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

Consideration in Detail

Resumed from 17 March.

Clause 5: Section 279 amended —

Debate was adjourned after the clause had been partly considered.

Ms M.M. QUIRK: The Minister for Police may have responded to my colleague on this matter—I was not present in the chamber—but can she explain how the period of 15 years was arrived at and whether a specific commitment to a mandatory term of 15 years was a Liberal Party election commitment?

Mrs L.M. HARVEY: I have answered this question previously, but I appreciate that the member for Girrawheen was not in the chamber at that time. The commitment of the government to the community was that for serious sexual and violent offences that occur in the course of an aggravated home burglary, it would mandate that the minimum penalty be 75 per cent of the maximum prescribed currently in the Criminal Code. We have arrived at 15 years as a penalty under section 279 because, obviously, although the penalty for life imprisonment generally settles on around 20 years, it can be longer, so in this circumstance we have made the mandatory minimum term of life for that offence 15 years.

Clause put and passed.

Clause 6: Section 280 amended —

Mr J.R. QUIGLEY: I will be very quick with clause 6. Once again, in relation to clause 6, does the government have a current database of sentences handed out for what is commonly termed "manslaughter" since the Criminal Code amendments raised it to 20 years?

Mrs L.M. Harvey: No; we have canvassed this before, member.

Mr J.R. QUIGLEY: I have to go through each of these proposed sections so that the minister can confirm that there is no database of sentences for manslaughter. Again, is it Liberal Party policy to make it 75 per cent?

Mrs L.M. Harvey: I beg your pardon? Sorry, member?

Mr J.R. QUIGLEY: We have covered how the 15 years was arrived at. Without being trite and to move the debate along, was the same consideration given to arriving at the sentences of 15 years for adults and three years for juveniles as the consideration given to clause 5 sentences—that is, a reflection of Liberal Party policy without reference to a database?

Mrs L.M. HARVEY: As I have said previously throughout this debate, that is correct. The government's view is that it is very difficult to arrive at an acceptable number of people who would be sentenced at the lower end of the scale before taking the step to introduce a minimum mandatory term. I put to the member for Butler that when one stands in the place of the victim, one offender who has received a sentence at the lower end of the scale, rather than the mandatory minimum term that is being prescribed, or above to the maximum, is one too many. That is the view of the community and that is why the government has arrived at these minimum terms—in the context of the maximums remaining where they exist at present. Magistrates can impose sentences up to the maximum, but the government is saying that they need to have a mandated minimum.

Mr J.R. QUIGLEY: I asked the minister a question at the outset, and her answer seems to conflict with her earlier answer. I will put to the minister the question that I put to her before, and read the honourable Attorney General's comments as reported at page 4 of *The Sunday Times* of 2 March 2014, which state —

> … high-profile campaigns based on particular cases did not enable a measured consideration of sentencing.

Does the minister disagree, therefore, with the Attorney General's comment when the minister says that one case is enough to trigger these amendments? The Attorney General says that high-profile campaigns based on a particular case, as the minister has identified, do not enable a measured consideration of sentencing. Does the minister disagree with the Attorney General?

Mrs L.M. HARVEY: Notwithstanding the Attorney General's comments that have been somewhat taken out of context in certain scenarios, the Attorney General is in agreement with this policy of mandatory minimum penalties that are being prescribed, and this legislation is government policy that the Attorney General has co-signed and agrees with.

Mr J.R. QUIGLEY: I appreciate that, but how have I taken it out of context? Did I not earlier read the entirety of the Attorney General's comments? The minister read it to the Parliament and I read it to the Parliament. We went on to say that Mr Mischin stood by the mandatory sentencing laws. I have not taken anything out of context, but the Attorney-General says, and I am just asking whether the minister agrees, that high-profile

campaigns based on a particular sentence do not enable a measured consideration of sentencing. I am asking whether the minister agrees with the Attorney General.

Mrs L.M. HARVEY: I think the member for Butler will agree that if we look at legislative responses around the country, laws are often changed in response to one set of circumstances, and amendments to legislation often occur in the context of one aberration, or one anomaly, whereby that anomalous situation is not acceptable, and that sparks legislative reform. There are numerous examples of that; I do not have them to hand, but it will not take much time to find them. There are all sorts of laws that have come into being around drink-drivers and a range of other initiatives when the government has said, "No. That is enough. That is one too many. It is time to change the penalties for this. It is time to change the legislative framework." So, it does happen. With regard to the comments that the Attorney General has made, the member will need to take up with the Attorney General. I cannot speak for the Attorney General, except to say that we are co-authors of this legislation. It is a policy position of the government that the Attorney General has said on numerous occasions that he supports, and he will be taking this legislation through the Legislative Council should it pass this house.

Mr J.R. QUIGLEY: Should it pass this house? It is going to pass this house. That is a given. We have all agreed that it is going to pass this house. We are doing what the Leader of the House invoked us to do—that is, scrutinise the bill and the policy behind the bill. The minister has explained to Parliament that she is here representing the Attorney General. She has said that several times. What I am asking is: in view of the minister's assertion that she is here representing the Attorney General, does she agree with the Attorney General that high-profile campaigns based on a single case do not enable a measured consideration of sentencing?

