CRIMINAL LAW AMENDMENT (HOME BURGLARY AND OTHER OFFENCES) BILL 2014

Consideration in Detail

Resumed from an earlier stage of the sitting.

Clause 15: Section 326 amended —

Debate was interrupted after the clause had been partly considered.

Mrs L.M. HARVEY: I was midway through a response when standing orders dictated that we move to other business. I want to clarify one aspect of the previous discussion with the member for Butler. Under the legislation before us, the proposed amendment to section 326 is that the mandatory minimum penalty for the offence of aggravated sexual penetration without consent will be 15 years. In the case the member for Butler was discussing, which I believe was Thorn, the maximum sentence available at the time was imprisonment for 13 years and four months. Had our mandatory minimum penalty legislation been in place at that time, that offender would have been sentenced to 10 years' imprisonment. However, under the new legislative framework, once this legislation is passed, the mandatory minimum penalty under section 326 will be 15 years.

Mr J.R. QUIGLEY: I was seeking to make a point. I am not critical of the minister, but she made a concession, not to the Labor Party but to their honours, that they were operating under a complex and confusing set of laws. I think the point the minister made was that in these scrambled-egg laws, as I refer to them, the maximum penalty in section 326 of the Criminal Code is 20 years. The minister pointed out that, despite the 20-year maximum in the Criminal Code, the real maximum was 13 years and four months, as the court pointed out in Thorn's case. It gets confusing, does it not? A member of the public reading the Criminal Code would not necessarily be cognisant of the complexities of the transitional provisions, since untangled; but it was difficult for their honours in those circumstances to strike what the minister would consider to be a proper sentence. They were doing their best with what this Parliament had delivered as a confusing and complex set of unsatisfactory laws. As the minister explained, that is why the government is amending these laws. Is that a fair encapsulation?

Mrs L.M. HARVEY: To a degree, member for Butler. If we go back to the case of Thorn and look at what was available at the time, the maximum allowable sentence because of adjustments to sentences at the time was 13 years and four months for the sexual penetration offence, and 10 years and six months for the aggravated burglary. There was a 25 per cent reduction for a guilty plea, which potentially left us with eight years for the conviction of sexual penetration and two years for aggravated burglary. The offender was actually sentenced to six years for the sexual penetration offence, and 18 months for the aggravated burglary. In any event, six years or seven and a half years falls well short of the 13 years and four months maximum for sexual penetration, and the 10 years and six months for aggravated burglary.

That is why we are here. I accept that, to a layperson in the community and to someone like me who has no legal training, these complexities can sometimes be somewhat confusing. However, I believe that the judiciary understands the role it has to play. I accept that it is not happy with our mandating minimum sentences as part of this amending legislation, but our responsibility is to set the legislative framework within which the judiciary works, and it is the judiciary's responsibility to administer justice within the framework that we set as elected members of the state of Western Australia.

Mr J.R. QUIGLEY: I was not going to what may or may not be the judiciary's view of the current bill; rather, I was going to the judiciary's performance under what the minister has said was a complex and confusing set of laws delivered to them by this Parliament. I was not going to any criticism the judiciary may or may not have of the legislation that is before the chamber at the moment, but its performance under what this Parliament—not the current minister personally—had previously delivered to it, which, as the minister has already said, is both complex and confusing.

Mrs L.M. Harvey: But do you have confidence, by interjection —

The SPEAKER: No, sorry; if you are going to answer, stand up, please, minister. It is difficult for Hansard.

Mrs L.M. HARVEY: I am sure that the member for Butler has confidence in the ability of the judiciary to understand the complexity of the sentencing environment within which it operates.

Mr J.R. QUIGLEY: I have absolute confidence in that, because it was the judiciary that pointed out that, notwithstanding the 20 years the minister had nominated as the maximum penalty available at the time of Thorn, by reason of clause 2(2) of schedule 1 of the Sentencing Act, the maximum term was in fact 13.4 years. The minister has conceded that she has no legal training, and I have absolute confidence that the judiciary understands that complexity. I am suggesting that, given the complexity of the spaghetti that has been served up to the judiciary, seven and a half years after the 25 per cent discount was applied, meaning 10 years, is hardly a personal criticism of the judiciary, when it was following the law delivered to it by Premier Court's government back in 1994 and thereafter.

