said that, on this occasion, the opposition has expressed its support for this particular initiative, but I do not want the government to think that, because the opposition is supporting these bills, we in any way countenance

and condone the mistruths that this government continues to tell the people of Western Australia. We will not countenance lies being told to the people of Western Australia prior to the election and then, after the election, the government saying that it can do whatever it likes. We will not countenance that and we want an explanation before these bills pass through this house.

The reason the opposition supports the Suitors' Fund Amendment Bill and the Suitors' Fund Amendment (Levy) Bill has already been articulated by my learned friend Hon Michael Mischin, the shadow Attorney General. However, this legislation is of interest to me, perhaps as it is for Hon Alison Xamon, because the genesis of this bill is also prior to my date of birth. I note, as she did, that it was first enacted in 1964. The purpose of the suitors' fund is to assist in paying legal costs incurred by litigants when decisions are upset on appeal or proceedings have been rendered abortive through no fault of the person in question. A couple of examples of that have been outlined by Hon Michael Mischin, who referred to the death or long illness of a judicial officer, amongst other scenarios.

I was interested in Hon Alison Xamon's remarks, in which she indicated that the fund is presently financed by contributions. I think I heard her indicate that the sum was somewhere between 10¢ and 20¢. That interested me because I was familiar with only the 20¢ version of the contribution, not the 10¢ version. Perhaps on another occasion I will ask the honourable member, behind the Chair, how one can access the 10¢ version because that would be of interest to a number of applicants and plaintiffs! However, in all seriousness, the amount in question, whether it be 10¢ or 20¢, is microscopic compared with the cost of accessing justice in Western Australia. It is no wonder the contributions are not keeping up with the necessary requirements for the fund.

These types of contributions are made whenever a writ of summons is issued in the Supreme Court of Western Australia or, alternatively, in any proceedings in the District Court. However, they can also be paid when a matter is entered in the Magistrates Court of Western Australia, which was formerly the Local Court of Western Australia. When a summons or a notice is issued in criminal proceedings, a contribution can also be made of the 20¢ variety.

The Suitors' Fund Amendment Bill will seek to create a mechanism by which the contributions can be increased. This is the revenue-raising initiative that the government seeks to have us all agree to, notwithstanding that a case was not made by the government to reveal this to the electorate before the election, when the then leader made it categorically clear that there would be no increase in taxes that had not previously been revealed.

These bills will seek to create this mechanism by allowing the regulations to be amended from time to time and to provide a fee for the contribution to the suitors' fund. As members will be aware, having considered clause 4 of the Suitors' Fund Amendment Bill, the government asks us to agree to clause (2), which indicates that "The regulations may prescribe different amounts of levy for different processes or classes of process." Perhaps in the Committee of the Whole House, we can ask the government further questions about the nature of those different processes, or classes of process, and what it intends to do about the different amounts. I note that the bills have been before the Parliament for an incredibly long time. It will not be missed by members that the principal bill is the Suitors' Fund Amendment Bill 2017 and that it is now 19 March 2019. Over that period, very little progress has been made with the passage of these two bills before the house. I note that today's *Daily Notice Paper* 112 informs us that the last time the matter was brought on by the Leader of the House was as far back as 12 September 2018. I have not had an opportunity to properly consider the passage of the bills since 2017, but suffice to say that the two bills have been before the house for an incredibly long time and have their genesis in the calendar year of 2017, the same year in which Hon Mark McGowan uttered those words to the Western Australian people prior to the election.

