CRIMINAL CODE AMENDMENT BILL 2003

Introduction and First Reading

Bill introduced, on motion by Mr J.A. McGinty (Attorney General), and read a first time.

Standing Orders Suspension

MR J.A. McGINTY (Fremantle - Attorney General) [11.47 am]: I move without notice -

> That so much of the standing orders be suspended as is necessary to enable the Attorney General at the motion for the second reading of the Criminal Code Amendment Bill 2003, to make some preliminary remarks and then have his speech incorporated in *Hansard*.

I do this for a very simple reason. The prepared speech relates to very extensive amendments to the Criminal Code. It would take longer than the standing orders allow for the speech to be delivered if I were to read it to the House. It would take more than the one hour allowed. To speak for more than one hour would require a suspension of standing orders. It would also be a waste of the precious time of this House to have the speech occupy prime time. This request is not without precedent. On 13 June 1991 a similar motion was moved and carried by the House that enabled a second reading speech to be incorporated in *Hansard*. I am also told that it is standard practice in the Parliament of South Australia. It was the standard practice in the Northern Territory until an error occurred and the wrong speech was incorporated. There is provision for this to occur in the standing orders of this House in respect of Bills from the Legislative Council. I refer to Standing Order No 86, which makes provision for a second reading speech to be incorporated in *Hansard* if it is substantially the same as that delivered in the Council.

We are dealing with very significant amendments to the Criminal Code with this Bill. The second reading speech is of enormous importance to the interpretation of those provisions. It is necessary to give a longer speech than would otherwise be the case in order to comprehensively cover all the issues and make sure the legislative intent is perfectly understood. It really is because of the great number of matters covered in this Bill that I seek to depart from the usual practice of the House and suspend standing orders to achieve that purpose.

MR R.F. JOHNSON (Hillarys) [11.50 am]: The Opposition opposes this suspension of standing orders, for very good and justifiable reasons. It shows a lazy, shoddy Labor Government that is not prepared to adhere to the normal practices of this House. The last time this happened was in 1991, and as far as I can ascertain that was the only time it has ever happened in this House. Some of the same ministers in this House today were in government at that time, including the Attorney General. He was a minister in the Labor Government in 1991. The Opposition is very happy to hear the Attorney General give a full second reading speech. We like to hear the sound of his voice. We also like to ensure the accuracy of his second reading speech. Every so often a minister in reading a second reading speech can use defamatory comments or reflect adversely on another member of this House. If this House agrees today to suspend standing orders to allow a lazy minister to simply dump the speech on the Table of the House to be incorporated in *Hansard*, that would subvert the possibility of our picking up on those comments or reflections.

Mr J.A. McGinty: I gave your side a copy of the speech yesterday.

Mr R.F. JOHNSON: I am sorry, but that is not good enough. The Attorney General cited the practices of both the South Australian and the Northern Territory Parliaments. I will quote from the chapter entitled "Control and conduct of debate" in *House of Representatives Practice*.

Point of Order

Ms S.E. WALKER: There are so many conversations taking place in the Chamber that I am finding it difficult to hear the member.

The SPEAKER: That is a very good point of order. I expect members to desist from their conversations.

Debate Resumed

Mr R.F. JOHNSON: The chapter states -

> Underlying the attitude of the Chair and the House over the years has been the consistent aim of keeping the Hansard record as a true record of what is said in the House. Early occupants of the Chair saw the practice of including unread matter in Hansard as fraught with danger and later Speakers have voiced more specific objections. For example, a 'speech' may be lengthened beyond a Member's entitlement under the standing orders, or the incorporated material may contain irrelevant or defamatory matter or unparliamentary language;

It goes on in great detail, outlining the reasons this sort of practice should not be allowed. The Attorney General has said that it is a long speech. He has the simple answer to that. He controls Cabinet and the Labor Caucus. He can go back to his bureaucrats and tell them that the speech is miles too lengthy.

Mr A.J. Dean: Does he control the bureaucrats as well?

Mr R.F. JOHNSON: The Attorney General controls almost everybody in this State. He is one of the most powerful people in the State. He controls Cabinet and the biggest faction in the Labor Party. He can go back to his bureaucrats and tell them that the speech is too long, and that he does not want to speak for an hour delivering the second reading speech. We are told that this is a very important Bill. Surely, then, it warrants the Attorney General reading the speech into the record of this House, so that members can hear it from his own lips. Will this be the start of a new practice of the Labor Party? It was done once before in 1991, and the Government is determined to do it today. It will do it today; the Opposition is under no illusions about that. The Government has the numbers; I have never seen the government benches as full as they are today. The Government wants to ensure that it has the absolute majority needed to suspend standing orders, so that the Attorney General can go this lazy, shoddy way. I am a bit surprised. I thought the Attorney General would have welcomed the opportunity to read this Bill to this House, rather than take this deliberately shoddy and lazy step of incorporating the speech.

We are told this speech would take longer than an hour to deliver. The Opposition would have no objections to agreeing to a request from the Attorney General to extend his speaking time. That is also contained in standing orders. I give an absolute assurance to the House that if the Attorney General retracts his motion to suspend standing orders, the Opposition will agree to his request to extend his normal speaking time. He would not have to do that, however, if he had gone back to his bureaucrats and told them that the speech was too long and needed to be condensed to comply with the standing orders of the House. He is saying that the speech is too long to comply with standing orders, but we do not know how long the speech will take. He is telling us it will take longer than the hour. I do not question the truthfulness of what he is saying, but if he does not actually make the speech we cannot judge how long the speech is. Can he speak quickly? If he wants to prove a point he will speak very slowly, so that the speech does exceed the allowed time.

We saw the precedent in 1991. That is the only time I can find on record when this has happened. That was a very unusual time, during the WA Inc years. Many things had happened, not only in government but also in this House. We are seeing again today that shoddy behaviour coming back again. A very important debate took place in this House yesterday about cabinet records not being kept by the Premier and the Cabinet. That was a very interesting debate, and I am staggered that the Press has not printed anything about it. It will in time. It took the Press a long time to get to grips with the WA Inc corruption, and it was only in the dying hours of that period that the Press actually started printing articles about it. This is Parliament, not the Executive Government controlling the whole of Western Australia and the conventions and standing orders of this House. Today we are seeing the Executive Government trying to control the conventions of this House and to subvert the standing orders. There is no need for it to do that. I am happy to move an amendment to the motion to suspend standing orders, so that it will incorporate the extension of time for the Attorney General to read his speech. That could be done by a simple amendment to the motion.

Mrs C.L. Edwardes: We could give him unspecified time.

Mr R.F. JOHNSON: Yes, unspecified time, as the member for Kingsley said. We are quite happy for the speech to take two hours. We will sit and listen to the Attorney General. We are very keen to hear what he has to say about this Bill, which he considers very important. All the members want to hear it. He has given some of the members on this side of the House a copy of the second reading speech, as he has said by way of interjection. Have all the government backbenchers read the speech?

Mr J.A. McGinty: They have heard me speak about the Bill at great length.

Mr R.F. JOHNSON: The Attorney General would not have given his second reading speech in Caucus, so most of the government members on the back bench would not have a clue what the second reading speech contains. More importantly, members on this side of the House - Her Majesty's official Opposition - have every right to hear the Attorney General's second reading speech.

Mr J.A. McGinty: Can you not read?

Mr R.F. JOHNSON: Yes, I can, but a story can be read out, with emphasis added. We have seen the Premier, reading his answers, suddenly give a particular emphasis. He knows he must move his arm at a certain point, because he will be on television later on in the day. It is all stage managed on behalf of government ministers. We want to see that stage management today, because we want to see how the Attorney General performs when he delivers his speech. If the Executive Government intends today, as it did yesterday in relation to cabinet

records, to bypass the normal practice in this House of delivering second reading speeches, using the argument that the speech will go for longer than an hour - and we do not know that, because we have not heard the speech - what will be the next step? Will speeches longer than three-quarters of an hour require standing orders to be suspended, so that ministers need not bother about reading them and can just dump them on the Table to be incorporated in *Hansard*? That is not good parliamentary practice, and I am sure you will agree, Mr Speaker. It has not happened since 1991, which is the only time on record I can find that it has happened in this House. That was a bad era for this Government, this State and this House. We must not go back to those days. We must ensure that the proper parliamentary scrutiny and conventions of this Parliament are upheld so that members of this House are kept abreast of the truthful comments of ministers of the Crown. Ministers hold an important and unique position in this State - one I was proud to hold. The Attorney General is demeaning the position by not being bothered through laziness and shoddiness and by not having the guts to deliver with conviction his second reading speech on both these Bills. I know other speakers will oppose the motion, which deserves to be opposed. The Opposition certainly opposes this motion.

MR C.J. BARNETT (Cottesloe - Leader of the Opposition) [12.02 pm]: I support the comments of the member for Hillarys. It may be that the Attorney General has a long second reading speech for the Criminal Code Amendment Bill, but bad luck, Attorney. This is Parliament, not Cabinet or a meeting of the Labor Party Caucus. One body in this State can make and change laws; namely, the Parliament of Western Australia. Legislation is properly introduced and debated through both Houses of Parliament. The Attorney seeks, for his convenience, to circumvent the parliamentary process. If the speech is too long and the Attorney is either too lazy or likely to get too tired reading out the speech, share it around; ask one of the parliamentary secretaries to finish the job if the Attorney becomes wobbly at the knees and cannot finish it.

I recognise that it can be tiring reading a speech. I had an experience as Leader of the House when the member for Stirling, as Minister for Primary Industry, late one afternoon said he had to go to a function and asked whether I would mind reading his speech for him. I said "Sure, young Monty - don't mind at all." When I started the speech, he had left the Chamber and had probably left the parliamentary precinct. It was a long speech about beagles and quarantine services at the airport; it took about 50 minutes to read. It described in detail how to train and breed a beagle, what a beagle can and cannot do, and what the beagle trainer does.

Mr P.G. Pendal: Once bitten, twice shy, I suppose.

Mr C.J. BARNETT: I am. Members who sat in the Chamber knew everything about beagles. I was always wary if the former Minister for Primary Industry wanted me to read one of his speeches. One gets a little tired when reading a 50-minute speech.

The Bill in question today is not about beagles, although they are important. This Bill is about child sex tourism. I would have thought members would be interested in that subject. I think that Parliament should have legislation on child sex tourism properly introduced. The Bill deals with public order at a time of international terrorism and demonstration. It is important. It is about changing legislation relating to homicide and crimes of murder and wilful murder. What could be more serious? It relates to the possible endangerment of life or health, and other issues relating to giving evidence regarding certain offences. It is not minor legislation. It is significant and covers a number of aspects of the Criminal Code of Western Australia.

The Attorney has two choices. If he does not want to read in a long speech, he can send it back to his advisers and ask them to prepare a shorter speech. If he thinks that is not appropriate - that is, if it is important that a detailed explanation of the Bill be recorded in this Parliament - he has no alternative but to get to his feet and read the speech. Other speeches in this Parliament go for more than an hour. The budget speech may well extend for that time, and the Leader of the Opposition's response to the budget speech can extend for more than an hour. If the Attorney does not want to read the entire speech, the Opposition would not object if he allowed the parliamentary secretary or another minister to read part of it. As the leader of the House for the Opposition indicated, the Opposition is prepared to amend the motion so that the Attorney will have unlimited time to finish his speech. What is wrong with that? Members opposite are all looking down. They know they are doing the wrong thing. They are displaying an arrogance to this Parliament because they are too lazy and too disinterested to read a speech on their legislation.

What is this motion about? It is about reading out a speech properly as an Attorney General on a significant Bill so that it is properly introduced to Parliament. That is consistent with hundreds of years of parliamentary democracy. The Attorney wants to change that tradition because it is convenient. Is the Attorney going to lunch? What valid reason does the member have, as a highly paid officer of this State, to fail to perform his duties and simply read a speech on the legislation? There is no justification at all for his refusal.

The Attorney's argument depended on one fact. He said, "I will not have time." The Opposition has offered to give the Attorney General the time to read the speech. If the Attorney General needs to give the detail on the measure, we will accept that judgment and sit here and listen to it being properly read. It is not good enough to simply hand a copy of the speech to Hansard and say, "Incorporate that. That's all I need to do because I'm the Attorney General. I'm so damned important that I don't have to waste my time in Parliament." I am sorry; the Attorney is not that important. If it is important legislation in which he believes, and he has the sincerity of his conviction, he should make the effort to properly introduce it into Parliament.

Amendment to Motion

Mr C.J. BARNETT: I move -

> That all words after "2003" be deleted and replaced with the following -
>
> to speak for an unspecified period of time

The motion would then read -

> That so much of the standing orders be suspended as is necessary to enable the Attorney General at the motion for the second reading of the Criminal Code Amendment Bill 2003 to speak for an unspecified period of time.

If the Attorney General agrees to that amendment, he can complete his task. If the Attorney gets tired or must pop out for a bite to eat, he should ask someone else to complete the speech. The Government could not ask for more in a bipartisan facilitation to allow the Attorney General to read a lengthy speech in Parliament. It is a fair and reasonable offer. If that is not done, and, as I suspect will happen, the Leader of the House tries to guillotine the motion, it will be recorded forever in the history of this Parliament. The Premier should not come into this Chamber and preach about parliamentary process or due process. I heard the Premier on ABC radio this morning with Liam Bartlett giving everyone a lecture on due process. Is this due process, Premier, in the Parliament of Western Australia? Absolutely not.

The Government is contravening the standing orders and going against 100 years of parliamentary democracy in this State and hundreds of years of the Westminster system. This is anything but due process. If the Government gags this debate and incorporates a significant piece of legislation into *Hansard* without proper parliamentary process, the Premier should never again waste our time with pious, self-righteous lectures on parliamentary democracy. The motion is a fraud and a sham.

Question to be Put

MR J.C. KOBELKE (Nollamara - Leader of the House) [12.09 pm]: I move -

> That the question be now put.