Does the minister see what I am saying? It is not as though the judiciary was just thumbing its nose at this Parliament. It was not as though the judiciary was failing this Parliament; it was, rather, that this Parliament, through the complexity of its laws, had struck a maximum penalty of 20 years and then almost, as it were, under the table or at least through another law that nobody knows about—or, in the case of the minister, was not fully aware of at the time of her second reading speech—required the judiciary to say, "Forget the 20 years; in reality it's 13.4 years." That is not a very satisfactory state of the law, and it was not a satisfactory state of the law at the time, was it, minister? As I understand her earlier answer, it is one of the very reasons the government is clarifying all this in the current legislation. Is that fair?

Mrs L.M. HARVEY: I think we have been pretty clear in saying that at the time there was some work to be done to improve the system, and that came about by way of various amendments to different acts of Parliament, which is where we are today. We are amending another act of Parliament because we have determined that the existing system is not reflective of community values.

To go back to that case, even with a 25 per cent discount for a guilty plea, Thorn could still have been sentenced to eight years for the sexual penetration offence and two years for the aggravated burglary offence. It is an older case under a different system, but, that said, we have more recent cases, and notwithstanding that, the community has said that it agrees with this policy initiative. It is frustrated that even though maximum penalties are set within the Criminal Code, very few offenders receive a penalty even close to the maximum penalty. That is what this mandatory minimum penalty policy is all about. It is about resetting the starting point, if you like—the lowest possible acceptable threshold in any circumstance in the context of sentences creeping towards the maximum, which is why the maximums are set.

Mr J.R. QUIGLEY: I understand and take all that on board, but my valid concern is about where the blame lies, if that is not too harsh a word. My concern is that when we look at the law and the confusing state of the law, it does not seem to be fair to blame the judiciary, which is doing its best to interpret the laws that this Parliament delivered it, which the minister has said are less than satisfactory. We are not opposing the government's amendments, but we are saying that we do not believe it is fair to blame the judiciary without placing responsibility for the laws where responsibility lies—that is, the collective responsibility of all of us in this chamber. To just say, "We're as pure as the driven snow; blame those people down the Terrace in Supreme Court Gardens" is where I have a difficulty. When we look at the case of Thorn, we do not see the state of Western Australia taking this case on appeal to the High Court and saying that the judgement was wrong. When I looked in the library at the media reports at the time of the decision, there is no mention of Thorn's case. As I recall at the time, the shadow Attorney General, the former member for Nedlands, was prepared in Parliament to criticise the judiciary if they did not have shiny shoes. She criticised magistrates and the judiciary on all sorts of irrelevant and outrageous bases, but even she did not criticise Thorn's case in this Parliament at the time. My point is that although I accept what the minister says about the law, would she not agree that it is a bit harsh to blame the outcome on their honours who interpreted what we have served up to them? That is all. This is not a criticism of the minister personally—nor is it a criticism of the Barnett cabinet. It is a bit harsh to stand here in 2015 and castigate the judges back in 2005 for interpreting and applying a law from 1995—fair go! I am making the point to the minister that it is unfair to blame judges now for doing their best with a law that was served up to them by a Parliament in 1995. Does that resonate with the minister at all?

Mrs L.M. HARVEY: The member's argument leads directly to the purpose of the legislation. When I attend community forums and the community complains to me and says that these sentences are not consistent with its expectations, I take that on board and say, "Okay, we will change the legislative and penalty framework within which the judiciary need to operate." That is what we are doing, that is our job and that is why this legislation is before the house.

Mr F.M. Logan interjected.

The SPEAKER: Order, member for Cockburn!

Mr F.M. Logan interjected.

The SPEAKER: Order, member for Cockburn! You do not seem to be getting the message. I call you to order for the first time.

Mr J.R. QUIGLEY: Having listened to the minister's answer carefully, I did not detect that point in the answer. I listened to what the minister said. I do not challenge what she said, but nowhere in her answer did she lay blame at their honours.

Mrs L.M. HARVEY: This is not about blaming anyone; it is about listening to the views of the community. We have highlighted a number of cases in which sentences were not consistent with community expectations, which brings us to our role as legislators—that is, to bring in amending or new legislation or whatever is required to have penalties reflect the views of the community. We are representative of our communities, and we

are here to respect and reflect their views. We are in furious agreement that there is no point in complaining about something and disagreeing with it unless we are prepared to do our role as legislators and a leader in government and change it.

