CRIMINAL LAW AMENDMENT (HOMICIDE) BILL 2008

Consideration in Detail

Clause 1 put and passed.

Clause 2: Commencement —

Mr J.A. McGINTY: I move —

Page 2, after line 7 — To insert —

(b) section 25(2) — on a day fixed by proclamation, being a day that is the day, or after the day, on which the *Community Protection (Offender Reporting) Amendment Act 2007* section 11 comes into operation;

(c) section 40(2) — on a day fixed by proclamation, being a day that is the day, or after the day, on which the *Community Protection (Offender Reporting) Amendment Act 2007* section 13(3) comes into operation;

This amendment relates to three clauses in the bill: clauses 2, 25 and 40. Clauses 25 and 40 of the bill currently make minor amendments to the Community Protection (Offender Reporting) Amendment Act 2007, when it is proclaimed, and the Working with Children (Criminal Record Checking) Act 2004. The Community Protection (Offender Reporting) Amendment Bill 2007, which is currently before the Legislative Council, will, when it has been passed by the Legislative Council, amend the Community Protection (Offender Reporting) Amendment Act 2007, when it is proclaimed, and the Working with Children (Criminal Record Checking) Act 2004 to insert references to the offence of wilful murder into the schedules to those acts. As the offence of wilful murder will be repealed by this bill, it is appropriate that those references be removed once this bill becomes law. The proposed amendments to clauses 25 and 40 will effect that removal. The proposed amendments to clause 2 will provide that the removal will occur only after the Community Protection (Offender Reporting) Amendment Bill 2007 comes into operation.

Amendment put and passed.

Clause, as amended, put and passed.

Clause 3 put and passed.

Clause 4: Section 23 replaced by sections 23, 23A and 23B —

Mr C.C. PORTER: It is obvious from a review of the Attorney General's second reading speech that new section 23 simply repeats, almost word for word, the first and second paragraphs of section 23 of the Criminal Code. The Attorney General is dividing the text that was previously in section 23 of the code, that is correct is it not?

Mr J.A. McGinty: Yes, that's right.

Mr C.C. PORTER: However, there is a substantive change to the terms of the law of accidents in proposed section 23B. The phrase I am interested in is in proposed section 23B(3)(a) and (b), which seems to be a statutory implementation of the eggshell skull rule. I understand that, previously, one would look to the common law as case law for that rule. I am interested in the phrase "for that reason alone". This enshrinement of the eggshell skull rule will read —

If death or grievous bodily harm —

(a) is directly caused to a victim by another person's act that involves a deliberate use of force; but

(b) would not have occurred but for an abnormality, defect or weakness in the victim,

the other person is not, for that reason alone, excused from criminal responsibility for the death or grievous bodily harm.

It seems to me that those words might have a longer term effect in the development of the law of causation that might not be contemplated by the review or might not be the intention of Parliament. As I understand the position at common law there is a strictness to the eggshell skull rule. Some people call it a test of strict liability, but that is not a particularly accurate description. However, in common law the rule is that if a person assaults someone and that person dies of underlying infirmity, that will not break the chain of causation. That is my understanding of the rule. The suffixing of those words "for that reason alone" seems to me to leave open the

door that an eggshell skull or an underlying infirmity, in conjunction with the grander law of causation, can become a basis on which it could be argued that a person is not liable for the victim's eventual death. I am thinking now about recent cases in this jurisdiction such as Krakouer and the reference to, I think, McHugh's judgement in the case of Royall, where they talk about the idea that reasonable foreseeability may be an applicable test in the law of causation. I seek the Attorney General's views on whether any contemplation has been given to whether the use of those words "for that reason alone" might hasten the development of a test of foreseeability or reasonable foreseeability in causation. I guess what I am asking the Attorney General is: does this attempt to enshrine the eggshell skull law or actually weaken it?

Mr J.A. McGINTY: The provision contained in this amendment to the Criminal Code follows the Queensland code provision. I am told that the experience in Queensland has not given rise to any issues that would cast any doubt over the understanding of the law of causation.

Mr C.C. Porter: When was the Queensland code amended?

Mr J.A. McGINTY: I am told it was about four years ago. The purpose of the provision that the member has referred to; that is, the words at the end of 23B "Accident", make it quite clear that "the other person is not, for that reason alone, excused from criminal responsibility for the death or grievous bodily harm". They are to ensure that we do not inadvertently exclude any other excuses for the behaviour concerned. It is really to keep alive any other excuses for the behaviour. The wording itself is quite clear; that is, in the eggshell skull case, where the victim has an abnormality, defect or weakness, if there is any other excuse available at law, that is preserved, so that the eggshell skull case would not be an excuse in itself.

I am told that, on checking the reference, the Queensland Criminal Code might have in fact been changed more than 10 years ago. There was a reference to the Queensland code in 1995 that contains this provision. I am sorry if I indicated that it was four years. That is what we thought it was but it is amazing how time flies!

Ms S.E. WALKER: It seems that we are getting rid of the first paragraph of section 20 of the code. It reads —

> Subject to the express provisions of this Code relating to negligent acts and omissions, a person is not criminally responsible for an act or omission which occurs independently of the exercise of his will, or for an event which occurs by accident.

Mr J.A. McGinty: You will find it in proposed section 23A. It is a restructuring of the provisions. The provision you are talking about has been restructured, but retained.

Ms S.E. WALKER: What are we doing here? Hypothetically, if someone has had a car accident and has had part of his skull removed, is wearing a protective device and goes to a pub and provokes someone who hits him and he then falls to the ground and dies as a result of hitting his head where part of the skull has been removed, that currently would not be foreseeable. Will the new provision mean that the person who was provoked will be held criminally responsible for the fact that the person had a defect? What is the difference?

Mr J.A. McGinty: I am told that this change will make no difference to the current law. Unfortunately, it is not that much of an uncommon occurrence. As a result of a so-called one-punch attack on someone who might have temporary protection on his head, the person making the assault would be liable, in any event, if it resulted in death.

Mr C.C. Porter interjected.

Mr J.A. McGinty: Yes.

Ms S.E. WALKER: What is the difference between the present provision in the code and the Attorney General's proposal?

Mr J.A. McGinty: In respect of the example you gave?

Ms S.E. WALKER: No, in respect of proposed sections 23A and 23B.

Mr J.A. McGinty: It does not change the law; it simply puts into the code the eggshell skull rule, which exists as part of the common law at the moment.

Ms S.E. WALKER: Is it the law at the moment that if someone who has an eggshell skull dies as a result of being hit, the person who does the hitting is criminally responsible? If the victim had not died but for the eggshell skull, the offender would probably get off, whereas, now he probably will not?

Mr J.A. McGINTY: I am told that under the current law the assaulter would most probably be convicted. Under what we are proposing here, he would almost certainly be convicted. In support of that proposition, I refer the member for Nedlands to the Law Reform Commission's report entitled "Review of the Law of Homicide" on which this legislation is based. The last paragraph of page 153 states —

> The position in Western Australia is not entirely clear.

There is a reference to "The Criminal Codes: Commentary and materials" by Whitney, Flynn and Moyle. There is also a reference to the case of Ward, which is a 1972 Western Australian case in which it was held that —

> [W]here the injury is the direct and immediate result of a blow intending to cause some harm it is immaterial from the point of view of criminal responsibility that death only results because of some constitutional defect unknown to the person responsible for the blow.

There is further discussion on that. By inserting this provision into the code, it will put beyond doubt the irrelevance to the outcome of a defect in the person who is being assaulted. There is probably a more articulate way of putting that proposition but I think the member knows what I mean.

Ms S.E. Walker: Are you just making certain that if someone hits someone and he has a defect that the accused did not know about, the accused will be held responsible for the full consequences of the damage of the assault?

Mr J.A. McGINTY: Yes. If we put it another way around, one takes one's victim as one finds him. That is the way that is often described. By codifying that provision, it places it beyond doubt, if there is doubt, as was observed by the Law Reform Commission, about the operation of the current law.

Mr C.C. PORTER: I wish to develop the point I raised earlier. The Moyle textbook's assessment of Ward is an assessment of whether the eggshell skull principle applies absolutely in this jurisdiction. I have my doubts about that assessment. I think it does. This intends to enshrine that principle legislatively, but in doing so it waters down the principle. For that reason alone, if the words were simply removed from this section so that it read "the other person is not excused from criminal responsibility", it would reflect more than the common law principle, which I believe applies in this jurisdiction in any event, that the offender takes the victim as he finds him. This is notwithstanding that it has been in place in Queensland for some time and it appears perhaps every 10 years.

The point I am trying to make is that the eggshell skull often comes up as a rule in conjunction with arguments about criminal causation. There is a variety of tests for criminal causation. If there is one area of the law that is in a stage of rapid development, in comparative terms, it is the law of causation. Perhaps I will put forward this phrase from McHugh. It is from the case of Royall, in which an angry and violent husband threatened his wife. In attempting to escape from him, the wife jumped out a window and was killed. There was obviously a great deal of argument about whether the husband in that case was causally responsible for the victim's death. McHugh at 449 states —

> The test of reasonable foresight is to be preferred to the "natural consequence" test and the "operating cause and . . . substantial cause" test. The balance of authority favours the reasonable foresight test over the "natural consequence" test.

