ELECTRONIC TRANSACTIONS (LEGAL PROCEEDINGS) AMENDMENT BILL

Second Reading

Adjourned debate on second reading.

(Continued from 1 December 2016.)

Ms CHAPMAN (Bragg—Deputy Leader of the Opposition) (16:13): Again, I regret to inform the house that the—

The DEPUTY SPEAKER: Sorry, deputy leader, are you the lead speaker?

Ms CHAPMAN: I am and, I think, probably the only one. I regret to inform the house that this bill—the second on the reopening of the parliamentary year—is laced with conduct by the Attorney that I consider to be reprehensible and, indeed, a repeat of the contempt for the parliament.

In this instance, it is not a question of not giving notice of the bill coming on or wanting to advance it in any rapid manner. In fact, the Attorney introduced this bill on 1 December last year and provided the usual advice to the opposition, and presumably to other members of the parliament, as to the current situation in respect of the use of electronic transactions and the reasons why we need to change. In this case, there is a need to modernise and be able to keep up with having, as best we can, an efficient sector for the provision and communication of documents between our courts, police, defendants, lawyers and the like. All of that was going swimmingly.

Indeed, from recollection, the Attorney himself hosted the briefing on this occasion and provided certain information. I may be wrong; he may not have been present on that occasion, but I certainly recall his principal adviser, Mr Evans, and Ms Morgan from the Attorney-General's Department providing particulars on it. In the course of that briefing, which was back on 7 June last year, I asked for certain material.

Firstly, having been given an assurance that there was considerable consultation on the bill and that there had been some comment made by some of the usual suspects (if I can put them in that category), I sought some qualification of the circumstances in which someone might be electronically forwarded documents without consent. They felt it was necessary to provide a clause for the defendant, or the party receiving it, to have the capacity to read electronically and to print. Secondly, I asked that some provision be made as to the circumstances of electronic communication as it occurs in our courts to date.

Disappointingly for me, when I asked for both a list of those consulted and the examples given, on around 8 February, by a letter dated 6 February by the Attorney, I was provided with a list of all the organisations and interested parties that had been invited to comment on the draft bill, a list of all of those who had forwarded responses and a summary of what currently applies in the courts. What the Attorney did not tell us was that this letter, as late as it had been received prior to the debate being listed for this week (in fact, it was first up this morning until proceedings on the child protection matters interjected), and what he did not address, was that the consultation with this great list of people was in respect of a draft legal proceedings bill and a second bill.

One bill was to amend the Electronic Transactions Act 2000 in respect of legal proceedings, and the second was to deal with the service of proceedings. That bill was the Summary Procedure (Service) Amendment Bill 2016. Does it make any difference? Does it matter that what the Attorney sent us is simply a list of what had been presented for consultation as a draft and not the final bill? In this instance, it is not terminal to the consideration of the matter and being able to work our way through it, but the problem is that when we go to speak to some of the stakeholders in this area, we say, 'We understand you have read the bill,' and they say, 'No. Has the Attorney tabled it?' 'Yes, he did table it back in December last year. I am led to understand that you have seen the bill.' 'Well no, we haven't.' There is a search through their records, and, 'But we did get consulted on two other draft bills.'

On examination of those, we were able to identify that the government had amended the legal proceedings bill and had apparently dumped the service bill, because we have not seen it, it has not been tabled in any form. There has been no indication by the Attorney in his second reading on this bill as to what happened to that. What has happened to the other half of what is being proposed here? Why was it aborted given that the concern, always, for a number of these stakeholders was the capacity for the recipient to be able to read the data or information being conveyed and/or the capacity to print it?

On the current bill before us, it appears it has been attempted to be dealt with by adding clauses to require an assessment to be made of the capacity of the recipient, in particular in respect of the proposed sections. Whether it relates to the writing or to signatures or to the production of documents, all add a clause to this effect. The proposed subsection X provides:

> … only applies if, before giving the information by means of an electronic communication, it has been ascertained that the person, or a legal practitioner representing that person, will be readily able to access or download and (if required) print, the information.

As I said, that is replicated in each of the different areas in the bill.

Having identified that has been included, I would have thought that at the very least the Attorney would write to the stakeholders, particularly those that had identified concerns, whether they represent Aboriginal communities or people who are in an impecunious state and need financial assistance through the Legal Services Commission, whether it is the commissioner for Aboriginal matters or the Law Society or others who have an interest in the efficient management of the courts but also in the protection of the interests of anyone involved in litigation, to ensure they are fully apprised not only of whatever they are being accused of or charged with or required to do in respect of attendance or production of documents but that they actually know what is going on.

It is one thing for the Attorney, or some of the people in his department, to sit there and work through, with a microscope, every possible little area of efficiency that might be to be achieved in the department or the courts, it is another thing to balance that off against ensuring that justice is applied. That is exactly why we have a court process, why we have the institution, why we have a judicial structure, to ensure that we protect people's rights—and that includes the general population.