Mr J.R. QUIGLEY: My primary concern is a threshold question. The way in which this was put to the community—that is, that some of the judges are not doing the right thing—undermines the integrity of an independent judiciary. Today the minister has conceded that it is not necessarily the judges' fault so much as it is the fault of the law, and that is a reasonable position. The minister might want to challenge that and say it is their fault, but there is an especially potent danger in doing so. By saying that it is their fault and not the fault of what we have produced in this room, which their honours have had to interpret, we collectively undermine the confidence that the community should have in individual judges. I accept what the minister has said about the law as it stood in Thorn's case, I accept that she is not blaming the judges for their performance in Thorn's case, and I accept that she says we are bringing about this legislation because of community feedback as to the sentences, without blaming the judges—I accept all that.

I now turn to the horrible case of Ugle, to which the minister referred in her second reading speech. I will firstly clarify a couple of things in relation to that case that were confusing. I am in full recognition of the minister's saying that she is not a legal person, and I am not putting her down for that.

Mrs G.J. Godfrey: I should hope not; she is a minister.

Mr J.R. QUIGLEY: Would the member like the call? Has she got something to say?

The ACTING SPEAKER: Member for Butler!

Mr J.R. QUIGLEY: The member has not contributed to the debate.

The ACTING SPEAKER: You cannot sit down and stand up again, member for Butler.

Mr P. PAPALIA: I would very much like to hear more from the member for Butler.

The ACTING SPEAKER: Thank you, member for Warnbro.

Mr J.R. QUIGLEY: As I was saying, I was interjected upon by the member for Belmont, who I note has made no contribution to the debate —

The ACTING SPEAKER: Member for Butler, we are on clause 15.

Mr J.R. QUIGLEY: I know, and I was wondering why the member has not made one contribution to this debate so far except by pathetic interjection.

However, I will now refer to the minister's second reading speech on page 1055 of *Hansard* to address the question of clause 15(2), proposed section 321(2), which reads in part —

> … the court sentencing the offender must, notwithstanding any other written law …

That therefore negates the provisions of section 9AA of the Sentencing Act, which the Barnett government introduced to this Parliament in 2012. Although I am dealing with clause 15(2), there is the same provision in every one of these clauses, both prior to and subsequent. I did not address this when I dealt with the other clauses, because I was waiting until now so we could spare the repetition of debating every clause. This clause provides that notwithstanding any other law, this will be the mandatory minimum sentence. When I addressed this issue in the second reading debate, I said that it would bring about a larger number of not guilty pleas. After more than a quarter of a century's experience in legal practice, especially on the defence end of the bar table, I suggest to Parliament that people plead not guilty when faced with a mandatory term, be it the suspension of a driver's licence or the infliction of penalties under legislation such as the Pearling Act, which has huge penalties. I remember acting for some pearlers who had the wrong number of panels and the penalties were huge. The minister said —

> There is a potential that a not guilty plea could result in the victim having to relive the circumstances of the case in court. That said, when we drill down into some of the matters and some of the cases that were used as examples in putting this legislation together, we found it was quite evident that a large number of those offenders were choosing not to enter guilty pleas regardless.

That is, to plead not guilty regardless. Could the minister refer us to those cases? I am not aware of them. The minister said that she found a large number of those offenders pleaded not guilty regardless. Could the minister refer us to those cases, because the three cases the minister brought to Parliament —

Mr D.A. TEMPLEMAN: I am interested in hearing further from the member for Butler.

Mr J.R. QUIGLEY: It is very generous of my friend to say that he is very interested in what I have to say.

The three cases the minister brought to Parliament were each disposed of on a plea of guilty, were they not?

Mrs L.M. HARVEY: The member referred to the changes to the Sentencing Act with respect to a 25 per cent discount for a plea of guilty. Specifically in the case of Ugle v The State of Western Australia—I said that I would not go through every case, but I did highlight three cases in my second reading speech—the trial judge commented that the court took into account an early plea of guilty but it was not early enough to avoid the necessity for the complainant to have to revisit all the details of the offences in the course of being proofed by counsel for the state. Yes, we have a standard provision that gives a discount for an early guilty plea under section 9AA of the Sentencing Act 1995, but that will not be available for mandatory penalties. That is how it is, but one can assume that the judiciary will look to a minimum penalty, when in actual fact there is a maximum penalty available in these circumstances. The maximum penalty is rarely achieved as a sentencing outcome.

Mr J.R. QUIGLEY: That seems to support continuing judicial discretion in these matters. I made the point that the Ugle, Miller and Thorn cases, which the minister brought before Parliament, all involved pleas of guilty.