Mrs L.M. HARVEY: The member for Butler is taking an interesting slant on what representing a minister means. Yes, I represent the Attorney General in this house when having carriage of legislation that falls under the portfolio of the Attorney General. But any minister of government can bring any piece of legislation forward in any house of Parliament, constrained, of course, by the standing orders, which state that if a bill has a financial ramification, it needs to be brought in through the Legislative Assembly process. As a minister of the government and the police minister, and also given that I represent the Attorney General and have carriage of this legislation in this house, I bring this legislation forward on behalf of the government. The government supports this legislation, cabinet has wholeheartedly supported it and endorsed it, and it is here in response to a commitment that we have made to the community, member for Butler. I am solid with the Attorney General on this. If the member for Butler takes issue with the Attorney General's comments to the media, I suggest that the member take that up with him.

Mr J.R. QUIGLEY: The minister said earlier that around the country there are instances in which a response to a particular law or a particular court outcome precipitates a change in the law; it is not a trend, as the minister has indicated before, but there are particular cases, and there are a lot of them. The minister said that she did not have them to hand now, but that she could get them. We have all agreed that this bill will get through this chamber by 5.00 pm tomorrow, so we will have plenty of opportunity tomorrow to ask the minister to take us to those cases.

Mrs L.M. Harvey: By way of interjection, an example is Jess's law, which concerned the unfortunate death of a young girl on Marmion Avenue —

Mr J.R. QUIGLEY: Perhaps the minister could answer that not by way of interjection.

The SPEAKER: Minister, are you answering that?

Mrs L.M. HARVEY: Yes, Mr Speaker. One example is what is colloquially known as Jess's law, which is a law that was introduced in response to a young girl who lost her life on Marmion Avenue in Clarkson at the hands of a recidivist drink-driver. The law was changed to tighten up and increase the penalties as a result of that one incident. That is one example that comes to the front of my mind. Obviously, as Minister for Road Safety and Minister for Police, perhaps that amendment to the legislation was too little, too late for Jess's family, but, thankfully, it occurred.

Mr J.R. QUIGLEY: If we go back to what the minister calls Jess's law, it was not a question of tightening up sentencing at all.

Mrs L.M. Harvey: It was increasing penalties.

Mr J.R. QUIGLEY: It was not a question of increasing penalties. It was changing a presumption. In respect to the law regarding dangerous driving and dangerous driving causing death, if the person had a positive blood alcohol reading, the presumption was changed so that the accused would have to prove that he was not driving dangerously whilst inebriated. In the case entitled Jess's law, in which this poor young woman died about 100 metres from my electorate office, the court found that she had successfully crossed Marmion Avenue, and having reached the eastern-most kerb, she turned on the spot and stepped back onto Marmion Avenue to go back to her friends on the median strip, and she was struck by a vehicle. The driver returned a positive blood alcohol

reading but the court found that notwithstanding that reading, he was driving within the speed limit, keeping a proper lookout and could not be said to have been driving dangerously. The law was changed so that if a person had a blood alcohol reading, there would be a presumption that he or she was driving dangerously until he or she proved the contrary. Let us get the facts right first before we go to whether there was a single case. That is the case, is it not? It was not just a case of increasing the penalties. It was a case of introducing a presumption that if a person is driving with a blood alcohol content, the person is presumed to be driving dangerously until he or she proves the contrary. That is what that whole law was about, was it not?

Mrs L.M. HARVEY: We are digressing somewhat from the legislation in front of us but, yes, I believe that the point we are making is a valid one about the legislative changes that occur in response to a single incident that has outraged the community. Therefore, that case is pertinent, in that the community was outraged with the offender's outcome in Jess's circumstances. But the member for Butler is quite right, the presumption was changed with respect to the alcohol content that a driver is read at and, as a result of that change to the presumption, drivers are now subject to a higher penalty by reason of the fact that they can be charged with a more serious offence in the first instance, which obviously then leads to a higher penalty.

Mr J.R. QUIGLEY: It is true that it was not just the single case of Jess's law. As Mr Speaker knows, not long before that, there was the case of a very high-profile lawyer who turned into his property in Dalkeith—I think it was Circe Circle, or it might have been Viking Road—who also had a positive blood alcohol content, but the prosecution was unable to prove that at the slow speed at which this senior legal gentleman turned into his driveway, his driving was dangerous. The prosecution was unable to prove that, and that disturbed the community. I am saying that there was a trend of cases. It was not just Jess's death in isolation; it was a trend of cases in which everyone said consistently that the law has to be changed. That is similar to what is now called the one-punch law. That goes back to the case of Norman Anzac Ward, which I was involved in—I do not know where the minister was in 1976—who was a police sergeant at Laverton, I think it was. He struck an arrestee, who fell down and hit his head, and death followed. In that case, the Full Court said that was accidental because the prosecution had failed to prove, both objectively and subjectively, that Sergeant Ward could have foreseen the death. Similarly, there was the case of John Pat in Roebourne in which five officers were charged with manslaughter. In the middle of a mini-riot, or heavy disturbance, the youth was punched and fell down, struck his head and subsequently died. The judge said, following Ward's case—I was there; he redirected the jury—I hope the member for Armadale finds this interesting —

The SPEAKER: Member for Butler, I think we are starting to digress.

