

**COVID-19 RESPONSE LEGISLATION AMENDMENT
(EXTENSION OF EXPIRING PROVISIONS) BILL 2020**

Committee

Resumed from an earlier stage of the sitting. The Chair of Committees (Hon Simon O'Brien) in the chair; Hon Stephen Dawson (Minister for Environment) in charge of the bill.

Clause 3: Act amended —

Committee was interrupted after the clause had been partly considered.

The CHAIR: Members, we return to the consideration of the COVID-19 Response Legislation Amendment (Extension of Expiring Provisions) Bill 2020, bill 213–1, in Committee of the Whole. We are under special orders, so we have a time limit on the committee stage, so I am going to continue to proceed with as much dispatch as I can, and I hope that members will do likewise.

Hon MICHAEL MISCHIN: Before the break I was about to pose some questions to the minister regarding parts 2 and 3 of the bill. The substance of those provisions in the original legislation that this bill seeks to extend—that is, the Criminal Code Amendment (COVID-19 Response) Act 2020—was to increase penalties under certain circumstances in sections 318, “Serious assault”, and 338B, “Threats”, of the Criminal Code. The increased penalties were originally to expire on 4 April 2021. This legislation seeks essentially to extend them by six months, to expire on 4 October 2021. The rationale given at the time was that these penalties were to deter people from certain behaviours that relied on them claiming, during the course of an assault or threat, that they had COVID-19, hence instilling fear and concern in the subject of their assault or threat. It was stated in this bill’s second reading speech —

The increased penalties have not been widely used; however, that may indicate that they are having an appropriate deterrent effect. Regardless of their uptake, it is important that they continue to be available to reflect the seriousness of the conduct.

How many prosecutions have been laid in respect of either section 318 or section 338B that would attract these increased penalties, and what has been the outcome of those prosecutions?

Hon STEPHEN DAWSON: I am advised that the Western Australia Police Force prosecution application does not specifically identify offences under section 318(1A) of the Criminal Code as distinct from other offences under section 318. A manual keyword search of related cases from 4 April 2020 to 25 October 2020 was undertaken and identified that nine persons had been charged with 16 offences of assault of a public officer under section 318(1A) of the Criminal Code; five accused have pending court appearances; two arrest warrants have been issued for non-appearance; one person pleaded guilty and was fined \$2 000; one person pleaded guilty, but did not appear at sentencing; and one person pleaded guilty to an alternative charge under section 318(1)(d) of the Criminal Code. No-one was charged with threats under section 338B(2) of the Criminal Code.

I can give the member details of the charges under section 318(1A) of the Criminal Code. They are as follows. On 5 April 2020, a 53-year-old male allegedly spat at a hospital worker at Fiona Stanley Hospital emergency department, saying he had COVID. He was charged but failed to appear at Fremantle Magistrates Court on 15 June 2020, and an arrest warrant was issued. On 6 April 2020, a 24-year-old male who was a patient at Bunbury Hospital’s COVID-19 isolation ward allegedly deliberately coughed on four nurses. He was charged and remanded for legal advice to Perth Magistrates Court on 16 November 2020. On 7 April 2020, at North Perth, a 37-year-old male was asked to leave a bus by the bus inspector due to his behaviour. He allegedly threatened and spat at the bus inspector, saying he had COVID-19. He was charged and was listed to appear in Perth Magistrates Court for a plea; that would have happened last week, but I do not have any further information on that. On 28 April 2020, a 30-year-old male allegedly spat at a police auxiliary officer at Perth watch house and whilst being restrained, he shouted that he had coronavirus. The charge was initially amended to section 318(1A), then amended again to a charge of assault of a public officer under section 318(1)(d) of the Criminal Code, to which he pleaded guilty; the sentence was a conditional suspended imprisonment order. On 28 April 2020, a 17-year-old male spat at arresting police officers at Joondalup Police Station and Banksia Hill Detention Centre, saying he had COVID-19. He was charged with four offences and pleaded guilty at Perth Children’s Court. He was remanded for sentencing on 14 October 2020; however, he did not appear and an arrest warrant was issued. On 28 April 2020 at Gosnells, a 54-year-old male allegedly spat at a police officer. At the time he indicated that COVID-19 was real and that the officer would die. He was charged and is due to appear at Armadale Magistrates Court for a first appearance on 8 December 2020 on this and other charges. On 29 April 2020 at Geraldton, a 19-year-old female allegedly spat at a police officer, saying she had coronavirus. She was charged and was due to appear at Geraldton District Court on 2 November. On 4 May 2020 at Rockingham, a 35-year-old male allegedly coughed and spat in the direction of police officers whilst being searched, saying after arrest that he had COVID-19. He was charged and is due to appear at Rockingham Magistrates Court for trial on 8 January 2021. Finally, on 7 May 2020 at Leederville, a 43-year-old male blew heavily on a police officer, saying he had COVID-19. He was charged and pleaded guilty at Perth Magistrates Court, and was given a \$2 000 fine.