Mrs L.M. HARVEY: I will qualify my answer. There may have been a plea of guilty, but in the case of Ugle, the guilty plea came at such a point that the victim had already had to revisit details of the offences. The reward, if you like, of a sentencing discount for a guilty plea needs to be in the context of mitigating the effect of the actions on the victim and trying to prevent re-victimisation. Drilling down into these cases, police and other prosecutors tell me that it is only when the offender and their counsel are presented with a full brief and get to the point at which they are ready to go to trial, when the victim has already been re-victimised, that they realise the weight of evidence is against them and they should proffer a plea of guilty to get the sentencing discount. That is not in the spirit of an early guilty plea discounting system. In the case of Miller, his plea of guilty to the offences charged was made only on the morning of the commencement of the trial. A lot of preparatory work goes into a trial.

In that circumstance, the victim, up until that morning, was preparing emotionally, physically and intellectually to present as a witness in a trial against someone who had offended against them in a very vile manner. In effect, that 25 per cent discount for a plea of guilty in that circumstance does not go any way towards mitigating the re-victimisation of that victim. In the cold light of day, had that been presented to the community, it would be seen as not in keeping with community standards. We are back where we started, looking at mandatory minimum penalties that are not subject to an early plea of guilty. One would expect that offenders would look at sentences nearer to the maximum penalty available for violent physical and sexual offences committed in the course of aggravated home burglary. The evidence presented in the cases we have discussed shows that sentences have been far from the maximum available.

Mr J.R. QUIGLEY: Returning to the minister's comment—I am not trying to rub her nose in it—that those offenders chose to enter not guilty pleas regardless, one of the problems is that the minister's own amending legislation that introduced section 9AA states that one of the things to be taken into account when applying for assessing a discount for a plea of guilty is whether the plea has been made at the first reasonable opportunity. The minister said that herself. The first reasonable opportunity must embrace the concept that the person—this is what police do not take into account when they are giving advice—has to have reasonable access to legal advice. The court states that once a plea is entered, it is assumed that the accused knows the law and what they are pleading guilty to. With the cuts to Aboriginal legal aid, that legal advice is not available, which has thrown that burden on to the Western Australian Legal Aid Commission that has to cover the Indigenous population as well, and legal advice for the accused person comes very, very late in the day.

I assure the minister and the chamber that sometimes it is not long before a scheduled trial that a Legal Aid lawyer gets assigned to see the accused prior to the trial to discuss the law and advise them on penalty. That will be taken into account by the courts. I want to ask the minister this in relation to section 9AA of the Sentencing Act and put two scenarios to the minister. Clause 15(2), proposed section 326(2), negates section 9AA of the Sentencing Act. I know the Chair is concerned with relevance; that is the relevance. I put these two scenarios to the minister that were put to me by a very senior judge of this city. I preface this by saying that when we discussed this issue last week, I read to the minister the comments of the person she represents, the Attorney General, Hon Michael Mischin, who acknowledged that the risk of injustice is increased by the risk of rigidity, and the minister conceded that that is possible but said, that notwithstanding, the government has made a call. Correct?

Mrs L.M. Harvey: Correct.

Mr J.R. QUIGLEY: Having made that call, I put this to the minister as a risk of injustice, not to accuseds but to victims. I am only concerned about the victims here. This is the first scenario. A woman is sunbaking in her alfresco area or under shade by her swimming pool. An offender enters on her property, sees her sunbaking clad

in swimwear or whatever, enters on the property, bashes her, breaks her jaw in the course of bashing her, and then sexually assaults her. She is outside by the pool.

Mr P. PAPALIA: I would like the member for Butler to continue if possible.

Mr J.R. QUIGLEY: She is on her property, by the pool, in Cottesloe, in the Premier's electorate, where they have lovely pools. I have been to a few of them.

Mr C.J. Barnett: This is becoming slightly distasteful.

Mr J.R. QUIGLEY: Sorry?

The ACTING SPEAKER: Move on member—keep going.

Mr C.J. Barnett: Your storytelling is becoming slightly distasteful.

The ACTING SPEAKER: Member for Butler—clause 15 please.

Mr J.R. QUIGLEY: The Premier has not contributed to this debate so far. He has interjected; he has not contributed to this debate despite my challenge to him to get to his feet to contribute. He has remained firmly in his seat. His only contributions are facile interjections. We are talking about real cases here, Premier.

An offender comes onto a property, violently assaults a woman sunbaking out by her pool, and sexually penetrates her. These new laws do not apply to that circumstance, do they?

