STATUTORY REVIEW: OPERATION AND EFFECTIVENESS OF THE 2008 AMENDMENTS TO THE *CRIMINAL CODE* AND THE *SENTENCING ACT 1995*

Introduction

The *Criminal Law Amendment (Homicide) Act 2008* (the 2008 Act) introduced significant reforms to the law of homicide in accordance with the recommendations of the Law Reform Commission of Western Australia in its *Final Report*: *Review of the Law of Homicide* published in September 2007.

The 2008 Act, with the exception of section 36 (which referred to amendments to the *Prisons Act 1981)*, came into effect on 1 August 2008; key reforms of which were:

- The consolidation of wilful murder and murder into one crime of murder.
- Increased flexibility in sentencing for murder, including the ability for judges to impose tougher sentences on persons convicted of murder.
- The introduction of a new offence to deal with "one punch" homicide cases.

The 2008 Act also contained numerous minor and consequential amendments. However, the statutory review did not consider those minor amendments but rather focussed on the above three matters.

In accordance with section 739(1) of the *Criminal Code*, also introduced by the 2008 Act, the Minister must carry out a review of the operation and effectiveness to the Code and the *Sentencing Act 1995* made by the *Criminal Law Amendment (Homicide) Act 2008* as soon as it is practicable after the fifth anniversary of the commencement of section 17 of that Act.

These amendments became due for review in August 2013.

In addition, section 739(2) of the *Criminal Code* states:

> "The Minister shall prepare a report based on the review and, as soon as is practicable after the report is prepared, cause it to be laid before each House of Parliament."

Terms of Reference

The statutory review examined the operation and effectiveness of the reforms introduced by the 2008 Act including but not restricted to:

1. Whether the consolidation of wilful murder and murder into one crime of murder has:

   (a) assisted the laying of and prosecuting charges against offenders;
   (b) has had an impact on the number of guilty pleas; and
   (c) had an impact on the sentencing outcomes for murder.

2. Whether the introduction of the offence of "unlawful assault causing death" in new section 281 of the *Criminal Code* has assisted the laying of and prosecuting charges against offenders where an assault results in a person's death and the death was not reasonably foreseeable and/or the death was unintended.

Stakeholder consultation

The Department sought input from relevant stakeholders: Western Australia Police, Director of Public Prosecutions, Chief Justice of Western Australia, the Law Society of Western Australia, Legal Aid Western Australia, Criminal Lawyers' Association of Western Australia and the Aboriginal Legal Service of Western Australia. Comment was not sought from the general community.

The Department did not receive any comments from Legal Aid Western Australia, Criminal Lawyers' Association of Western Australia or the Aboriginal Legal Service of Western Australia.

The Attorney General approved the Terms of Reference on 25 October 2013 and stakeholders were asked to submit their comments by 7 February 2014.

Stakeholder responses were supportive of the amendments, although comment was made that items 1(a) and 1(b) would be better answered by the Director of Public Prosecutions

Consolidation of wilful murder and murder into one crime of murder

Prior to the 2008 Act, Western Australia was the only state in Australia that had separate offences for wilful murder and murder. This proved to be a disincentive to plead guilty to a charge of wilful murder due to the complexities of factors that affect the seriousness of a murder.

Unlawful assault causing death

According to the Criminal Law Amendment (Homicide) Bill 2008 Second Reading Speech this new offence is to address so-called "one-punch" homicide cases. An example of these cases occurs when a person who is punched (once or a number of times) falls to the ground and suffers a blow to the head from hitting the ground and dies. This new offence was introduced in response to community expectations that violent attacks which result in the unintended death of a person are not acceptable behaviour and that persons should be punished as a result of their violent behaviour. The maximum penalty for this offence is 10 years imprisonment.

Prior to the introduction of this offence, offenders who were charged with manslaughter were often acquitted on the basis that the death was an accident. A death will be an accident when it was not reasonably foreseeable that death would result as a consequence of a punch.

Western Australia was the first jurisdiction in Australia to introduce legislation that created an offence to deal with this issue.