Hon MICHAEL MISCHIN: So far we have had some nine individual cases and the most that has been done is a \$2 000 fine for this heinous behaviour that was meant to be deterred by these increased penalties of imprisonment and the like. It has been said that the purpose of extending the time in respect of these matters is slightly different from that of the Emergency Management Amendment (COVID-19 Response) Act 2020. In that legislation it is to address the need for orders to direct the way that the community functions to address the risks of COVID-19, for about six months from April, in case the emergency continues. In this case, however, we are told that it is to address the problem of maintaining a suitable sentence after 4 April. Is that correct?

Hon STEPHEN DAWSON: It has a dual function. It allows us to sentence people after 4 April, but it also sends the message to our frontline people that we value their work and that they should not be threatened during this COVID-19 pandemic.

I earlier gave the honourable member information about a 19-year-old female who allegedly spat at a police officer in Geraldton on 29 April. I indicated that she had been charged and was due to appear at Geraldton District Court on 2 November. I have just been advised that she was sentenced to 12 months' imprisonment.

Hon MICHAEL MISCHIN: That is a bit more like it. I thank the minister. I posit the two examples I asked about on the last occasion this legislation was before the chamber, in its original form. Perhaps the minister can put an answer on the record. I will outline two scenarios. Firstly, let us assume for a moment that the extension sought by the government is granted up to 4 October 2021 for the operation of these increased penalties. At some time before 4 October 2021, an offender commits an offence in circumstances that attract the increased penalties. However, the offender is charged with the offence after 4 October 2021. The offender is convicted and sentenced after 4 October 2021, when the provisions have expired. Will that offender be liable to the greater penalties or to the default base penalties under sections 318 or 338B?

Hon STEPHEN DAWSON: I am told that they would be captured by the default penalties.

Hon MICHAEL MISCHIN: Scenario 2 is that sometime between now and 4 October 2021, an offender commits an offence in circumstances that attract the increased penalties and the offender is charged with that offence before 4 October, when the provisions are still in operation, but is convicted and sentenced after 4 October 2021. Will the offender be liable to greater penalties or to the default penalties?

Hon STEPHEN DAWSON: It would be the default penalty.

Hon MICHAEL MISCHIN: Thank you. That confirms my understanding of the situation, which I tried to put forward on the last occasion. That being so, why has the government has not sought to include some kind of savings provision? If the objective is to ensure that potential offenders are deterred from spitting, coughing or otherwise threatening or infecting police officers and other public officers with COVID, why is there not a savings provision so that if someone commits an offence before the expiry of the increased penalties and is charged at any time with that, they will still be subject to the increased penalties? If I were to give legal advice to someone in my responsibility to my client who is charged with this offence, I would suggest that they seek a trial or sentencing date after 4 October 2021 when they would not be subject to the aggravated increased penalties. Does the minister agree with that as a strategy?

Hon STEPHEN DAWSON: Obviously, I am not a lawyer, so it is not for me to give legal advice or to agree.

Hon MICHAEL MISCHIN: I accept that. Perhaps I should have framed that the other way. If I were to give that sort of advice and it were to be followed, my client would be subject to only the non-aggravated penalties. Any deterrent effect that is sought to be achieved, especially for those who have absconded and may not be caught, would be lost. Why has the government not included some kind of transitional saving type provision to ensure that this increased penalty will, in fact, stick?