Mrs L.M. HARVEY: That is correct, member for Butler. We have drawn the line at the threshold to the dwelling on the premise that people should be able to lock their doors and close their windows, or even sleep with their windows open if they so choose, and they should be safe in their home from offenders who choose to enter uninvited. That said, I am curious to know in the scenario that the member for Butler has presented why what the victim was wearing was relevant or indeed where she lives? My understanding of aggravated sexual penetration and other sexual offences is that society has moved on from addressing what a woman may or may not have been wearing when she was subject to a sexual assault. That is just a curiosity that I am sure the member will expand upon as he presents us with further scenarios. It is somewhat offensive to suggest that because she was sunbaking and potentially wearing a bikini or a swimsuit, that is relevant to the sexual penetration offence that the member described to have occurred.

Several members interjected.

The ACTING SPEAKER: Member for Warnbro, you are on two.

Several members interjected.

The ACTING SPEAKER: Premier, the member for Butler has the call.

Mr J.R. QUIGLEY: The Premier did not get to his feet again—still too chicken to get to his feet.

The ACTING SPEAKER: Member for Butler, address the Chair.

Mr J.R. QUIGLEY: I was not suggesting it was by her manner of clothing; I was suggesting that she was being modest in her backyard just sunning herself in the open alfresco area by the pool. The minister said these laws do not apply to "a serious sexual assault involving serious injury".

Mr P. Papalia: That is the point; it's the location.

The ACTING SPEAKER: Member for Warnbro.

Mr J.R. QUIGLEY: That is the point.

I want to put a second scenario to members. This is not a locked door, and now the relevance of location is mildly relevant. Secondly, we have a woman also in her alfresco area sunning herself by the pool, but she is in the member for Mandurah's electorate. Because of the prevalence of Ross River virus, and because of the prevalence of mosquitoes down in Mandurah carrying Ross River virus, she has a flyscreen around her alfresco area. It is not locked. It has a flyscreen, but is not latched—and the sliding flyscreen is closed over. She is in a very similar position to the woman by the pool with no flyscreen. Would the minister agree that exactly the same assault now in the second instance would attract sanction under the proposed legislation?

Mrs L.M. HARVEY: There are a couple of aspects. One of them is that the court will determine under the definitions of the Criminal Code whether in the circumstances that the member has described that that penalty would fit the definition of "place", which means a building, structure, tent or conveyance, or a part of a building, structure, tent or conveyance et cetera. There is a court test of whether a fence in that circumstance could be defined by the court as fitting the criteria. That said, we are seeking to impose only a mandatory minimum penalty for these offences; the maximum still applies. For aggravated sexual penetration such as section 326 of the Criminal Code describes, the maximum penalty is still 20 years no matter where that occurs. For those circumstances specifically in which the offence is during an act of aggravated home burglary, this legislation

means that a mandatory minimum penalty will apply. But it is still up to the courts, and I would encourage them to consider sentencing closer to the maximums for those offences of aggravated sexual penetration.

Mr J.R. QUIGLEY: Of course that is the case, minister, because we all encourage the courts to put away serious offenders for a long time. Turning to my earlier question to the minister at the opening of this committee stage of the bill about what constitutes burglary, she turned to the definition in section 400(1), which was "that enters any place". I asked her and she correctly said, "had to open the door". A victim might be sunning themselves out in the backyard by the pool, but an offender who approaches her in the backyard has not opened the door, according to the minister's answer given to this Parliament last week, and that is why I asked her the question. When I asked the question, I said to the minister that the relevance of this question would become clearer later because we were dealing, if she recalls, with clause 4 of the bill. I asked the minister what constituted the definition of home burglary and she took me, as the act provides, to section 400(1) of the Criminal Code. Let us go back to that definition again because the minister put it there. It reads —

> ***place*** means a building, structure, tent, or conveyance, or a part of a building, structure, tent, or conveyance,

The backyard is not part of the building, structure, tent or conveyance. The minister said earlier this afternoon that part of what has to be achieved here is parity across punishments for offences. Therefore, the victim who is caused grievous bodily harm and sexually assaulted in their own backyard is not within the building, structure, tent, or part of a building structure or tent. But does the minister agree that if an offender opens the flywire door and, in circumstances that constitute an offence now contained within this Criminal Law Amendment (Home Burglary and Other Offences) Bill, the person who is sunning themselves within a flywire-enclosed area has been assaulted?

Mrs L.M. HARVEY: I refer to section 401 of the Criminal Code to which the member referred.

Mr J.R. Quigley: I referred to section 400(1), not 401.