Question (that the question be now put) put and a division taken with the following result -

Ayes (29)

Mr P.W. Andrews	Mrs D.J. Guise	Ms S.M. McHale	Mrs M.H. Roberts
Mr J.J.M. Bowler	Mr S.R. Hill	Mr A.D. McRae	Mr D.A. Templeman
Mr C.M. Brown	Mr J.N. Hyde	Mr N.R. Marlborough	Mr P.B. Watson
Mr A.J. Carpenter	Mr J.C. Kobelke	Mr M.P. Murray	Mr M.P. Whitely
Mr A.J. Dean	Mr R.C. Kucera	Mr A.P. O'Gorman	Ms M.M. Quirk *(Teller)*
Mr J.B. D'Orazio	Mr F.M. Logan	Mr J.R. Quigley	
Dr J.M. Edwards	Mr J.A. McGinty	Ms J.A. Radisich	
Dr G.I. Gallop	Mr M. McGowan	Mr E.S. Ripper	

Noes (20)

Mr R.A. Ainsworth	Dr E. Constable	Ms K. Hodson-Thomas	Mr P.D. Omodei
Mr C.J. Barnett	Mr J.H.D. Day	Mr M.G. House	Mr P.G. Pendal
Mr D.F. Barron-Sullivan	Mrs C.L. Edwardes	Mr R.F. Johnson	Ms S.E. Walker
Mr M.J. Birney	Mr J.P.D. Edwards	Mr W.J. McNee	Dr J.M. Woollard
Mr M.F. Board	Mr L. Graham	Mr B.K. Masters	Mr A.D. Marshall *(Teller)*

Pairs

Ms A.J. MacTiernan	Mr J.L. Bradshaw
Mrs C.A. Martin	Mr R.N. Sweetman

Question thus passed.

Amendment to Motion Resumed

Amendment put and a division taken with the following result -

Ayes (19)

Mr R.A. Ainsworth	Dr E. Constable	Mr M.G. House	Mr P.G. Pendal
Mr C.J. Barnett	Mr J.H.D. Day	Mr R.F. Johnson	Ms S.E. Walker
Mr D.F. Barron-Sullivan	Mrs C.L. Edwardes	Mr W.J. McNee	Dr J.M. Woollard
Mr M.J. Birney	Mr J.P.D. Edwards	Mr B.K. Masters	Mr A.D. Marshall *(Teller)*
Mr M.F. Board	Ms K. Hodson-Thomas	Mr P.D. Omodei	

Noes (30)

Mr P.W. Andrews	Mr L. Graham	Mr M. McGowan	Mr E.S. Ripper
Mr J.J.M. Bowler	Mrs D.J. Guise	Ms S.M. McHale	Mrs M.H. Roberts
Mr C.M. Brown	Mr S.R. Hill	Mr A.D. McRae	Mr D.A. Templeman
Mr A.J. Carpenter	Mr J.N. Hyde	Mr N.R. Marlborough	Mr P.B. Watson
Mr A.J. Dean	Mr J.C. Kobelke	Mr M.P. Murray	Mr M.P. Whitely
Mr J.B. D'Orazio	Mr R.C. Kucera	Mr A.P. O'Gorman	Ms M.M. Quirk *(Teller)*
Dr J.M. Edwards	Mr F.M. Logan	Mr J.R. Quigley	
Dr G.I. Gallop	Mr J.A. McGinty	Ms J.A. Radisich	

Pairs

Mr J.L. Bradshaw	Ms A.J. MacTiernan
Mr R.N. Sweetman	Mrs C.A. Martin

Amendment thus negatived.

Standing Orders Suspension Resumed

MR L. GRAHAM (Pilbara) [12.16 pm]: I intend to support the suspension of standing orders. For the benefit of members who do not understand why I just voted the way I did, I have not and will never knowingly vote for a gag or a guillotine motion in this place. This is a House of debate, and debates should be held. The irony and absurdity of members having a lengthy debate about not debating a matter is not lost on too many people in the public. However, for me it is an absolutely joyous occasion when I do not have to listen to a speech from the Attorney General.

MRS C.L. EDWARDES (Kingsley) [12.17 pm]: For a number of reasons I rise to oppose the suspension of standing orders to allow the second reading speech to be tabled. It is an important speech and I, probably more than anyone in this House, understand the role of the Attorney General and the workload that comes with that position. When I was the Attorney General, never once did I not have the opportunity to thoroughly peruse a second reading speech - prior to bringing it into this House - to make sure that it accorded with standing orders. It was the message that I, on behalf of the Government, wanted to give to this House and the people of Western Australia. Erskine May's *Parliamentary Practice* states at page 472 that -

> The second reading is the most important stage through which the bill is required to pass; its whole principle is then at issue, …

I suggest that making short comments in what would probably constitute a media release and then tabling the second reading speech does not constitute what Erskine May and everybody else requires of a second reading speech.

In the past I have been critical of the Attorney General's second reading speeches. They have been too short and have lacked content and the like. Yesterday I was pleased to read a copy of the speech that was handed to the member for Nedlands. It is quite an extensive and detailed speech. However, I suggest to the Attorney General that reading out a couple of sections of the Criminal Code breaches all standing orders in terms of the content of a speech. The second reading speech does not need to contain section 279 or 282 in full. Neither does the second reading speech require sections 90 and 91 of the Sentencing Act to be read out in full. I suggest, Mr Speaker, that what is contained in this speech breaches the rules for what would normally be contained in a second reading speech. In addition, in a number of parts, the speech extends to the detail of the clauses proposed in the Bill. As members know, ministers must ensure that second reading speeches are not just a repetition of the detail of the clauses of a Bill. I know that if I were to do that during the second reading debate, you, Mr Speaker, would pull me up and say that I was breaching standing orders. Erskine May states on page 473 that-

> Debate on second reading should not extend to the details of the clauses.

I suggest to you, Mr Speaker, that much of what is in the Attorney General's second reading speech extends to the detail of the clauses. If the Attorney General had had the opportunity to read his speech prior to bringing it to this House, instead of working out how to extend the time for his speech beyond 60 minutes or to suspend standing orders, he could have deleted large portions of the speech, which would have enabled it to be read within the 60-minute time limit.

Reference was made to a precedent that occurred in 1991. The Leader of the House then, Mr Bob Pearce, sought the suspension of standing orders at 5.58 pm on 13 June 1991, just before Parliament rose for its winter break, because the Government had seven Bills printed and ready for distribution. Mr Pearce said -

> Clearly, the second reading speeches could be read on the first day of the next sitting -

Parliament was to resume seven weeks hence. As the Leader of the House said at that time, that would have denied both opposition and government members the opportunity to read through and consult the community on the seven pieces of legislation. The Bills all related to the Reserves and Land Revestment Bill. Although standing orders were, on that occasion, suspended to incorporate the second reading speeches into *Hansard*, it was done for an entirely different purpose than the one behind today's motion to suspend standing orders. Standing orders were not suspended on that occasion because the second reading speeches were long and complex and the minister had not had the chance to peruse them in sufficient detail in order to edit them. From my cursory glance at this speech, I believe that it could have been edited quite easily. If passed, this action would be in total breach of what could be called due process. It would be a total breach of what would normally be expected under the standards of this House.

If the Attorney General were allowed to incorporate his second reading speech into *Hansard*, what would happen if I were to seek to do the same thing with my contribution to the second reading debate? I often would like to speak longer than 60 minutes. I often have a lot more detail that I would like to give to this House, which would take longer than 60 minutes to do. I would also like to be able to incorporate my contribution to the second reading debate. I am sure that you, Mr Speaker, would say that I would not be able to do that, unless standing orders were suspended to enable me to do so. I do not think that the Government would allow me to do that.

We could take it further. I refer to the consumer protection laws that we debated a couple of weeks ago. The template legislation now requires the Queensland Parliament to sit on behalf of the Western Australian Parliament. We now just table second reading speeches. What about e-mail? None of us would need to come to Parliament. We could send in our speeches by e-mail. That would save a lot of parliamentary time. If part of the Attorney General's argument is that it would take too long to read out his speech and that the Government is conscious of parliamentary time, we can make it even easier. We do not have to come into this place. Queensland could make laws on our behalf with no problem at all, as Queensland does not have a Legislative Council. We could incorporate second reading speeches and send in the rest of our speeches by e-mail to be incorporated in *Hansard*. We could all then read what goes on in Parliament. I am sure that it would send many people to sleep.

A process is being circumvented by the suspension of the standing orders. The Attorney General's second reading speech is a legitimate process of this Parliament. As Erskine May said -

> The second reading is the most important stage through which the bill is required to pass;

As such, I believe that this Government is trying to circumvent an important process of this Parliament. I ask the Government to reconsider its position and withdraw the suspension of standing orders motion before it embarrasses itself. There is no precedent for this action.

If the question is put and passed, what next will occur? Will ministers ensure that their second reading speeches take 61 minutes or longer to read, so that they can incorporate them? Is that what the next step will be - all second reading speeches will be incorporated from hereon? Ministers will make sure that their second reading speeches contain an awful lot of information so that they will not need to read them out but instead may incorporate them. They will argue that their speeches relate to complex pieces of legislation, and that everybody can read the speeches in *Hansard*. This move is an abuse. It is an absolute disgrace. It is appalling to ask this Parliament to allow any minister, let alone the Attorney General on an important piece of legislation such as this, to incorporate a second reading speech and to read out probably what is the content of a media release to support its incorporation.

Question to be Put

MR J.C. KOBELKE (Nollamara - Leader of the House) [12.26 pm]: I move -

That the question be now put.

Question (that the question be now put) put and a division taken with the following result -

Ayes (29)

Mr P.W. Andrews	Mrs D.J. Guise	Ms S.M. McHale	Mrs M.H. Roberts
Mr J.J.M. Bowler	Mr S.R. Hill	Mr A.D. McRae	Mr D.A. Templeman
Mr C.M. Brown	Mr J.N. Hyde	Mr N.R. Marlborough	Mr P.B. Watson
Mr A.J. Carpenter	Mr J.C. Kobelke	Mr M.P. Murray	Mr M.P. Whitely
Mr A.J. Dean	Mr R.C. Kucera	Mr A.P. O'Gorman	Ms M.M. Quirk *(Teller)*
Mr J.B. D'Orazio	Mr F.M. Logan	Mr J.R. Quigley	
Dr J.M. Edwards	Mr J.A. McGinty	Ms J.A. Radisich	
Dr G.I. Gallop	Mr M. McGowan	Mr E.S. Ripper	

Noes (20)

Mr R.A. Ainsworth	Dr E. Constable	Ms K. Hodson-Thomas	Mr P.D. Omodei
Mr C.J. Barnett	Mr J.H.D. Day	Mr M.G. House	Mr P.G. Pendal
Mr D.F. Barron-Sullivan	Mrs C.L. Edwardes	Mr R.F. Johnson	Ms S.E. Walker
Mr M.J. Birney	Mr J.P.D. Edwards	Mr W.J. McNee	Dr J.M. Woollard
Mr M.F. Board	Mr L. Graham	Mr B.K. Masters	Mr A.D. Marshall *(Teller)*

Pairs

Ms A.J. MacTiernan	Mr J.L. Bradshaw
Mrs C.A. Martin	Mr R.N. Sweetman

Question thus passed.

Standing Orders Suspension Resumed

Question put and a division taken with the following result -

Ayes (30)

Mr P.W. Andrews	Mr L. Graham	Mr M. McGowan	Mr E.S. Ripper
Mr J.J.M. Bowler	Mrs D.J. Guise	Ms S.M. McHale	Mrs M.H. Roberts
Mr C.M. Brown	Mr S.R. Hill	Mr A.D. McRae	Mr D.A. Templeman
Mr A.J. Carpenter	Mr J.N. Hyde	Mr N.R. Marlborough	Mr P.B. Watson
Mr A.J. Dean	Mr J.C. Kobelke	Mr M.P. Murray	Mr M.P. Whitely
Mr J.B. D'Orazio	Mr R.C. Kucera	Mr A.P. O'Gorman	Ms M.M. Quirk *(Teller)*
Dr J.M. Edwards	Mr F.M. Logan	Mr J.R. Quigley	
Dr G.I. Gallop	Mr J.A. McGinty	Ms J.A. Radisich	

Noes (22)

Mr R.A. Ainsworth	Mr J.H.D. Day	Mr R.F. Johnson	Mr T.K. Waldron
Mr C.J. Barnett	Mrs C.L. Edwardes	Mr W.J. McNee	Ms S.E. Walker
Mr D.F. Barron-Sullivan	Mr J.P.D. Edwards	Mr B.K. Masters	Dr J.M. Woollard
Mr M.J. Birney	Mr B.J. Grylls	Mr P.D. Omodei	Mr A.D. Marshall *(Teller)*
Mr M.F. Board	Ms K. Hodson-Thomas	Mr P.G. Pendal	
Dr E. Constable	Mr M.G. House	Mr M.W. Trenorden	

Pairs

Ms A.J. MacTiernan	Mr J.L. Bradshaw
Mrs C.A. Martin	Mr R.N. Sweetman

Question thus passed with an absolute majority.

Second Reading

MR J.A. McGINTY (Fremantle - Attorney General) [12.34 pm]: I move -

That the Bill be now read a second time.

This Bill implements a number of significant reforms of the criminal law. The reforms serve to address deficiencies in the law that have been identified by the Standing Committee of Attorneys General - the so-called Murray report, which was an extensive review of the Criminal Code (WA) undertaken in 1982 by His Honour Michael Murray QC, as he then was - and various other individuals and bodies. Several deficiencies have been outstanding for some time.

The SPEAKER: Some members in the back of the Chamber are having difficulty hearing. I ask members to keep the level of noise down so that everyone can hear.

Mr J.A. McGINTY: The substantive reforms are contained in parts 2 to 8 of the Bill, part 1 being preliminary. In addition, the Bill has five schedules, which include consequential, transitional and savings provisions. I will first provide an overview of the substantive reforms.

Part 2 contains amendments to the Criminal Code in response to what is commonly referred to as paedophile sex tours or child sex tourism.

Mr C.J. Barnett: People care about child sex tours.

The SPEAKER: Order, members! Other members want to hear the Attorney General.