The critical thing to remember in the process here is that the Attorney did not do that and, one by one, the parties who raised issues said to me, 'We haven't seen the bill that has been tabled by the Attorney at all.' Fortunately, I was able to do some of his job and give them some reassurance, I hope, that some of the clauses in the bill that was tabled in the parliament—given that we have never seen the first one—did in fact appear to have clauses in them that related to that. That gave them some confidence, I think, or

allayed some of their concerns that the bill had been tabled without them knowing anything about it.

Unlike the circumstances this morning, where the government pushed ahead in a political stunt in respect of child protection, in this instance it has not been full and frank in what it is doing, and it should be. At first blush, when I listened to the Attorney back in December saying that there would be electronic transactions reform, I thought that was great. It is part of the normal contemporising of how we operate in our courts. As has been identified and confirmed by the Attorney's office—in fact, under his hand by this recent correspondence—we already have a registry online website through the Courts Administration Authority. There is the capacity for people to order transcripts and various other documents online, which is all pretty normal.

The Magistrates Court uses an electronic service for filing of some of their fines enforcement related matters and for filing of documents in civil matters. The superior courts (the District Court and Supreme Court) have an electronic case management system. Like most of the government's systems, it does not always run smoothly; nevertheless, it is an important innovation that enables an electronic filing service, provision of notices and, generally, to communicate for the parties. In the criminal divisions of the Supreme Court and District Court, service of some documents can be provided via email if email addresses are provided.

Largely, I think the system operates quite well in the civil jurisdictions. In the criminal jurisdictions, where there has been a consent recorded between the relevant parties—for example, the lawyer and the Legal Services Commission—who are active participants in these matters, it is clearly known to each other, it is recorded, and provides a convenient conveying of information. That is great. If that can be enhanced, explored and extended, that is fantastic.

But the problem is that when you are dealing with criminal charges, and perhaps I will compare it to a corporate case, where XYZ company nominates a particular legal firm to handle their legal matters and, in litigation, to receive service of documents on their behalf, etc. They file a notice of address for service, and that is used between lawyers—sometimes crown law in civil matters. Unfortunately, there are hundreds of cases at any given time between the government and other people, so we do know that there is obviously a lot of litigation happening in the civil area, outside of criminal matters.

In criminal matters, however, here is the practical position: firstly, the majority of defendants are young people. That is sad enough in itself, but the biggest pool of the population who come before our criminal system are young people. When I say 'young', I am talking about those aged 30 or 35 and under; they are often aged 20 and under. There is probably an even higher profile, relative to the population, of a percentage incarcerated in criminal matters who are of that very young age.

Some would argue that is because they are poorer; they are more likely to be in a public area, they get caught more easily, they do not have the money to spend on lawyers. Whatever the explanation, the reality is that crime is not the reserve of young people, but the criminal conduct of those who are caught is certainly a very high profile. Sadly, as we know, a very high level of incarcerated young males are Indigenous, reflected in the representation of their profile in the population—way above.

I think it is reasonable to assume that the policymakers, including the people advising the Attorney, would think, 'Okay, this is a fairly young cohort. They are probably going to be pretty tech savvy. They all have a phone or an iPad, or a communication tool with which they are familiar, and can restore and communicate data electronically. Great.' But, here is where the problem comes. The problem is that the young people in this

category are also frequently poor, and they do not always have an account where their data is up to date and accessible on a phone. If they are homeless, they do not have somewhere to plug it in to recharge the batteries and receive information.

These are the sorts of things that affect some young people, particularly in the cohort of poor or homeless or who are at large, who do not have access to that electronic communication. It is all very well for us, any one of us, as we all have these things, and we can all afford to have them plugged in and connected to the world 24/7. We are talking about a group in the community that does not necessarily have the benefit of that, so we as policymakers, or the government as legislative sponsors of reform, need to understand what they are doing in the real world.

Secondly, there is every likelihood that that young person, as an offender who has been arrested, charged or whatever, is unrepresented at the initial part of the proceedings and certainly does not have a notice of address for service advising that XYZ company is their nominated lawyer for the purposes of receiving documents on their behalf, or getting information which might detail the particulars of the charge, the number of offences and accounts of the charge, etc.

This is back in the real world, and we are saying to the government, and I think it is certainly reasonable for some of the stakeholders to say, 'Understand that you are dealing with a population of people who are largely unrepresented, who may have had no experience with the court processes in the past, who do not have a nominated solicitor they know at the District Court they can get in touch with to deal with the matter and who may be in financial circumstances that minimise their capacity to receive this information and be assured that they are capable of receiving it.'

In a way, if we were to be perfectly frank about it, it is not a question of quicker service or identifying that you can transfer information across town more quickly electronically and do not have to have a clerk to deliver it from one chambers to another, or from the DPP's office across to a lawyer's office. We experienced this with fax machines and we now have electronic transactions—we are in the real world. The truth is that when you send documents electronically it does not mean that the recipient is in a position either to receive them and to store them, or to immediately retrieve them for the purposes of conducting their defence or putting in their responding material.