Hon STEPHEN DAWSON: My advisers tell me that they wanted to affect the Criminal Code as little as possible. It would still be regarded as an aggravated circumstance even if they were to be charged and convicted after 4 October. The member gave the example of people who abscond. People who abscond would also get charged with that act, so they would be penalised multiple times. The decision was made, a number of things were thought through at the time, and this is where it landed.

Hon MICHAEL MISCHIN: I will not pursue the matter much further, unless the government wishes to amend these provisions to make real the potential punishment for those who are intended to be deterred in this fashion. I make the point that an aggravated penalty with a mandatory punishment is available for someone who does bodily harm and threatens COVID. If they happen to be sentenced, or convicted and sentenced, after 4 October next year, that will not apply. It may be that the magistrate or judge will take that into account, but the mandatory nature of that condign punishment will not be applicable. They could not be sentenced on that basis. Particularly in the case of those who have absconded and may not be caught and brought to justice before 4 October, the government will not meet its claim that it is deterring offenders and protecting public officers and others from this sort of behaviour. That is a matter for the government.

Hon STEPHEN DAWSON: We do not propose to make any amendments on that issue to the bill before us. However, should the bill pass as it stands with a six-month extension, that would give us three extra months during which these expanded penalties will apply. That would enable us to get more offenders charged and, hopefully, convicted. It will certainly be more than would be the case if it were only a three-month extension. I think Hon Michael Mischin is trying to be helpful in suggesting an amendment, but I suggest that he could be very helpful if he supported the six-month extension that is before us.

Clause put and passed.

Clause 4: Section 318 amended —

Hon COLIN de GRUSSA: At clause 1, we countenanced and discussed the various merits of the extension proposed by the government and the amendments on the supplementary notice paper proposed by me. I am not convinced that there is any need to extend these provisions for the full six months. In fact, three months will be ample time. That will also allow Parliament to revisit these extraordinary powers and determine their necessity based on the latest information at the time. It will not be difficult to prepare a bill such as this. It is a simple bill and would be possible. The government is well aware of the date of expiration; therefore, the government of the day could make it its first order of business should it wish to do so. On that basis, I see no reason why three months will not be enough. I move —

Page 3, line 7 — To delete “18” and substitute —

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Hon STEPHEN DAWSON: It will be no surprise that the amendment on the supplementary notice paper is not supported. A number of cases are currently before the courts relating to serious assaults against public officers committed in the context of COVID-19. Following the sunset date, the higher penalties will be removed from the Criminal Code and will not be available for sentencing for any cases that were not finalised before the sunset date. The Commissioner of Police has expressed that the government’s proposal for a six-month extension is an appropriate time frame, having regard to the progression of these criminal matters. It is important that the higher penalty continue to be available for the duration of the COVID-19 pandemic to have a deterrent effect on that abhorrent behaviour, and to reflect the seriousness of the conduct for sentencing purposes. Hon Colin de Grussa’s proposal to reduce the extension of the sunset date from six months to three months could cause uncertainty for victims of these serious assaults, as it will not properly account for the progression of these criminal matters. We will not support this amendment.

Hon TJORN SIBMA: I will not detain the chamber too long on debating this clause, suffice it to say that we support the amendment. The justification against it is, I am sorry to say, a nonsense. It is completely unsubstantiated fearmongering with not a shred of evidence to support it.

Hon COLIN de GRUSSA: The minister asserts that the provisions will expire and therefore the penalties or convictions in progress will not occur or people will be penalised under a lesser penalty. However, it is up to the government to extend the provisions. That will happen regardless of the sunset date. I do not accept that as an argument at all and encourage members to support this amendment.

Division

Amendment put and a division called for, the Chair casting his vote with the ayes.

Bells rung and the committee divided.

The CHAIR: Order! Hon Colin Tincknell, I urge you to go to the standing orders where you will find there is an expressed prohibition against any member ever passing between the Chair and the committee table.

A member interjected.

The CHAIR: There is a further order that says you do not address the Chair when you are not in your place.