Mr C.J. Barnett: Does the Attorney General have a copy of that speech?

Mr J.A. McGINTY: Yes, that is what I am reading from.

Mr R.F. Johnson: Do we get a copy of it?

Mr J.A. McGINTY: Yes.

Mr C.J. Barnett: This Parliament is a sham; it is falling apart.

The SPEAKER: I call the Leader of the Opposition to order for the first time. Words of that nature come very close to reflecting on the Chair. I warn the Leader of the Opposition very seriously not to go down that path. I ask members not to interrupt the Attorney General's speech. Members wish to hear it without interjections.

Mr J.A. McGINTY: Part 2 contains amendments to the Criminal Code in response to what is commonly referred to as child sex tourism. In recent years concern has been expressed about Australians travelling to developing

countries to seek out children for sexual activities. The Standing Committee of Attorneys General considered proposals for legislation to criminalise such behaviour and this resulted in the enactment of the Commonwealth Crimes (Child Sex Tourism) Amendment Act 1994. That Act made it an offence for an Australian citizen to engage in sexual activity in another country with a child under 16 years, or for a person to encourage or benefit from the promotion of such activity.

The present amendments complement the commonwealth legislation. The primary object of the amendments is to prevent the sexual abuse of children. This is achieved by penalising not only those who profit from such abuse, but also those who do, or omit to do, any act that aids, facilitates or contributes to sexual offences against children under the Criminal Code of this State or the Commonwealth Crimes Act 1914. The Bill introduces a new offence into the Criminal Code of facilitating sexual offences against children outside Western Australia and consequentially amends the Travel Agents Act 1985.

The Murray report made several recommendations for amendment to the Criminal Code to unlawful assemblies, breaches of the peace and other offences against public authority. These recommendations are implemented in part 3 of the Bill. The language used in relevant sections is modernised, provision is made for the summary disposition of offences where this is appropriate, and, in certain instances, offences are consolidated. The Bill also makes consequential amendments to the Police Act 1892 and the Justices Act 1902. I emphasise that the amendments in part 3 are neither intended to impact, nor will have any unusual impact, on the right of citizens to gather peacefully and protest or engage in lawful industrial action.

Point of Order

Mr C.J. BARNETT: Mr Acting Speaker, I seek clarification about whether this is a second reading speech or a description of a second reading speech.

Mr J.A. McGinty: You are just a grumpy old man.

Mr C.J. BARNETT: I want to know what is happening in the Parliament. I ask the Acting Speaker to clarify whether this is a second reading speech or a description of a second reading speech. Which Bill is it?

The ACTING SPEAKER (Mr A.P. O'Gorman): There is no point of order. The Attorney General is reading the speech that he wants to read on this Bill.

Mr C.J. Barnett interjected.

The ACTING SPEAKER: Is the Leader of the Opposition questioning the Chair?

Mr C.J. Barnett: I want to know what speech it is.

The ACTING SPEAKER: The Attorney General is reading to the House the speech on the Bill.

Mr C.J. Barnett: Which speech?

Mr J.A. McGinty: Behave yourself.

Mr E.S. Ripper: Stop being a bully. Don't interrupt the Attorney General while he is on his feet.

The ACTING SPEAKER: I have ruled that there is no point of order. The Attorney General has the floor.

Debate Resumed

Mr J.A. McGINTY: Reforms to the sentencing process for wilful murder are contained in part 4. The present arrangements for the sentencing of offenders who commit homicide are artificial, unduly complex and poorly understood. Following the lead in other States and consistent with the views of the Chief Justice, this Bill abandons the present distinction between murder and wilful murder and establishes a single new offence of murder.

Part 5 of the Bill concerns offences of endangering life or health. The Murray report expressed concern that many of the provisions of the Criminal Code relating to these offences are overly restrictive and narrow and that there is no general provision that simply proscribes such acts or omissions. The Bill repeals many of these narrow provisions and enacts general provisions in their place. In particular, a general offence provision is inserted - new section 304 - that proscribes acts or omissions that cause bodily harm or endanger or are likely to endanger a person's life, health or safety.

Mr C.J. Barnett interjected.

The ACTING SPEAKER (Mr A.P. O'Gorman): I call the Leader of the Opposition to order for the second time. I am trying to hear what is going on.

Mr J.A. McGINTY: A new broader provision dealing with setting mantraps is introduced to remedy a deficiency of the existing section, which limits dangerous traps to those that can be defined as "engines".

A new specific offence of female genital mutilation also is established by part 5. Female genital mutilation, a collective term given to several traditional practices that involve the cutting of the external female genitalia, has emerged as an issue because of increased immigration and the arrival of refugees. It is a practice that cannot be defended in any form, and one that all other Australian jurisdictions have seen fit to criminalise through the enactment of specific legislation. Although female genital mutilation can be prosecuted under general provisions of the Criminal Code, the creation of a specific offence will make clear to the community that the practice will not be tolerated.

Part 6 addresses the crime of sexual servitude, which has recently been the subject of media attention. Australia has obligations under a number of international instruments to prohibit sexual servitude and the trafficking in persons for the purpose of sexual exploitation. Noting this, the Standing Committee of Attorneys General agreed to the enactment of commonwealth and state legislation. In 1999, the Commonwealth subsequently passed the Criminal Code Amendment (Slavery and Sexual Servitude) Act 1999. However, that Act is limited to offences in which part of the offence occurred in a place outside Australia. Consequently, there is a need to enact state legislation to criminalise offences of sexual servitude that take place wholly or partly within Western Australia.

Reform of the process for dealing with the trial of either-way offences - that is, offences that may be tried either summarily in the Court of Petty Sessions or on indictment in the District Court - is addressed in part 7 of the Bill. As the criminal law in this State currently stands, if a defendant is charged with an indictable offence that may be dealt with summarily, he or she may, with some exceptions, elect to have the matter heard either summarily or on indictment. This arrangement results in many matters of lower levels of seriousness being dealt with in the District Court. The effect is delay in more serious matters coming to trial and waste of valuable resources. The amendments provide that either-way offences must be tried summarily unless a Court of Petty Sessions decides that the matter cannot be dealt with adequately in a summary way. With the intention of pushing less serious indictable matters into the summary courts, part 7 also reclassifies some indictable offences as either-way offences and at the same time gives the summary courts the scope to punish them in a serious way.

The final part of the Bill, part 8, deals with a range of unrelated but important reforms. Among others, these include amendments to the Criminal Code that -

ensure that government contractors are prohibited from disclosing official secrets;

criminalise concealment of the death of a person;

repeal or amend anachronistic references to masters, servants and apprentices;

remove ambiguity from provisions relating to procuring, inciting or encouraging a child to commit an indecent act;

protect the release of reports from royal commissions and other statutory bodies;

make clear that any animal being reared by aquaculture is capable of being stolen;

allow courts to restrict the publication of matters likely to lead the public to identify the victims of an offence;

permit burglary in company to be dealt with summarily in certain circumstances;

broaden the scope of the mental element of the offence of being armed with intent to commit a crime;

authorise the playing of a videotape of suspects by the Coroner's Court and legal practitioners acting for or representing the State; and

allow the court to order that a trial may proceed in the absence of the accused.

I have covered in broad terms the major provisions contained in this legislation. The remainder of this very lengthy second reading speech details specific provisions of the Bill and, in accordance with the motion I have previously moved, will be incorporated into *Hansard* for the information of members.

[The following material was incorporated by order of the House.]

I will now elaborate on the specific provision of the Bill. In doing so, I will comment on the numerous penalty changes included in the Bill. For ease of reference I have also summarised the penalty changes in the schedule attached to this Speech.

Part 2 - Amendments about child sex tourism

In response to concerns regarding Australians participating in paedophile sex tours to other countries, in 1994, the Commonwealth Parliament enacted the *Crimes (Child Sex Tourism) Amendment Act*. Victoria followed suit with amendments to the *Crimes Act* 1958 (Vic) and the *Travel Agents Act* 1986 (Vic) which created offences relating to the organisation and promotion of overseas child sex tours. A Western Australian committee established to investigate the matter recommended that legislation based on the Victorian model should be enacted in this State.

The Bill introduces a new section 187 into the *Criminal Code* [clause 4]. The new section aims to prevent the sexual abuse of children by penalising those who -

> do an act for the purpose of enabling or aiding another person to engage in "prohibited conduct";
>
> aid another person to engage in "prohibited conduct"; or
>
> counsel or procure another person to engage in "prohibited conduct".

"Prohibited conduct" is defined in the Bill to mean either -

> the doing of an act in a place outside of Western Australia in respect of a child under the age of 16 years which if done in Western Australia would constitute an offence under Chapter XXXI; or
>
> the commission of an offence under Part IIIA Division 2 of the *Crimes Act 1914* of the Commonwealth.

In order specifically to disqualify from gaining or holding a licence those travel agents convicted of the new offences, the *Travel Agents Act* 1985 (WA) is consequentially amended. First, the grounds for granting a licence are amended so as to exclude an individual or body corporate who has been convicted of an offence under the new section 187 of the *Criminal Code* or the relevant sections in the *Crimes Act* 1914 (Cth). Secondly, the conviction of a travel agent of an offence under the new section 187 of the *Criminal Code* or a relevant Commonwealth offence is made a ground for an inquiry by the Commercial Tribunal of WA. If, after such an inquiry, the Tribunal is satisfied that the licensee has been found guilty of any of these offences, the licensee must be permanently disqualified.

Part 3 - Amendments about public order

The Murray Report made several recommendations for amendments in respect of Chapters IX and XX of the *Criminal Code* which relate to unlawful assemblies, breaches of the peace and other offences against public authority. Part 3 of the Bill implements those recommendations and also makes consequential amendments to the *Police Act* 1892 and the *Justices Act* 1902.

Amendment of section 62

The first of the amendments in this Part is to section 62 of the *Criminal Code*. Section 62 defines the terms "unlawful assembly," "riot" and "riotously assembled." The Bill amends the section to remove the need for a common purpose as a prerequisite of an unlawful assembly. At present, the requirement to prove a common purpose can be difficult to prove and this restricts the application of the offences in Chapter IX. For example, it does not allow the police to intervene to *prevent* the commencement of the execution of the common purpose. The amendment addresses the mischief because the requirement that there be a common purpose no longer applies.

The words "tumultuous" and "tumultuously" are proposed to be deleted as they do no more than qualify or describe the breach of the peace which is anticipated and thereby introduce a degree of uncertainty into section 62 which ought not to be present. As the Murray Report observed, the mischief is clearly to identify the assembly as one which has the characteristic of being likely of itself to disturb the peace, or provoke others to do so. To make the provision require that the unlawful character of the assembly is to depend upon the degree to which the peace will be disturbed is, in practical terms, to make it unworkable. That was never the way in which the word "tumultuously" was used in the common law offence from which section 62 was derived. There, the word "tumultuously" was applied to the assembly itself and was used to describe the large number of persons who were assembled and the manner in which they were behaving.

Amendment of sections 63 to 67

Sections 63 to 67 of the *Criminal Code* create offences relating to unlawful assemblies, riots and other breaches of the peace. At present these offences must all be dealt with on indictment. They cannot be dealt with summarily in the Court of Petty Sessions even when the particular circumstances of the offence are not serious. The amendments provide for their summary disposition. Their suitability for summary disposition is illustrated by comparing them with other *Criminal Code* offences which may be dealt with summarily, such as: "serious

assaults" – section 318; "aggravated indecent assault" – section 324; and "burglary" when not committed in circumstances of aggravation – section 401.

The classification of the section 63 offence of taking part in an unlawful assembly is changed from a misdemeanour to a simple offence, but the penalty – imprisonment for one year – is unchanged.

Section 64 is renumbered to be section 65 and a new section 64 is inserted. The new section provides that if 3 or more persons form an unlawful assembly, a justice of the peace or a police officer may orally order them to disperse, and if they do not do so they are guilty of a crime and liable to imprisonment for 3 years. A summary conviction penalty of imprisonment for 2 years or a fine of $8,000 is also provided for. The new section 64 is designed to avoid any erosion in the powers of the police with respect to dispersing unlawful assemblies that might otherwise result from the repeal of section 54A of the *Police Act* 1892 by this Bill.

The new section 65 provides for the offence of "Taking part in a riot", and replaces the existing provision in section 64. The classification of the offence is changed from a misdemeanour to a crime. Provision is made for a summary conviction penalty of imprisonment for 2 years or a fine of $8,000, but the penalty on indictment is increased from the present imprisonment for 3 years to imprisonment for 5 years.

The current section 65 is renumbered to be section 66 and renamed to be "Rioters may be ordered to disperse". The language of the section is also modernised and the maximum penalty is reduced from imprisonment for 14 years to imprisonment for 10 years.

The current sections 66 and 67 are consolidated into a single new section 67 which renders any person who is riotously assembled liable for unlawful damage or destruction to property caused by the riotous assembly. The new section 67 provides for a maximum penalty of imprisonment for 10 years for the offence, except where the property is destroyed or damaged by fire, in which case the maximum penalty is 14 years imprisonment. These penalties are comparable with the present penalties for offences under sections 66 and 67 of imprisonment for 14 and 7 years respectively.

No summary penalty is provided for the offences contained in the new sections 66 and 67 as the severity of their maximum penalties renders them unsuitable for summary disposition.

Section 68 replaced

Section 68 of the *Criminal Code* currently provides for the offence of going armed in public so as to cause terror. The Bill repeals the current section 68 and inserts a new section that addresses a similar offence while implementing a number of recommendations of the Murray Report. These changes include that -

> the offence no longer requires that the offender be in public;
>
> the offence is described using the broader expression of being armed or pretending to be armed "with any dangerous or offensive weapon or instrument" which is found in various other sections of the *Criminal Code* including, for example, in the definitions of "circumstances of aggravation" in the sections relating to sexual offences (section 319), stalking (section 338D), and burglary (section 400); and
>
> provision is made for a defence where the accused has lawful authority to be so armed.