There is a great deal of argument over what is the appropriate test. Different tests are applied in different situations and different judges will argue about which tests should be applied to which situations. Using the words "for that reason alone" leaves open a greater consideration of the underlying physical defects in the victim in the context of arguing the law of causation. It is a fine point, but my concern is that in an attempt to enshrine the common law position, it is being watered down, opening up a very messy argument of causation apropos underlining physical defects.

Mr R.C. Kucera: Is that simply shifting the onus in favour of the victims as opposed to in favour of the offenders? It is shifting the emphasis onto —

Mr A.D. McRAE: That is a pretty interesting argument. I ask the member to resume, as we were anticipating.

Mr C.C. PORTER: I thank the member for Riverton and the member for Yokine. It is probably incorrect to say that there is an onus that says one takes the victim as one finds him. This does not change that position. I am saying that it says, in quite a clumsy way, that one takes the victim as one finds him but that that person is still able to avail himself of other defences such as causation in the context of who the victim is. It is a slightly weaker version of the common law rule.

Mr R.C. Kucera: I still feel that the main thrust of this piece of legislation is to move the emphasis more towards the plight of the victim away from the emphasis that traditionally has been placed on raising the defence in this instance. I support this part of the legislation because over the past two or three decades we have tended to shift the emphasis further and further towards supporting the role of the defence as opposed to upholding the right of the victim. I am surprised at the member for Murdoch's argument. I suppose we have to get a balance, which is the member's point.

Mr C.C. PORTER: I think the member is missing my point. I agree with him absolutely. This is what it is trying to do. I wonder whether it actually achieves that.

Mr R.C. Kucera: Maybe you can suggest a way that that could be improved. I am not as well versed as you on the finer points of law.

Mr C.C. PORTER: I would remove the words "for that reason alone" and have a simpler piece of drafting so that the other person is not excused from criminal responsibility. I understand that that is what is in common law. Common law does not use the words "for that reason alone"; it just says that one takes the victim as one finds him and that is the rule.

Mr R.C. Kucera: Does that put you in conflict with the normal attitude that is taken, particularly by appeal courts, to the causal defence?

Mr C.C. PORTER: The defence of causation would still exist but it would limit defence counsel's ability to tap into the underlying infirmity to argue that there was not a causal link.

Mr J.A. McGINTY: Interestingly, the Queensland provision, which again is set out on page 153 of the Law Reform Commission report, states —

> [A] person is not excused from criminal responsibility for death or grievous bodily harm that results to a victim because of a defect, weakness, or abnormality even though the offender does not intend or foresee or can not reasonably foresee the death or grievous bodily harm.

That is the formulation that supports the proposition being put by the member for Murdoch. Against that, during consultation in the drafting of this bill, a judge of the District Court raised this issue. That particular judge, who was a criminal prosecutor before her appointment to the bench, said that it would be better to include the words that the member is now objecting to to place beyond any doubt that other excuses were not excluded from the operation of the section. That view was then supported by the chief judge of the District Court. We took the advice from the judiciary on the best way to achieve that particular end result. I can understand the member's point of view. I think there is a countervailing point of view to be put. In the light of a clear statement during the course of the debate, I do not think the intent of this particular provision—that it could properly be interpreted in the way that the member has advocated—is something that would be available on the words used there. It is, as the member for Murdoch rightly pointed out, a fine point. We could have gone either way in the drafting of the legislation. We opted to support the view put forward by the judiciary, who are responsible for interpreting these provisions. I do not deny the validity of the point raised by the member for Murdoch. Hopefully, it will not arise very often.

Mr C.C. PORTER: I thank the Attorney General for explaining the government's position. One of the benefits of being an elected representative is that for the first time I can say that judges can be wrong. They are quite wrong in this instance. The Queensland drafting is much better. Perhaps I would not have arrived at that view if it were not for the fact that my analysis of the law of causation is that, in legal terms, it is in a state of flux. It might look like glacial change outside the law, but it is moving rapidly. We are heading towards a consolidated reasonable foreseeability test, in which case these words will open the door so that defence counsel can argue that an offender is not guilty of the death by virtue alone of the eggshell skull, but that has to be taken into account in a grander test of reasonable foreseeability or natural consequence. Although it is a fine point—the Queensland drafting is better—it will have significant consequences over the next four to 10 years. I will not labour the point.

Ms S.E. WALKER: I refer to the battered wife syndrome or sane autonomism. Does section 23 refer to sane autonomism?

Mr J.A. McGinty: Yes.

Ms S.E. WALKER: I have asked about that because it relates to the defence of duress. During the second reading debate, I referred to Mrs Falconer and said that, from memory, she had the benefit of a plea bargain of manslaughter after she killed her husband. I put that on the record because I want to talk about it when we deal with the provision that relates to duress. Mrs Falconer was convicted—the Director of Public Prosecutions will be able to confirm this—of wilful murder after her trial. Her counsel appealed and the Court of Criminal Appeal, as it then was, ordered a retrial. The crown took the case to the High Court. The High Court granted special leave, but the appeal was dismissed. It then went back to the chief crown prosecutor who decided how to get around it. The plea entered into was sane autonomism; that is, Mrs Falconer acted independently of her will. I think that was right.

Mr C.C. Porter: What case are you talking about?

Ms S.E. WALKER: The Crown v Falconer. Is it right that a plea of manslaughter was accepted on the basis that she acted independently of her will?

Mr J.A. McGinty: I will provide more completeness to the description. If she had acted independently of her will, she would have been not guilty. There is uncertainty around the operation of that that effectively resulted in an agreement to accept her plea of guilty to manslaughter.

Ms S.E. WALKER: Okay. So she was not able to use section 23.

Mr J.A. McGinty: No, but it was taken into consideration.

Ms S.E. WALKER: I think she received two or three years.

We have talked about battered wife syndrome. The Attorney General said that we are collapsing the two provisions. Under the new provisions, will a battered wife who commits murder be able to rely on sane autonomism or duress—or both?

Mr J.A. McGinty: It is self-defence. I do not think sane autonomism would be relied upon in the general circumstances. If you look at the newly crafted self-defence defence, that is where you will find the major advantage for women suffering battered wife syndrome. It is not duress, unless there is a circumstance that you want to relate to us around that.

Ms S.E. WALKER: A battered wife who kills her husband or a battered husband who kills his wife cannot rely on section 23 for sane autonomism.

Mr J.A. McGinty: Only if true autonomism were in existence.

Ms S.E. WALKER: Is that provision still in the Criminal Code?

Mr J.A. McGinty: Yes, nothing has changed in respect of autonomism.

Ms S.E. WALKER: Under section 23?

Mr J.A. McGinty: Yes, that is right. Autonomism will not be affected by these amendments.

Ms S.E. WALKER: A battered wife or husband will still be able to rely on that.

Mr J.A. McGinty: Only if the evidence reveals it. I wouldn't have thought that that would have been a common occurrence in the usual case of battered wife syndrome, as I understand it.

Mr C.C. PORTER: My understanding with respect to that is that the words in proposed section 23A(2), which refer to something that occurs "independently of the exercise of the person's will" refer straight to the case law, and there is no change. Is that the case?

Mr J.A. McGinty: That is right.

Ms S.E. WALKER: Is there another duress defence?

Mr J.A. McGinty: Yes, there is.

Ms S.E. WALKER: Okay. We will discuss that soon.

Clause put and passed.

Clause 5: Section 25 replaced —

Mr C.C. PORTER: I will not labour too long the position that I outlined in my response to the Attorney General's second reading speech. Insofar as this extends the defence of duress, the opposition will oppose this clause.

Mr J.A. McGinty: This clause does not relate to duress.

Mr C.C. PORTER: I am sorry, this clause deals with emergency. The opposition has no problem with clause 5.

Clause put and passed.

Clause 6: Section 31 replaced by sections 31 and 32—

Mr C.C. PORTER: Clause 6 deals with the expansion of the law of duress. The opposition's position was put relatively clearly during my second reading contribution. There are some minor extensions to the law of duress which, in and of themselves, are not of an enormous consequence, although they are useful. A threat can be made telephonically; that is, a person does not need to be at the scene when a threat is being made. That makes some sense in the modern world of telecommunications. As I have stated previously, the opposition has two major problems with this clause. Presently, a threat that could activate the defence of duress is limited to threats of immediate death or the doing of grievous bodily harm. Those threats have been opened up to any threat. The safety-valve mechanism, if I can put it way, that has been inserted is that the response must be reasonable. The opposition considers that simply making a response to any threat, even a reasonable response to any threat, a

legitimate defence is far too broad in its scope. The other difficulty which the opposition has and which has been stated relatively clearly is that for the first time in this jurisdiction it will be possible, albeit with the attached criterion of reasonableness, for a person to engage in conduct that results in another person's death and successfully avail himself of the defence of duress. That is simply an expansion of the law of duress that the opposition cannot support under any circumstances.