Mrs L.M. HARVEY: I refer the member to section 401, "Burglary". Section 401(1) reads in part —

> A person who enters or is in the place of another person, without that other person's consent, with intent to commit an offence in that place is guilty of a crime —

Section 401(2) reads in part —

> A person who commits an offence in the place of another person, when in that place without that other person's consent, is guilty of a crime —

Section 401(2)(b) reads —

> if the place is ordinarily used for human habitation but the offence is not committed in circumstances of aggravation, to imprisonment for 18 years;

We are not changing the definition of burglary.

Mr J.R. Quigley: No.

Mrs L.M. HARVEY: But in circumstances of aggravated home burglary, during which these offences are committed, we are legislating for a mandatory minimum penalty.

Mr J.R. QUIGLEY: I understand. If a person has entered a person's yard and sexually assaulted them in the backyard, the minister is not suggesting that that involves a burglary, is she?

Mrs L.M. HARVEY: Section 401(1)(b) provides that "if the place is ordinarily used for human habitation". The assumption would be that, technically, a yard is not ordinarily used for human habitation. However, the courts will interpret as they see fit. I am sure that if the judiciary would prefer to assess some of these offences under our mandatory penalties regime, they may in fact consider extending the remit of a definition of a place in the Criminal Code.

Mr J.R. Quigley: It could be a backyard.

Mrs L.M. HARVEY: The courts will determine what that is. As I have said a number of times, my understanding is, for the purposes of this legislation, that when we bring legislation to this place, we need to draw a line in the sand and determine where that legislation will come into effect. When we look at some of the cases we have discussed, for example the Thorn case, in which the woman was subject to the aggravated sexual penetration while she was lying in her bed with her child beside her, these mandatory minimum penalties will definitely apply in that circumstance. Increasing the sentences for people who commit those acts is precisely the purpose of this amending legislation.

Mr J.R. QUIGLEY: This may take a little longer than I indicated to the Leader of the House. On the advice of the minister's adviser—I saw her nattering—the minister is now suggesting that, under section 401 of the act, the backyard might be interpreted by the court as a place.

Mrs L.M. HARVEY: The member mentioned that a place means a building, structure, tent or conveyance or a part of a building, structure, tent or conveyance. In the context of the tent scenario, he described —

Mr J.R. Quigley: I didn't describe a tent at any stage.

Mrs L.M. HARVEY: I am sorry; he did. He referred to a person sunbaking in the member for Mandurah's electorate where there is a mosquito issue and they were inside a tent.

Mr J.R. Quigley: That doesn't matter. I agree with that.

Mrs L.M. HARVEY: For the purposes of that scenario, a tent could fit the definition of a "place", for the purposes of the Criminal Code.

Mr J.R. QUIGLEY: I could not agree more. I did not say "tent" but I did say within a confined area on the premises away from mosquitos. I agree with the minister 100 per cent—burglary. But opposed to that, out by the swimming pool, not inside the place, in the garden, it does not involve burglary, does it? It does not involve burglary if the person is out in the backyard and has not entered the place, does it?

Mrs L.M. HARVEY: As I said previously, the court has defined the parameters for an aggravated burglary, and over time it has further defined the definition of "place" as described in section 400 of the Criminal Code. We are not changing any of that. All we are changing is the mandatory minimum penalty for the sentences that are imposed by the courts, having established that this would be an aggravated home burglary and that one of these violent physical or sexual offences has occurred in the context of an aggravated home burglary. I think it is pretty clear.

Mr J.R. QUIGLEY: It is not. Is Mr Penn suggesting to the minister, or is the minister suggesting to this Parliament, that at any time in any case in Australia, entering a person's backyard without entering part of a building is burglary? Is the minister suggesting that entering a person's garden is burglary?

Mrs L.M. HARVEY: I cannot speak for legislation in other states, member for Butler; I am not across it. However, I will bring him back to the clause of the bill that we are debating—that is, clause 15, "Section 326 amended". I understand that we are talking about clause 15(2), which states —

> (2) If the offence is committed by an adult offender in the course of conduct that constitutes an aggravated home burglary, the court sentencing the offender must, notwithstanding any other written law, impose a term of imprisonment of at least 75% of the term specified in subsection (1).

I understand that is what we are dealing with, which will clearly impose a term of imprisonment of at least 75 per cent of the term specified in subsection (1). That is what we are discussing. As I have said previously, and I doubt that I am going to have much further to say on this, we are not attempting to change the definitions of "place" or what constitutes an aggravated home burglary; that has already been defined. However, we are saying that if people commit serious violent physical and sexual offences in the course of an aggravated home burglary, they will be subject to the mandatory minimum penalties. I have said that a number of times. I think people in the chamber are probably tired of me saying it, so I will sit down and wait for the member for Butler's next question.