Additionally, as a result of a review of the maximum penalties for comparable provisions and to better reflect the seriousness of the offence, the maximum penalty is increased from imprisonment for 2 years to imprisonment for 7 years, with a summary conviction penalty of imprisonment for 3 years or a fine of $12,000.

Amendment of section 69

Section 69 of the *Criminal Code* currently provides for the offence of forcibly entering upon land. The Bill seeks to implement the recommendation of the Murray Report that the offence be changed from a misdemeanour to a crime and the maximum penalty be increased from 1 year imprisonment to 2 years imprisonment. A summary conviction penalty of a fine of $6000 is also inserted.

Amendment of section 70

Section 70 of the *Criminal Code* provides for the offence of forcible possession of land against a person entitled to possession of the land by law. The Bill gives effect to the recommendation of the Murray Report that the offence be changed from a misdemeanour to a crime and the maximum penalty be increased from 1 year imprisonment to 2 years' imprisonment. A summary conviction penalty of a fine of $6000 is also inserted.

Replacement of section 71

Section 71 of the *Criminal Code* is entitled "Fighting in public so as to cause alarm" and contains the statutory form of the common law offence of affray. Consistent with the Murray Report the Bill modifies the section so

that it has a broad application to public places and that it applies wherever there is a general fight of some seriousness, irrespective of whether or not any particular member of the public is alarmed by what occurred.

Also, as recommended by the Murray Report, the offence is reclassified as a crime, and the penalty increased from imprisonment for 1 year to imprisonment for 2 years. This brings the offence into line with the other less serious offences in Chapter IX of the *Code*. A summary conviction penalty of a fine of $6000 is also inserted.

Amendment of section 72

Currently, it is a misdemeanour under section 72 of the *Criminal Code* to "Challenge to fight a duel". Section 72 is amended by the Bill to implement the Murray Report recommendations that the offence be re-categorised as a crime, that the maximum penalty be changed from 3 years to 2 years imprisonment in order to maintain consistency with other offences within the Chapter, and that provision be made for summary disposition of the offence.

Amendment of section 73

Pursuant to section 73 of the *Criminal Code*, it is a misdemeanour to fight in a prize fight or to subscribe to or promote a prize fight. The Bill proposes to implement the Murray Report recommendations that the offence be categorised as a crime, that there be provision for summary disposition, and that the maximum penalty be increased from imprisonment for 1 year to imprisonment for 2 years to maintain consistency with other offences within the Chapter.

Amendment of section 74

The offence of "threatening violence" is provided for by section 74 of the *Criminal Code*. As in the case of other offences in the Chapter, the Bill implements the Murray Report recommendations that the offence be categorised as a crime, and that provision be made for summary disposition. Again, the maximum penalty for the offence is increased – from 2 to 3 years imprisonment – in the interests of maintaining consistency with other offences within the Chapter.

Repeal of sections 174 and 175

Sections 174 and 175 are located in Chapter XX of the *Criminal Code* titled "Miscellaneous Offences Against Public Authority". Section 174 provides for the offence of neglecting to suppress a riot by sheriffs, under-sheriffs, justices, mayors or police officers. It is an offence under section 175 for a person to fail, when requested, to aid one of the above-mentioned persons in suppressing a riot. The Murray Report asserted that it is wrong in principle to impose duties in this area or to have criminal sanctions for the non-performance of those duties. The community relies upon the public-spirited undertaking of obligations by such public officers in this area and has no right to ask for more. The Government accepts these arguments. Accordingly, clause 14 of the Bill repeals these two sections.

Consequential amendment to the Police Act 1892

As a consequence of the amendments contained in Part 3, there is considerable overlap between the redrafted provisions of Chapter IX of the *Criminal Code* and the offence of "disorderly assembly" contained in section 54A of the *Police Act 1892*. Since the latter provision no longer serves a useful purpose it is consequentially repealed.

Impact of amendments on industrial action and right to protest

With respect to the impact of the *Criminal Code* on the right to engage in industrial action or other forms of protest, the *Code* applies, as it must, equally to everyone in Western Australia. There is no logical or fair basis to exempt any class or group from its proper operation. The ordinary norms of free and effective industrial association and organisation promoted by the *Industrial Relations Act 1979* and the democratic right to voice political dissent are consistent with the obligations and boundaries of acceptable social behaviour imposed by the *Code*. There is no essential conflict in the quality of civil conduct respectively promoted and permitted by the *Industrial Relations Act*, Australian democracy, and the *Code*. Thus, persons taking part in industrial action and other forms of conscientious political protest, like all other persons, are liable under the unlawful assembly and riot provisions of the *Code* only if their conduct disturbs the peace or is likely to do so.

As liability under the unlawful assembly and riot provisions of the *Code* depends very much on the degree of behaviour involved, it also depends on police discretion. The Commissioner of Police and his individual officers have a duty to uphold the law and each of them has the power to determine whether there is sufficient evidence to charge a person with an alleged breach of the *Code* and whether the laying of a complaint is in the public interest. Similarly, the Director of Public Prosecutions has an independent statutory authority to bring and conduct prosecutions for alleged breaches of the *Code* and inevitably scrutinises all complaints made by the

Commissioner of Police and his officers, often before the complaints are sworn, weighing important core factors including the sufficiency of evidence available, the prospects of reasonable conviction and, importantly in this area, whether there is any public interest in maintenance of a prosecution. Thus, in relation to the enforcement of the unlawful assembly and riot provisions of the *Code*, our society is reliant on the institutional good sense of the police, an independent Director of Public Prosecutions, and finally the courts to ensure against any slide into draconianism.

The amendments to the unlawful assembly and riot provisions contained in the Bill are not intended to have any unusual impact on the right of citizens to gather peacefully and protest or engage in lawful industrial action and will not do so. They will not make industrial action or political protest relatively more or less amenable to the *Code* provisions. Nor will they increase or reduce the relevance of police discretion in the enforcement of the provisions. Overall, the relationship between the *Code* and the right to engage in industrial action or other forms of protest will remain unchanged.

Part 4 - Amendments about homicide

Turning now to Part 4 of the Bill, this Part contains amendments relating to homicide offences.

Amendments about wilful murder and murder

Currently, the *Criminal Code* makes a distinction between the offences of wilful murder, which requires an intention to kill (section 278) and murder, which requires an intention to do grievous bodily harm (section 279). In all the other Australian jurisdictions this distinction has been abandoned and there is one offence of murder which incorporates, generally speaking, both such intentions.

Section 282 of the Code currently prescribes the punishment for wilful murder and murder. It relevantly provides that -

> *A person, other than a child, who commits the crime-*
>
> *(a) of wilful murder is liable to mandatory punishment of -*
>
> *(i) strict security life imprisonment; or*
>
> *(ii) life imprisonment;*
>
> *(b) of murder is liable to mandatory punishment of life imprisonment.*

Section 90 of the *Sentencing Act 1995* sets out what "life imprisonment" entails. It provides that -

> *(a) A court that sentences an offender to life imprisonment for murder must set a minimum period of at least 7 and not more than 14 years that the offender must serve before being eligible for release on parole.*
>
> *(b) A court that sentences an offender to life imprisonment for wilful murder must set a minimum period of at least 15 and not more than 19 years that the offender must serve before being eligible for release on parole.*

Section 91 of the *Sentencing Act 1995* sets out what "strict security life imprisonment" entails. It provides that -

> *(1) A court that sentences an offender to strict security life imprisonment must, unless it makes an order under subsection (3), set a minimum period of at least 20 and not more than 30 years that the offender must serve before being eligible for release on parole.*
>
> . . .
>
> *(3) A court that sentences an offender to strict security life imprisonment must order that the offender be imprisoned for the whole of the offender's life if it is necessary to do so in order to meet the community's interest in punishment and deterrence.*
>
> *(4) In determining whether an offence is one for which an order under subsection (3) is necessary, the only matters relating to the offence that are to be taken into account are -*
>
> *the circumstances of the commission of the offence; and*
>
> *any aggravating factors.*

For some time there has been discussion among criminal lawyers and judges regarding the merits or otherwise of the distinction between murder and wilful murder. The Hon Chief Justice is of the view that the distinction is unnecessary, it unduly complicates the law and it creates difficulties for juries. Similar criticisms of the distinction have been made by some academics. For example, Ms I Morgan argues that whilst there is in theory

a distinction between an intent to kill and an intent to do grievous bodily harm, this is insufficient in itself to support an automatic and substantial differentiation in sentence. She further argues that it will not always be easy for a jury to distinguish an intent to kill from an intent to do serious injuries and notes that the common law has long taken the view that an intent to kill *or* to do grievous bodily harm constitutes the *mens rea* for murder.

Criticism has also been levelled by the Chief Justice at the sentencing framework that exists in the context of the distinction between wilful murder and murder. This framework often requires judges to "grade" cases on some theoretical scale of seriousness. This grading can cause hurt and offence to the family and friends of the victim.

Part 4 of the Bill proposes to repeal the offence of wilful murder contained in section 278 of the Code and amend section 279 so that the offence of murder includes both intent to cause death and intent to do grievous bodily harm.

In conjunction with the abolition of the distinction between wilful murder and murder, Part 4 of the Bill proposes to repeal the current section 90 of the *Sentencing Act 1995* and replace it with a new section 90. This will provide that a court sentencing an offender to life imprisonment for murder must either set a minimum non-parole period of at least 10 and not more than 30 years or order that the offender must never be released. This reflects the recommendation of the Chief Justice who has noted that if the Code is to provide simply for an offence of murder, encompassing both intent to kill and intent to do grievous bodily harm, then the trial judge's discretion in fixing the minimum non-parole term for the offence must be broadened.

Amendments to "Felony Murder"

Section 279 of the *Criminal Code* defines "murder" in the following terms -

> *Except as hereinafter set forth, a person who unlawfully kills another under any of the following circumstances, that is to say -*
>
> *(1) If the offender intends to do to the person killed or to some other person some grievous bodily harm;*
>
> *(2) If death is caused by means of an act done in the prosecution of an unlawful purpose, which act is of such a nature as to be likely to endanger human life;*
>
> *(3) If the offender intends to do grievous bodily harm to some person for the purpose of facilitating the commission of a crime which is such that the offender may be arrested without warrant, or for the purpose of facilitating the flight of an offender who has committed or attempted to commit any such crime;*
>
> *(4) If death is caused by administering any stupefying or overpowering thing for either of the purposes last aforesaid;*
>
> *(5) If death is caused by wilfully stopping the breath of any person for either of such purposes;*
>
> *is guilty of murder.*
>
> *In the first case it is immaterial that the offender did not intend to hurt the particular person who is killed.*
>
> *In the second case it is immaterial that the offender did not intend to hurt any person.*
>
> *In the 3 last cases it is immaterial that the offender did not intend to cause death or did not know that death was likely to result.*

The Murray Report recommended the repeal of subsections (3), (4) and (5) of section 279, but the retention of subsection (2). The Report concluded that as intent to do grievous bodily harm was sufficient of itself under subsection (1) of 279, the requirement in subsection (3) of intent to do grievous bodily harm for the purpose of "facilitating the commission of a crime" or "facilitating the flight of an offender" added nothing to the ambit of the earlier paragraph. Subsection (3) was therefore unnecessary.

With respect to subsection (2), the Murray Report noted that it potentially included within the offence of murder, acts which would not otherwise fall within that category because the person causing death did not intend to kill or do grievous bodily harm. The Report concluded, however, that if a person deliberately did an act which endangered human life and in fact resulted in death, he or she compounded the heinousness of his or her conduct if the act was done in prosecution of an unlawful purpose. Thus, even though the act causing death may have been done negligently or inadvertently, the offender should be visited with the most serious consequences by way of punishment. Subsection (2) should therefore be retained.

On analysis, the Murray Report found that almost all of the cases covered by subsections (4) and (5) would be covered by subsection (2) also. The act of wilfully stopping the breath of a person in subsection (5) would

clearly be an act "likely to endanger human life" within subsection (2). Similarly, the act of administering a stupefying or overpowering thing in subsection (4) would in many cases be an act "likely to endanger human life". Moreover, the relevant purposes associated with subsections (4) and (5) of facilitating the commission of a crime or facilitating the flight of an offender would clearly come within the phrase "unlawful purpose" in subsection (2). The Report concluded that, to the extent that subsections (4) and (5) extended the meaning of murder beyond subsection (2), they were undesirable. Accordingly, they should be repealed.

The Bill gives effect to these recommendations by repealing paragraphs (3), (4) and (5) of section 279. The Hon Chief Justice has indicated his support of these changes in the interests of achieving a comprehensive, logical and principled statement of the law of homicide.

Attempted infanticide

Section 283 of the *Criminal Code* creates the offence of attempted murder. As the section is presently worded, it is unclear whether attempted infanticide can be dealt with under this section. Currently, the wording refers to the "crime of infanticide" rather than the crime of *attempted* infanticide. At present, it is only possible to charge a person with attempted infanticide in Western Australia by using the general attempt section in section 552 of the *Criminal Code.* This was the approach followed by Scott J in the case of *R v H (a child)* SupCt of WA; 206 of 1998; 1 December 1998.

If the general attempt section is used it is not possible to allege that a person who attempts unlawfully to kill did any act or omitted to do any act which was of such a nature as to be likely to endanger human life. By contrast, it is possible to allege this if a person is charged with attempted murder. Additionally, if the general attempt section is relied upon, the maximum punishment for the crime of infanticide is 3 years and 6 months imprisonment. By comparison, the maximum penalty stated under section 283 in relation to infanticide is 7 years imprisonment.

The Bill proposes to amend section 283 by deleting the words "where the person is convicted of an offence under this section upon an indictment charging her with the crime of infanticide" and inserting instead: "if the person commits the offence in circumstances that, had the other person died, would constitute the crime of infanticide." This amendment will clarify the situation in order to ensure that attempted infanticide can be dealt with under section 283 of the *Criminal Code.*

Part 5 - Amendments about endangering life or health

I will now comment on the amendments contained in Part 5 of the Bill - Amendments about endangering life or health.

