FAMILY VIOLENCE LEGISLATION REFORM BILL 2019

Receipt and First Reading

Bill received from the Assembly; and, on motion by **Hon Sue Ellery (Leader of the House)**, read a first time.

Second Reading

HON SUE ELLERY (South Metropolitan — Leader of the House) [5.02 pm]: I move —

That the bill be now read a second time.

Today the McGowan government reaffirms its stand against family violence with the introduction of the Family Violence Legislation Reform Bill. Family and domestic violence is a scourge in the community. The statistics are alarming. The Australian Institute of Health and Welfare states that one in six women, or 1.6 million women, across Australia have experienced physical or sexual violence by a current or previous partner since the age of 15. One in four women have experienced emotional abuse by a current or previous partner. All of us know someone, or are someone, who has experienced this violence. Our family relationships and homes should be our safe places, free from psychological and physical violence and abuse. Every night across Western Australia, children are exposed to violence that would not be tolerated in any public location—not on the street, not in a pub and not on a sporting field. There is a sense of community outrage when we observe an intentionally violent act, and this outrage needs to extend to those acts that we do not see.

The McGowan government is committed to stopping the violence and to changing the story for victims. We went to the last election with a series of family violence promises, and this bill delivers on a number of them. We promised to strengthen legislation by addressing the outstanding recommendations of the Law Reform Commission of Western Australia's "Enhancing Family and Domestic Violence Laws: Final Report" from 2014. I am pleased to confirm that we have done that in this bill. In amending nine separate pieces of legislation across six separate ministerial portfolios, the bill demonstrates a cross-government commitment to tackling family and domestic violence. It is the most comprehensive family violence legislation reform package ever introduced in Western Australia. I turn now to the detail of the bill.

The Criminal Code: This bill introduces two new criminal offences—a specific offence for suffocation and strangulation, and an offence of persistent family violence.

Strangulation and suffocation: This bill proposes new section 298, a dedicated offence for the serious and violent acts of suffocation and strangulation. Suffocation and strangulation are perversely intimate and callous forms of violence. In committing this act, a perpetrator conveys to the victim that they have the power to take their life away. Acts of suffocation and strangulation represent a distinct risk when committed in circumstances of family violence. Research shows that suffocation and strangulation committed against an intimate partner is one of the strongest indicators of an increased risk of homicide. Women who experience an episode of non-fatal strangulation by their intimate partner are over seven times more likely to be killed than other women.

Although the act of suffocation or strangulation represents a particular risk in circumstances of family violence, the general application of the offence recognises that the act of suffocation or strangulation can cause serious adverse health outcomes for a victim, regardless of whether they are in a family relationship with the offender. As it currently stands, a person who commits an act of suffocation or strangulation might be charged with a range of offences under the Criminal Code, including common assault. The new section 298 creates the offence committed if a person unlawfully impedes another person's normal breathing, blood circulation, or both, by manually, or using any aid (a) blocking, completely or partially, another person's nose, mouth or both; or (b) applying pressure on, or to, another person's neck. The reference to impeding a person's normal breathing or circulation, read together with the acts outlined in limbs (a) and (b), has been drafted to overcome the difficulties in other Australian jurisdictions in which strangulation offences have been interpreted by the courts as requiring the complete stopping of a person's breathing. The very clear intent is that the offence does not require the complete stopping of the victim's breath or blood circulation. Impeding normal breathing or blood circulation will include any interference with those normal processes by the offender carrying out an act outlined in limb (a) or (b) of the offence. This offence also differs from that in other Australian jurisdictions in that it does not include as an element that the offence occurred without the consent of the victim. Lack of consent is not an element of this offence as this conduct is inherently dangerous. As a matter of policy, a person should not be able to consent to a life-threatening act of this nature. This is consistent with section 304 of the Criminal Code, "Act or omission causing bodily harm or danger", which does not require a lack of consent to make the act of endangering life unlawful. Including lack of consent as an element would require victims to give evidence in every trial, even when the offence was witnessed. This also means that the accused will not be able to raise as a defence that they were honestly and reasonably mistaken as to consent.

