

CRIMINAL LAW AMENDMENT (UNCERTAIN DATES) BILL 2019

Introduction and First Reading

Bill introduced, on motion by **Mr J.R. Quigley (Attorney General)**, and read a first time.

Explanatory memorandum presented by the Attorney General.

Second Reading

MR J.R. QUIGLEY (Butler — Attorney General) [10.03 am]: I move —

That the bill be now read a second time.

The Criminal Law Amendment (Uncertain Dates) Bill 2019 seeks to ensure that a conviction can be secured in the face of uncertainty as to the date of the commission of an indictable offence, uncertainty of the age of the victim at the time of the commission of a sexual offence, or uncertainty as to whether an accused was a child at the time of an offence. The proposed amendments to the Criminal Code and the Children's Court of Western Australia Act 1988 seek to remedy situations in which uncertainties as to particular dates prevent a person being found guilty of a crime that is otherwise proved to have occurred.

Although this bill will have application across a range of matters in which there is uncertainty of relevant dates, there is no doubt that it will also facilitate the successful prosecution of child sexual abuse offences and cases in which the trauma of the victim and the passing of time make it difficult to provide sufficient details to a court as to when the abuse occurred. This bill thus extends improvements to the administration of justice for victims of child sexual abuse.

Part 2 of the bill proposes that a new chapter IIB is inserted into the Criminal Code to provide that a person may be charged and convicted regardless of when in a relevant period an indictable or sexual offence occurred, or regardless of the exact age of the victim at the time of a sexual offence. This will be achieved by providing that the accused person may be charged in respect of the relevant offence with the lesser maximum statutory penalty. Importantly, if it can be proved that the offence occurred at some time during the relevant period in situations in which there is uncertainty as to the exact date, the person may be convicted and sentenced in respect of the relevant lesser penalty offence. A similar approach is proposed for situations in which there is uncertainty as to the particular age of the victim at the time of a sexual offence, because of uncertainty about the date of birth. The proposed remedy has been developed with regard to improving access to justice for victims of serious crimes and is consistent with the principle that an accused is not exposed to a harsher penalty than existed at the time of the offence.

I now provide more detail on the very circumstances to be covered in chapter IIB. The Criminal Code requires that the date on which an offence occurred needs to be established with sufficient certainty to enable an offender to be charged and successfully convicted. A person cannot be convicted under a provision that did not exist at the time the offence occurred. Typically this may not be difficult. But it is often a feature of child sexual abuse cases, given the historical nature of the offending and the tender age of the child, that it is difficult for the victim to recall specific dates of the abuse. Unfortunately, there have been a number of cases in Western Australia in which perpetrators have evaded conviction because it could not be conclusively established when the offending took place. This represents a serious miscarriage of justice.

Under the Criminal Code, sexual offences against a child under 13 years of age are demarcated from those against older children. But if, for example, it cannot be established with sufficient certainty whether a victim had turned 13 years of age at the time of an offence, it may not be possible to establish which relevant age-dependent sexual offence would apply. Similarly, sexual offences against a child under 16 years of age are demarcated from those against older children and adults. To illustrate, I will provide some hypothetical examples. For instance, a child is sexually assaulted on their thirteenth birthday, but cannot say whether this occurred before or after midnight. Or, as may often be the case with historical child sexual abuse that occurred over an extended period, a victim may not be able to recall the specific dates of the abuse, but it could be established that the alleged conduct spanned a period during which the victim turned 13 years of age. Additional issues may arise where an offence is alleged to have occurred in a period which spans amendment to the relevant offence provision.

Proposed section 10L will address the problems that arise where an indictable offence occurred sometime in a period during which the relevant written law was amended, inclusive of being repealed and replaced. Currently, if the conduct constitutes an offence under both the old and new provisions, the perpetrator cannot be convicted where it cannot be established which provision was in force at the time of the offence. The new section provides that an accused may be charged in respect of the relevant offence with the lesser maximum statutory penalty, whether it be under the old or new law. If it can be proved that the offence occurred sometime in the relevant period, the person may then be convicted and sentenced in respect of the lesser penalty offence.

Proposed section 10M will address problems that arise when a sexual offence occurred sometime in a period during which the victim had a relevant birthday. This may arise where it is unclear which age-dependent child sexual

offence would apply or whether the victim was still a child at the time of the offence. Again, these problems are resolved by providing that an accused may be charged in respect of the relevant offence with the lesser maximum statutory penalty, whether this is before or after the victim's relevant birthday. If it can be proved that the sexual offence occurred sometime in the relevant period, the person may then be convicted and sentenced in respect of the lesser penalty offence.

Proposed section 10N seeks to address problems where there is uncertainty regarding the birthdate of the victim of a sexual offence, which could be an issue in remote regional areas of Western Australia or for children with refugee backgrounds. This again may be particularly relevant when dealing with age-dependent sexual offences. Consistent with proposed sections 10L and 10M, in such cases the accused may be charged in respect of whichever relevant offence has the lesser maximum statutory penalty, whether this is an offence if the victim was of a particular age or an offence if the victim was of a different age. If it can be proved that the offence occurred, the person may be convicted and sentenced in respect of the lesser penalty offence.

The amendments proposed under part 2 of the bill will remove technical impediments to convicting perpetrators for serious offences, with particular regard to historical sexual offences against children. It is therefore necessary that the remedies available under new chapter 11B of the Criminal Code include acts or omissions committed prior to the commencement of the amendment provisions. Importantly, the bill will not retrospectively alter or add new offences.

I now turn to part 3 of the bill, which proposes amendments to deal with circumstances in which it is uncertain whether the accused was a child or an adult at the time of the commission of the offence. As a result, it is not possible to establish which court has jurisdiction to hear the matter. This situation arises predominantly when an offence occurred sometime in a period spanning the accused's eighteenth birthday, where the exact date of the offence is uncertain. It may also occur where there is no formal registration of the accused's date of birth. There have been several occasions on which the state has been unable to proceed with charges due to uncertainty as to the age of the accused at the time of the offence. For example, in one case, a person was alleged to have committed sexual offences against a younger child in a period spanning a number of years. Particular dates on which the offending occurred were unable to be specified. A number of charges alleging very serious sexual offences could not be pursued because the state could not determine whether the accused was over or under 18 years of age at the time the particular offences were committed.

To address this problem, amendments are proposed to the Children's Court of Western Australia Act to provide the Children's Court with jurisdiction to hear and determine charges where it is uncertain whether the accused was a child at the time of the alleged offence. Proposed section 19(2AA) and (2AB) will provide for the Children's Court to have and retain jurisdiction if the charge alleges that the offence was committed by a person who may have been a child. Section 19(2AB) in particular is intended to avoid prosecutions being discontinued where, during the trial, evidence suggests that the accused was, or may have been, an adult at the time of the offence. This will avoid additional stress and trauma, particularly for victims of child sexual abuse, associated with the trial having to be commenced afresh in another court. The approach under part 3 of the bill has regard to the interests of the accused whilst ensuring a prosecution can proceed in the jurisdiction of the Children's Court.

In conclusion, the amendments proposed in this bill will resolve technical impediments that currently prevent prosecution and conviction, in particular regarding sexual offences against children. The sexual abuse of children is one the worst crimes imaginable. The provisions proposed in this bill will improve the administration of justice for the victims of child sexual abuse. They represent further improvements by the McGowan Labor government in the wake of the Royal Commission into Institutional Responses to Child Sexual Abuse and will be complemented by further appropriate reforms over time.

I commend the bill to the house.

Debate adjourned, on motion by **Mr P.A. Katsambanis**.