In January 2014, New South Wales passed the Crimes and Other Legislation Amendment (Assault and Intoxication) Bill 2014, which amended the *Crimes Act 1900* (NSW), in response to alcohol-fuelled violence which included a mandatory minimum eight year prison term for a person who fatally assaults someone (one punch assault) if that person is under the influence of alcohol or drugs.

Western Australia and New South Wales remain the only jurisdictions to have the offence of unlawful assault causing death.

Findings in relation to Terms of Reference

1(a) Laying of and prosecuting charges against offenders

Submissions to the review agreed that the consolidation of wilful murder and murder into the single offence of murder has simplified the processes of drafting indictments and preferring charges against offenders.

It was also observed that the general experience of the Court is that the changes have obviated the need for juries to specifically consider the issue of whether the accused had an intent to kill. This is consistent with the intent of the reforms as outlined in the Second Reading Speech where it was stated: “it is often difficult to distinguish between whether a person had an intention to kill someone or an intention to do them grievous bodily harm”.

1(b) Impact on the number of guilty pleas

In order to answer this part of the Terms of Reference, all charges that originated in the Magistrates Court pursuant to then sections 278 and 279 of the *Criminal Code* were identified.

An examination of data sourced from the Department of the Attorney General, five years before [1 August 2003 – 31 July 2008] and after [1 August 2008 – 31 July 2013] the amendments in the 2008 Act shows that before the amendments there were 22 guilty pleas (17% of all pleas) for charges of wilful murder and murder lodged in the Supreme Court. However after the amendments that number climbed to 36 guilty pleas (29% of all pleas). This represents an increase of 64%. In relation to not guilty pleas, prior to the amendments there were 105 (83% of all pleas) for charges lodged in the Supreme Court. After the amendments, the number fell to 89 (71% of all pleas), a reduction of 15% in not guilty pleas.

The consolidation of these former offences into the single offence of murder as set out in the current section 279 of the *Criminal Code* appears to have resulted in more guilty pleas and fewer not guilty pleas. It was noted by stakeholders that an increase in guilty pleas results in the reduction of trial costs and means that a trial does not have to be endured by families of murder victims.

1(c) Impact on sentencing outcomes

In order to address this part of the terms of reference all charges that originated in the Magistrates Court in relation to sections 278 and 279 of the *Criminal Code* were identified using the same data set referred to in (1b) above. Of these, only charges that were either finalised initially in the Magistrates Court or subsequently in the Supreme Court were then

further analysed. Charges which have not yet been finalised in a particular court have been excluded.

Charges lodged and finalised in the courts were investigated to determine whether a downgrade in the section 278 or section 279 charges had occurred at any stage. Usually downgrades for wilful murder and murder charges are to the alternative charge of manslaughter in section 280. Downgrades can be identified by comparing the relevant legislation for the charge at the time of lodgement and at finalisation.

According to the data sourced by the Department of the Attorney General, there were, coincidentally, an equal number of charges (132) relating to section 278 or section 279 finalised in the Magistrates Court for offences committed in the five years before and the five years after the amendments. Of these, only 2 charges were downgraded before the amendments and 4 charges were downgraded after the amendments.

However, after the charge has been committed to the Supreme Court the majority of downgrades occur. There were 60 charges finalised by downgrades in the Supreme Court in the five years prior to the amendments which represented 45% of total charges (132).

In the five years following the amendments, a total of 99 charges have been finalised in the Supreme Court of which 35 charges were finalised by downgrade. This amounted to 35% of total charges.

In relation to the finalisation of the original more serious charge in the Supreme Court, where the charge remained unchanged or was upgraded, 72 were finalised prior to the amendments, which represented 55% of the total charges.

During the five years after the amendments, 64 original or more serious charges were finalised, representing 65% of the total charges. There are still 33 charges lodged for offences that are still cases on hand in the Supreme Court.

The sentence length handed down by the Supreme Court was extracted for both murder and manslaughter charges for the five years before the amendment and the five years after the amendment. In the case of life imprisonment, the minimum non-parole period has been used. The median sentence length was calculated for the various imprisonment penalties handed down, as the median is unaffected by extreme values which can be associated with such sentences.

Prior to the amendments, the median life imprisonment prison sentence for murder charges finalised in the Supreme Court was 15 years. After the amendments, it was 18 years.