Persistent family violence: This bill introduces the offence of persistent family violence to the Criminal Code. This offence recognises that physical and psychological abuse against a partner often forms a pattern of offending. The traumatic and ongoing nature of persistent acts of family violence means that victims may find it difficult to recall the specific details of each individual act of violence perpetrated against them.

In 2014, the Australian Law Reform Commission observed the difficulties in proving specific incidents to the requisite standard of proof in circumstances in which a victim has been subject to ongoing family violence. The community, and we as a government, cannot accept that a perpetrator of continued abuse against their partner is able to face fewer charges or a lesser sentence due to a victim being unable to detail the individual acts of abuse against them. Perpetrators of repeated criminal acts against their current or former partner need to be held to account for that persistent abuse. The persistent family violence offence applies when an offender commits three or more acts of family violence against a person with whom they are in a designated family relationship over a period not exceeding 10 years. A "designated family relationship" includes current and former partners, whether married, de facto or other intimate personal relationship. The offence applies only when the offending is against a single victim. An "act of family violence" is defined to be an act that would constitute one of the defined "prescribed offences" that fall within the scope of the persistent family violence offence, being offences that are most commonly committed in circumstances of family violence. Serious offences that can be charged only on indictment have been excluded from the scope of the offence, as those offences are of such a serious nature that they ought to be charged, prosecuted and punished in their own right. The offence captures acts of family violence that were committed before, on or after the commencement of the provision. However, the provision is not truly retrospective as the acts must have been unlawful at the time they were committed. The offence captures a wide range of conduct and, accordingly, it is an either-way offence that can be heard on indictment, with a maximum penalty of 14 years' imprisonment; or summarily, with a maximum penalty of three years' imprisonment and a fine of $36 000. Proposed section 300(2) provides that a charge for the offence must specify the period during which it is alleged that the acts of family violence occurred; however, it need not specify the dates, or in any other way particularise the circumstances of the acts of family violence that are alleged to constitute the offence. This means that if a victim cannot remember the exact date on which an act of family violence occurred, or, for example, in what room of the house it occurred, the offence can still be charged and prosecuted. Proposed section 300(5) makes it clear that any particulars of the dates and circumstances of the alleged acts of family violence cannot be supplemented by a court order for subsequent provision of further particulars. Although this provision is unique, it is not novel law. It adopts much of the framework of existing section 321A of the Criminal Code concerning persistent sexual conduct with a child regarding particularisation of acts comprising child sexual abuse. I also note that nothing in the proposed offence absolves the prosecution of its statutory duty to disclose evidence to the accused person and to the court during a prosecution.

The provision ensures, by the operation of proposed section 300(4) and (7), that in the event that the persistent charge is unsuccessful, the accused may still be convicted and punished for prescribed offences committed over the same period in respect of which there is sufficient evidence for a conviction. Proposed section 300(6) provides that when the trier of fact is a jury, each juror is to be satisfied beyond reasonable doubt that the accused person committed an act of family violence on at least three separate occasions within the alleged period. However, the members of the jury need not all be satisfied that the same acts occurred on the same occasions in order to return a guilty verdict. This is intended to overcome any common law requirement for jury unanimity. The offence also contains protections for the accused against double jeopardy and double punishment in proposed section 300(8) and (9).

Aggravated penalties: This bill also addresses the Law Reform Commission of Western Australia's recommendations regarding aggravated penalties for offences that commonly occur in circumstances of family violence, including deprivation of liberty, threats and criminal damage. These amendments create consistency in the penalty regime for offences that commonly occur in a family violence context. Section 221 of the Criminal Code will be amended to exclude child offenders from the operation of aggravated penalties when the aggravating circumstances are the family relationship between the child offender and the victim or the presence of a child at the time of the commission of the offence. This amendment recognises the dynamics of a child offending against family members. It acknowledges that this kind of offending is different from an adult intimate partner situation, that the dynamics in which children offend in the home are typically very different from the dynamics in which an adult offends and that "acting out" by children is often a response to exposure to abuse and trauma, including family violence.