Mr J.R. QUIGLEY: I am dealing with this trend. There was a whole string of cases before the one-punch and the presumption dangerous driving laws were changed. I am asking in relation to the legislation before Parliament: since the significant amendments were made to section 280 of the Criminal Code, has there been a string of cases that demonstrate that the sentencing under section 280 of the Criminal Code has been manifestly inadequate by community standards and therefore requires this amendment? Does that make it relevant, Mr Speaker?

The SPEAKER: I think you have traversed it very thoroughly, so we can move on.

Mr J.R. QUIGLEY: Was there a string of cases prior to the amendment to section 280 or was it once again preventive action on the part of Liberal Party policy?

Mrs L.M. HARVEY: Perhaps the member for Butler could inform the house of how many cases it would take, in his view, to justify an amendment to legislation. The government has made it very clear in the second reading speech and has named a number of cases in which we believe the sentencing was not consistent with community standards. As a result of that, and in response to concerns by the community, we have brought this legislation before the house. We have been discussing these matters for quite some time and it appears that somewhere in the member's analysis of this, there is a magic figure of cases that would pre-empt a government taking a step to change legislation in these circumstances to impose a mandatory minimum penalty for those types of offences. Perhaps the member might be able to inform us how many victims it will take. How many instances of people receiving lower sentences than the community expects would it take for him to justify changing the legislation? We say the time is right now. We took it to the election and the community endorsed it; we are bringing it before Parliament.

Mr J.R. QUIGLEY: Although it is not my bill and it is unusual for the minister to ask the opposition a question of this nature during consideration in detail, I accept it as a rhetorical question. I would need to see the database and the sentencing history before I could advance that answer. Similarly, the minister put such a rhetorical question to me yesterday, which was: if I think that a mandatory minimum of three years for murder committed by a 17-year-old in the course of an aggravated home burglary is too low, what does the opposition say would be a more adequate mandatory minimum? I accept that also is a rhetorical question, as I would need to see the sentencing database. As far as I can tell, one does not exist.

I have moved on and we will not take up an inordinate time on these clauses, but I am just trying to probe because their honours and the courts expressed to me their concern about how we arrived at these figures when not even the judges have available to them such a database. They have sought government funding. The Chief Justice has sought government funding to create a database so that the community and the government can know the sentencing patterns and trends so that any inadequacies can be identified and addressed. However, because of the state of the budget, no funds are coming forward for such a database. The concern is that this is all being done without proper analysis of what is happening in our courts.

The minister says to me that the government has brought before Parliament a number of cases identifying inadequate sentencing. We will come to these in more detail in a moment but those cases are Miller, Thorn and Ugle, none of which involved murder or manslaughter. They were horrendous crimes, but none of them involved murder, manslaughter or grievous bodily harm. One might have involved grievous bodily harm, but I do not think so. I will go back to the indictment in a moment when we get to the amendments to deal with sections 325 and 326, which are under later clauses in the bill.

My concern is that the government strikes a three-year mandatory mandated minimum sentence for murder by a juvenile. It strikes a three-year mandated minimum for unlawful killing, otherwise known as manslaughter, committed in the course of an aggravated home burglary, but none of us know—with respect, not even the minister—the sentencing patterns of the judges. The government has been highly critical of their honours, and these are noble men with no political agenda. These are noble men and women, should I say.

Mrs L.M. Harvey: Thank you! There are some women. I appreciate you including them.

Mr J.R. QUIGLEY: It is not that there are "some" women; there are a good proportion of women. Indeed, Her Honour Justice McClure is the President of the Court of Appeal and she is no judge to quarrel with. We will come to some of her judgements in a moment. These are noble people doing their best on behalf of the community to inflict appropriate sentences and strike justice, and I am saying and Labor is saying that we should go to what they are doing in actuality before we criticise them.

Dr A.D. BUTI: I am interested in hearing what the member for Butler is saying. I would like to hear some more, please.

Mr J.R. QUIGLEY: Before we criticise their honours for inadequate performance, let us look at what they are doing. When we come to these cases of murder and unlawful killing in the case of aggravated home burglary, the government does not bring one case before Parliament to say, "Here is an example of the judiciary acting inadequately and failing to meet community expectations." I do not get it. We are not opposing it; I just do not understand it at all. All we are seeking to do is to scrutinise the legislation and the policy that sits behind it, as invoked to do by the honourable Leader of the House. Where are the examples of inadequate sentencing for unlawful killing in the course of an aggravated home burglary? It is not a complex matter, I would have thought.

Mrs L.M. Harvey: I answered this last night.

Dr A.D. BUTI: Is the minister saying, in response to the various questions put by the member for Butler about clause 6, that the government does not need a string of cases in which it believes the proper administration of justice did not occur and that the government needs only one case that it believes does not meet the community's expectations and that is motivation enough to change the law? Does the minister believe that what she may consider as one unjust outcome is sufficient motivation or justification for changing the law?

Mrs L.M. HARVEY: As an elected member of this Parliament, I believe in acting consistent with the community views. The community has overwhelmingly endorsed this policy. It is a matter that comes up at every community forum I attend, and we are acting consistent with community views, which is what we are required to do as elected members.

Clause put and passed.