Proposed section 32(3), "Duress", states —

> Subsections (1) and (2) do not apply if the threat is made by or on behalf of a person with whom the person under duress is voluntarily associating for the purpose of —
>
> (a) doing an act or making an omission of the kind in fact done or made by the person under duress; or
>
> (b) prosecuting an unlawful purpose in which it is reasonably foreseeable such a threat would be made.

This proposed subsection is the proviso that a person cannot avail himself of the defence of duress if that person had put himself in a position in which it was reasonably foreseeable that he would be subject to such a threat.

Existing section 31 uses the term "rendered himself liable", which has been substituted in this proposed section with the term "reasonably foreseeable". The term "reasonably foreseeable" represents a slightly more expansive test than the test of rendering oneself liable to be put into a situation of threat. The threshold is much lower and the system is much safer than the one that exists at the moment. Predominantly, the opposition's difficulty with this matter is that previously it was the case that a person was not able to engage in behaviour that could result in strict security life imprisonment, the doing of grievous bodily harm to another individual or an offence for which an intention to do grievous bodily harm was an element. The opposition is firmly of the view that under no circumstances, even with the criteria of reasonableness, should the law of duress extend to what is in effect murder or the doing of GBH. The opposition has made that position clear. It is a philosophical position that one either accepts or does not accept.

Mr J.A. McGINTY: I would like to make a number of points. First, it is wrong to suggest that no other jurisdiction will allow a person whose life is threatened to kill another person.

Mr C.C. Porter: I do not think that I have suggested that.

Mr J.A. McGINTY: No; I am just making it clear for the record.

In the Australian Capital Territory and in Victoria, as well as under the commonwealth Criminal Code, there is no limit to the defence of duress. Second, for the defence of duress to be made, the person must reasonably believe that a threat will be carried out, that the act or omission is necessary to stop the threat from being carried out and that the act or omission is a reasonable response to the threat in the circumstances that the person believed on reasonable grounds to exist. That test will provide a difficult hurdle for the use of lethal force in all but the most exceptional of cases.

I will refer to three parts of the Law Reform Commission's "Review of the Law of Homicide". On page 196 of the report the following example is given —

> A is driving his car. B hijacks the car when it stops at the traffic lights. B holds a gun to A's head and orders him to drive to a particular location, where B intends to shoot a person unknown to A. If A complies and drives B to the location and thereby knowingly aids B in committing murder, in the absence of the defence of duress A would also be guilty of murder.

Perhaps more compelling than that is the observation on page 196 of the Law Reform Commission report. One paragraph from that page states —

> The Commission agrees with the observation that a 'parent who acts out of love for a child is perhaps the most obvious case where duress might be put forward as an excuse to murder'. The Law Commission (England and Wales) provided examples of possible 'deserving cases' of duress. One such example is where the actions of the accused resulted in 'net gain of life'. The Commission agrees that where an accused acts to save a number of people, the killing of one person may be considered reasonable.

Finally, the commission weighs up the issues on page 198 of its report. The first full paragraph on that page states what is essentially the commission's summary on the matter. It reads —

> Notwithstanding the arguments against extending the defence of duress to murder, the Commission is convinced that it is appropriate to do so. The Commission has not reached this conclusion lightly: it recognises that excusing the killing of an innocent person raises complex moral questions. However, it must be emphasised that extending the defence of duress to murder does not mean that every time a person kills under duress he or she will be relieved of criminal responsibility. The recommended new defence of duress is not easy to make out. In practical terms, it is unlikely that the defence would ever be successfully raised in a murder trial. Bearing in mind both rationales for the defence—the avoidance of greater harm and the terrible predicament faced by a person acting under duress—the Commission believes that it is necessary that the criminal law provides for the possibility that in extreme circumstances an accused should not be held criminally responsible for killing under duress.

Duress is not currently available as a defence to murder. This proposal is to extend duress to include murder. It is based on the Law Reform Commission recommendation and is made for the sort of reasons that are given in the Law Reform Commission Report.

Ms S.E. WALKER: I do not know whether anyone has already put on record our thanks to the principal project writer, Victoria Williams; project writers Dr Tatum Hands and Danielle Davies; executive assistant Sharne Cranston; technical editor Cheryl MacFarlane; officers from the Director of Public Prosecutions' office; and all the other researchers involved in writing this report. It could not have been easy.

I will support the government's extension to the defence of duress. On page 186 in chapter 4 of the "Review of the Law of Homicide", the Law Reform Commission supports the extension of the defence of duress to all offences, saying —

> The Commission recently examined the defence of duress . . . It observed that the defence in Western Australia is one of the most restrictive models in Australia.

Furthermore, on page 187 the report states —

> **The defence of duress is potentially gender-biased**
>
> A number of the requirements under s 31(4) of the Code may operate unfairly to women who are victims of domestic violence. In relation to the defence of duress in New Zealand (which is similar to that in Western Australia) it was observed that the defence is under-used by women.

It goes on to say —

> Evidence of 'battered woman syndrome' has been given in cases dealing with duress for the purpose of assisting juries to understand why an accused was unable to avoid the threat from being carried out and to assess whether an ordinary person would have yielded to the threat.
>
> . . .
>
> The Commission remains of the view that this recommended defence of duress should be introduced in Western Australia because it removes unwarranted restrictions on the availability of the defence. Importantly, it caters for threats made against a third party; removes the requirement for the presence of the person making the threat; and allows any type of threat to be taken into account.
>
> . . .
>
> The Commission agrees that there are problems in respect to the offences excluded from the defence of duress. The current law is illogical.

I must admit that I have not read the whole report.

Mr J.A. McGinty: It is a great read.

Ms S.E. WALKER: It is no longer my responsibility to do that! I like now to cover things other than law. However, I have read this section of the report and I will support the government on this clause.

Mr T.K. WALDRON: The National Party also has looked closely at this clause. I must admit to some confusion at the start, not having a legal background. I thank the member for Murdoch for sharing his thoughts with us, the Attorney General for the points he has made today and the member for Nedlands.

The National Party will support the government on this particular clause. Weighing the evidence, obviously there will be some occasions when this law will apply and be applied properly. A fear which has been highlighted for me, and which I have taken on board, is that this defence may start to be abused. However, for the reasons that have been raised, the National Party will support the government on this matter. I have a limited knowledge, but having thought about what a normal person in the community would expect from some of the cases that have been highlighted, both I and the National Party (WA) will be supporting this clause.

Mr C.C. PORTER: I thank the Attorney General for his explanation, but there are two different positions on this, and one or other of them can be accepted. The example that the Attorney General read from, which appears at section 196 of the review, is one of the most seriously ridiculously non-legal examples I have ever heard of. I cannot conceive of how it made its way into this review. I will read it again: A is driving his car. B hijacks the car when it stops at the traffic lights. B holds a gun to A's head and orders him to drive to a particular location where B intends to shoot a person unknown to A. If A complies and drives B to the location, and thereby knowingly aids B in committing murder, in the absence of the defence of duress, A would also be guilty of murder.

That just cannot be right. One would presume that person would be charged, under section 7(b), as a principal—in common law language—but the Criminal Code reads —

> (b) Every person who does or omits to do any act for the purpose of enabling or aiding another person to commit the offence;

One of the basic tenets of that section is that a person must not merely knowingly aid, but because of the words "the purpose of enabling", a person must intend, by his actions, to aid. The case of Jervis states that, the case of Coney states that and the case of Mirrless states that. The case of DPP for Northern Ireland v Maxwell almost precisely mimics this situation, except that the fellow was guilty because he did intend, by his acts, to aid. In that case the Irish Republican Army called one of its officers and asked him to lead it to a public house, where it threw a pipe bomb in. Some brave person threw the pipe bomb out, but the IRA officer intended, by his act of driving, to aid the IRA. It could not be conceivable that in that circumstance the individual would be guilty of murder, because he would not be considered a party under section 7(b) because he did not do something for the purpose of enabling. He might have known, but he did not intend his act to enable. I put on the record that that example is wrong. Nevertheless, it will be the case that under the opposition's opposition to the amendment certain people would find themselves excluded from the defence of duress, but in circumstances whereby they murder another person under duress, we could never accept that.

Mr M.J. COWPER: I was very interested to hear the member for Murdoch speak on this clause, and I note that he has an amendment standing in his name in the orders of the day that perhaps he would care to move.

Mr C.C. PORTER: I always appreciate a reminder. I move —

Mr J.A. McGinty: You don't have to move it; it is just voting against it.

Mr C.C. PORTER: That's correct. The motion to oppose stands in my name on page 12 of the notice paper.

The ACTING SPEAKER (Mrs J. Hughes): The member is unable to oppose a clause, but he can vote against it. Is that clear?

Mr J.A. McGinty: You don't move to oppose the clause, you just simply vote against it.