Mr J.R. QUIGLEY: I certainly am, so I dare say others are too! Might the two victims feel that they have been unequally dealt with? In the case of victim A, out by the pool, the offender is not subject to a 15-year mandatory minimum term; they might get a lesser term. In the case of victim B, who was inside the flywire screen, her offender is subject to the mandatory term by reason of being on the other side of a piece of flywire. That does not seem very just in respect of the two victims, does it, minister? Furthermore, and this is the point, the assailant of victim A, who was outside the flywire, is encouraged to plead guilty by reason of section 9AA of the Sentencing Act, whereas victim B, who was on the inside of the flywire, is likely to have to go to trial because there is no encouragement for that offender to plead guilty. That is the problem, is it not, minister? Victim A, who suffers exactly the same offence on the outside of the flywire, is likely to be spared the trauma of a trial because her assailant is encouraged to plead guilty, with a 25 per cent discount dangling in front of him or her, whereas victim B is in all likelihood is going to be re-traumatised because section 9AA will not apply because she is on the other side of the flywire. Does that not seem incongruous?

Mrs L.M. HARVEY: The member is basing that on the assumption that the court will award less than the mandatory minimum penalty that is being prescribed for aggravated sexual penetration in the course of an aggravated home burglary to the person who is in the courtyard, or indeed in the vicinity of the home without being within the threshold of the home. That is the member for Butler's assumption, which is an interesting assumption—that is, the court will sentence that offender for less than the mandatory minimum penalty being

prescribed by way of this amending legislation, when the maximum for that offence is in fact 20 years. It could well be that the court determines that in that circumstance, and as a result of this amending legislation, the penalties for aggravated sexual penetration should in fact be lengthier, and that would be a very good outcome.

Mr J.R. QUIGLEY: It is a reasonable assumption to make in view of what the minister has informed the Parliament, is it not? The reason this bill has been introduced is that the courts are handing out less than the mandated minimum sentence. That is what the minister is telling the Parliament, and in support of that she cites the cases of Miller, Thorn and Ugle. They are the only three cases that the minister cites. She says that the sentences in those cases were under 75 per cent of the maximum, so I make the reasonable assumption, in view of the minister's strong advocacy in support of this legislation, that it may be that the judges inflict on the assailant of the woman out by the pool a lesser term than the 15 years' minimum sentence for the assailant on the other side of the flywire. The minister said that I am making an interesting assumption. Is it not the assumption that the minister is advancing? Is it not the very point that the minister is advancing in bringing forward this legislation? I mean to say, where am I wrong? The minister says that she has introduced this legislation because the court did not give 15 years in the cases of Miller, Ugle and Thorn. In view of the minister's advocacy, why would anyone in this Parliament not conclude that the assailant of the woman by the pool should get less than 15 years, whereas the assailant of the woman on the other side of the flywire should get 15 years? Does the minister not think that the victims would then feel that that is not justice? Does it not resonate with the minister that the woman outside by the pool might think, "I haven't been given justice. My offender got 15 years minus 25 per cent for his plea of guilty," which I bring down to 11.5 years, give or take a month, because of the plea of guilty, but the offender who assaulted the woman on the other side of the flywire gets 15 years. Why would the woman outside near the pool not say, "This Liberal government has let me down! This Liberal government has done me in the eye. They said they were going to protect me from people who come into my house and rape me"? Why would the victim by the pool not be very disturbed that her offender got off with 11.5 years, whilst the offender who committed the offence with one millimetre of flywire difference got 15 years? Where is the justice for the victims? I am not talking about the offenders—hang the offenders!

Mrs L.M. HARVEY: The nature of legislation, crime and punishment, and penalties is that sometimes it throws up anomalous situations. We are not seeking to redefine the definition of "home burglary", which has been defined as crossing the threshold of a home or a place that is ordinarily used for habitation. Once we start to expand that definition, it becomes problematic because of a range of other factors. We are not making this legislation retrospective either, so any person who offends in this way up to the point at which this legislation is proclaimed will not be subject to the same penalty framework as will occur after the date of proclamation. That is the way that it is. The government has made a judgement call that I agree with, and the judgement call is based on people feeling safe within the confines of their home and ensuring that people who violate the sanctity of that home and offend in the worst possible ways, as we have previously described at great length during this debate, are subjected to these mandated minimum penalties. We have to make the call. The call we have made is that the threshold of the home is where this mandatory minimum penalty regime will step in for violent physical and sexual offences committed in the course of an aggravated home burglary. That is as it stands. If the member would like to amend it, by all means he should amend it to expand the remit and the definitions of what a place may be and how its perimeters are suitably defined, but that is not what we as a government seek to do. We seek to amend the sentencing framework with mandatory minimum penalties being set at 75 per cent of the maximum.