Division Resumed

The division resulted as follows —

Ayes (20)

Hon Martin Aldridge	Hon Diane Evers	Hon Michael Mischin	Hon Aaron Stonehouse
Hon Robin Chapple	Hon Donna Faragher	Hon Simon O’Brien	Hon Dr Steve Thomas
Hon Tim Clifford	Hon Nick Goiran	Hon Robin Scott	Hon Colin Tincknell
Hon Peter Collier	Hon Colin Holt	Hon Tjorn Sibma	Hon Alison Xamon
Hon Colin de Grussa	Hon Rick Mazza	Hon Charles Smith	Hon Ken Baston (<i>Teller</i>)

Noes (11)

Hon Alanna Clohesy
Hon Stephen Dawson
Hon Sue Ellery

Hon Laurie Graham
Hon Alannah MacTiernan
Hon Kyle McGinn

Hon Martin Pritchard
Hon Matthew Swinbourn
Hon Dr Sally Talbot

Hon Darren West
Hon Pierre Yang (*Teller*)

Pairs

Hon Jacqui Boyde
Hon Jim Chown

Hon Adele Farina
Hon Samantha Rowe

Amendment thus passed.

Clause, as amended, put and passed.

Clause 5: Section 338B amended —

Hon COLIN de GRUSSA: We have had the same debate for the previous clauses. I move —

Page 3, line 12 — To delete “18” and substitute —

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Hon TJORN SIBMA: I indicate once again support for the amendment for exactly the same reason as proffered earlier.

Amendment put and passed.

Clause, as amended, put and passed.

Clause 6 put and passed.

Clause 7: Section 2 amended —

Hon COLIN de GRUSSA: I move —

Page 4, line 10 — To delete “October” and substitute —

July

Amendment put and passed.

Clause, as amended, put and passed.

Clause 8 put and passed.

Clause 9: Section 2 amended —

Hon COLIN de GRUSSA: I move —

Page 5, line 10 — To delete “October” and substitute —

July

Hon STEPHEN DAWSON: I indicate that the government will not support this amendment. The government’s proposal for a six-month extension of the sunset provision achieves what we think is the right balance between the need to ensure that the operative provisions are linked to the pandemic emergency, and that these extraordinary powers are brought back to Parliament within an appropriate time frame for further consideration. Although Western Australia and other states and territories have done exceptionally well to minimise the spread of COVID-19, the greatest threat of the pandemic in WA is international arrivals from countries severely impacted by the pandemic and also international maritime and cargo operations. It is therefore vital that the section 72A powers continue to be available for the duration of the state of emergency in respect of COVID-19. This is to ensure that if there is a need, the emergency powers can be used to maintain or re-establish border controls and implement appropriate quarantine and COVID-19 health testing. The continuation of the section 72A provisions are essential for contact tracing and the management of public registers, which are important in the event of an outbreak. This clause relates to the Emergency Management Act 2005 and the Emergency Management Amendment (COVID-19 Response) Act 2020. The clauses that were amended earlier related to a different act. It is for these reasons that we support the six-month extension.

Hon COLIN de GRUSSA: I accept that the section 72A powers need to be available for the duration of the COVID pandemic. We do not know how long the pandemic will last. A six-month extension may not be long enough. Indeed, a 12-month extension may not be enough and a three-month extension may or may not be enough, but there is always the option to extend these provisions and that is what we are seeking to do here. It is absolutely not about letting these provisions expire. It is about giving adequate time for the Parliament to consider the provisions to ensure that they are necessary and needed at the time and to extend them if they need to be extended. I do not believe the provisions will expire because, obviously, after the next election the government of the day will certainly

make it a priority to ensure that they do not expire and that the powers under section 72A continue for as long as they are needed with the oversight of the Parliament of Western Australia to ensure that Western Australians are safe and that we do all that we can to keep them that way, especially given the arrivals coming into the state, which will increase with the changes to border measures. Again, I do not think the shortening of this provision to three months is a hindrance to ensuring that these powers stay in place. The government will have to ensure that it brings the appropriate amendment to this place after the election if it is re-elected.