Clause put and a division taken with the following result —

Ayes (30)

Mr P.W. Andrews	Mr F.M. Logan	Mr P. Papalia	Ms S.E. Walker
Mr A.J. Carpenter	Mr J.A. McGinty	Ms M.M. Quirk	Mr P.B. Watson
Mr J.B. D'Orazio	Mr M. McGowan	Ms J.A. Radisich	Mr M.P. Whitely
Dr J.M. Edwards	Ms S.M. McHale	Mr D.T. Redman	Mr G.A. Woodhams
Ms D.J. Guise	Mr A.D. McRae	Mrs M.H. Roberts	Mr B.S. Wyatt
Mr J.N. Hyde	Mrs C.A. Martin	Mr T.G. Stephens	Mr S.R. Hill *(Teller)*
Mr J.C. Kobelke	Mr M.P. Murray	Mr D.A. Templeman	
Mr R.C. Kucera	Mr A.P. O'Gorman	Mr T.K. Waldron	

Noes (15)

Mr C.J. Barnett	Mr M.J. Cowper	Mr R.F. Johnson	Mr G. Snook
Mr T.R. Buswell	Mr J.H.D. Day	Mr P.D. Omodei	Dr S.C. Thomas
Mr G.M. Castrilli	Dr K.D. Hames	Mr C.C. Porter	Dr G.G. Jacobs *(Teller)*
Dr E. Constable	Ms K. Hodson-Thomas	Mr A.J. Simpson	

Pairs

Mr J.R. Quigley	Mr B.J. Grylls
Mr E.S. Ripper	Mr D.F. Barron-Sullivan

Independent Pair

Dr J.M. Woollard

Clause thus passed.

Clause 7: Section 244 amended —

Mr C.C. PORTER: Proposed subsection (1A) states —

> (1A) Despite subsection (1), it is not lawful for the occupant to use force that is intended, or that is likely, to cause death or grievous bodily harm to a home invader unless the occupant believes, on reasonable grounds, that violence is being or is likely to be used or is threatened in relation to a person by a home invader.

I take it that the amendment to section 244 arises from a concern that as the section stands now, it may excuse lethal force in the absence of a reasonable apprehension on behalf of the home occupiers that they themselves will suffer such force; is that the gist of it?

Mr J.A. McGinty: Yes, either them or somebody else; that is right.

Mr C.C. PORTER: The view was that it was too wide previously?

Mr J.A. McGINTY: The Law Reform Commission recommended—and we accepted—that lethal force should not be able to be used in the absence of any personal threat or threat to some other person; in other words, lethal force should not be used solely in defence of property. The classic example of that would be lying in wait for somebody to come onto a property, knowing full well he poses no personal threat whatsoever but he might want to pinch a sprinkler top, or something like that, and then he gets shot. The defence ought not be available when there is the intention to cause either grievous bodily harm or to kill solely in defence of property; that is putting it the other way around.

Ms S.E. WALKER: I raised this matter with the Attorney General a few days ago. I do not feel comfortable with a proposal that will restrict the action that a person will legally be allowed to take in the circumstance of a home invasion. Section 244 of the Criminal Code states —

> (1) It is lawful for a person **("the occupant")** who is in peaceable possession of a dwelling to use any force or do anything else that the occupant believes, on reasonable grounds, to be necessary —
>
> (a) to prevent a home invader from wrongfully entering the dwelling or an associated place;
>
> (b) to cause a home invader who is wrongfully in the dwelling or on or in an associated place to leave the dwelling or place;
>
> (c) to make effectual defence against violence used or threatened in relation to a person by a home invader who is —
>
> (i) attempting to wrongfully enter the dwelling or an associated place;
>
> (ii) wrongfully in the dwelling or on or in an associated place;
>
> or
>
> (d) to prevent a home invader from committing, or make a home invader stop committing, an offence in the dwelling or on or in an associated place.

Clause 7 of this bill proposes to insert after section 244 of the Criminal Code a new subsection(1A) that provides —

> Despite subsection (1), it is not lawful for the occupant to use force that is intended, or that is likely, to cause death or grievous bodily harm to a home invader unless the occupant believes, on reasonable grounds, that violence is being or is likely to be used or is threatened in relation to a person by a home invader.

We cannot know how people will react when they become aware of a person—or persons—who has invaded their home. Does this new subsection mean that the occupant must believe that the home invader is in possession of a weapon and that violence is being or is likely to be used or is threatened? Does it mean that the occupant of the home can take action against that home invader only if that person says to the occupant, "I am going to harm you or kill you"? We cannot predict how people will react in such a circumstance. I am concerned that this new provision may be too restrictive. Has the Attorney General, the Law Reform Commission or the Director of Public Prosecutions given any thought to how people might react when they find an unknown person in their home? It is very invasive and very frightening.

Mr J.A. McGINTY: The intent of this provision is to exclude the use of lethal force that is intended to kill or cause grievous bodily harm to another person—to put it in a very shorthand way—unless the occupant believes on reasonable grounds that violence is being or is likely to be used or is threatened. If an unknown person came into a person's home at night, the occupant of that home would have every reasonable ground to believe that violence was likely if that person was breaking the law by coming into his property. This exclusion of the defence against home invasion would be likely to be employed only if there was something about the person who had invaded the property that meant that that person was not in any sense threatening.

Ms S.E. WALKER: I still believe this provision is too restrictive. I would like the Attorney to revisit this proposed subsection, and I will tell him why. A woman may be in her bed at night, with a weapon at hand, and an unknown person may come into her room and cause her to panic and to attack that person with her weapon and cause that person grievous bodily harm. The accused may say in his defence that he had said to the woman that he was not going to hurt her. It is quite on the cards that an accused will say that. I am concerned that this proposed section will not allow a person in that circumstance to use this defence against home invasion.

Mr J.A. McGINTY: The advice that I have received from the people at the table is that this amendment will have no effect on a circumstance such as that described by the member. If I confronted an intruder in my home —

Ms S.E. Walker: Even if that intruder said he was not going to hurt you?

Mr J.A. McGINTY: First, I most probably would not believe the person if he said that. In the circumstance that the member has described, I would have thought that the existing defences will be completely available to that occupant. The problem that the member has described is the very problem that has been identified by the Law Reform Commission. Section 244 of the Criminal Code, "Defence against home invasion", states in part —

> (1) It is lawful for a person **("the occupant")** who is in peaceable possession of a dwelling to use any force or do anything else that the occupant believes, on reasonable grounds, to be necessary —

It then goes on —

> (d) to prevent a home invader from committing, or make a home invader stop committing, an offence in the dwelling or on or in an associated place.

Ms S.E. Walker: The offence of break and enter, for instance?

Mr J.A. McGINTY: The offence of—to trivialise this—taking a sprinkler out of the garden, for example.

Ms S.E. Walker: But the person is committing an offence just by coming onto that person's property without that person's consent, is he not?

Mr J.A. McGINTY: Yes. The aim of this provision is to prevent the occupant from committing an offence. That is the matter about which concerns have been raised. This provision deals with a person who is wrongfully in the dwelling, or on or in an associated place.

Ms S.E. Walker: It could be a garage or a shed.

Mr J.A. McGINTY: Yes. It would include a carport, a garage and things of that nature. That is the area of concern that the Law Reform Commission has identified. The policy intent that underpins this proposed new subsection is that legal force should not be able to be used solely in defence of property. There needs to be an element of concern that violence is likely to be used. As the member for Murdoch has said, if an intruder had come onto another person's property or into another person's house, I would have thought that no jury would ever accept that violence would not have been a likely outcome. I would have thought that would be a classic case in which the occupant could say that he reasonably believed that violence, or some form of assault, was about to be used against him.

Ms S.E. WALKER: I do not agree with the member for Murdoch, because, for example, a young Aboriginal person may enter a person's house to get a drink and something to eat and then wander off, never thinking of committing violence against the occupant. The other issue is that I think the Attorney is trying to draw a distinction between coming onto another person's property and coming into another person's home, or garage. I think the Attorney General would accept that people often come onto our property without our consent. One example is the people who read our water and electricity meters. However, for a person to come into our home without our consent is a completely different situation. I am concerned that under this provision, a person will have no right to protect himself in his own home. The situation that I think the Attorney is looking at, and that I think the commission was looking at, is a person who has a cannabis crop in his backyard and who shoots a person, or sets a mantrap for a person, with the intent of causing that person grievous bodily harm. I am

concerned that this provision may remove the right of a person to protect himself. It also fails to take into account how a person may react if he finds an unknown person in his home.

Mr J.A. McGINTY: The view that we have taken in support of the Law Reform Commission recommendations may be summarised in this way. It is found at page 175 of the report.

Ms S.E. Walker: Did the Law Reform Commission draft this provision?

Mr J.A. McGINTY: No; parliamentary counsel drafted this provision. In fact, we had some considerable debate about this matter during the drafting process because we wanted to ensure that this provision would do nothing more than exclude the defence against home invasion in circumstances in which legal force was used solely in defence of property, to put it in that way. That is what we are attempting to achieve in this drafting.