Clause 7: Section 281 amended —

Dr A.D. BUTI: The answer the minister has just given to the previous question I asked is interesting. As the minister knows, clause 7 deals with amending section 281 of the Criminal Code, which of course deals with the so-called one-punch laws that were amended in 2008 by Hon Jim McGinty. As the minister also knows, the amendments were basically to address the so-called one-punch homicide or manslaughter cases when an intent to kill could not actually be proven. That was considered to be in line with community expectation that such an offence would result in a maximum penalty of 10 years' imprisonment for unlawful assault causing death in which intent to kill did not need to be shown. The minister would know that the Leader of the Opposition, the member for Rockingham, brought in a private member's bill called the Criminal Code Amendment (Domestic Violence) Bill 2012 on 26 September 2012, in which he sought to amend section 281 of the

Criminal Code to increase the maximum penalty from 10 years' imprisonment to 20 years in circumstances of aggravation. "Circumstances of aggravation", as the minister would know, is defined in section 221(1)(a) of the Criminal Code as —

> ***circumstances of aggravation*** means circumstances in which —
>
> (a) the offender is in a family and domestic relationship with the victim of the offence; or

"Family and domestic relationship" is defined in section 4(1) of the Restraining Orders Act 1997 as —

> ***family and domestic relationship*** means a relationship between 2 persons —
>
> (a) who are, or were, married to each other;
>
> (b) who are, or were, in a de facto relationship with each other;
>
> (c) who are, or were, related to each other;

There are other paragraphs in that definition.

The Leader of the Opposition's bill was brought before the house in response to community expectation. The minister has stated that she, as an elected member of Parliament, is responding to community expectation. As the minister very well knows, there was much, much angst over many of the prosecutions under section 281 being related to domestic violence. A petition was submitted in the other place and, as a result, on 30 September 2012, the Legislative Council Standing Committee on Environment and Public Affairs tabled its twenty-seventh report in response to that petition. The report recommended that —

> **… the Government urgently review the legislative framework for addressing family and domestic violence incidents to ensure that it appropriately acknowledges and reflects any history of violence and abuse associated with such incidents.**

As the minister said, sometimes one case and normal injustice is motivation enough to change legislation. I am sure the minister is very well aware of the Saori Jones case. I think it is important to allow Parliament to familiarise itself with that case, so I will read part of what the Leader of the Opposition, in introducing the private member's bill, stated in regards to Saori. He stated —

> … the violent death of Saori Jones is foremost in my mind. Saori Jones, a mother of two children, was 31 years of age when she suffered a brutal death at the hands of her estranged husband. Saori endured years of violence in her marriage. On a visit to collect her daughter who was visiting her father in December 2010, Saori's estranged husband forcefully punched her in the head. He only stopped punching his wife when his four-year-old daughter begged him to stop. Saori fell to the kitchen floor, unconscious, covered with blood and vomit. While she lay prone on the floor, unresponsive, he lifted up her shirt to allow their 10-month-old son to suckle from her breast.

Ms L.L. BAKER: I am very much interested in the contribution from the member for Armadale, and would ask if he could continue.

Dr A.D. BUTI: The Leader of the Opposition continued —

> Saori's estranged husband did not seek medical help for his wife. He dragged her into the shower and washed the vomit and blood off her body, then dragged her into the bedroom where he covered her with a blanket.
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> By morning she was dead. Saori's corpse remained in the bedroom for 11 days, rotting under the summer heat, while her two children remained in the house. Saori's corpse was only discovered after police came to the house to question her estranged husband, her killer. Originally he was charged with manslaughter but this was downgraded to "unlawful assault causing death" because the delay in discovering Saori's body made identifying the specific cause of death difficult. He was imprisoned for five years but may only serve three. This sentence enraged many in the community, with the Women's Council for Domestic and Family Violence Services leading the battle for legislative reform to more appropriately reflect the seriousness of domestic violence. One cannot fail to be moved by the horrific nature of Saori Jones' violent death. As the Leader of the Opposition and as a legislator, I am moved to introduce legislation to ensure that sentencing in domestic violence deaths reflect the hideous nature of the crime.

I refer to a document of the Attorney General that was tabled on 18 February 2015 in relation to the review of section 281. The Attorney General stated that some concern had been expressed over the use of section 281 in domestic violence scenarios. As I, the Leader of the Opposition and the Attorney General have stated, unfortunately in some cases that section has to be used. In the Saori Jones case it had to be used because there were problems identifying the cause of death because the body had been rotting for 10 or 11 days. But the

problem was the sentence. Bradley Jones was sentenced to only five years, with a non-parole period of three years; he may be out this year, I am not sure. I know the minister agrees that that was too lenient a sentence. The opposition sought to increase the maximum penalty to 20 years' imprisonment, and without any explanation the government would not agree to amend the Criminal Code. To this day I still do not understand why the government did not amend the Criminal Code. It is interesting that in the Attorney General's ministerial statement given at the time of the tabling of the review, he stated —

> The state government cannot, as a matter of law or convention, instruct the DPP how to prosecute particular cases, and it would be inappropriate for the government to seek to try to wield any such influence;

I think we all agree with that. The Attorney General continued —

> the administration of criminal justice should not be influenced by politics.

