FAMILY VIOLENCE LEGISLATION REFORM BILL 2019

Introduction and First Reading

Bill introduced, on motion by **Mr J.R. Quigley (Attorney General)**, and read a first time.

Explanatory memorandum presented by the Attorney General.

Second Reading

MR J.R. QUIGLEY (Butler — Attorney General) [12.47 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 is a perversely intimate and callous form of violence. In committing this act, a perpetrator conveys to the victim that they have the power to take their life away. Acts of strangulation or suffocation 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 strangulation or suffocation represents a particular risk in circumstances of family violence, the general application of the offence recognises that the act of strangulation or suffocation 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 strangulation or suffocation 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. Including lack of consent as an element would require victims to give evidence in every trial, even when the offence was witnessed.

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 its 2014 report "Family Violence—A National Legal Response", 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 (8), 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. The offence provides in proposed section 300(6) that the court or jury need be satisfied only of the general nature and character of the acts of family violence that constitute the offence, and not the particulars of those acts, as it would otherwise need to be if the acts were charged as separate offences. This provides a link between the reduced requirement for particularisation and the matters the court or jury must be satisfied of to find that an act of family violence occurred. Proposed section 300(7) 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(9) and (10).

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 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: I turn now to amendments to the 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 re-offending, 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 an 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.

Improved electronic monitoring of high-risk offenders: 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 and 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: This bill introduces a range of amendments to the Restraining Orders Act 1997 to make it easier and less traumatic for victims to obtain protection from violence.

Conferencing for family violence restraining orders: 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 McGowan government's election commitment to make it easier and less traumatic for victims to obtain violence restraining orders and will 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 which 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, with the assistance of independent legal advice, to ensure their safety concerns are addressed. This model will also 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. In 2018, the commonwealth Parliament's Senate Legal and Constitutional Affairs References Committee concluded that dowry abuse ought to be recognised as an example of family violence across all Australian jurisdictions because of its nature as a specific and unique form of abuse. Western Australia will now join Victoria in explicitly recognising this form of family violence.

Less traumatic to obtain restraining orders: The bill inserts part 4, division 4, in the Restraining Orders Act 1997 to introduce new provisions to make the process less traumatic for victims. New section 44D enables an applicant to have a support person nearby during any restraining order proceedings, and section 44E elevates existing regulations to draw attention to the court's power to use closed-circuit television and other screening arrangements during the giving of evidence in restraining order proceedings. New section 44F will provide the court with greater discretion to conduct family violence restraining order proceedings in a manner that will ensure that a person who has or may have experienced family violence feels safe during proceedings, including by actively directing, controlling and managing the conduct of the proceedings, and by limiting cross-examination when appropriate.

Easier and more efficient to obtain restraining orders: New section 13A will make it easier for victims of specified criminal offences to obtain a family violence restraining order or violence restraining order. It provides an avenue for victims of a specified offence who did not obtain an order at the time of conviction to more easily obtain an order. The provision recognises that the existence of a conviction for specified criminal offences is a sufficient ground for a court to make a restraining order, and victims of serious offences should not be subject to re-traumatisation when seeking protection from a perpetrator.

Section 13A retains the distinction between existing sections 63 and 63A and provides victims of specified criminal offences with an assurance that, in the absence of exceptional circumstances, a restraining order will be made by the court. I also note here an amendment to section 63A, which will remove the distinction between general victims and family violence victims. The violent personal offences specified in existing section 63A are of such a serious

kind that there is no justification for this distinction. It is only appropriate that a child victim of a sexual offence perpetrated by a neighbour has access to a mandatory lifetime restraining order against the perpetrator in the same way that a victim of that same offence committed by a family member currently does. The bill also ensures an order made against a child offender is not made for the life of that child.

Amendments to section 45 will allow a criminal court to vary or cancel a restraining order without the need for the parties to submit an application under the civil jurisdiction. Amendments will also enable conversion of an existing violence restraining order to a family violence restraining order in the course of criminal proceedings. New section 49C will permit a court to convert an application for a family violence restraining order to an application for a violence restraining order, and vice versa. New section 66 will require a court to inquire whether any Family Court orders are in place before making a restraining order. If there are, the court must consider any inconsistencies between the Family Court order and the restraining order. Currently, an applicant is required to notify the court of the existence of any Family Court orders.

Improvements in service arrangements: Amendments to section 59 will allow the court to notify a person protected by a restraining order and, when relevant, the person who made the application on their behalf that the order has been served using electronic means, such as by SMS or email. The bill also amends section 60 to allow substituted service without application to the court if a person attempting to serve the order has failed to achieve personal service following reasonable attempts to affect service. The bill also amends a number of provisions in the Restraining Orders Act 1997 to ensure that if a person does not readily understand English or does not understand the explanation of the order, the explanation must be given by someone over the age of 18 years in a way the person understands. This amendment recognises that a child is not an appropriate person to provide an explanation of an order.