It should also be noted that prior to the amendments, section 91 of the *Sentencing Act 1995* allowed the court to impose a sentence of strict security life imprisonment and to 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. This sentencing option was available for persons who had been convicted of the now abolished offence of wilful murder as set out in then section 278 of the *Criminal Code*. The median sentence length for wilful murder was 22.5 years.

As part of the amendments, sections 90 and 91 of the *Sentencing Act 1995* were replaced by current section 90 of the *Sentencing Act 1995*. This section is almost identical to former section 91. Section 90(1)(b) of the Act, provides that where the court sentences an offender to life imprisonment for murder, it must order that the offender is never to be released. Furthermore, section 90(3) requires the court to make such an order if it is necessary to do so to meet the community's interest in punishment and deterrence.

The median sentence for murder charges finalised as manslaughter in the Supreme Court also increased. Prior to the amendments, the median sentence was 4.25 years, and increased to 5.33 years after the amendments.

To summarise, the consolidation of wilful murder and murder into the singular crime of murder has produced favourable results on both the number of guilty pleas entered and on the sentencing outcomes for murder.

2 Section 281 – Unlawful assault causing death

Stakeholders were supportive of the introduction of this new offence of unlawful assault causing death in the *Criminal Code*.

The consolidation of wilful murder into the singular crime of murder has been a benefit to WA Police (WAPOL) investigators:

- The elements of the offence have been simplified, making a determination of the appropriate offence less complex based on the evidence at the time.

- There is less ambiguity in relation to the issue of intent when determining the initial offence to be preferred by investigators.

In relation to the introduction of the offence of "unlawful assault causing death" in new section 281 of the *Criminal Code*, this offence has also been of benefit and assisted WAPOL investigators:

- The elements of the offence are now particular to the incidents that are investigated more frequently.

- The foreseeability issue that was inherent with a charge of manslaughter has been removed with the introduction of the section 281 offence and this has reduced the complexity in determining the most appropriate offence in the circumstances as the elements are specific.

- The introduction of this offence has provided an alternate charge during the indictment and trial process as managed by the Office of the Director of Public Prosecutions.

With regard to prosecutions the consolidation of wilful murder and murder into one crime of murder has made the task of drafting an indictment simpler. Prior to the amendment there was the necessary requirement that prosecutors had to plead both the crimes of wilful

murder and murder in the indictment, with the statutory alternative of manslaughter also being available.

The Director of Public Prosecutions (DPP) advised that, as far as the trial process is concerned, the consolidation of wilful murder and murder into one crime of murder has undoubtedly assisted juries in that directions are less complex. Prior to the amendments, the DPP was informed by prosecutors that in several cases the jury returned seeking clarification of the distinction between wilful murder and murder. Also, notwithstanding that the crime that previously constituted wilful murder is still contained in substance within section 279(1)(a) of the *Criminal Code*, a judge does not have to now direct a jury as to the three alternatives of wilful murder, murder and manslaughter.

Furthermore, it was submitted that the amendment to section 90(1) of the *Sentencing Act 1995* that accompanied the consolidation of the crime of wilful murder and murder into one crime of murder now precludes a judge from adopting a "merciful approach" and requires sentencing in relation to a conviction for murder that reflects community expectations that the taking of a human life will result in an appropriate sentence.

The DPP also referred to the sentencing option available to a judge pursuant to section 279(4) of the *Criminal Code* to sentence a person, other than a child, who is guilty of murder, to a maximum sentence of 20 years unless the sentence would be clearly unjust and the person is unlikely to be a threat to the safety of the community when released from imprisonment. The DPP understands that no Supreme Court Judge has yet exercised this option.

In regard to pleas entered, the DPP referred to the data analysis provided by the Department of the Attorney General in relation to items 1(b) and 1(c) of the Terms of Reference. It was observed that the removal of the distinction between wilful murder and murder allows defence counsel to focus on the real issues which has resulted in more guilty pleas at an earlier stage of the prosecution process.

Comment was also made that another significant factor that has increased the rate of guilty pleas (and, in particular, at an early stage) is the introduction of the Stirling Gardens Magistrates Court in the Supreme Court. This has enabled the early intervention of the Supreme Court and the DPP with defence counsel and WA Police and has ensured that matters are settled without trial.