The *Criminal Code* contains various provisions which prohibit acts causing bodily harm, endangering human life or health or which may cause damage to property. Many of the proposed amendments to Chapter XXIX contained in Part 5 of the Bill are based on recommendations contained in the Murray Report. The Murray Report noted that a difficulty with many of the provisions was that they are very narrow and that there was an absence of a general provision simply proscribing acts or omissions of whatever sort which cause bodily harm or which are likely to endanger life or likely to cause injury to health of members of the community. The Report therefore recommended the repeal of many of these narrow provisions and the enactment, in their place, of several general provisions.

This need for the amendments contained in Part 6 of the Bill has been highlighted by recent events in other parts of Australia concerning the deliberate contamination of consumer goods. This can have significant, detrimental impacts on both consumers and manufacturers. The proposed amendments will, among other things, ensure that in Western Australia, those who contaminate goods, whether or not the contamination is done in a bid to extort money or for some other reason, will be held accountable for their actions.

Repeal of various sections

Part 5 of the Bill proposes to repeal several sections of the Code which deal with a mischief of a similar nature. These are sections -

208 - Poisoning water-holes;

296 - Intentionally endangering safety of persons travelling by railway;

296A - Intentionally endangering safety of persons travelling by aircraft;

298 - Causing explosion likely to endanger life;

299 - Attempting to cause explosion likely to endanger life;

300 - Maliciously administering poison with intent to harm;

302 - Failure to supply necessaries;

304 - Endangering life of children by exposure;

306 - Unlawful acts causing bodily harm;

307 - Endangering safety of persons travelling by railway;

308 - Sending or taking unseaworthy ships to sea;

309 - Endangering steamships by tampering with machinery;

310 - The like by engineers;

311 - Evading laws as to equipment of ships and shipping dangerous goods; and

312 - Landing explosives.

Introduction of a new section 304

In the place of these sections, the Bill inserts a new section 304 which contains two separate offence provisions. The first of these addresses acts and omissions which cause bodily harm, or which endanger or are likely to endanger the life, health or safety of any person. The offence is classified as a crime and carries a maximum penalty of imprisonment for 5 years, with a summary conviction penalty of 2 years' imprisonment or a fine of $8,000.

The second addresses the same acts or omissions where there is an intention to cause harm. This more serious offence is also classified as a crime but carries a much higher maximum penalty of imprisonment for 20 years. The requisite intent to harm is defined in subsection (3), and includes an intent to gain a benefit, pecuniary or otherwise, for any person (s304(3)(d)) and an intent to cause a detriment, pecuniary or otherwise, for any person (s304(3)(e)). Accordingly, the provision is framed widely enough so as to address the need for a provision which covers the contamination of goods, whether or not that is done in a bid to extort money.

It is relevant to note that, rather than make specific provision in section 304 for the payment of compensation by an offender, victims will be able to utilise the provisions of Part 16 of the *Sentencing Act* 1995. Part 16 of that Act provides for the Courts to make reparation orders in respect of compensation and restitution.

Amendments to section 305 ~ mantraps

Section 305 of the *Criminal Code* prohibits the setting of spring-guns, mantraps or other engines calculated to destroy human life or inflict grievous bodily harm. However, a problem has been identified with the current wording of the section. The problem is that due to the rule of statutory interpretation known as the *esjudem generis* rule, the phrase "or other engine" contained in paragraphs 1 and 2 of the section restricts the meaning of "mantraps" and "spring-guns" to devices that are "engines." This means that people who set dangerous traps that cannot be defined as "engines" are able to escape the prohibition contained in section 305.

The problem is illustrated by the facts in the following cases. In the directions hearing of *R v Philip Carl Matthees* (DCt of WA; 100 of 1997; 17 September 1998), Hammond CJ considered the meaning of section 305 of the *Code.* Matthees had been charged under the second limb of section 305 for leaving planks of wood embedded with long nails on his property. The planks of wood were in the accused's back garden, and 2 planks were also placed near the fence so that anyone jumping over the fence would be likely to come into contact with them. Counsel for the accused argued that section 305 of the *Criminal Code* did not apply. Hammond CJ agreed, holding that due to the *esjudem generis* rule, section 305 only applied to traps that could be defined as "engines". This was so because the wording of section 305 refers to "any spring-gun, mantrap or *other* engine" (my emphasis added).

In the English case of *R v Munks* [1964] 1 QB 304, Parker LCJ applied the *ejusdem generis* rule to an almost identical English provision and held that electrical wires attached to a window with the aim of electrocuting anyone who entered could not be defined as "or other engine." Parker LCJ held that because the wires were not a mechanical contrivance, they were not an engine and therefore did not fall within the statutory provision. Under the current wording of section 305, a similar problem would occur.

The Bill proposes to repeal the current section 305 of the *Code* and insert a new section 305 which overcomes this defect. Essentially, the new section makes it an offence to set a "dangerous thing" and defines the term "dangerous thing" broadly. In addition, the Bill further proposes to insert a new section 595B into the *Code* to make specific provision for alternative verdicts in respect of the different offences created by new subsections 305(3) and (4).

Female genital mutilation

Part 5 of the Bill also creates a specific offence of female genital mutilation thereby criminalising and expressly prohibiting this practice. The amending provision is inserted in the chapter of the *Criminal Code* titled "Offences endangering life or health".

Female Genital Mutilation, or "FGM" as it commonly referred to, is the collective name given to several different traditional practices that involve the cutting of female genitals. FGM may range from ritual nicking of the female genitalia to wholesale removal of all external female genitalia and the closure of the vaginal opening. It has been reported in 28 African countries, primarily in non-Arabic speaking Northern Africa. There is some evidence to suggest that FGM is practised by immigrant communities in Australia. FGM pre-dated the reception of Islam into Northern Africa and is a cultural rather than a religious practice. The practice has well documented detrimental physical, psychological and sexual effects and cannot be justified on any health grounds whatsoever.

FGM breaches numerous international human rights contained in a variety of human rights instruments to which Australia is a party. These include the rights of the child, the right to sexual and corporal identity, the right to be free of cruel and degrading treatment and the right to health.

The Standing Committee of Attorneys General on 14 July 1995, endorsed the Model FGM provisions prepared by the Model Criminal Code Officers Committee as the basis for uniform national legislation to criminalise the practice of FGM.

Presently, the *Criminal Code* does not include specific offences relating to FGM. The Crown Solicitor's Office has advised that the practice of FGM can be addressed under provisions such as unlawful wounding (section 301), doing an unlawful act to cause bodily harm (section 306) and unlawfully doing grievous bodily harm (section 297). The police may also take action under section 14 of the *Code* if a person takes or arranges to take a child from the State with the intention of having FGM performed.

However, others are of the view that specific legislation criminalising the practice is still required. The Family Law Council, in its report on FGM to the Federal Attorney-General concluded that specific legislation was necessary because of -

> doubts about the adequacy of existing laws and the legal status of FGM,
>
> the desirability of having a clear legislative statement on the issue,
>
> the need to give protection and support to women who wished to resist the practice; and
>
> the need to prevent girls being taken outside Australia to be circumcised.

The Government believes that it is incumbent upon Parliament to make a strong statement condemning the practice of FGM. Therefore, the Bill proposes to insert a new section 306 into the *Criminal Code*. The new section prohibits the performance of FGM on another person and prohibits taking a child or arranging to take a child from Western Australia with the intention of subjecting them to FGM. It is not a defence to a charge of performing FGM that the person on whom the procedure was performed or a parent or guardian of that person consented to the act.

Section 306 is modelled on the FGM legislation of the Australian Capital Territory, Queensland and the Northern Territory and the Model Criminal Code provisions on FGM. Like those Acts, the Bill includes certain exclusions. In particular, a reassignment procedure within the meaning of the *Gender Reassignment Act 2000* (WA) or a medical procedure carried out for proper medical purposes is excluded.

Part 6 - Amendments about sexual servitude

Part 6 of the Bill seeks to address the increasing prevalence of the offence of "sexual servitude".

The expression "sexual servitude" refers to the degrading practice of placing women, and in some instances children, under contract of so-called "debt bondage" for the purposes of the sexual gratification or sexual arousal of others. The victims of this trade are usually from countries that are less developed than Australia, and, at the time of their recruitment, they are often unaware that they will be required to provide sexual services for money.

Australia has obligations under a wide range of international instruments to prohibit servitude and the trafficking in persons for the purpose of sexual exploitation. These include the *1979 Convention on the Elimination of all Forms of Discrimination Against Women*, the *1989 Convention on the Rights of the Child* and the *1948 Universal Declaration of Human Rights*.

In November 1998 the Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General released its report on Slavery which proposed the enactment of legislation relating to slavery offences and sexual servitude. Since the release of the report, the Standing Committee of Attorneys-General has agreed to the enactment of Commonwealth and State legislation and the Commonwealth Parliament has enacted the

Criminal Code Amendment (Slavery and Sexual Servitude) Act 1999. As the Commonwealth legislation is limited so as to mainly target offences in which part of the offence takes place outside of Australia, there is still a need to enact State legislation, particularly in the area of sexual servitude, where such offences take place wholly or partly within a State or Territory. To this end, legislation prohibiting sexual servitude has been introduced in the Australian Capital Territory, South Australia and New South Wales.

The Commonwealth sexual servitude legislation is located in Chapter 8 of the *Criminal Code Act* 1995 (Cth) ("Offences Against Humanity"). It was inserted by the *Criminal Code (Slavery and Sexual Servitude) Act* 1999 (Cth).

Sections 270.6 and 270.7 of the *Criminal Code Act* 1995 (Cth) create offences in relation to sexual servitude and deceptive recruiting for sexual services. Sexual servitude offences can occur where a person either (1) causes another person to enter into or remain in sexual servitude and who intends to cause, or is reckless in causing that sexual servitude; or (2) conducts any business that involves the sexual servitude of other persons, and who knows about, or is reckless in respect of that sexual servitude. The "deceptive recruiting" offences target those people who, with the intention of inducing another person to enter into an engagement to provide sexual services, deceives that other person that the engagement actually involves the provisions of sexual services.

Section 270.8 provides that an offence against section 270.6 or 270.7 is an aggravated offence if the offence was committed against a person who is under 18 and sections 270.6 and 270.7 provides for increased penalties in the case of aggravated offences. Section 270.9 provides for an alternative verdict against section 270.6 or 270.7 if an aggravated offence is not proven.

Part 3 of the *Crimes Act 1900* (ACT) is entitled "Offences against the person". Part 3C of that Act contains provisions criminalising sexual servitude. These provisions are modelled on the *Criminal Code Act* 1995 (Cth).

Part 7 of the Bill inserts new provisions into the *Criminal Code* in order to outlaw sexual servitude. These provisions are modelled on the Commonwealth and Australian Capital Territory legislation outlined above. They aim to prohibit sexual servitude by -

first, creating an offence of "sexual servitude";

secondly, creating an offence of "conducting a business involving sexual servitude"; and

thirdly, creating an offence of "deceptive recruiting for commercial sexual services".

In each case the offences are punishable by imprisonment for 20 years if the victim of the offence is a child or an incapable person. In all other cases the penalties are 14 years, 14 years, and 7 years imprisonment, respectively.

Part 7 - Amendments about the summary trial of indictable offences

Part 7 of the Bill introduces a single mechanism for dealing with "either way offences" – that is, indictable offences which can either be tried summarily in the Court of Petty Sessions or on indictment in the District Court. Under the proposed new arrangement, all "either-way offences" must be tried summarily unless the Court of Petty Sessions itself decides otherwise or another written law expressly so provides. The Part also creates several new "either-way offences".

New procedure for either-way offences

In Western Australia, the *Criminal Code* and other legislation authorises the summary determination of indictable offences. At present, if a defendant is charged with an indictable offence that can be dealt with summarily he or she is able, with some exceptions, to elect whether or not to have the matter heard summarily. Once a defendant elects for summary trial the Magistrate proceeds to a summary trial unless he or she determines that the matter cannot adequately be dealt with in summary fashion. If the Magistrate so determines, then he or she commits the defendant to a higher court for trial or sentencing, as the case may be.

The exceptions to the present rule are sections 426(2a) or (3) of the *Criminal Code* and section 23D(2) of the *Firearms Act 1973*. Where an offence is one to which these provisions apply, the prosecutor may request a Court of Petty Sessions to try a matter and the Court must comply with such a request.

By giving defendants a general right of election, the current system means that certain cases which could be dealt with adequately by a Court of Petty Sessions are heard by judge and jury. This is very wasteful of costly judicial, prosecutorial and other Court resources, and, given the current backlog in the District Court, this is a problem of considerable weight. Moreover, the current system does not pay sufficient regard to the interests of victims and witnesses, which are best promoted by expediency in the Court process. The current system also enables the accused to decide the mode of trial in pursuit of his/her personal interests, such as a belief that a jury trial will increase his/her chances of success. This is not appropriate. A system which enables the court to decide the mode of trial on the basis of clearly stated criteria is a better way to ensure justice and fairness.

In England, the procedure for dealing with "either-way offences" is set out in the *Magistrates' Courts Act* 1980 (UK). Under section 19, the court is to decide which mode of trial is more suitable - summary trial or trial on indictment. Section 19(3) sets out the jurisdictional criteria which the court is to have regard to in making this decision. Section 19(4) preserves the right of the Attorney General, Solicitor General or Director of Public Prosecutions to apply for the offence to be tried on indictment.

Case law indicates that the most significant concern of a court under section 19 of the *Magistrates' Court Act* and earlier equivalent legislation, should be the gravity of the offence and thus the adequacy of the possible punishment: *Coe* [1968] 1 WLR 1950 (CA); *Justices of Bodmin; Ex parte McEwen* [1947] KB 321.

Section 20 sets out the procedure that applies where summary trial appears more suitable. Importantly, it requires the consent of the accused to be tried summarily.

In *Criminal Procedure (2nd Edition)* (Sydney: Butterworths, 1998), John B Bishop states at pp 309-310 that the English approach would be useful for application in Australia. This is not only because it standardises the criteria, but also because it precludes the court from considering the criminal record of the accused. If the court were to consider the criminal record of the accused, this could, on occasion, indirectly reflect the result of the case. In any event, it would be wholly inconsistent with the appearance of justice.