Let me read these two paragraphs. The first states —

> The scope of s 244 of the Code is potentially wider than other jurisdictions in Australia mainly because the defence allows the use of any force even where the 'home invader' is not actually in the dwelling or even on the surrounding premises. The Commission does not consider that it is appropriate for the defence to apply in such a broad fashion, especially because there is no objective requirement that the force used must have been reasonable. In the Commission's recommendation for the general test of self-defence, the requirement that the force used must have been objectively reasonable in the circumstances replaces the existing threshold requirement that in order to use lethal force the accused must have feared death or grievous bodily harm.

Further down on page 175, it states —

> The Commission agrees that people are entitled to complete safety within their own homes; however, it does not consider it appropriate that force intended or likely to cause death or grievous bodily harm can be used without any requirement that such force is objectively reasonable. This is especially the case given that under s 244, force may be used solely for the purpose of protecting property. One of the Commission's guiding principles for reform is that the only lawful excuse for an intentional killing is selfpreservation or the protection of another. Consistent with this principle, the Commission recommends that s 244 be amended to provide that force intended or likely to cause death or grievous bodily harm cannot be used solely in defence of property.

That is the issue that underpins this provision. I think that is a reasonable proposition.

Ms S.E. Walker: What you're saying is that if you're at home, Attorney General, and you sense the presence of two people in your home at night and you happen to pick up a vase and go to see who is there —

Mr J.A. McGINTY: In Fremantle it is more likely to be a bit of four-by-two, but go on.

Ms S.E. Walker: I was thinking of something else. You pick up the vase and you strike the intruders and cause them grievous bodily harm. That is a natural reaction, but this is taking that away, isn't it?

Mr J.A. McGINTY: No; unless I was convinced in my own mind that there was no threat whatsoever from the people.

Ms S.E. Walker: But their very presence is a threat to you and your family in your home at night.

Mr J.A. McGINTY: If that threat is there, the existing defences will be appropriately available. I do not think there will be any difficulty putting up a current defence against the situation in which strangers enter a person's home at night. It is always conditioned by reasonableness. However, more importantly, if I wanted to defend my fishbowl, to use a Nedlands analogy, it would not be appropriate to try to kill somebody to do that, if that were the only issue at stake.

Mr J.B. D'ORAZIO: What would happen if someone tried to take my boat out of the carport? Is the Attorney General telling me that I cannot go out to my carport and use force to stop a person taking my boat?

Mr J.A. McGinty: No; you certainly can.

Mr J.B. D'ORAZIO: However, if I hurt or kill the person, I will have a problem.

Mr J.A. McGinty: No, it is not that at all. It is what you intend to do, and if the intent is to kill —

Mr J.B. D'ORAZIO: I intend to stop him taking my boat.

Mr J.A. McGinty: No, it is not that at all.

Mr J.B. D'ORAZIO: I have a club beside my bed. If someone is trying to pinch something out of my carport, I am going to stop him. However, if I hit him, I would be charged under this law. That is crazy.

Mr J.A. McGinty: No, that is not what it says.

Ms S.E. Walker: He could be.

Mr J.A. McGinty: No.

Ms S.E. Walker: The capacity is there.

Mr J.B. D'ORAZIO: It is only for the defence of property. The person is not coming into my house; I am going out to the carport to protect my property. If I hit him and he died, I would get charged. That is ridiculous.

Mr J.A. McGinty: No, that is not what it says.

Ms S.E. WALKER: It detracts from the current law. A person who is growing a hydroponics crop in his house is not allowed to keep nearby a loaded gun, a baseball bat, a knife or any other weapon with which to protect his property from a local gang that might know that he is growing the crop. That is what the Attorney General is trying to do, and by doing that he is watering down —

Mr R.C. Kucera: Doesn't that then become part of an unlawful act in itself? Therefore, they would be charged under those circumstances. They fall into categories.

Ms S.E. WALKER: I know that that is what the Attorney General is trying to do, but by doing it this way, he is detracting from homeowners' rights to defend themselves, their property and their lives.

Mr R.C. Kucera: But there's a difference between a drug dealer defending his crop and somebody in a house using a vase.

Ms S.E. WALKER: The member can get up and speak. I believe that the Attorney General is detracting from homeowners' rights to protect themselves and is not taking into account how homeowners will feel. Anyone who hears a noise at night and thinks that someone is in the house gets nervous and jittery—unless that person is a psychopath.

Mr R.C. Kucera: Member, I am not disagreeing with that point; I am disagreeing with the example of a drug dealer protecting his crop. I think that is a poor example to use.

Ms S.E. WALKER: No, it is not, because the Attorney General used it in his response to the second reading debate a couple of days ago. He said that this is what the bill intends to stop people doing. People who are growing an unlawful crop are not meant to sit there and watch and wait and kneecap or kill someone because they think that person is going to take their crop. I would like the provision to be reworded.

Mr C.C. PORTER: The opposition is concerned with this provision, but perhaps not as concerned as the member for Nedlands. However, I will put our concern. In the example given by the member for Ballajura, the likelihood is that the mere act of someone trying to steal his boat would make him feel sufficiently apprehensive about his personal safety that he could undertake significant responses. There is often a link with the idea that someone is going to steal a person's property. I will put an example to the Attorney General that I preface by asking whether any consideration has been given to limiting this provision to the inability to use lethal force, while still allowing the use of force intended or calculated to do grievous bodily harm. Many people think this way. This provision requires that a person believes on reasonable grounds that violence is being or is likely to be used before that person can do GBH to an intruder. It is safe to say that if many people heard their wooden floorboards creaking at dusk on a summer's afternoon and no-one in their family was due home, and they knew that there had been burglaries in the neighbourhood, they may well say to themselves, "When this person comes around the corner, who is not a member of my family and who I think is an intruder, regardless of whether it is a 10-year-old boy or a 35-year-old muscular man, I positively intend to do him GBH, irrespective of any belief about what he is about to do next." In that situation, those people have predetermined that they will not take any risk and will hit the person on the leg with a baseball bat as he comes around the corner and do him grievous bodily harm. That type of scenario concerns me. It is certainly not outside the realm of possibility that an honest defender of his home under cross-examination might say, "I didn't care what the person was going to do next." The defence counsel might ask the homeowner whether he had formed any belief based on reasonable grounds that he was in danger. That person might honestly answer, "No, I didn't. I knew it wasn't someone who was supposed to be there, but whether it was a 10-year-old or a 40-year-old, I was going to knock him on the leg with a baseball bat and do him grievous bodily harm."

Mr J.B. D'Orazio: That's not a very good defence lawyer!

Mr C.C. PORTER: Some of them are like that.

Mr J.A. McGinty: He isn't; he's a prosecutor!

Mr C.C. PORTER: In that scenario, most people would reasonably expect that the uncertainty of an intruder's presence might give them ground for doing GBH to the intruder. One way of solving that problem would be to delete the words "or grievous bodily harm", so that a person would be limited to an inability to undertake lethal force. I wonder what the Attorney General has to say about that sort of scenario.

Ms S.E. WALKER: This is a subjective test, is it not? If a defence lawyer was any good, he would ask what the person's intention was. The defence lawyer would probably say, "This is the law and it is all based on what you intended" and then he would ask the person, "What did you intend? What did you feel? What were your reasonable grounds? What did you think might happen?" I do not know whether that adds anything. I think it should be more specific, but I cannot take it any further than that. All I am concerned about is that some people will be captured by this provision and caused a lot of grief without need.

Mr J.A. McGINTY: Some valid points have been made in the debate. I go back to the principle that underpins this issue. The Law Reform Commission's guiding principle for reform of the law of homicide is that the only justification or defence for taking the life of another human being is self-defence, or the defence of another. If we are to apply that guiding principle here, we want to enable people to defend themselves in their own homes. We only want to make sure that where there is an intent to kill—if that is the intent of the member for Ballajura when he comes out to defend his boat—or if conduct is engaged in that is likely to kill, then that is going too far solely in defence of property. I appreciate the point of view raised by the member for Murdoch, but if there is an element of personal apprehension or fear of violence being perpetrated, then the defence is fully available. In the absence of any concern that violence is about to be perpetrated, if a person forms the intent to kill another who is trying to steal his boat, that is an abuse of that right.

Mr J.B. D'Orazio: Attorney General, you know what will happen. Someone will shoot an intruder, and then say he is only protecting his property.

Mr J.A. McGINTY: Perhaps he should not shoot that person. Let us bring it back to the point. The point of view that has been put is that, if we can limit the defence to a situation in which there is an intent to kill, or the conduct is likely to result in the death of a person, to extend the circumstance to grievous bodily harm goes further than what the Law Reform Commission spoke about, and further than what we would like to see happen. This was a difficult clause to formulate during the drafting process. We had several discussions and meetings on this issue. I understand the member for Murdoch has an amendment, which the government will be happy to support, that will go a significant way towards meeting the concerns. Grievous bodily harm can be a relatively low threshold, whereas death is not a low threshold.