That is interesting. One would argue that in many respects the bringing before the house of this bill is a matter of politics. It was raised in the heat of the election campaign, and in answer to many of the questions put to the minister by the member for Butler the minister stated that this is the government's position, without being able to provide any empirical evidence and so forth. But more importantly, why did the minister not agree to support the private member's bill brought in by the Leader of the Opposition? The government may argue now that the amendment it is seeking to change regarding section 281 would result in Bradley Jones receiving a higher penalty. It may say that it welcomes that, but I cannot understand how the minister would believe that 10 years is sufficient as a maximum penalty for someone in the Saori Jones' scenario. Under clause 7, "section 281 amended", the government is seeking a mandatory minimum of 7.5 years' imprisonment. I agree that 7.5 years is much better than five years in the Bradley Jones case, but that is still not sufficient—and the maximum is still only 10 years. In that situation with Saori Jones, Bradley Jones could be sentenced to only 10 years' imprisonment. If the government had supported the private member's bill introduced by the Leader of the Opposition, the penalty could have been much more than 10 years. I believe that the minister deep down would not think that 10 years' imprisonment would be sufficient for Bradley Jones.

Ms L.L. BAKER: I think that the member for Armadale should finish his story. I look forward to hearing his explanation.

The ACTING SPEAKER (Peter Abetz): Member for Armadale, I caution you to try and focus on the clause and wrap it up. Thank you.

Dr A.D. BUTI: Mr Acting Speaker, you can ask me to be relevant —

The ACTING SPEAKER: That is what I am trying to imply.

Dr A.D. BUTI: But I do not think you should be asking me to wrap it up—thanks. I think it is relevant.

Clause 7, proposed section 281(4), relating to offences committed by a juvenile states that the sentence imposed must be a term of at least three years' imprisonment. That is interesting. That is the same sentence that is imposed under clause 5 for murder. Presumably sentencing of a 10-year maximum under section 281 is recognition that the severity of the penalty should not be as great as applied under section 280 for murder because it cannot be proved under section 281 that there was an intent to murder. Therefore, why is the juvenile penalty the same for murder and for the so-called one-punch scenarios? Forgetting about domestic violence for a minute, section 281 was brought in for the so-called one punch outside the pub et cetera. Why are we now saying that the minimum penalty under section 281 for a juvenile should be the same as the penalty for murder? There seems to be some inconsistency there because the penalty for the adult is much lower. Under the amendment to section 280, for an adult it will be 7.5 years' imprisonment and 15 years for murder. I am not sure of the logic. I do have another point, but maybe the minister can respond to that point first. I do not want to put too many things to the minister at once.

Mrs L.M. HARVEY: The member for Armadale raises some very relevant issues. I know that the member shares my outrage in the domestic violence space. That case of Saori Jones was a particularly reprehensible scenario, and I think that nobody can listen to that story and not be outraged and offended by what happened to that woman and her children in those circumstances. As the member acknowledged, had the government's legislation been in place at that point in time, and Saori Jones' husband had been charged under an amended section 281, he would have been subject to a mandatory minimum term of 7.5 years' imprisonment in the context of a 10-year maximum. The member raised a couple of things. The use of section 281 when appropriate in the circumstances is something that can be looked at in a different context. With respect to domestic violence and its interaction with this legislation, in a domestic violence relationship, if there is a violence restraining order in place and the offender who has the restraining order issued against them unlawfully enters the house of a domestic violence victim and assaults them under any of these categories in a violent way or sexually assaults

them, they will be subject to these mandatory minimum terms as well. I believe this is a step in the right direction for domestic violence victims in those scenarios. In addition, they will be charged with those breaches of violence restraining orders. I believe the member for Armadale was in the house when I previously announced the government's changes to family violence restraining orders and the criteria around them. We can go into that at a different time.

With respect to the maximum penalty, there is an artificial ceiling in the Criminal Code for life imprisonment being around 20 years. One must look at all these offences and maintain some kind of relativity with them. I understand that was part of the reasoning for the government at the time not accepting the extension of the maximum for section 281, "Unlawful assault causing death", to 20 years. We already have that sentence for murder and manslaughter. I understand that that was the reasoning at the time. That said, perhaps a debate for another time is where the maximum should realistically sit. As previously discussed, we are not proposing to amend the maximums as part of this legislation.

A comprehensive review of the Young Offenders Act has been in train over time, and I believe that is nearing the final stages of consultation and a range of offences and penalties under the Young Offenders Act will be looked at in greater detail. The government has settled on three years being the maximum in keeping with its requirement to treat young offenders differently from adults in this law and order space. At the present time, we are looking at only 16 to 17-year-olds in the remit of this legislation, understanding that the review of the Young Offenders Act is occurring concurrently with this legislation running through Parliament. A few other irons are in the fire in that space. Yes, we have a review clause in this legislation as well so we can have a look at what happens as a result of this measure. We are introducing those new categories of home burglary and aggravated home burglary so that we can keep better track of these cases where there are violent offences occurring in the context of an aggravated home burglary. It is complex. In starting to look at changing the maximums, the relativities of the other more serious offences need to be considered at the same time. That is a conversation for a different time.

Dr A.D. BUTI: I will not labour this much longer, minister. I think I misspoke and the minister also probably misspoke because, of course, the Bradley Jones case was not a burglary issue, so this measure would not apply.

Mrs L.M. Harvey: That's true. Of course—yes.