The *Criminal Justice (Mode of Trial) (No 2) Bill* (UK) was withdrawn from the House of Commons in December 2000. However, its content is still useful for present purposes. According to the *Explanatory Notes* to the Bill, it sought to amend the procedure for determining the mode of trial for "either-way offences". The *Mode of Trial* Bill sought to insert, in place of the relevant provisions of the 1980 Act, new sections which omitted any requirement for the defendant's consent to summary trial, amended the criteria to be taken into account when Magistrates are considering whether the offence should be tried summarily or on indictment, provided for a right of appeal and required the court to give reasons for its decision.

Part XIV of the *Crimes Act* 1900 (ACT) sets out the circumstances in which a charge may or may not be determined summarily. Section 476 of the Act provides that offences under the Act that are not punishable by imprisonment or are punishable by imprisonment for a term not exceeding twelve months are punishable summarily. More serious offences are so punishable only where the conditions set out in s 477 of the Act are satisfied. These are that the accused must be present in court; the offence must be a common law offence or an offence punishable by imprisonment for a term not exceeding ten years (or, in the case of money/property offences, fourteen years); the relevant jurisdictional limit of money or property value must not be exceeded; the court must be of the view that the case can be properly disposed of summarily; and that the accused has consented to the charge being disposed of summarily.

Importantly for present purposes, section 477(8) of the *Crimes Act* 1900 (ACT) states that before forming an opinion as to whether or not a case can properly be disposed of summarily, the court shall have regard to the following -

> any relevant representations made by the defendant;
>
> any relevant representations made by the prosecutor in the presence of the defendant;
>
> whether, if the defendant were found guilty or the defendant's plea of guilty has been accepted by the court, the court is, by virtue of this section, empowered to impose an adequate penalty, having regard to the circumstances and, in particular, to the degree of seriousness of the case; and
>
> any other circumstances which appear to the court to make it more appropriate for the case to be dealt with on indictment rather than summarily.

This Bill proposes to repeal the current section 5 of the *Criminal Code* and replace it with a new section 5 which adopts many of the features of the legislation outlined above. Essentially, the new section 5 provides a single mechanism whereby all "either-way offences" must be tried summarily unless the Court of Petty Sessions decides otherwise. The Court may decide otherwise on an application made by the prosecutor or the defendant before the defendant pleads to the charge if and only if it considers that -

(a) the circumstances in which the offence was allegedly committed are so serious that, if the defendant were convicted of the offence, the court would not be able to adequately punish the defendant;

(b) the charge forms part of a course of conduct during which other offences were allegedly committed by the defendant and the defendant is to be tried on indictment for one or more of those other offences;

(c) a co-accused of the defendant is to be tried on indictment;

(d) the charge forms part of a course of conduct during which other offences were allegedly committed by the defendant and others and the defendant or one or more of the others is to be tried on indictment for one or more of those other offences; or

(e) the interests of justice require that the charge be dealt with on indictment.

This final ground is necessary as the grounds contained in (a) to (d) do not adequately cover all situations in which trial by indictment may be appropriate. For example, trial by jury may be necessary in particular circumstances so as to establish contemporary community standards. As it is impossible to foresee all the circumstances in which trial by indictment may be appropriate, a general "catch-all" ground is necessary.

The only other situation in which a Court of Petty Sessions may try an "either-way offence" on indictment is if the *Code* or another written law expressly provides.

The Bill also requires that, where the court decides that a charge relating to an "either-way offence" is to be tried on indictment, it must state its reasons. Such a decision, however, is final and cannot be appealed.

Creation of new "either-way offences"

In addition to inserting a new section 5 into the *Code*, Part 7 creates several new "either-way offences" by inserting summary conviction penalties in or replacing the following sections of the *Code* -

section 360 - Unlawful publication of defamatory matter;

section 361 - Defamation of Members of Parliament by strangers;

section 444 - Criminal damage;

section 552 - Attempts to commit indictable offences;

section 553 - Incitement to commit indictable offence;

section 558 - Conspiracy to commit indictable offence; and

section 562 - Accessories after the fact to indictable offence.

section 426 - "Summary conviction of stealing and like indictable offences" - is amended to insert new summary conviction penalties, and section 427 is repealed and a new section 427 - "Summary conviction penalty for certain offences of a fraudulent nature" - is inserted in its place.

Procedure when defendant is committed for sentence

There is presently no legislative provision which prescribes the procedure for dealing with a case where a defendant is committed for sentence in a superior court. In *Eatwell v R* [1963] WAR 121 Jackson SPJ provided guidance on the procedure to be followed. He held at 128 that -

> *"Where a person is summarily convicted in a Court of Petty Sessions or a Children's Court and is committed for sentence to the Supreme Court, no indictment should be filed, but he should be brought up before the Court and the conviction and order of committal should be tendered; but where a person is committed for sentence without having been convicted, an indictment should be presented against him and he should be called upon to plead to it."*

The issue of how to prove in the superior court what happened in the lower court, however, remains. This issue may arise in a case where a defendant has been committed for sentence after conviction (on a plea of not guilty or a plea of guilty), for example under proposed *Code* section 5(8) or in a case to which section 618 of the *Code* applies (that is, where a defendant is committed for sentence without being convicted by the lower court).

Although cases involving committal for sentence are rare, they do arise occasionally and may even increase in volume as a result of the amendments contained in Part 8 of the Bill. It is for this reason that the Chief Magistrate has suggested that it may be of assistance to further prescribe the procedure to be followed.

Accordingly, the Bill proposes to insert a new section 107 into the *Justices Act 1902*. The new section provides that upon committing a defendant to a court of competent jurisdiction for sentence the justice must record the following matters on the complaint – (a) the defendant's plea before the justices; (b) if the justices convicted the defendant, the fact that they did so; and (c) the date of the committal. It further provides that a copy of a complaint certified as a true copy by a Clerk of Petty Sessions is, in the absence of evidence to the contrary, evidence of its contents and of any matter recorded on it.

Part 8 - Other amendments

The amendments to the *Criminal Code* contained in Part 8 of the Bill address a range of matters which have been identified as being in need of reform. I will summarise each of them in turn.

Amendment to ensure government contractors are prohibited from disclosing official secrets

Section 81 of the *Criminal Code* currently provides that it is unlawful for persons employed in the public service to publish or communicate any official secret. In 1996, the operation of section 81 was extended so that it bound not only existing WA Public Service officers, but also persons who, having been Public Service officers, had retired or resigned. However, the section, as it currently stands, does not apply to persons who are contracted to, but not employed by, the State Government.

With the increasing use of contracted labour to supply Government services to the community, contracted people are, of necessity, becoming aware of confidential or private information. The extension of these non-disclosure provisions to government contractors, such that they will be subject to the same sanctions as public servants for breaches of confidentiality, is an important step in ensuring public confidence in the provision of Government services by contractors.

The Bill proposes to replace the existing secrecy provision with a new section 81 that applies to public servants, government contractors and those people who have been either a public servant or government contractor.

New offence for concealment of the death of a person

At present, there is no specific offence prescribed in Western Australia relating to the concealment of a death. However, there are numerous provisions which touch upon related aspects of the circumstance where another person conceals a death.

For example, section 17 of the *Coroner's Act* 1996 (WA) imposes a duty upon a person to report a death to a coroner or a member of the Police Force.

Further, section 214 of the *Criminal Code*, whilst not cast so as to expressly cover the situation of concealing a death, may be construed, with reference to section 17 *Coroner's Act*, as covering it. It at least exposes a person to imprisonment for up to 2 years. However, because the connection presented by section 214 of the *Criminal Code* along with section 17 of the *Coroner's Act* is somewhat tenuous, a more direct expression of legislative intent is desirable.

The only other expressly relevant provision in the *Criminal Code* is section 291, which deals with concealing the birth of newborn (still or alive) children. The offence under section 291 of the *Criminal Code* carries a sentence of 2 years. Although this provision covers the concealment of the death of a child, it does not encompass deaths of adults.

Apart from the provisions discussed above, the sections in the *Criminal Code* dealing with conspiracies (sections 558-560 *Criminal Code*) and perverting the course of justice (s143 *Criminal Code*) may in some situations be appropriate to cover the above situation, but again, the connection may be tenuous.

The absence of an indictable offence of concealing the death of a person who is not a child and the relatively low penalties prescribed for the applicable simple offences mean that this area of the law is in need of reform.

This is illustrated by the 1987 Cheyenne Bradshaw case. Cheyenne Bradshaw "accidentally" shot his friend Mick Johnson at Kalgoorlie on 17 May 1986. Since he was on parole, Cheyenne feared that the police would not believe his tale, and consequently he panicked and decided to conceal the death. His actions were later discovered by the Police. As there was (and still is) no indictable offence of concealing the death of a person who is not a child, Cheyenne's actions had to be covered by the woefully inadequate penalties prescribed for the simple offence of conspiracy ($20 fine). The conspiracy charge was laid under the former section 559 of the *Criminal Code*. The substantive charge was under the former section 46 *Coroner's Act* (now replaced by section 17 in the 1996 *Coroner's Act*) which carried a maximum penalty of $20 fine. Although section 17 *Coroner's Act* now provides for a penalty of $1,000, which is substantively greater than the former penalty of $20, the penalty was clearly lacking in severity.

At common law, it is a misdemeanour to dispose or destroy a dead body with intent to prevent an inquest being held. In *R v Davies* (1942) SR (NSW) 263, the New South Wales Court of Appeal held that it is a misdemeanour at common law for anyone (1) knowingly to bury or otherwise conceal, or to destroy or mutilate, a corpse if, (2) he has knowledge of circumstances suggesting that death has resulted from some abnormal cause, and (3) the way in which he so deals with the corpse in fact operates, or is likely, to prevent or prejudice inquiry by the proper inquiries.

The Bill proposes to insert a new section 215 into the *Criminal Code* to provide for the offence of the concealment of the death of a person which reflects the content of the offence at common law. The new section

prescribes a penalty of imprisonment for 10 years for the offence. The insertion of a new section into the *Code* is considered more appropriate than amending section 214 of the *Code* as section 214 has room for operation quite apart from the duty to report a death. In relation to subsection (1) for example, at common law, if a dead body is found in a house, and is not claimed by the executors or relatives, the householder in whose house the deceased died or where his or her body lay is under a duty to bury the body. Many other circumstances can be envisaged in which subsection (2) could still operate.

Amendments about masters, servants and apprentices

The *Criminal Code* currently contains provisions that include references to "masters, servants and apprentices." Several of these provisions are an historical carry-over from the days when servants and apprentices became part of the master's household and had no protection other than that offered by the criminal law. However, apprentices and trainees now have disciplinary matters dealt with by the State, and employment conditions that are governed by industrial legislation.

Accordingly, this Bill proposes the removal or amendment of various anachronistic references to masters, servants and apprentices. The removal of these provisions has been recommended by the following reports -

The Criminal Code: A General Review by Mr Michael Murray QC;

Review of the WA Labour Relations Legislation by Commissioner Fielding; and

WA Families – Our Future by the Taskforce on Families in Western Australia.

To give effect to these changes, the Bill amends sections 245 and 257 of the *Criminal Code* and repeals sections 264, 303 and 372(3).

Procuring, inciting or encouraging a child to commit an indecent act

It is an offence under section 321 of the *Criminal Code* to procure, incite or encourage a child of or over the age of 13 and under the age of 16 years to do an indecent act, other than an indecent act that is committed in the presence of or viewed by the spouse of the child. Section 321(10) states that it is a defence to a charge under subsections (2), (3), (4) and (6) of section 321 to prove that the accused was lawfully married to the child, but subsection (5) is not mentioned.

Sections 320(5), 322(5) and 330(5) also describe the offence of procuring (etc) an indecent act. Sections 322(8) and 330(9) provide that it is "a defence to a charge under this section" to prove the accused was lawfully married to the child or incapable person. Therefore, under section 322(5), it is a defence if the accused is married to a child but this defence does not apply under section 321(5).

This wording of section 321(5) was identified in February 1999 by the then Director of Public Prosecutions, John McKechnie QC, as unclear and open to ambiguous interpretation. The phrase "other than an indecent act that is committed in the presence of or viewed by the spouse of that child" in section 321(5), read literally, suggests that a third party may procure, incite or encourage a child to commit an indecent act as long as the spouse of the child is present or views the act. This contradicts the aim of the *Criminal Code* that a child under 16 may only have sexual contact with his or her spouse.

The term "indecent act" is defined in section 319(1) of the *Criminal Code* as an indecent act which is either committed in the presence of or viewed by any person, or photographed, videotaped, or recorded in any manner. It seems that Parliament intended that s321(5) should not apply to an accused if the accused is the spouse of the child, and that it has inserted the wording from the first part of the definition of "indecent act" into s 321(5) to try and convey that an indecent act committed in the presence of or viewed by the spouse is acceptable, but an indecent act photographed, videotaped or recorded by the spouse is not acceptable. This would explain why section 321(10) does not refer to section 321(5), as it seems Parliament intended a defence only in certain circumstances.

However, as it is currently phrased, section 321(5) could not be relied upon if a third party procured, incited or encouraged an indecent act while the spouse looked on. The following scenarios illustrate this problem. A husband could be in the company of a third party, and either the husband or the third party could encourage the child (the husband's wife) to do an indecent act in front of both of them – they would avoid the scope of section 321(5) since the husband was watching. An even more disturbing scenario would be if an intruder broke into the home, tied the husband up and forced him to watch the child (his wife) doing indecent acts upon being threatened by the intruder. Again, section 321(5) could not be relied upon because the spouse would be present/viewing the indecent act.

Therefore, as it currently stands, section 321(5) provides a loophole for offenders who procure, incite or encourage a child to do an indecent act where the spouse is watching or present, whether by choice or under duress.

Section 321(5) was inserted into the *Criminal Code* by Act No 14 of 1992. There was no equivalent to section 321 prior to this section being inserted. The insertion of section 321, sought to implement the recommendations of the Murray Report.