Hon STEPHEN DAWSON: Through you, Mr Chair, I ask Hon Colin de Grussa, the mover of this amendment, whether he is willing to give the chamber a guarantee that when the next government brings in legislation before 3 July, if this amendment passes, that he will guarantee to give support to a clause extending the powers under section 72A.

Hon COLIN de GRUSSA: I find it very interesting that the government wants me to give a guarantee of support for an extension to a provision that we do not know we will need. We do not know where we will be. It will be a different Parliament, and I may not even be here. Regardless of whether I want to make a commitment like that, I feel that that is quite extraordinary. The justification for the extension of these provisions will need to be made by the government of the day and the members of this and the other place will have to decide whether they support that extension, and that will always be the case.

Hon TJORN SIBMA: I support the amendment moved by Hon Colin De Grussa but not without first recognising what was a silly piece of politicking. It was absolutely unnecessary and, to be perfectly honest, it undermines the minister's previous contribution on this bill. Of course, any responsible government faced with the continuation of a pandemic will bring in appropriate legislation at the time. The point is that sufficient time is available from 13 March onwards until July. I hope that a future government—indeed, even, sadly, a future McGowan government—would have the competence and capacity to draft a five-page bill to respond to the circumstances at the time in the appropriate way. I hope the minister can give me a guarantee that he will be part of a capable government that is able to do that.

Hon STEPHEN DAWSON: Obviously, the honourable member is entitled to his opinion but to suggest that I am silly is beneath him. Certainly, he has not had the opportunity to sit at the table as I have, and I hope that he does not get it for a very long time. As somebody who has sat here over the past few years, it is not as easy to get a piece of legislation through this place as one would imagine. There are archaic standing orders and some members have unlimited speaking times. It takes an inordinate amount of time to get legislation through this place. It is one thing to give proper scrutiny to legislation but it is another thing to drag things out. Given that Hon Colin De Grussa suggested in his contribution that section 72A is important, I was seeking an undertaking from him to support that provision when the legislation comes before us. Obviously, it is disappointing that he has not given that undertaking, but so be it. That is his choice.

Hon COLIN de GRUSSA: Noting that the guillotine is about to drop, I do not want to extend this debate any longer than is necessary.

Hon Michael Mischin: The bill might not pass if the time runs out!

Hon COLIN de GRUSSA: That is right! I did not say that I would not support an extension. It is up to the government of the day to provide the evidence that an extension is necessary. That is what I said to members of this place. If I am a member of this place after the election, I certainly commit to scrutinise any proposed legislation to extend these powers and review the evidence that suggests that they need to be extended for whatever period the government of the day comes up with.

Division

Amendment put and a division taken, the Chair casting his vote with the ayes, with the following result —

Ayes (20)

Hon Martin Aldridge
Hon Robin Chapple
Hon Tim Clifford
Hon Peter Collier
Hon Colin de Grussa

Hon Diane Evers
Hon Donna Faragher
Hon Nick Goiran
Hon Colin Holt
Hon Rick Mazza

Hon Michael Mischin
Hon Simon O'Brien
Hon Robin Scott
Hon Tjorn Sibma
Hon Charles Smith

Hon Aaron Stonehouse
Hon Dr Steve Thomas
Hon Colin Tincknell
Hon Alison Xamon
Hon Ken Baston (*Teller*)

Extract from *Hansard*

[COUNCIL — Wednesday, 11 November 2020]

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Hon Michael Mischin; Hon Stephen Dawson; Hon Colin De Grussa; Hon Tjorn Sibma

Noes (11)

Hon Alanna Clohesy
Hon Stephen Dawson
Hon Sue Ellery

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Hon Dr Sally Talbot

Hon Darren West
Hon Pierre Yang (*Teller*)

Pairs

Hon Jacqui Boyde
Hon Jim Chown

Hon Adele Farina
Hon Samantha Rowe

Amendment thus passed.

Clause, as amended, put and passed.

Title put and passed.

Report

Bill reported, with amendments, and the report adopted.

Third Reading

Bill read a third time, on motion by **Hon Stephen Dawson (Minister for Environment)**, and returned to the Assembly with amendments.