Dr A.D. BUTI: Finally, in tabling that report, the Attorney General acknowledged that there is quite considerable community comment on the need to reconsider maximum penalties for domestic violence under section 281. I hope that the member, as the Minister for Police, the minister representing the Attorney General and the Minister for Women's Interests will consider that in due course.

Mrs L.M. HARVEY: Just in response, I would need to reacquaint myself with all aspects of the Saori Jones case because I thought there was a VRO in place at the time. Both of us probably need to go back and have that discussion.

Dr A.D. BUTI: I do not think there was because Saori took the child to his house for a visit that was approved.

Clause put and passed.

Clause 8: Section 283 amended —

Mr J.R. QUIGLEY: Clause 8 deals with an amendment to section 283 of the Criminal Code. I want to deal with this and all other clauses expeditiously. Save and except for the amendments to home invasion involving sexual assaults, which I believe start at clause 14 —

Mrs L.M. Harvey: Clause 11 to amend section 320 of the code refers to sexual assaults against a child under the age of 13 years.

Mr J.R. QUIGLEY: In relation to the other clauses right up to home invasion involving aggravated sexual assault, is it fair to say this, and then we can just skip by them and I will not raise them —

Mrs L.M. Harvey: Is that clause 15 to amend section 326, "Aggravated sexual penetration without consent"?

Mr J.R. QUIGLEY: That is right. It is to do with aggravated sexual penetration without consent, because that involves the three cases the minister brought to this Parliament. If you can cut me a bit of latitude here, Mr Acting Speaker (Mr P. Abetz), up until there—did we say it is clause 15?

Mrs L.M. Harvey: Perhaps the member needs to articulate which clauses he means. Clause 11 amends section 320, which refers to sexual offences against a child under 13.

Mr J.R. QUIGLEY: I do not want to go through every clause. Up to clause 15, the bill deals with aggravated sexual —

Mr P. Papalia: Maybe the Chair can deal with them up to there.

Mr J.R. QUIGLEY: In relation to the clauses between 8 and 14, is it fair to say this: in setting the mandatory minimum penalty, the minister is not relying on the precedent cases that she identified but, rather, is saying, "It is our policy to set the mandatory minimums set in this bill. We're not going to take you to individual case judgements where we are criticising particular outcomes"? She is, however, saying, "It is our policy, as announced at the election, to set these 75 per cent minimums. We're not going to go to individual cases." If that is the situation in relation to each of these clauses, we will not take them further.

Mrs L.M. HARVEY: As I previously mentioned, we highlighted three examples, and I said last week in the debate that I was not prepared to go through every individual judgement and sentencing outcome for the range of offences for which the penalties will be amended by this amending bill. However, we settled on the mandatory minimum penalty at 75 per cent of the maximum, and obviously we have prescribed that mandatory minimum penalty to be 15 years in the terms of life imprisonment that could be the maximum penalty imposed; and the three-year mandatory minimum for juveniles in those areas that we have been discussing. Although we highlighted three cases that the community raised about which there was outrage at the circumstances and the sentencing outcomes, in my view that was sufficient and, acting consistently with the views of the community, we have brought the legislation forward in response to the community's endorsement of our policy.

Mr J.R. QUIGLEY: The minister's given answer begs one further question. I am trying to accelerate this debate. However, the minister said that she has already indicated the cases and is not prepared to go through individual judgements. I am now talking about amendments contained in clauses 8 to 14 inclusive. The minister has not brought any case before Parliament—let us not talk about discussing and analysing them in detail—in relation to those clauses, has she?

Mrs L.M. Harvey: No.

Mr J.R. QUIGLEY: It is therefore not a case of discussing them in the broad or in the particular; there is no case.

Mrs L.M. Harvey: I said that I would not bring individual cases forward, bar the three examples highlighted in my second reading speech.

Mr J.R. QUIGLEY: The three that the minister highlighted are the ones she is relying on.

Mrs L.M. Harvey: Yes.

Mr J.R. QUIGLEY: It is fair, therefore, to say that all the amendments to penalties between clauses 8 and 14 inclusive were arrived at with the same considerations as the considerations we discussed in clauses 5, 6 and 7 thus far, and we need not traverse that ground again; is that fair?

Mrs L.M. HARVEY: I think that we have traversed that ground effectively, member for Butler, and my response will remain consistent.

Mr J.R. Quigley: Good.

Mrs L.M. HARVEY: We took this policy to the community; the community emphatically endorsed it; and in keeping with our commitment to the community, we have brought the amendment before the house.

Clause put and passed.

Clause 9: Section 294 amended —

Mr J.R. QUIGLEY: Subject to other members, I have no clauses to raise prior to clause 15.

Clause put and passed.

Clauses 10 to 14 put and passed.

Clause 15: Section 326 amended —

Mr J.R. QUIGLEY: Bear with me for a moment, Mr Acting Speaker. I am trying to speed up this process. I will open up the Criminal Code and I will not take a moment of the Parliament's time. I believe the section of the code we are dealing with is 326. Clause 15 involves offences about which the minister brought three cases to Parliament; that is correct, is it not? We will speed this up if the minister could say yes by interjection.

Mrs L.M. Harvey: Yes.

Mr J.R. QUIGLEY: The minister is nodding in furious agreement, but I just want it for the record.