Sentencing Act 1995 and Sentence Administration Act 2003, serial family violence offender declaration: This bill amends the Sentencing Act 1995 to enable a court to declare a person a "serial family violence offender". This declaration is the first of its kind in Australia and will identify high-risk repeat family violence offenders. New section 124E empowers a court convicting a person to declare the offender to be a serial family violence offender if they have committed at least three prescribed offences, or at least two prescribed indictable-only offences if those offences were committed on different days. The offences must have been committed within a 10-year time period, unless the court considers that exceptional circumstances exist. The declaration applies to offences perpetrated against a single partner or multiple or successive partners. Consistent with the scope of the new offence of persistent

family violence in the Criminal Code, the declaration applies to prescribed offences committed against a victim with whom the offender is in a designated family relationship.

The bill inserts a definition of "prescribed offences" in section 124D for the purpose of identifying those offences that can lead to a declaration being made. The definition includes a "family violence offence" as defined in section 4 as amended by the bill. The definition of prescribed offence includes corresponding offences committed in other jurisdictions. It also includes any attempt to commit a family violence offence or a corresponding offence. This definition ensures that the entirety of an offender's known family violence criminal history is able to be put before a court considering a declaration. A court's decision to make a declaration will be informed by the risk of the offender committing another family violence offence, the offender's criminal record, the nature of the offences for which the offender has been convicted, and any other matter the court considers relevant.

When assessing an offender's risk of reoffending, the court, at its discretion, is empowered to take into account an assessment of the offender by an approved expert. This approved expert will be a person or group of persons approved by the CEO of corrections to carry out risk assessments in this context. A declaration is to be made prior to the court sentencing the offender for the offence for which they came before the court. The type of sentence is to be made in the normal manner under section 39 of the Sentencing Act 1995. If the court determines that the appropriate sentence for an offence committed by a declared offender is community based, the court will be required to consider the application of an electronic monitoring requirement. In this circumstance, the court will receive a report from the CEO of corrections that will address the suitability or otherwise of the offender for electronic monitoring. If a declared offender is imprisoned for a family violence offence, the Prisoners Review Board will be required to consider an order for electronic monitoring as part of a parole order, re-entry release order or post-sentence supervision order made in respect of a family violence offence. This is effected by an amendment to section 97A of the Sentencing Act 1995. A declared offender will also be disqualified from holding a licence for firearms and explosives.

Finally, a declaration will have the effect that upon arrest for a future family violence offence, a declared offender will be subject to a presumption against bail and, if bail is granted, consideration must be given to imposing a home detention condition with electronic monitoring. The declaration will have effect for an indefinite period; however, the person subject to the declaration may apply to have it cancelled after 10 years. At this time the court will re-assess the offender's level of risk and consider whether the declaration ought to be cancelled.

The bill also introduces amendments to the Sentencing Act 1995 and Bail Act 1982 to allow for locational tracking and monitoring of offenders. Currently, electronic monitoring under the Sentencing Act 1995 is limited to static location monitoring for the purposes of compliance with a curfew condition, but does not provide for tracking a person's movements. The amendments in this bill will enable locational tracking of offenders sentenced to an intensive supervision order or a conditional suspended imprisonment order. The Bail Act 1982 is amended by the bill to enable location tracking under a home detention bail condition imposed by a judicial officer. These amendments are not intended to provide an alternative to a sentence of imprisonment; rather, the initiative will increase community safety by providing an additional tool in protecting the safety of victims.

The bill introduces a consistent definition of "approved electronic monitoring device" across the Sentencing Act 1995, Bail Act 1982 and Sentence Administration Act 2003 to incorporate current and future electronic monitoring devices and all ancillary equipment associated with those devices. New sections 33HA and 67A of the Sentencing Act 1995 are inserted to require the court to consider application of an electronic monitoring requirement if making a pre-sentence order or a community-based order in respect of a declared serial family violence offender who is being sentenced for a family violence offence.