Mr R.C. KUCERA: Is it not fair to say that the law should really place some parameters around what a person is intending to occur? If the parameters were not included, as has been done here, we would see the same situation occur as in the United States, where people do go out and shoot people simply for coming onto their property. The way this has been handled is sensible. I can see that there can be some adjustment to it, but if the parameters are not set, we are inviting the kinds of circumstances that we do not want. I am not sure whether the Attorney General or the member for Nedlands used the example, but the example of somebody protecting a drug crop or an amphetamine laboratory is not a good situation in which someone should have the right to self-defence. This clause builds in the protection that we are looking for.

Ms S.E. WALKER: I want to respond to what was said by the member for Yokine. I did not say those people had a right to kill or inflict grievous bodily harm. I appreciate that that is what the Attorney General is trying to do. The member for Yokine is twisting my words, as he often seems to do. I am saying that this is what the clause is trying to prevent people from being able to do—to simply use the current law to defend their property willy-nilly without any apprehension or fear. I agree with where the Attorney General is coming from. My concern is that it may capture people who currently can use it for proper purposes under the current law.

Mr C.C. PORTER: I move —

> Page 7, line 6 — To delete the words "or grievous bodily harm".

Mr J.B. D'ORAZIO: Does this amendment mean that only people who kill in defence of property will have a problem?

Mr J.A. McGinty: I will clarify it a little. If a person intends to kill, or engages in activity that, objectively viewed, is likely to cause the death of another —

Mr J.B. D'ORAZIO: So the reference to grievous bodily harm is being removed?

Mr J.A. McGinty: That is right.

Mr J.B. D'ORAZIO: So now I can defend my property to that level. I am happy with that, because it makes things a lot clearer for a lot of people.

Mr J.A. McGinty: I think your boat would be a lot safer!

Amendment put and passed.

Clause, as amended, put and passed.

Clause 8: Sections 248, 249 and 250 replaced by section 248 —

Mr C.C. PORTER: I imagine that there may be some discussion on this clause, so I will commence by stating that this clause represents the expansion of the defence of self-defence. There are a number of good reasons for doing that. One of those reasons, which seems to attract perennial public interest, is the battered wife syndrome. Several sensible submissions were written to the effect that the battered wife syndrome, while it clearly exists in one form or another, is not yet such a structured and understandable psychological phenomenon that it warrants its own separate defence, and I think that is a view well put. It seems to the opposition that the kinds of unfortunate circumstances that are often characterised as battered wife syndrome will fall well and truly into this expanded defence of self-defence. It is a very much expanded defence of self-defence. To begin with, I ask the Attorney General for some comment about the harmful acts. The response now needs to be to a harmful act, and the harmful act no longer needs to be imminent. The definition in proposed section 248(1) states —

> **"harmful act"** means an act that is an element of an offence under this Part other than Chapter XXXV.

Chapter XXXV is in part V of the Criminal Code, and it is worth looking at the types of acts that might currently warrant a response, to get a perception of how the defence of self-defence has been expanded. Chapter XXXV refers to criminal defamation, which is about the only act that is not now covered. Other than that, part V includes, in chapter XXVI, assault and violence to the person generally. That includes assaults, homicides, offences endangering life or health, sexual offences, and offences against liberty, which might be an unlawful detention of some type. To give an idea of how broad the category of harmful acts that might justify self-defence response will be, threats will now be included. I would like some comment from the Attorney General about what thought was given to the breadth of those harmful acts. It seems to me, particularly with the idea of threats, that we are getting quite close to the edge of what might be sensible in an act that might activate a further act in self-defence.

Mr M.W. TRENORDEN: I have a similar, although broader, question and I put to the minister my concerns about how he is going to make this work, rather than pursuing the political process. The community is very concerned. In a particular high-profile case, one person shot another, while the other person stabbed the first person, and they both successfully argued self-defence. The question is: what engenders the intention to kill or harm? On the other side of the fence, people are very concerned about individuals gatecrashing parties and about burglaries. People are calling out for the ability to defend themselves. As much as I am hugely in favour of what the minister is attempting to do, I would like him to describe how he will make a law that sends the message that we do not want people to shoot or stab each other in the name of self-defence, and that we do not want people to carry weapons. People are also saying to us that they want to be able to protect their families in their homes or on the beach at Geraldton. These are the sorts of questions that need to be answered. There is no clash as far as the community is concerned, but I cannot see how there cannot be a clash in law.

Mr J.A. McGINTY: The essence of clause 8 is to be found at page 8 of the bill. Proposed clause 248(4) states —

> A person's harmful act is done in self-defence if —
>
> (a) the person believes the act is necessary to defend the person or another person from a harmful act, including a harmful act that is not imminent . . .

Forgetting the last few words, the key elements are that there must be a belief that what one is about to do is necessary to defend oneself or another person.

Mr M.W. Trenorden: I understand that, but why wouldn't a gang member who has just stabbed someone use the same argument and say, "I needed the knife to stab him because I needed to protect myself"?

Mr J.A. McGINTY: That is covered under proposed section 248(4)(b), which states —

> the person's harmful act is a reasonable response by the person in the circumstances as the person believes them to be . . .

In order to avail oneself of self-defence, the circumstances as one understands them to be must be such that one's behaviour or reaction is reasonable under those circumstances.

Mr M.W. Trenorden: Was that not the argument that got those two individuals off those charges? "I heard that this person was out to kill me, so therefore I had to carry my weapon because I knew at some stage I was going

to be fronted by that person and it was only reasonable that I protected myself." My concern is that someone could say, "I heard on the grapevine that Fred Nerk is going to kill me, so therefore I cannot go out on the street without my gun or knife, because I have reasonable cause to believe that I need them to defend myself."

Mr J.A. McGINTY: Putting to one side that carrying a weapon in those circumstances would be an offence under the Weapons Act —

Mr M.W. Trenorden: It currently is —

Mr J.A. McGINTY: It is a breach of the law, as it currently stands, to do that.

Mr M.W. Trenorden: Is it not currently the case that you're not allowed to carry a gun or a knife?

Mr J.A. McGINTY: Yes, that is right, unless there is some lawful authority for it, but generally speaking one cannot carry a weapon. Under the circumstances the member has described, if one is in fear for one's life and one takes lethal force to protect oneself, that is self-defence. I do not argue with the example provided by the member. It is exactly the sort of circumstance for which self-defence is currently available.

Mr M.W. Trenorden: In the high-profile case of more than a year ago when one person shot another, and the other person stabbed the other one, their argument was self-defence, wasn't it, even though the member for Nedlands said there were two separate trials? The public tell me that both people got off because of self-defence. My reading of those cases is that they both got off because they claimed they needed to defend themselves.

Mr J.A. McGINTY: Yes.

Mr M.W. Trenorden: What is going to change?

Mr J.A. McGINTY: Under what is being suggested here?

Mr M.W. Trenorden: Yes.

Mr J.A. McGINTY: It will not change the law with regard to the factual situation referred to by the member. The existing law of self-defence will be availed of in those circumstances. I think that is the answer to the member's question.

Ms S.E. WALKER: I am interested in what the member for Murdoch has to say about this. The member for Murdoch says that there will be many more offences that will trigger self-defence. I would like to understand the Liberal Party's view on this, because I might agree with it. The member for Murdoch says—I am speaking to the Attorney General as well—that people will now be able to plead self-defence against threats. What is wrong with that? Someone might hold a knife to one's throat and threaten to kill, and one might happen to have a piece of four-by-two to hand—if one is in Freo—and hit the attacker on the head and kill him. I am trying to work this out so that I can come to my own understanding of it.

Deprivation of liberty is another issue. What if one is chained up in a room somewhere and is raped every day? Forget the rape; let us say one is locked up in a room, cannot get out and is in fear for one's life; one then gets hold of a piece of pipe, waits until the attacker enters the room and kills him. What is wrong with that? I suppose I am directing my question to the member for Murdoch. The member for Murdoch says that self-defence cannot currently be used in situations involving deprivation of liberty, threats or assault. Is that what he is saying?

Mr J.A. McGINTY: Under the current law there needs to be an assault. Self-defence is then used as a response to that assault. A mere threat is not sufficient. In the bill that is before the house, a threat, to use the member for Nedlands' example —

Ms S.E. Walker interjected.

Mr J.A. McGINTY: Yes, that is a threat; I presume it is not more than that. To put it in its simplest form, there needs to be a reaction to an assault. The assault has to have occurred in order to invoke self-defence. We are saying that a threat is now sufficient. To use the member for Nedlands' perhaps provocative example of the rape situation, one would have to wait for the rape to occur.

Ms S.E. Walker interjected.

Mr J.A. McGINTY: In other words, we are saying that this can be an early intervention or preventive measure—to refer to another portfolio—as a means of availing oneself of the defence, which I think is sensible.