The introduction of the offence of "unlawful assault causing death" as set out in section 281 of the *Criminal Code* has permitted the State in preferring counts in circumstances where an offender assaults a person which results in a person's death even if the offender does not intend or foresee the death of the other person and even if the death was not reasonably foreseeable. Since 1 August 2008 until the end of 2012, there have been 18 indictments and 13 convictions for this offence.

The DPP also referred to media comments regarding the use of a section 281 offence in the circumstances of family and domestic violence. In this context, the DPP made a submission to the Law Reform Commission of Western Australia (LRC) regarding that issue. In the LRC's Discussion Paper *Project 104 Enhancing Laws Concerning Family and Domestic Violence*, it was emphasised that in the absence of the section 281 offence, some fatalities

caused in family and domestic violence would go unpunished. The DPP agreed with this finding and stated: “the offence of assault causing death was an alternative to murder/manslaughter. On occasion it is not possible to negate the defence of accident for a charge of manslaughter.”

The Chief Justice advised, by way of general observation, in relation to the three items in the first term of reference that the general experience of the Court has been, as might have been expected, that the changes have obviated the need for juries to specifically consider whether the accused had an intent to kill, so as to sustain a conviction of wilful murder, as compared to some lesser intent. Under the current structure of homicide offences, a conviction for murder can be sustained on the basis of either an intent to kill, or an intent to do a bodily injury of such a nature as to endanger or be likely to endanger life. This has tended to simplify the prosecution and presentation of murder cases.

The Chief Justice was also of the view that whether the consolidation of wilful murder and murder into the one crime of murder has assisted in the laying of and prosecuting offenders was more the responsibility of the DPP.

In regard to item 1(b) concerning guilty pleas entered, reference was made to the data analysis provided by the Department of the Attorney General which shows a substantial increase in the percentage of accused persons entering an initial plea of guilty subsequent to the amendments as compared to the percentage of accused persons entering a plea of guilty to either murder or wilful murder prior to the amendments.

It was submitted that the data confirms the expectations at the time the amendments were made as the change in relation to the element of intent necessary to sustain a conviction for murder has had the effect that a wider range of cases will satisfy the statutory definition of that offence [murder] than would have come within the category of either wilful murder or murder prior to the amendments. That is because the intent necessary to sustain a conviction of murder prior to the amendments (intention to cause grievous bodily harm) placed a more substantial onus on the prosecution than the onus of proving an intent to cause a bodily injury of such a nature as to endanger or be likely to endanger life.

It was also submitted that the data establishes that in the five years prior to the amendments a greater percentage of charges were downgraded prior to trial than in the five years subsequent to the amendments, and that this reduction could be attributed to the significantly greater onus which the prosecution faced in order to obtain a conviction for wilful murder prior to the amendments.

In relation to item 1(c) concerning the impact of the amendments on sentencing outcomes for murder, reference was made to the data which shows that there has been an increase in the median sentences for murder and manslaughter since the amendments came into effect.

In the case of sentences imposed for murder, this is likely due to the increased range of sentences now available to the Court. Similarly, in the cases of sentences for manslaughter, it is likely that the sentencing range applied following conviction for that offence has been affected by the greater sentencing range now available following a conviction for murder.

The comment was made that the introduction of the new offence in section 281 of the *Criminal Code*, in the general experience of the Court, has worked well in practice. There have been a number of convictions in cases in which it might be reasonably assumed that the accused person would otherwise have been acquitted entirely.

Comment was also made on the changes to the law of self-defence which were primarily directed at homicide cases involving domestic violence, which also formed part of the amendments contained in the 2008 Act. In particular, it was noted that in the experience of the Court these self-defence provisions are more frequently invoked in cases of homicide which occur during illegal drug transactions, which it seems are not the type of cases that Parliament intended for the amendments to apply.

The Law Society of Western Australia made the following observations in respect of the new offence in section 281 of the *Criminal Code*:

- It appears to be the experience of criminal lawyers that the introduction of section 281 of the *Criminal Code* has facilitated plea negotiation in circumstances in which an accused has been charged with manslaughter or murder and it has been determined that it would otherwise be in the public interest for a plea of guilty to be entered to the new offence.