Amendments were made when the relevant Bill was before the Legislative Council in Committee to make it a defence to various sections where the accused was the spouse of the child (Council in Committee, *Hansard Parliamentary Debates,* 1992, Vol 298, pp 2362-2364). On page 2362, an amendment was made to section 321(10) to insert subsection (6) so that the charge of indecently recording a child did not apply to the accused if he or she was married to the child. However, subsection (5) was not inserted.

On page 2364 of the Debates, Hon Derrick Tomlinson asked the Attorney General to explain the meaning of the phrase "other than an indecent act that is committed in the presence of, or viewed by the spouse of that child" in section 321(5). The Attorney General replied that -

> *In general, and this is now reflected in new subsection (10), the Committee proceeded on the basis that marriage should in almost all situations put a child in the same position as an adult for the purposes of a defence. The present subsection about which we are talking falls short of that in that it would still be an offence for a child's spouse to be subject to some of these activities in the absence of his or her spouse, but for the rest it looks to that general equivalence applying in the presence of the spouse. That was done with a view to adopting as a general principle that marriage does not have a significant effect on the applicability of the general range of offences covered by this legislation. (at 2364).*

It seems that this statement was made to convey that if the spouse is present, the indecent act may be committed, but not in other circumstances. It also seems that since there is no defence to the spouse who encourages the child to do an indecent act which is photographed (etc), Parliament did not intend to provide a defence where there was a risk that a third party may see the indecent act at some stage. However, being the spouse of the child is a defence to subsection (6) (indecently recording a child), so again, the intent behind section 321(5) remains unclear.

This Bill proposes to amend section 321 so as to close this loophole in the law. It does so by making it an offence to procure, incite or encourage a child to do an indecent act and then providing that it is a defence to prove that the indecent act was or was intended to be a private conjugal act. An indecent act is a "private conjugal act" if (a) it is not committed in the presence of, or viewed by, any person other than a person lawfully married to the child and (b) no photograph, film, videotape or other recording is made f it other than for the exclusive and private use of the child and a person lawfully married to the child.

Protection of release of reports from Royal Commissions and other statutory bodies

Section 354 of the *Criminal Code* is located in Chapter XXV of the *Code* ("defamation") which contains several provisions relating to the law of defamation and various defences.

The general legal principle in relation to defamation is that the publication of defamatory material (that is, material which tends to lower a person in the estimation of others) about a person entitles that person, subject to carefully defined qualifications, to damages from the publisher and, in appropriate circumstances, to an injunction preventing further publication.

It is a defence to an action in defamation that the publication occurred in circumstances attracting either absolute or qualified privilege. A form of qualified privilege is created by section 354 of the *Criminal Code.* Subsection (4) of that section provides that -

> *It is lawful . . . [t]o publish in good faith, for the information of the public, a fair report of any inquiry held under the authority of a statute or ordinance of the Commonwealth or a State or Territory of the Commonwealth, or by or under the authority of Her Majesty, or of the Governor in Council of the Commonwealth, the Governor in Council of any State of the Commonwealth, or the Administrator in Council of any Territory of the Commonwealth.*

The section goes on to state -

> *A publication is said to be made in good faith, for the information of the public, if the person by whom it is made is not actuated in making it by ill-will to the person defamed, or by any other improper motive, and if the manner of the publication is such as is ordinarily and fairly used in the case of the publication of news.*

The protection of section 354 extends to both criminal and civil proceedings: *Western Australian Newspapers Ltd v Bridge* (1979) 141 CLR 535.

In the Queensland case of *Wishart v Doyle* St R Qd 269, the Queensland Court, in interpreting a similar provision to section 354(4), held that the provision was confined to inquiries directly authorised by statute of a more or less judicial nature. The decision in *Wishart v Doyle* suggests that section 354(4) does not apply to administrative inquiries, including Royal Commissions. Although this conclusion is open to debate, especially in light of the decision of the High Court in *Bailey v Truth and Sportsman Ltd* (1938) 60 CLR 700, which held that a comparable New South Wales decision did protect publication of the report of a Royal Commission, prudence demands that the section be amended.

The Bill proposes to insert a new subsection (4a) into section 354 of the *Code* which states clearly that it is lawful to publish in good faith a fair report of the public proceedings of any Royal Commission. This will avoid the need to publish such reports under the order or authority of Parliament and will save the need to recall Parliament for such purposes.

Things capable of being stolen

At present, the law provides that wild animals are generally not capable of being stolen. Section 370 of the *Criminal Code* creates three exceptions to this rule -

> First, animals wild by nature, of a kind which is not ordinarily found in a condition of natural liberty in WA, which are the property of any person, and which are usually kept in a state of confinement, are capable of being stolen, whether they are actually in confinement or have escaped from confinement.
>
> Secondly, animals wild by nature, of a kind which is ordinarily found in a condition of natural liberty in WA, which are the property of any person, are capable of being stolen while they are in confinement and while they are actually pursued after escaping from confinement, but not at any other time.
>
> Thirdly, oysters and oyster brood are capable of being stolen while in oyster beds, layings or fisheries, which are the property of any person, and which are sufficiently marked out, or are known by general repute as his property.

The Aquaculture Council of WA is concerned that because mussels, unlike oysters, are not expressly included in these exceptions, it is unclear whether mussels are capable of being stolen. If mussels are not capable of being stolen under section 370 of the Criminal Code a person who takes mussels without having any right to do so cannot be convicted of stealing under section 378 of the Criminal Code.

Section 390 of the *Criminal Code* (Qld), which is the equivalent of section 370 of the *Criminal Code* (WA), has recently been amended to provide that anything that is the property of any person is capable of being stolen if it is -

(a) moveable; or

(b) capable of being movable, even if it was made movable in order to steal it.

When this amendment comprised part of the *Criminal Law Amendment Bill (No 2) (2000)*, it was originally envisaged that such a broad approach would also be adopted in Western Australia as this would obviate the need to amend the *Criminal Code* each time aquaculture techniques were employed on new species. However, during the drafting process for that Bill, Parliamentary Counsel and Crown Counsel expressed concerns regarding the adoption of such an approach. They observed that the Queensland approach relied upon other provisions within the Queensland Code, which were not reflected in the *Criminal Code* (WA) and that the adoption of further amendments in WA relating to the definition of property would have ramifications across the *Criminal Code* creating difficulties with the existing concepts and provisions relating to property.

Consequently, this Bill specifically addresses the problem of the stealing of aquaculture species, rather than following the approach adopted by Queensland. The Bill inserts a new paragraph into section 370 of the *Criminal Code* to make clear that: an animal being reared by aquaculture is capable of being stolen while it is in a bed, fishery or other place which is the property of any person and which is designated as being the property of or under the control or management of a person.

This provision will apply regardless of the species being reared by aquaculture and will provide protection for the investments made by aquaculturalists in farming various species of seafood.

In addition, the Bill repeals sections 436 and 437 of the *Criminal Code* and replaces them with new sections relating to *Unlawful fishing* and *Unlawfully taking or destroying fish*. The amendments are intended to broaden the scope of these provisions in order to make clear that the sections apply to any aquatic organism that is being reared by aquaculture in a place that is the property of, or under the control of, any person. The new section 437 also applies to unlawfully taking or destroying aquatic organisms in any water that is private property or in which there is a private right of fishery.

These amendments will provide important protection for the investments made by aquaculturalists in farming various species of seafood.

Restriction on publication of stalking proceedings

The act of stalking is a sustained invasion of another's privacy. The resultant court proceedings necessarily involve a further intrusion on the victim's privacy. This loss of privacy can be further aggravated by the enormous interest shown in stalking cases by the media. As a result of this disproportionate media scrutiny, there is a danger that victims of stalking may be discouraged from reporting offences through fear of an even greater loss of privacy.

The Bill proposes amendments to section 635A of the *Criminal Code* that will allow the Court to prohibit or restrict the publication of any matter likely to lead the public to identify the victim of an offence.

In the drafting of the amendments, it became apparent that a specific provision which applied only to stalking offences may not protect the privacy of all victims of stalking type behaviour. The following scenario illustrates this point. A person charged with a stalking offence may, due to the evidence revealed in the proceedings, be found guilty of an alternative offence such as making threats with intent to influence. The invasion of privacy involved in this case would be no less severe because the offender was convicted of the alternative offence. In light of the above, the amendments to section 635A have been drafted in a manner that allows them to be applied generally by the court, rather than being restricted specifically to stalking offences.

The Bill amends section 635A of the *Criminal Code* by inserting a new subsection (d) into subsection (2) of the section so as to allow the Court to prohibit or restrict the publication of any matter likely to lead the public to identify the victim of an offence. It is not limited to those offences involving stalking. It also inserts a new subsection (2a) into section 635A which provides that an order under the new subsection (1)(d) does not prohibit the publication of matter identifying a victim if the victim consents to the publication of the matter before it is published and the victim is legally capable of giving their consent. Section 399A of the Code – Court may restrict publication of certain proceedings is repealed.

Aggravated burglary

Section 401 of the *Criminal Code* creates the offence of burglary. At present, the offences of burglary and burglary of a place ordinarily used for human habitation are crimes which are triable summarily or on indictment at the election of the accused. The penalty on indictment is 18 years imprisonment (if the place is ordinarily used for human habitation) or 14 years in any other case. However, burglaries committed in circumstances of aggravation are not triable summarily and the maximum penalty on conviction is imprisonment for 20 years.

For the purposes of section 401, "circumstances of aggravation" are defined in section 400 as meaning circumstances in which -

(a) immediately before or during or immediately after the commission of the offence the offender -

(i) is or pretends to be armed with a dangerous or offensive weapon or instrument;

(ii) is or pretends to be in possession of an explosive substance;

(iii) is in company with another person or other persons;

(iv) does bodily harm to any person;

(v) threatens to kill or injure any person;

(vi) detains any person (within the meaning of section 332(1)); or

(b) immediately before the commission of the offence the offender knew or ought to have known that there was another person (other than a co-offender) in the place.

The Hon Chief Judge of the District Court and several Magistrates, particularly in the North West of the State, have urged that the offence of aggravated burglary, where the only circumstance of aggravation is that the offender is in company with another person or other persons, be made into an "either way offence" and thus triable summarily. In their experience, this particular circumstance of aggravation drags within the aggravated burglary net a whole host of instances of offending which are not particularly serious and do not truly warrant being regarded as aggravated. In their view, such offences may properly be dealt with by a Court of Petty Sessions. However, at present the Code does not provide for this and they must be handled by the District Court thereby contributing to the current backlog in that Court and, where the offences arise in remote communities, involving extra delays and expense.

The primary purpose of defining being in company as a circumstance of aggravation in relation to burglary offences is to address the impact on victims of being confronted by more than one person breaking into their home. Providing for a summary conviction penalty for the offence of aggravated burglary, where the *only* circumstance of aggravation is that the offender is in company with another person or other persons, will not undermine this purpose, as many cases where victims are confronted in their home will involve other circumstances of aggravation, particularly those under section 400(1)(b).

The Bill proposes to amend sections 401(1) and (2) by deleting the summary conviction penalties prescribed therein, and replacing them. The new penalties include a new paragraph (a) which provides for a summary conviction penalty of imprisonment for 3 years or a fine of $12,000 in "a case to which paragraph (a) applies where the only circumstance of aggravation is that the offender is in company with another person or other persons".

Persons found armed etc with intent to commit crime

Section 407 of the *Criminal Code* makes it a crime for a person to -

> be armed with any dangerous or offensive weapon or instrument with an intent to enter a place and to commit a crime therein (s 407(a));
>
> be in possession at night, without lawful excuse, of any instrument of housebreaking (s 407(c));
>
> be in possession by day of any instrument of housebreaking with intent to commit a crime (s 407(d)); or
>
> have his face masked or blackened or being otherwise disguised with intent to commit a crime (s 407(e)).

The expression "intent to commit a crime" as used in subsections (a), (d) and (e) of section 407 has been interpreted to exclude the intent to commit a misdemeanour. Consequently, it is difficult for the prosecution to prove the requisite mental element for an offence under section 407.

This weakness has been highlighted in recent cases where, in the absence of evidence by an accused, the Magistrate has held that there was no case to answer under section 407. The broadening of the mental element of the offence created under section 407 to include the intent to commit misdemeanours would facilitate prosecutions under section 407 in circumstances where the accused does not testify.

Therefore, the Bill amends section 407 of the *Criminal Code* by deleting the words "a crime" in paragraphs (a), (d) and (e) of the section and, in each place, substituting the words "an offence."

Receiving stolen property

Section 414 of the *Criminal Code* currently provides that a person who receives property which has been obtained by means of any act constituting an indictable offence, knowing the property to have been so obtained, is guilty of a crime. The section sets out a penalty regime whereby an offender may be liable to the greatest punishment provided for "the kind of offence" by means of which the property was obtained, or imprisonment for 14 years, whichever is the lesser.

However, His Honour Judge Nesbitt has raised concerns about the potential for confusion over what penalty should be applied. His Honour's comments raise two separate issues -

(1) Whether the phrase "the kind of offence" denotes -

  (a) the actual offence committed by the stealing party (that is burglary, stealing, aggravated burglary); or

  (b) a class of offences such as offences against the person or offences against property; and

(2) How can the penalty provision contained in section 414 of the *Criminal Code* be applied in circumstances where it is not clear how the property was obtained initially (that is, through a burglary, stealing, aggravated burglary).

Although the second paragraph of section 414 of the *Criminal Code* does not appear to have been judicially considered, the meaning is nonetheless clear from extrinsic evidence. The second reading speeches of the *Criminal Law Amendment Bill (No 2) 1992* (WA) indicate that the legislature intended the courts to consider the maximum penalty applicable to *the offence by which the property* (received by the defendant) *was first obtained*. If the relevant maximum penalty exceeds 14 years, then the applicable penalty will be 14 years. However, if the relevant maximum penalty is less than 14 years then the lesser penalty applies.