Mrs L.M. Harvey: By interjection, yes.

Mr J.R. QUIGLEY: The minister took exception to the comments I made in my second reading contribution about the three cases raised by the minister. I will refer to those comments. I want to get this right because—no criticism of the minister, of course—they were not in chronological order, as I recall. Miller's case involved the

offences that were committed in the 1990s—during, I think, the first term of Premier Richard Court's government. That was a case that involved these offences, but the judgement was given in March 2005 —

Mrs L.M. Harvey: Miller was 25 October 2002, member.

Mr J.R. QUIGLEY: Sorry?

Mrs L.M. Harvey: The offence was committed on 25 October 2002 for Miller. That would have been the Gallop government, I believe, member.

Mr J.R. QUIGLEY: I am sorry; the minister is right. It is Thorn's case. In Thorn's case, they were the offences committed on 2 September 1995.

Mrs L.M. Harvey: Correct.

Mr J.R. QUIGLEY: He was subsequently convicted on a plea of guilty in 2004. That went to the Court of Appeal and the court upheld the sentence imposed; I think it was a total of seven and a half years. That was the case in which His Honour Judge John Wisbey, as he was then, was charged with the difficult task of striking a sentence in 2004, as the law was in 1995, consistent with the case law of 1995. Does the minister agree that in that case it is hard to be critical of the judiciary now on the basis of a sentence being imposed more than 10 years ago for the commission of an offence 20 years ago? That is not reflective or indicative of a failure within the system today, is it?

Mrs L.M. HARVEY: The member raises an interesting point because if we go to the victim in the case of Thorn v The State of Western Australia, the offender broke into the house after disconnecting the victim's telephone, ensuring that she would be unable to seek help as required. He entered the bedroom of the victim, where she was sleeping with her four-year-old daughter. He sexually assaulted the victim while her daughter slept beside her. Back in 1995, the maximum penalty for that offence, as I understand it, was 20 years' imprisonment; this offender was sentenced to seven and a half years' jail. Under the new regime, the mandatory minimum sentence would be 10 and a half years for that offence.

I put it to the member for Butler that if I were the victim in those circumstances, I doubt that 10 and a half years would seem sufficient, but in the context of looking at 75 per cent of the maximum, I believe 10 a half years is more consistent with community expectations than is seven and a half years, for a victim who has been through the horrendous ordeal of being sexually assaulted with her four-year-old sleeping beside her. I can only imagine that she must have been wondering if he was going to sexually assault her child next, while she had no means whatsoever of seeking assistance, given that her home telephone had been disconnected. It is a very serious offence. In my view, something closer to the maximum would have been preferable; however, this legislation seeks to amend the mandatory minimum to 75 per cent of the maximum, so he would be looking at a minimum term of imprisonment of 10 and a half years under this legislation, which is better than the seven and a half years that he received as a consequence.

Mr J.R. QUIGLEY: To take the minister's points one by one, I have gone through the media at the time and I could not find any expression of community outrage about the outcome of this case. Did the minister find any media on that? I could not find any public expression of outrage or any criticism of the court's performance in the case of Thorn in 2004 for the imposition of the 1995 penalty. Did the minister find any?

Mrs L.M. Harvey: Member, the question you need to ask is: do you think seven and a half years was sufficient, or would 10 and a half years be preferable, as a minimum?

Mr J.R. QUIGLEY: I take that as a rhetorical question, but before answering that, the minister said that it was open to the court to impose a maximum sentence of 20 years. Is that correct?

Mrs L.M. HARVEY: That is correct, member. If the member looks at section 326 of the Criminal Code, he will see that in cases of aggravated sexual penetration without consent, the person in circumstances of aggravation is guilty of a crime and liable to imprisonment for 20 years.

Mr J.R. QUIGLEY: I want to read from the judgement itself. One of the senior judges was a married woman, Mrs Justice Christine Wheeler of the Court of Appeal. Before her appointment to the Supreme Court she was, as I recall, for all of her professional life a State Counsel for the state of Western Australia, so she was not a defence counsel looking for excuses. She was the go-to person behind the then Mr Kevin Parker, QC, later Mr Justice Parker at what was then called Crown Law. She was the president of the court and one would assume would have had some sympathy with the plight of a woman who was so sexually assaulted. The other justices were Justice Buss, who was still on the Court of Appeal. One has only to read his judgements to see that he is very, very stern, as was Mr Justice Miller QC, who had previously been a defence counsel and prosecutor, but soon gained the reputation at the Court of Appeal for being very, very strict, both in terms of the conduct of trials and in the imposition of sentences.

I refer to them for the reason that these judges are burdened with what we do in this chamber. The minister has correctly read out the penalty contained in the Criminal Code as a maximum penalty. I now turn to paragraph 41 of the 2008 Court of Appeal judgement in Thorn v The State of Western Australia. It states —

> Clause 2(1) of Sch 1 of the *Sentencing Act 1995* (WA), which is part of the transitional provisions introduced by the *Sentencing Legislation Amendment and Repeal Act 2003* (WA) (the *Amendment and Repeal Act*), requires that a court which has decided to sentence an offender to a fixed term of imprisonment must impose a fixed term that is two-thirds of the fixed term that would have been imposed under the law as it stood prior to the *Amendment and Repeal Act*.