Explosives: New section 14A will require the court to consider in every family violence restraining order or violence restraining order application whether a restraint on the respondent accessing explosives is required. Consequential amendments are made to the Dangerous Goods Safety Act 2004 to ensure that when a person bound by a restraining order is prohibited from possessing explosives or holding an explosives licence, the chief dangerous goods officer is required to refuse new applications that would enable access to explosives and cancel or suspend any existing approvals that would allow the person to access explosives.

Holding perpetrators to account: Section 61 is amended to increase the maximum fine for breach of a family violence restraining order, violence restraining order or police order to $10 000 while preserving the maximum term of imprisonment at two years. Further, the limitation period for prosecution of breach of a family violence restraining order, violence restraining order or police order is increased from one year to two years. An amendment to section 61A provides that an offence of aggravated stalking under section 338E of the Criminal Code is included as a conviction for the purposes of triggering the existing presumption of imprisonment. This amendment means that if an offender is convicted of aggravated stalking involving a breach of a family violence restraining order, violence restraining order or police order, the offence will count as a conviction for the purpose of section 61A.

Police Act 1892: This bill will insert new section 135 into the Police Act 1892, which relates to the reporting of family violence to police. This amendment will require police officers and other police staff to make a written record of every alleged incident of family violence reported to or observed by them. It will also require them in cases when a report is made by or with the consent of the alleged victim of the violence to provide the alleged victim with a report number.

Road Traffic (Administration) Act 2008: Amendments to the Road Traffic (Administration) Act 2008 will address circumstances in which a family violence perpetrator commits a road traffic offence or incurs an infringement while driving a car registered in the victim's name. These amendments will ensure that a victim cannot be prosecuted for an offence, and is not subject to a presumption that they incurred an infringement if they are concerned that providing the information would expose them to a risk or apprehended risk of family violence.

Section 4 of the Road Traffic (Administration) Act 2008 is amended to introduce a number of definitions. "Family violence evidentiary document" is defined for the purpose of prescribing a list of documents that may be provided by a victim to prove they are in fact a victim of family violence and to ensure the provisions are not used fraudulently to avoid the payment of infringements or to avoid complying with important road traffic obligations. Sections 34, 35, 94 and 103 are all amended in a similar manner to provide that a victim will be absolved from the relevant statutory obligation if the victim provides a statutory declaration that they were not the driver of the vehicle at the time of the offending and they are concerned about providing the information due to a risk or apprehended risk of family violence. A declaration must be accompanied by a family violence evidentiary document to verify the person is a victim of family violence.

The amendments also provide that provision of information relating to the existence of family violence under the provisions does not give rise to a requirement for a police officer to carry out an investigation under section 62A of the Restraining Orders Act 1997. This provides police with discretion as to the response to

potential evidence of family violence, particularly in circumstances in which the victim is making the request to avoid alerting the perpetrator.

This bill will introduce amendments to the Evidence Act 1906 to ensure that when family violence is at issue in criminal proceedings, evidence of family violence is admissible. Amendments to the Evidence Act 1906 will make it easier for evidence, including expert evidence, of family violence to be introduced in a criminal proceeding when relevant to issues before the court, including, but not limited to, when self-defence is at issue, and will introduce jury directions that will address the stereotypes, myths and misconceptions about family violence. Admissible evidence will include information about the nature and dynamics of relationships affected by family violence, including the dangerous consequences that often flow from attempting to separate from an abuser. The new provisions will state that evidence of this nature may be relevant when determining, in circumstances in which an accused has claimed that they had acted in self-defence, whether the person believed their actions to be necessary, whether the conduct was reasonable, and whether there were reasonable grounds for those beliefs. Importantly, these provisions will also provide that this evidence can be given by those with expertise in the area, for example, researchers or family violence sector workers.

The bill also introduces jury directions about family violence, including: that family violence is not limited to physical abuse; that it may include a complex range of behaviours that keep a person subordinate, isolated, controlled, monitored, deprived of freedom, frightened, humiliated and powerless to resist violence; that it is not uncommon to stay with an abusive partner; and that it is not uncommon not to tell anyone of the abuse, including the police, and that, in fact, doing these things may lead to an increased risk of violence.

This bill is comprehensive. It puts victims of family violence first. It introduces measures to improve the safety of victims of family violence, hold perpetrators of family violence to account, and makes it easier and less traumatic for victims to obtain protection from violence. This bill will ensure that Western Australia is at the forefront of the fight against family violence in Australia. I commend the bill to the house.

Debate adjourned, on motion by **Mrs A.K. Hayden**.