The rationale behind the 1992 amendment to the penalty provision was that the person receiving the stolen property should not be liable to a greater penalty than the person who actually stole the property. Therefore, it appears that the phrase "the kind of offence" contained in section 414 of the *Criminal Code* was intended to be synonymous with the phrase "the offence." Section 414 should be amended, however, in order to remove any doubt.

On the other hand, if it is not known how the property was obtained, but it is clear that the taking of the property was unlawful, it would appear that the penalty provision cannot be applied accurately, if it can be applied at all. The most conservative approach would be to apply the maximum penalty associated with the property offence (which could fall within the scope of the provision), that carries the lowest maximum penalty. Such a solution, although practical, would involve reading words (albeit words in default) into the provision.

Several cases support the general proposition that additional words should not be read into a statute where such words do not already appear in the provisions in question. This principle has, however, been refined in subsequent cases. It has been recognised that there are some gaps that will be filled by the courts. The type of gaps the courts are now prepared to fill are those where the error is apparent and Parliament's intention is manifest, requiring the correction of the error. The types of errors that courts will not correct were described aptly in the following passage in *Tokyo Mart Pty Ltd v Campbell* (1988) 15 NSWLR 275, 283 by Mahoney JA (McHugh and Clarke JJA agreeing) -

> Legislative inadvertence may consist, inter alia, of either of two things. The draftsman may have failed to consider what should be provided in respect of a particular matter and so fail to provide for it. In such a case, though it may be possible to conjecture what, had he adverted to it, he would have provided, the court may not, in my opinion, supply the deficiency. In the other case, the legislative inadvertence consists, not in a failure to address the problem and determine what should be done, but in the failure to provide in the instrument express words appropriate to give effect to it. In the second case, it may be possible for the court, in the process of construction, to remedy the omission.

The present problem falls clearly into category one, an area where the court will not read further words into a statutory provision.

At present, the provisions of the *Criminal Code* do not provide a clear answer to the question of whether a superior court judge has the capacity to determine a simple offence of unlawful possession as an alternative to the indictable charge of receiving.

Section 594 of the *Criminal Code* provides that -

> *Except as hereinafter stated, upon an indictment charging a person with an offence he may be convicted of any indictable or simple offence under this Code, or any other indictable offence, which is established by the evidence, and which is an element or would be involved in the commission of the offence charged in the indictment.*

Section 599 of the *Criminal Code* provides that -

> *(1) Upon an indictment charging a person with an offence under section 378, 409 or 414 the person may be convicted of an offence under another of those sections if that offence is established by the evidence.*
>
> *(2) Where a charge of an offence under section 378, 409 or 414 is dealt with summarily the person may be convicted summarily of an offence under another of those sections if that other offence is established by the evidence.*

The offences dealt with in section 599 of the *Criminal Code* are stealing (section 378), fraud (section 409) and receiving stolen property (section 414). With respect to section 599, there are two possible views. First, that section 599 is a specific provision, which applies the rule in section 594 of the *Criminal Code* but also appears to have the effect of delimiting which offences can be considered to be alternative offences for *inter alia* the specific offence of receiving stolen property. Hence, on this view, whilst section 599 remains a provision of the *Criminal Code*, the only alternative verdicts in relation to the offence of receiving stolen property are stealing and fraud.

An alternative view is that section 599 is merely illustrative and not exhaustive in relation to which offences may be considered alternatives to the named offences. On this view, the fact that only fraud and stealing have been named as alternative offences in section 599 of the *Criminal Code* is not conclusive on the issue of which offences may be alternative offences to the offence of receiving stolen property. Rather, fraud and stealing represent examples of alternative offences to receiving stolen property.

There is implicit support for the former view.

The Bill proposes to address the problems with sections 414 and 599 of the *Criminal Code* identified above. To this end, the Bill contains amendments to clarify the meaning of the penalty provision in section 414 of the *Criminal Code* relating to the receipt of stolen goods. The Bill also includes amendments to section 599 of the *Criminal Code* so that a Judge is able to determine guilt and deliver a sentence on the simple offence of unlawful possession rather than the indictable offence of receiving stolen property.

Playing of video tapes of suspects

Amendments were made to the *Criminal Code* by the last Labor Government in 1992 to greatly increase the use of video recordings of police interviews for indictable offences. The provisions contained significant safeguards to ensure that videotapes of interviews should only be viewed and possessed by a limited range of authorised persons. The Second Reading Speech in the Legislative Assembly reveals the purpose of these safeguards was to guard against "the greater possibility of trials being aborted because of leaks to the media or other misuse of video material."

The principal provision is section 570B of the *Criminal Code* which provides that videotapes of interviews should only be viewed and possessed by a limited range of authorised persons for a limited number of approved purposes. As section 570B of the *Criminal Code* presently reads, a videotape of a suspect cannot be played for the purposes of coronial investigations or inquiries or by a legal officer of the Crown Solicitor's Office.

The Bill proposes two amendments to the existing videotape system. Firstly, it is proposed that certain staff of the Coroner's Court be permitted to possess and view videotapes of interviews with people of direct relevance to an investigation or inquest into a death. The second proposal is to authorise legal practitioners acting for or representing the State to possess and view videotapes when undertaking a prosecution. Although prosecutors and court staff have always been included as authorised personnel, it has not been clear that staff from the Coroner's Court and prosecutors acting for or representing the State are included within those categories.

The Coroner's Court conducts investigations and holds inquests into certain deaths occurring within Western Australia. The State Coroner often investigates matters that are referred to him by the Police Service. Much of the information held by the Police Service is stored on videotapes of interviews. Transcripts of interviews are not permitted to be made: section 570A of the *Criminal Code*. The Police Service therefore wishes to provide the Coroner with copies of the videotapes of interviews with persons relevant to the coronial inquest or investigation.

As the law presently stands, the Police are able to give such information to the Coroner (when he requests it by virtue of subsection 570B(1)(e) of the *Criminal Code*). However, the Coroner's Court staff are unable to play these tapes: subsection 570B(3) of the *Criminal Code*. In relation to subsection 570B(3)(a), coronial investigations or inquiries do not involve a prosecution, defence or legal proceedings relating to a charge. Further, in relation to paragraph 570B(3)(b), section 570F of the *Criminal Code* only deals with directions made by the Supreme Court or District Court, and not the Coroner's Court.

In order to overcome this difficulty, the Coroner presently has to request a member of the Police Service to play any videotapes for him. As well as being inconvenient and wasteful of Police resources, this also precludes the Coroner from authorising certain members of the Court staff or consulting experts (such as doctors) to watch the tape, except by having those people present when the police officer plays the videotape.

The Bill proposes to overcome this problem by amending subsections 570B(1) and (3). It is envisaged that such amendments will remove the necessity for a wasteful use of Police time and resources (in playing the tapes for Coronial purposes); and increase the efficiency of Coronial investigations by allowing the Coroner to authorise certain members of the Court staff or consulting experts (such as doctors) to watch the tape.

Legal practitioners acting for or representing the State are periodically requested to prosecute people alleged to have breached various statutes (such as fisheries and conservation legislation). Where the person has been interviewed by the Police, much of the important information required for a proper preparation for prosecution will be contained on a videotape of interview. Legal practitioners acting for or representing the State are currently not included within the limited range of people authorised to possess videotapes of interviews. If they were allowed to possess them, then subsection 570B(3)(a) of the *Criminal Code* would allow them to play the videotapes. However, as the legislation stands, practitioners who are assigned to undertake prosecutions are seriously inhibited in their preparations by not being able to possess these videotapes.

The Bill proposes to overcome this problem by amending subsection 570B(1) of the *Criminal Code* to insert legal practitioners acting for or representing the State as a new category of authorised persons.

Presence of the accused at trial

Section 635 of the *Criminal Code* requires an accused to be present for trial. This requirement is expressed to be subject to two exceptions, namely -

the court may order the accused to be removed and may direct the trial to proceed in the absence of the accused where the conduct of the accused would render the continuance of the proceedings impracticable; and

the court may, in any case, if it thinks fit, permit a person charged with a misdemeanour to be absent during the whole or part of the trial on such conditions as it thinks fit.

Recently, a joint trial in the Supreme Court involving eight accused persons had to be adjourned when one of the accused became ill and was taken to hospital. This occurred because section 635 of the *Criminal Code* does not allow the court to proceed with a trial in the absence of an accused who is ill or infirm.

The Hon Chief Justice has suggested that the existing provisions of section 635 of the *Criminal Code* be expanded along similar lines to section 617(3) of the Queensland *Criminal Code.* The Bill proposes to repeal section 635 of the *Criminal Code* and substitutes a new section 635 drafted according to the recommendation discussed above. Subsection (4) of the new provision will allow a court to order the trial to proceed in the absence of an accused if it is satisfied that the interests of the accused will not be prejudiced, and that it is necessary for the proper administration of justice that the trial proceed in the absence of the accused.

Conclusion

This Bill includes important reforms to our system of criminal law. Many are long overdue. Their implementation will serve to improve the effectiveness and efficiency of the criminal justice system in our State. In a number of instances they will also serve the needs of victims by ensuring that matters are dealt with more speedily and that victims are protected from harassment. The community at large will benefit not only from the greater protection offered, but also from the greater clarity of the provisions, in particular in respect of the offence of murder.

I commend the Bill to the House.

Schedule 1: Summary of penalty changes

Offence	**Current penalty**	**Clause in Bill**	**New penalty proposed**
1. Failure of unlawful assembly to disperse (s54A *Police Act 1892*)	Fine of $500 or 6 mths imprisonment or both on indictment. No summary conviction penalty.	Cl 7 of the Bill–new s64 of the *Criminal Code* ("*Code*")	3 yrs imprisonment (on indictment); 2 yrs or a fine of $8000 (summary conviction)
2. Taking part in a riot (s64 of the *Code*)	3 yrs on indictment. No summary conviction penalty.	Cl 7 of the Bill–new s65 of the *Code*	5 yrs (on indictment); 2 yrs or a fine of $8000 (summary conviction)
3. Failure of rioters to disperse (s65 *Code*)	14 yrs (on indictment)	Cl 7 of the Bill –new s66 of the *Code*	10 yrs (on indictment)
4. Damage to or destruction of property by persons riotously assembled (ss 66 & 67 of *Code*)	14 yrs (s66) 7 yrs (s67) (on indictment.	Cl 7 of the Bill –new s67 of the *Code*	10 yrs or 14 yrs where the property is damaged or destroyed by fire.
5. Being armed so as to cause fear (s68 of the *Code*)	2 yrs on indictment. No summary conviction penalty.	Cl 8 of the Bill	7 yrs (on indictment); 3 yrs or a fine of $12,000 (summary conviction)
6. Forcibly entering land (s69 of the *Code*)	1 yr on indictment. No summary conviction penalty.	Cl 9 of the Bill	2 yrs (on indictment); $6000 (summary conviction)
7. Forcibly keeping possession of land (s70 of the *Code*)	1 yr on indictment. No summary conviction penalty.	Cl 10 of the Bill	2 yrs (on indictment); $6000 (summary conviction)
8. Fighting in public causing fear (s71 of the	1 yr on indictment. No summary conviction	Cl 11 of the Bill	2 yrs (on indictment); $6000 (summary conviction)

Code)	penalty.		
9. Challenge to fight a duel (s72 of the *Code*)	3 yrs on indictment. No summary conviction penalty.	Cl 12 of the Bill	2 yrs (on indictment); $6000 (summary conviction)
10. Prize fighting (s73 of the *Code*)	1 yr on indictment. No summary conviction penalty.	Cl 13 of the Bill	2 yrs (on indictment); $6000 (summary conviction)
11. Threatening violence (s74 of the *Code*)	1 yr on indictment (if offence during day) 2 yrs on indictment (if at night). No summary conviction penalty.	Cl 14 of the Bill	3 yrs (on indictment regardless of day or night); 1 yr or a fine of $4000 (summary conviction)
12. Murder (s279 of the *Code*)	life imprisonment (min of 7 yrs and max of 14 yrs: s90 *Sentencing Act 1995*)	Cl 18 of the Bill	Life imprisonment (min of 10 yrs and max of 30 yrs under proposed changes to s90 *Sentencing Act 1995*)
13. Forcibly freeing certain offenders from custody (s144 of the *Code*)	Imprisonment for life	Cl 19 of the Bill	20 yrs
14. Setting mantraps (s305 of the *Code*)	3 yrs on indictment. No summary conviction penalty.	Cl 28 of the Bill	3 yrs (on indictment); 1 yr or $4000 (summary conviction)
15. Unlawful fishing (s436 *Code)*	Fine of $1,000	Cl 76 of the Bill	Imprisonment for 2 years or a fine of $8,000.
16. Unlawful publication of defamatory matter (s360 *Code*)	On indictment: (a) 12 months and $600, or (b) 2 yrs and $1000 (if defamatory matter known to be false). No summary conviction penalty.	Cl 37 of the Bill	(a) 12 months and $4000 (on indictment); $1000 (summary conviction), or (b) 2 yrs and $8000 (on indictment); $2000 (summary conviction)
17. Defamation of members of Parliament by strangers (s361 *Code*)	2 yrs and $1000 on indictment. No summary conviction penalty.	Cl 38 of the Bill	2 yrs and $8000 (on indictment); $2000 (summary conviction)
18. Certain fraudulent offences (see s426A of the *Code*)	Summary conviction penalty of 6 months or $2000 (if offence punishable on indictment by not more than 1 yr); or 12 months or $4000 (if offence punishable on indictment by not more than 2 yrs); or 2 yrs or a fine of $8000 (otherwise)	Cls 41 and 42 of the Bill - new s427 of the *Code*	Summary conviction penalty of: $2000 (if offence punishable on indictment for 1 yr or less); or 1 yr or $4000 (if offence punishable on indictment with over 1 yr but not more than 2 yrs); or 2 yrs or $8000 (if offence punishable on indictment with more than 2 yrs).
19. Criminal damage (s444 *Code*)	No summary conviction penalty	Cl 44 of the Bill	Summary conviction penalty of 3 yrs or $12,000 (provided property not destroyed or damaged by fire and amount of injury doesn't exceed $25,000)

Debate adjourned, on motion by Mr W.J. McNee.