Although the opposition supports the bills and the mechanism that will be created to ensure that further increases can be made in the future by regulation, I ask the government: should we be doing more? I want to bring to members' attention a couple of practical examples. We have heard that access to the suitors' fund is restricted to circumstances in which litigants have had decisions upset on appeal, or proceedings rendered abortive through no fault of their own, yet I put it to members that our current system of dealing with appeals in criminal injuries compensation matters is entirely inadequate when it comes to the recompense of victims of crime after a successful appeal. In Western Australia, a victim of crime can make an application to the Chief Assessor of Criminal Injuries Compensation, and that is not done through a court. Therefore no filing or 20¢ fee is added; it is simply done by application, either electronically or in writing, to the chief assessor. Victims of crime need to meet a number of criteria to have an application considered. However, if the victim is dissatisfied with the award made by the Chief Assessor of Criminal Injuries Compensation, under our laws in Western Australia, the victim has a statutory right to appeal to a District Court judge. If a District Court judge determines otherwise, a replacement award—a new award—can be made for that victim of crime. Although that is a very good statutory mechanism to ensure that the victim of crime properly receives the reward they are entitled to for their injuries and loss, the problem is that they have no ability whatsoever to claim their legal costs. It is outrageous that a victim of crime in Western Australia, having received an inadequate or nil award at first instance through no fault of their own, appeals to the District Court and a District Court judge says, "Yes, the chief assessor was wrong. I'm going to

disturb that award and award you a proper amount, yet you are not entitled to claim costs nor are you able to access the suitors' fund." That is outrageous, and it is all the more outrageous considering the rights of perpetrators in Western Australia to access the suitors' fund. Would members believe that it is possible in Western Australia for a perpetrator to access the suitors' fund because their trial has been aborted—for example, through the death or longstanding illness of the judge—and get back their legal costs of the aborted trial, and then go to a subsequent trial and be found guilty? A guilty perpetrator has been able to access the suitors' fund, yet a victim of crime is not able to access it on a successful criminal injuries compensation appeal. That is wrong and unjust. Something needs to be done about it. I encourage the government to give strong consideration to a proper review.

We have already heard Hon Michael Mischin indicate that a review is needed. I ask the government to expedite that review rather than simply picking the low-hanging fruit. It grabbed out of the drawer a bill that had effectively already been prepared by the previous government and presented to Parliament in 2017. This bill was before one house of Parliament in 2017 and has languished between the houses since that time. Instead of just picking the low-hanging fruit, why do we not elevate this review to ensure that not only does the suitors' fund have the funds that it needs, but also the right people are able to access it.

I draw members' attention to a couple of cases in which costs were granted from the suitors' fund in criminal proceedings. The first case I draw to members' attention is the State of Western Australia v Quartermaine. This was a decision of the Supreme Court of Western Australia. The judicial officer who considered the matter was Commissioner Sleight, as he then was. It was heard on 19 March 2012, and the decision was delivered on 26 April 2012. The parties that appeared before the judicial officer included the prosecution on behalf of the State of Western Australia and two accused—Mr Quartermaine and Mr Drage. The two accused were legally represented by solicitors. Mr Quartermaine was represented by Legal Aid WA. The other accused was represented by a private law firm. For members who want to access that decision, it was delivered on 26 April 2012 and appears in Western Australian Supreme Court volume 138. That decision awarded costs from the suitors' fund in those criminal proceedings.

I also bring members' attention to a second case in a similar circumstance. That case is the State of Western Australia v AJC [No 2]. That case was not heard in the Supreme Court of Western Australia; it was heard in the District Court of Western Australia. Yet again, it was a criminal matter. The District Court judge was His Honour Judge Stavrianou, who heard that matter on 8 April 2016 and delivered his decision on the same day. For members who are interested in it, it is in Western Australia District Court volume 52. That is another case that deals with the suitors' fund and a successful application for costs to be paid from the fund. Those are a couple of matters in which costs were granted from the fund for criminal proceedings.

To contrast that, I bring members' attention to the outcome of a criminal injuries compensation appeal that took place in 2017. It disturbed the finding of the Chief Assessor of Criminal Injuries Compensation that there would be a nil award in that case. In the end, the District Court judge awarded $147 000. In that case, the District Court appeal assessed the award at $285 749, but because of the statutory limits, it was able to award only $147 000.

Debate adjourned, pursuant to standing orders.