Ms S.E. WALKER: I understand now. The Attorney General is saying that with regard to the depravation of liberty, if a man had dragged a young girl into a room, locked the door and assaulted her, if she killed him, she could now avail herself of self-defence. If he had not dragged her into the room but she had gone in there and then he locked the door, she could not avail herself of self-defence. Frankly, I agree with the Attorney General's proposal.

Mr J.A. McGINTY: Grabbing the woman and dragging her into a room is the assault. Once that assault has stopped and she is locked in the room, she cannot avail herself of self-defence.

Ms S.E. Walker: There has to be a connection somehow.

Mr J.A. McGINTY: Yes, that is my understanding of the current law.

Mr M.W. TRENORDEN: I go back to what I was alluding to in trying to understand the bill. We recently heard Chief Justice Wayne Martin offer a fairly high-profile argument about taking weapons off the street, which nearly everyone in Western Australia would agree with. Is the Attorney General saying that we are going to do something else in some other bill to make it a greater offence to be caught with weapons? This self-defence argument will be strong. If some underworld figures say, "I need to carry a gun, even if it is illegal, to be able to protect myself because I know somebody is trying to harm me", it weakens the intent of the bill. I will always accept the argument of the Attorney General and his advisers because I would never even call myself a bush lawyer. If we need to wear the provisions of the particular clause in this bill, we must make changes elsewhere about being armed in public.

Mr J.A. McGinty: When we have finished considering the homicide bill, we will be debating the Acts Amendment (Weapons) Bill 2008, which deals with the issue you are now raising.

Mr M.W. TRENORDEN: I am aware of that. I would like the Attorney General to say something about it now while we are debating this clause, even though I am slightly outside the rules of the chamber because it relates to another bill. What are we going to do about the other question? If we do not do anything, this clause will be a groundcover to some very nasty rabbits.

Ms S.E. WALKER: The member for Avon raised an interesting point. I do not think that this clause will change people's ability or desire to carry a gun or weapon illegally if they choose to do so.

Mr J.A. McGinty: That is exactly right. There is nothing in this expanded self-defence provision that will authorise the carrying of a weapon.

Ms S.E. WALKER: I have looked at how this is defined in the Weapons Act 1999. At the moment people can carry around all sorts of things that are classed as weapons that are not knives or guns or defined as a weapon under the Weapons Act. I understand what the member for Avon is saying but I think we are allowing people who find themselves in situations that are threatening and possibly life-threatening to avail themselves of that defence, other than if they were assaulted.

Mr J.A. McGINTY: A person cannot carry a weapon around for the purposes of using it as a weapon, with some exceptions. There is nothing in this law that would change that arrangement.

Mr M.W. TRENORDEN: I understand that. I do support the process of self-defence. However, in all these questions of cause and effect, it is a case of act and react. A criminal may decide it is worthwhile carrying a pistol around because he can use the self-defence argument. I do not want to take away the self-defence argument. I want to hear the Attorney General, as the chief legislator in this area, tell me what we are going to do about it. I am happy to accept his argument. The weapons bill will be debated at some later date. I think both bills are directly related. We could go back to that high-profile case in which the defendant said he had to have his gun. If he is told it is against the law to have a gun, he takes the rap on the knuckle. I worry about that balance. If we are going to accept this process, which I will accept, the Attorney General needs to give us some indication of how that will work with his planned overall umbrella argument about law and order. The criminal should not be able to say to his mates, "It will not matter if you carry a gun because once you are pinged, you can just say you need it for self-defence." Even though someone will get pinged for carrying a gun, that is a lesser rap on the knuckle than being able to say he needed it for self-defence.

Ms S.E. WALKER: The Weapons Act 1999, a copy of which I got this morning because the Acts Amendment (Weapons) Bill is coming on for debate, states at section 8 —

> Except as provided . . . a person who carries or possesses an article, not being a firearm, a prohibited weapon or a controlled weapon, with the intention of using it, whether or not for defence —
>
> (a) to injure or disable any person; or
>
> (b) to cause any person to fear that someone will be injured or disabled by that use,
>
> commits an offence.

It is an offence to carry an article that is not a firearm, a prohibited weapon or a controlled weapon with the intention of disabling someone.

Mr M.W. Trenorden: What is the penalty?

Ms S.E. WALKER: It is very little. It is $4 000 or imprisonment for one year.

Mr M.W. Trenorden: That is the point I am making. That is not a big clout against the other argument of needing a pistol for self-defence.

Ms S.E. WALKER: That is already an offence under the Firearms Act 1973. It is talking about firearms. The Firearms Act will carry another offence. I do not have that act. The penalty for carrying prohibited weapons is $8 000 or imprisonment for two years. The penalty for carrying controlled weapons is $4 000 or imprisonment for one year. It is an offence to carry prohibited weapons, controlled weapons or any other sorts of devices such as nunchakus, bits of steel or tyre levers with intent to disable.

Mr C.C. PORTER: I put forward my understanding of the situation in qualifying the member for Avon's point, which is quite a good point but it is more an evidentiary point than a point about this law. If we had a hypothetical situation in which a person pulls a knife and the other person pulls a gun, person two might be acting in self-defence on the basis of threat and assault as the law stands at the moment. As the member pointed out, there are often evidentiary problems, given that these things happen almost simultaneously, with the regulatory standard beyond reasonable doubt. Who pulled the first weapon is almost impossible to determine. I imagine the only way we could deal with that legislatively in a case of this kind is to have some kind of proviso that says that people cannot avail themselves of self-defence in a melee-type situation.

Mr M.W. Trenorden: That is where I would like to go.

Mr C.C. PORTER: That would be very difficult. It might be something the Attorney General could look into. Whether or not that can be achieved, keeping in mind the types of circumstances the member is talking about, might be very difficult. In any event, that is predominantly an evidentiary situation. We are going to look at the Weapons Act, which has something to say about the penalties for death or carrying a weapon. The member for Avon's point is an evidentiary point that may be able to be dealt with. It would take some very interesting drafting.

The point that I was making about the extent of the expansion was a point that this house should not take lightly—exactly how far the defence is being expanded. It has been expanded significantly. To say that as the law stands at the moment, someone could not respond in self-defence to a threat is partly true. It is also partly false. At the moment we are aiming to respond to an assault. The definition of assault includes a bodily act or gesture that attempts or threatens to apply force. As the law stands at the moment, a threat or assault can also be responded to.

The question that I originally put to the Attorney General was: what consideration has been given to the other areas in which self-defence has been expanded in terms of what is a trigger? Section 338 of the Criminal Code deals with the definition of "threat" and refers to a threat to kill, injure, endanger or harm any person; destroy, damage, endanger or harm any property; take or exercise control of a building, structure or conveyance; or, cause a detriment of any kind to any person. The opposition supports the concept of expanding threats to take into account the battered wife situation to which the member for Nedlands referred. Risks are involved when a defence such as this is expanded. I will put simply what I think the risks will be. During the time I spent at the Office of the Director of Public Prosecutions—before the changes to what are now the "either way" offences—the lowest grade offence that was tried in front of a jury in the District Court was a threat. While threats to kill might sound very glamorous, they are often the type that occur when a drunken neighbour says, as part of an ongoing dispute, "You're a bastard, I'm going to kill you" or "You're history, mate". That becomes a threat to kill.

Ms S.E. Walker: No, it doesn't.

Mr C.C. PORTER: Yes, it does. It has to be proved, but it does.

Ms S.E. Walker: No, it doesn't.

Mr C.C. PORTER: Of course it does. If a person leans over his neighbour's fence and says "I'm going to kill you, mate"—

Ms S.E. Walker: Not if the person does not take it seriously.

Mr C.C. PORTER: That is the point, is it not? That is the provability element. The fact is that those situations went to trial and a jury had to decide whether the effect of the threat could be taken seriously. Let us leave aside the notion of whether or not it is taken seriously. Under the new provisions there can be a response, albeit a reasonable response, to something as simple as a threat of detriment to a person. For example, a person may say, "I'm going to kick your dog". By radically expanding self-defence, the reality is that, for good or for ill, we will open up a range of responsive behaviour. Even though that responsive behaviour is linked by a test of reasonableness, it has never been the case that we could conceivable physically respond to a threat to cause

detriment, even if it was a threat seriously made and seriously received. I am interested to hear the Attorney General's view about what consideration was given to the possibility that this will open up a whole range of responsive behaviour that previously was not excused by criminal law.

Ms S.E. WALKER: I will raise two issues. I refer to an instance in which a woman is locked in a room after she has entered it. When the person who has locked the door comes back after three or four days, the woman is fearful and hits the person over the head with a pipe. At the moment that woman cannot use self-defence. What defence can she use? Would she be charged with grievous bodily harm? Perhaps the Director of Public Prosecutions can advise the Attorney General. The person would be defending herself because she would have been deprived of her liberty. The defence of self-defence is currently not available.

Mr C.C. Porter: It probably is.