New sections 76A and 84CA are inserted by the bill to enable the court to include an electronic monitoring requirement to monitor the location of an offender sentenced to an intensive supervision order or a conditional suspended imprisonment order. In each of these cases, before the court makes an order inclusive of an electronic monitoring requirement, the court must have received a report on the suitability of electronic monitoring in the particular case. The bill inserts section 147A, which enables the administration of an electronic monitoring requirement by a community corrections officer, consistent with the approach in existing legislation. The bill amends section 118 of the Sentence Administration Act 2003 to provide that it is an offence for anyone to interfere with, damage or destroy, hinder access to, or contravene a direction in relation to the monitoring equipment that is installed either at a place or worn by a person. The penalty for these offences is $12 000 or 12 months' imprisonment.

Bail Act 1982: The bill makes a range of amendments to the Bail Act 1982 to enhance community and victim safety and ensure judicial officers and other persons authorised to consider bail give proper consideration to the effects of family violence. Section 9 is amended to make it clear that a judicial officer or authorised officer called upon to consider a case for bail for an offence committed against a family member can defer consideration of bail for up to 30 days for the express purpose of considering what, if any, bail conditions should be imposed to enhance the protection of that family member. The bill deletes section 16A(3) to allow police to grant bail for breaches of family violence restraining orders and violence restraining orders in urban areas. The bill amends section 38

to disqualify victims and alleged victims of family violence from acting as surety for an accused who is the perpetrator or alleged perpetrator of that violence. Clause 2 of part D of schedule 1 is amended to require a judicial officer or authorised officer to consider whether on a grant of bail the safety of a victim would be better served by protective bail conditions or a restraining order under the Restraining Orders Act 1997, or both. Further, a judicial officer or authorised officer will be required to ensure, when setting or amending protective bail conditions, that bail conditions are not inconsistent with any existing restraining order, unless that inconsistency is necessary to protect the safety of an alleged victim or child protected by a restraining order.

The bill also introduces an amendment to clause 3 of part D of schedule 1 to enable electronic monitoring of an accused while subject to a home detention condition. The bill amends the reporting requirements for a community corrections officer under section 24A to ensure that any report recommending home detention also includes a recommendation as to the suitability of electronic monitoring.

Finally, only a judicial officer other than a justice can consider bail for a declared serial family violence offender. This is effected by new clause 3F of part C of schedule 1. Restraining Orders Act 1997: The bill introduces a range of amendments to the Restraining Orders Act to make it easier and less traumatic for victims to obtain protection from violence.

A major reform to the restraining order regime introduced by this bill is the introduction of a registrar-facilitated conferencing model for family violence restraining orders. This will implement the election commitment to make it easier and less traumatic for victims to obtain violence restraining orders and address the Law Reform Commission's recommendation to improve respondents' understanding of and subsequent compliance with family violence restraining orders. The shuttle conferencing model will be available when a respondent to a family violence restraining order objects to an interim order becoming final, and in applications to vary or cancel existing orders. This will reduce the likelihood of the victim being required to attend a disputed final order hearing and undergo cross-examination, a process that is known to be traumatic for victims. The autonomy and safety of victims in this model are paramount. A conference can occur only with the agreement of the protected person, and parties will be located in separate rooms of the court. This model removes the need for victims to face perpetrators of family violence in court. It provides an opportunity for the applicant to tailor the terms of restraining orders to ensure that their safety concerns are addressed with the assistance of independent legal advice. This model will enable perpetrators to enter into an unenforceable undertaking to attend a behaviour change program as part of an agreed outcome to a family violence restraining order application.

Dowry abuse: The bill amends the definition of "family violence" in section 5A to include dowry abuse as a specific example of family violence.

Debate interrupted, pursuant to standing orders.

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