- There has been some limited concern expressed about the fact that the elements of the section 281 offence are practically indistinguishable from the elements of manslaughter, notwithstanding the very different maximum penalties.

The Commissioner for Victims of Crime noted that, given the evidence suggested that the amendments resulting in the one crime of murder have led to more guilty pleas, less not guilty pleas and an overall increase in the length of sentences, the amendments considered in items 1(a) to 1(c) of the Terms of Reference have been positive for victims of crime.

The Commissioner noted that the statutory review was to examine the operation and effectiveness of the reforms introduced by the 2008 Act including but not restricted to the matters set out in detail in items 1(a) to (c) and item 2 of the Terms of Reference.

Item 2 of the Terms of Reference is concerned with whether section 281 of the Code assisted the laying of and prosecuting charges. Stakeholder feedback suggesting that there have been fatalities that would not have resulted in convictions but for the offence in section 281, in the Commissioner's view, highlights the importance of this provision.

The LRC expressed the view that there is insufficient evidence to sustain the contention the offence in section 281 of the *Criminal Code* has been inappropriately charged in cases of family and domestic violence related fatalities. The LRC also noted that the periods of imprisonment imposed for section 281 offences where the offender and the victim where in a family and domestic violence relationship have been higher than for non-family and domestic violence relationships.

The LRC did recommend that this provision should be amended to provide that if this offence is committed in circumstances of aggravation (which would include a family and domestic violence relationship with the victim), then a higher maximum penalty of 20 years'

imprisonment should apply. (This was also the subject of a private member's bill introduced into the WA Parliament on 26 September 2012, which was defeated).

The overall views of the Commissioner for Victims of Crime regarding section 281 of the *Criminal Code* are as follows:

- The parliamentary debates around the introduction of this provision was that it was aimed at overcoming the defence of accident in appropriate cases where "one punch" leads to homicide;
- The provision has become useful in the area of domestic and family violence fatalities. There is, however, a policy argument with some merit that section 281 of the *Criminal Code* is a step forward in the criminal law for dealing with fatalities that result from domestic and family violence, but that section 281 does not entirely reflect the underlying criminality.
- That is, where there is a documented history of previous family and domestic assaults by the offender against the victim, that there is an element of foreseeability or aggravation involved in the offending that is not reflected in the "one punch" offence of section 281 of the *Criminal Code*. While sentences have been marginally higher for family and domestic violence related "one punch" crimes, there is an argument that section 281 of the Criminal Code does not adequately reflect the nature of the criminality therefore sentences available under that provision may not be adequate.
- Legal policy possibilities that could potentially better reflect the criminality of a "one punch" fatality where there is history of family and domestic violence by the perpetrator against the victim include a presumption of reasonable foreseeability for a charge of manslaughter where there is a history of family and domestic violence.

Conclusion

The offences introduced by the *Criminal Law Amendment (Homicide) Act 2008* have simplified the investigative and prosecutorial requirements and process, and from the perspective of the court removed the need for juries to specifically consider whether an accused had an intent to kill.

These views are augmented by the data provided by the Department to stakeholders which has shown more guilty pleas being entered, a reduction in not guilty pleas and an overall increase in the length of sentences.

In relation to the second term of reference concerning the introduction of the new offence of "unlawful assault causing death" as set out in section 281 of the *Criminal Code*, stakeholders expressed their support for this offence. In particular, the removal of the foreseeability issue associated with the charge of manslaughter has resulted in persons being charged with and convicted of an alternate offence, and in the absence of such an offence, some fatalities in family and domestic violence would go unpunished.

The comments by stakeholders and the data provided by the Department of the Attorney General confirm that the effect of the above amendments has facilitated the prosecution of persons charged with murder, improved sentencing outcomes for persons convicted of that offence, and enabled persons to be prosecuted and punished for "one punch" homicides.

The amendments are operating as intended. The only matter identified where further amendments may be necessary are in relation to the operation of section 281 of the *Criminal Code* - “one punch” homicides - in circumstances of family and domestic violence. Given the range of legal options that could be involved in potentially better reflecting the underlying criminality of homicide occurring in family and domestic violence circumstances, stakeholders will be consulted regarding options.