Mr J.R. QUIGLEY: In response to that invitation to comment—I assume the minister is addressing me as shadow Attorney General of the Labor Party—on whether I would like to amend that, I make this comment, seeing I was asked the question: perhaps, but not before there was a properly convened sentencing council—this is our policy—that could properly investigate all these cases and report to us on the utility of such an amendment so that it is done not in the hot crucible of an election campaign, but examined rationally and thoroughly. Then perhaps I might. That is why we have the policy of instituting a sentencing council to advise government on these matters, which would include the creation of a sentencing database for all courts so it could be looked at. There is another aspect to this, and not only the sentence now; I am looking at it from the victim's point of view. I wish to stress this: I am looking at this from the victim's point of view and not from that of the offender.

Another aspect concerns me with the negation of section 9AA of the Sentencing Act. For the victim who was out by the pool, her offender will be encouraged by this government's law to plead guilty; indeed, and rightly so. When the amendment to the Sentencing Act came before this chamber in 2012, it was presented by the then representative of the Attorney General, the honourable Deputy Premier of Western Australia, who represented the Attorney General before the member for Scarborough took over, who said —

> The government recognises that some credit should be given for a plea of guilty for essentially utilitarian reasons, against a background of the presumption of innocence and the entitlement of an accused to have the prosecution prove its case against him or her beyond reasonable doubt. A plea of

> guilty saves the state the cost, the expenditure of resources, and the uncertainty of a trial, possibly a lengthy one. It saves witnesses the inconvenience and expense of having to put aside their daily routines and attend court, and often the stress of giving evidence. In the case of witnesses to traumatic events —

He was not here talking about victims —

> or witnesses who are also victims of crime, it also relieves them of the trauma of remembering and recounting their experience, often a considerable time after the event.

Then here is the important bit —

> Those who have not had to do so may not readily appreciate it but, for the majority of people who happen to be witnesses necessary to prove a case, the idea of attending court and giving evidence—even uncontroversial evidence—and being exposed to cross-examination testing their recollections, and perhaps calling into question their veracity and character, is a daunting prospect.

Mr P. PAPALIA: I am fairly certain the member for Butler has more to add and I would like to hear what he has to say.

Mr J.R. QUIGLEY: I take the member for Warnbro to task; he usually says that he is very interested in what I have to say. He did not say that on this occasion, but I just take that as read.

The victim out by the pool is likely not to have to give evidence and recall and face this daunting prospect by reason of the 25 per cent discount being applied to her offender, as was the case in Thorn, Miller and Ugle; none of the victims in those cases were cross-examined in court. I have been there, member, and I have seen them shaking and crying and I have seen them faint under the daunting prospect of having to relive these horrible sexual assaults. I have seen them pass out. The Evidence Act now has positions of protected witnesses, but that is not in all cases. Even then, they are still cross-examined. I am not concerned about the offender so much as I am concerned about the victim. The victim one millimetre away on the inside of the flywire will almost face the certain prospect of having to go to court and be, as the then representative of the Attorney General said —

> ... exposed to cross-examination testing their recollections, and perhaps calling into question their veracity and character ...

Why are these victims on the inside of the flywire being cast into this awful situation by reason of the government's lust for the mandatory minimum without consideration to section 9AA of the Sentencing Act? It discriminates against those victims. I want to ask the minister: prior to determining that section 9AA would be excluded, how many victims of these sexual assaults did the government consult to get their opinion on whether they would rather their offender get 15 years after they give evidence—and be subject to the daunting prospect—or the case to be resolved immediately or reasonably soon without them having to give evidence? Firstly, what consultation was there with victims; and, secondly, did the minister consult with the Commissioner for Victims of Crime?

Mrs L.M. HARVEY: I think I might have about 30 seconds to respond to nine and a half minutes or so of questions and preamble from the member for Butler outlining a range of issues and matters with respect to clause 15. Member for Butler, as I have said previously —

Mr J.R. Quigley: I am concerned about victims.

Mrs L.M. HARVEY: We are concerned about victims.

Debate adjourned, pursuant to standing orders.