Ms S.E. WALKER: If it is, what is all the hoo-hah about? While the Attorney General is discussing that issue with the Director of Public Prosecutions, I refer to the weapons regulations. The list of prohibited weapons that people are not allowed to carry is quite extensive. They include an acoustic shock weapon, a ballistic knife, a blow pipe, a butterfly knife, a catapult, a commercially-produced catapult, a disguised knife or sword, an electric shock weapon, an extendable baton, a flick-knife or switchblade, a gas dart, a knuckleduster, a knuckle-knife, a pistol crossbow and a spray weapon. Controlled weapons include an approved electric shock case, a baton flail, a bow, a crossbow, a dagger, a double-end knife, a fixed baton, a halberd, a hand or foot claw, an imitation firearm, a machete, a metal whip, a pressure-point weapon, a pronged weapon, a spear, a spear-gun, a sickle or scythe weapon, a throwing blade or knife, a throwing star and a weighted chain or cord. When the member for Midland was the Minister for Police and Emergency Services, I sent her an enormous knife that a constituent had brought into my office. The man had found it under his son's bed. His son had mental health problems and the man was concerned about him. That incident was not covered by the weapons regulations. It was a horrific looking knife. What defence is available to the woman to whom I referred?

Mr J.A. McGINTY: Self-defence is currently available as a response to an assault, including a variety of threats. Of course, I refer to a limited variety of threats. An assault includes any bodily act or gesture that attempts or threatens to apply force of any kind. It is a narrower definition of a threat than the one now envisaged.

Mr M.W. Trenorden: That means that I can view as a threat someone who wants me to watch a Dockers match!

Mr J.A. McGINTY: It would certainly be picked up under the new definition of a "harmful act"!

The SPEAKER: It is better if I tell the jokes.

Mr J.A. McGINTY: Sorry, Mr Speaker!

That is the way in which self-defence is dealt with at the moment. It is a response to an assault. Some harmful acts are not assaults, including the broader definition of "threats" and "deprivation of liberty", depending on the circumstances.

Ms S.E. Walker: What offences are you extending it to?

Mr J.A. McGINTY: All the offences in part VI of the code, most of which have an element of assault, but there is the new concept of harm. During the Law Reform Commission's consultation there appeared to be a general view that having self-defence available only as a response to an assault is too narrow for the purpose of effecting justice. That is the basic underpinning principle. We are replacing self-defence as a response to assault to self-defence as a response to a harmful act that is perpetrated. The element of a physical assault in itself is no longer a limitation. That is the concept that we are moving towards with the changed definition. It broadens the availability of self-defence, because that rule in turn is conditioned by the reasonableness of the response to the harmful act that is being committed. I think that broadly covers the issues that have been raised.

Mr M.W. Trenorden: A decade ago there was a case in Queensland in which an elderly man, confronted by a younger man in the passageway, shot the young man. The elderly man was charged and got off. I understand that the older man's argument was that he was terrified of the younger man who had entered his house in the middle of the night.

Mr J.A. McGINTY: He would get off under current Western Australian law and under the proposed law.

Mr M.W. Trenorden: Even if the younger person is not armed and it is a dark night?

Mr J.A. McGINTY: It all depends on the circumstances of the case. Broadly speaking, the defence of self-defence is currently available and will be available in the future to persons in circumstances described by the member for Avon.

Mr C.C. PORTER: To return to my point—we have been a little sidetracked by the contributions of other members—and to put it crassly, my concern is a suburban concern. If we open up the ability to respond legally to threats of just about every conceivable type, I envisage some very difficult times ahead in the Magistrates Court. I understand that we need to expand the defence of self-defence to take into account battered wife syndrome and other such matters. However, my concern is that we will now make it lawful for someone to respond, albeit proportionally, to a threat to cause a pecuniary detriment. This troubles me. I see this as the absolute outer edge of what should be triggering a response. I wonder whether any thought has been given to the effects this might have at the less glamorous end of self-defence in the Magistrates Court with neighbourhood disputes and people outside of pubs calling each other's girlfriends ugly or whatever it might be. However, these types of things could now provide a legal defence to the response. One of the happier effects of a stricter definition is that everyone knows some things just cannot be defended. I have had a look through the Law Commission's review and I sometimes think the level of analysis the commission engages in is not at the level of magisterial practice or suburban life. I am interested to hear the Attorney General's view about and hear him explain how the problem I have mentioned has been considered.

Mr J.A. McGINTY: Obviously, examples can be provided that would take this debate about the availability of the defence of self-defence into areas that we would all regard as unreasonable, such as the example given a few moments ago: "I'm going to kick your dog"—although I imagine the response would depend upon one's relationship with the dog!

Mr C.C. Porter: People have quite different views about what constitutes a proportional response. I can foresee an occasion when a jury considering a case of assault against the maker of such a threat might consider it an acceptable defence, and that concerns me.

Mr J.A. McGINTY: I would be surprised if it were taken to that extreme. However, I would have thought that a battered wife who is told by her husband as he goes to bed one night that he intends to give her a belting in the morning could view that statement as containing a significant threat such as to warrant on reasonable grounds the objective test being applied as to the reasonableness of the response by someone who claims self-defence. This defence is not perfect, and case law will obviously develop around it. However, it is accepted that the current limitation of self-defence being related to a response to an assault is too narrow. It is something we will have to monitor as case law evolves.

Ms S.E. Walker: Attorney General, what if you are standing with your daughter and someone comes up and says, "I'm going to kick your daughter" and you think they meant it? Does this mean you cannot push them away?

Mr C.C. Porter: Clearly, that is one of the circumstances covered.

Ms S.E. Walker: Some people love their dogs and consider them part of the family. If someone comes up and says, "I'm going to give your dog a hiding" and he means it, you will be entitled to push them away and use self-defence under this bill, but currently you are not.

Mr J.A. McGINTY: Under current law the defence of self-defence applies to defence of self or another person. That is available as a current defence.

Mr C.C. Porter: But not for the dog.

Mr J.A. McGINTY: No.

Ms S.E. Walker: Well, it should be.

Mr J.A. McGINTY: I will take the member's point on that.

Mr C.C. PORTER: Attorney General, using the case of battered wife syndrome, in the case of a disproportionate response to a harmful act that causes a death, will the battered wife be convicted and sentenced according to the manslaughter regime?

Mr J.A. McGinty: If it is excessive self-defence.

Mr C.C. PORTER: If it is excessive?

Mr J.A. McGinty: Yes.

Ms S.E. WALKER: I wish to make one more point. Currently, I do not think the Director of Public Prosecutions would charge these people. I do not think an indictment is issued if a neighbour says, "I'm going to kill you because you've increased the height of the fence by two feet."

Mr C.C. Porter: That will be dealt with in the Magistrates Court.

Ms S.E. WALKER: My point is that the jury will make a decision on the evidence, including the effect on the person and the history of the case. If someone waves a knife around threatening a person or the person's child, in those circumstances evidence is given and the jury makes a decision. I would like to see this defence extended such that it gets down to the facts of the case. In any event, I think there are all sorts of safeguards in place.

Clause put and passed.

Clause 9: Section 441 amended —

Mr C.C. PORTER: I will be very brief. I wonder where this fits in with unlawful acts. Is the intention of this clause to make the offence consistent with home invasion; and, if so, do we need a consequential amendment of any type here?

Mr J.A. McGINTY: Clause 9 amends the definition of unlawful acts for the purposes of chapter 45 of the Criminal Code. Section 441 is amended by a new provision, subsection (3), which rates the defence of property. This proposed section imposes a similar test for self-defence of property as the one proposed in section 248(4), except that the person must reasonably believe that injury to himself, herself or someone else or property is imminent. The amendment is proposed for the sake of consistency and is an amendment consequential to the earlier matter we dealt with.

Clause put and passed.

Clause 10: Sections 278, 279 and 282 replaced by section 279 —

Mr C.C. PORTER: Attorney General, this clause collapses wilful murder, does away with the grievous bodily harm murder rule and establishes a new sentencing regime. The two amendments proposed by the opposition are to —

The SPEAKER: Is the member seeking leave to move both amendments at the same time?

Mr C.C. PORTER: I am.

[Leave granted.]

Mr C.C. PORTER: I move —

> Page 9, lines 26 to 29 — To delete the lines and substitute —
>
> > (b) the person intends to do the person killed or another person some grievous bodily harm; or
>
> Page 10, lines 11 to 20 — To delete the lines.

The two amendments proposed by the opposition seek to re-substitute the GBH murder rule and remove the proposed amendment at 279(4), which will open up unlimited sentencing discretion. I mentioned both these amendments in my response to the second reading speech.

First, if the Attorney General is to consider any amendments to this legislation, I implore him to consider replacing proposed section 279(1)(b) with the old GBH murder rule. That is to say, proposed new section 279(1)(b) states —

> (b) the person intends to cause a bodily injury of such a nature as to endanger, or be likely to endanger, the life of the person killed or another person . . .

The opposition suggests that those words be replaced with the wording of section 279(1) of the Criminal Code, which states —

> (1) If the offender intends to do to the person killed or to some other person some grievous bodily harm;

Debate interrupted, pursuant to standing orders.

[Continued on page 2761.]