Why do I say that? Because the fundamental aspect of this legislation is about saving time and money because, in the end, someone else has to maintain the electronic equipment to receive and store it—not just read it but receive it and store it—and/or have the facilities to print it out and make the necessary copies for others, etc. Why do I say this? Let me give you a classic example of how unelectronic we are in the real world in our courts. Yesterday, I was at the Supreme Court listening with interest to the Full Court submission in a case of interest to most of us. The parties included the Electoral Boundaries Commission. It went all day in submissions and judgement was reserved.

In that case, which is a civil case, unsurprisingly a lot of the pleadings of the notice of appeal and so on filed by the ALP, etc., were electronically filed and served—easy. The first thing to happen when the Full Court came into courtroom 11 yesterday and sat down, counsel having identified who they were representing, was that the Senior Counsel for the ALP handed up five copies of the part of the constitution that was going to be argued . Even though we had all the appeal books, all the notices, all there electronically, and every judge had a monitor in front of them, they all said, 'Yes, that would be most helpful to have a hard copy.'

I do not doubt for one moment that that is the way it is. They do not have two screens. There is not a situation where you can have two screens in front of you, either at the bar

table or on the bench, with both the statute and the other. Some are really clever because they can put in a little pocket of inserts, like you do on the screen. Most judges, let me tell you, cannot do that, and probably most at the bar cannot do it. I make the point that hard copies have to be found.

The next thing I see is that full reports of the select committee of the parliament from 1991, preceding the 1991 constitutional referendum and amendments in respect of electoral redistribution laws, were not conveyed electronically, but a large wad of them was handed out to all the parties and people on the bench.

What happens in the real world in most cases, even in civil cases, where there has been some significant advance in the use of electronic material—the recording of witness statements, affidavits, pleadings and obviously exhibits and the like—is that there is still a heavy reliance on the printed document. We all thought 20 years ago that we were going to move into a paperless world. What a joke! I do not know about you, but my office is wall to wall with paper. It is not because we do not use electronic devices; it is because we cannot always rely on material being easily retrievable, accessible or marked up.

The DEPUTY SPEAKER: You also have to have power.

Ms CHAPMAN: The Deputy Speaker reminds me, of course, that you also have to have power to operate these things, which is another problem, but we will not go there today. What I am trying to point out is that there is the ideal, there is the fantasy world and there is the real world. In the real world, we still are very dependent on hard-copy documents. Again, picture the 20 year old who has been charged with an offence. He is sent the material on his iPhone, and he goes into the lawyer's office and says, 'Can I plug the phone in for the first two hours to recharge it and show you what I've been charged with?' 'Yes, that's fine,' and tick, tick, tick, goes the lawyer's bill.

Or he goes into the Legal Services Commission, and asks them to print it off so that they can then enter into electronic correspondence with the relevant parties, and then says to the lawyer, 'Well, okay, you've printed them off. That's great.' He can now be charged $1.90 a page, or whatever it is for photocopying these days, if he is not on legal aid. If he is on legal aid, who is going to pay for it? The Legal Services Commission presumably will absorb the bill, if they have in-house counsel or solicitors handling the matter, and it costs no extra money.

At the end of the day, these things are dressed up with, 'Let's be contemporary, modern, blah, blah, blah.' The truth is that it is a cost-shifting exercise because we still rely on paper, we still rely on documents, we still require amongst the parties to convert the documents in order to have some capacity to record on. Even the instruction from the lawyer to the person we are using as an example needs to leave the office with an identification of what he is or is not to do, what his conditions of bail will be, what has been negotiated, and that in some way has to be recorded. Sure, he or she can put that in the notes section of their iPhone but, again, it has to be retrieved in order to rely upon it.

Most importantly, we are still living in the twilight zone, where we have the benefit of some electronic conveyancing, but we do rely heavily on the written document, and I expect we will for some time. In reality, whilst this is a cost-shifting exercise, I expect that the Attorney will ensure that in this year's budget, before the implementation of this legislation, there will be some provision for the Legal Services Commission in particular to be covered for the costs of dealing with printing material. You might think that it is insignificant, but it involves thousands and thousands of pages and it is operating

electronic equipment. The courts still demand it, the client is still entitled to it and the prosecution needs it.

I just say that, if they want to go into this era of requiring people to have to sign up or to opt out rather than opt in now, it does come at a cost. Someone is going to have to pay for it, and I think the Attorney should ensure that the estimated costs attached to that will be budgeted for and reimbursed. It may need to be done on that basis for the first year but, thereafter, there is some provision for that to occur, otherwise we just alienate people via the cost of justice in yet another way but in this case to the most financially vulnerable—those who are charged with criminal offences.

The position from the opposition is that we will not oppose the bill. Obviously, there are good aspects to it in the sense of its objective, but if it comes at a cost to the people who are most vulnerable then that needs to be remedied. It appears that, at this stage, those stakeholders we have been able to identify, at least by telephone communication, are accepting of the provision by virtue of the additions to the bill that we have read out to them. If there is any further comment formally put to us between now and the deliberations in the other place, we reserve the right to consider any further amendments; otherwise, we support the passage of the bill.