Paragraph 42 reads —

> So, for example, the maximum sentence which may now be imposed for sexual penetration, without consent, in circumstances of aggravation, contrary to s 326 of the *Criminal Code*, is 13 years and 4 months.

Does the minister disagree with their honours' analysis of the law, both in the Criminal Code, which the minister has referred to, and in the transitional legislation, which required them to impose a fixed term as if the maximum term were two-thirds of that in the Criminal Code? Does the minister disagree with their honours?

Mrs L.M. HARVEY: The member for Butler has just explained quite succinctly that the maximum sentence that the judge could have been imposed as a penalty in that circumstance was 13 years and four months. When we go to the finer point of that judgment, under section 326 of the Criminal Code titled, "Aggravated sexual penetration without consent", the maximum sentence that could be imposed in the context of the repeal act to which the member referred was 13 years and four months. As a consequence of that sexual offence a six-year sentence was applied. For aggravated sexual penetration without consent, that offender was still allocated only a six-year penalty for the action of unlawfully sexually penetrating that woman while her child was lying beside her. Six years was less than half the prescribed maximum at the time, which was 13 years and four months. Do I think that is acceptable? I do not, which is why the legislation is before Parliament.

Mr J.R. QUIGLEY: I understand what the minister has said but, with respect, we will do this in steps. Does the minister agree, however, that the maximum term that the judiciary can start with in this case is not 20 years but 13 years and four months, as identified by the Court of Appeal?

Mrs L.M. HARVEY: At the time of the sentencing for that offence there was a restriction to the maximum penalty that could be imposed, but that no longer applies.

Mr J.R. QUIGLEY: Correct. The minister would agree, would she not, that under clause 15 before the chamber, and all other clauses that precede it, that for multiple offences on the one indictment, most of which include multiple offences—I am looking at the database, and a lot of them include deprivation of liberty, burglary, aggravated sexual penetration and, unfortunately for the victims, often the offences include multiple counts of sexual penetration—there is no requirement to make all of these terms cumulative? Therefore, if a person commits aggravated burglary and thereafter deprives the victim of his or her liberty and sexually penetrates the person on several occasions, notwithstanding that each one of these offences carries a mandated minimum penalty, it is quite open to the court to make those terms concurrent. In other words, the court still could apply the law as it is today; that is, the principle of totality of sentence, which is that one cannot look at the sentence on any one particular count but on the total sentencing package. Does the minister agree that that is still the situation under the amendments the government has before the chamber?

Mrs L.M. HARVEY: The member is quite right. My understanding of the case of Thorn v The State of Western Australia is that the cumulative aspect of that sentence was six years for the aggravated sexual penetration plus 18 months for the aggravated burglary, and then the other aspect of that case was that those sentences were made concurrent. Although the principle of totality applies and is one of the principles that the judiciary takes into account in sentencing, it is not restricted by the principle of totality. The judiciary still has the option of levying sentences to be cumulative if it so choses, or to have the offender's sentences applied concurrently. That option is still available to the judiciary and this amending legislation does not address the ability of the judiciary to apply penalties for these offences by their nature as either being concurrent or cumulative.

Mr J.R. QUIGLEY: With regard to the totality principle that the courts are required to apply, in this instance it starts with 13 years and four months as the maximum penalty for that offence, and then seven years and six months becomes the total sentence, which by my reckoning is in excess of the 50 per cent.

Mrs L.M. HARVEY: No, we need to get this correct because it is important. I know that the member has the judgment in front of him so if he turns to paragraph 43, the declaration of the judge at that time was that the offences committed by the appellant were, without doubt, within the worst category of offences of the kind in

question, yet for that offence of aggravated sexual penetration without consent whereby the maximum at the time available for that offence was 13 years and four months, the offender was still penalised with a term of only six years, which is less than half the maximum penalty available when the offences were within the worst category of offences of the kind in question. The salient point is that it is not acceptable and that is why the legislation is before the house. The community does not find that level of sentencing or that consequence to be appropriate for the actions of the offender in this circumstance.

Mr J.R. QUIGLEY: I appreciate what the minister is saying. It is always a difficult proposition to determine which offence is the worst and which is the worst category. This offence occurred in 2004, and I would definitely say that it is all subjective. When we talked about Kuzimski yesterday, the minister said that that was the worst murder, but then again —

Mrs L.M. Harvey: I did not say it was the worst murder; I said it was the most severe sentence ever handed down in the state for murder. It was not the worst murder, but the heaviest sentence.

Mr J.R. QUIGLEY: But the minister detailed how the person had been shot with a shotgun and a digger had been used and she said that the offence was as bad as it gets. But then again, I refer to the victim who had his head cut off, which was later found washed up on the beach at Rottnest Island. If we had asked him at the time his head was being cut off, he would have said, "This is as bad as it gets. It does not get worse than this; my head is being cut off!" It is hard to categorise which offence is the worst out of all of those offences. Is the case of Ugle worse than the case of Thorn? In the case of Ugle, a 78-year-old woman was defiled in the most terrible way; we will come to her case in a moment. Perhaps the victim in Ugle would say, "Hang on, what happened to me"—I will not go through the detail of that again, it is already in *Hansard*—"was considerably worse than what happened to the victim in the case of Thorn." However, the judges have to strike a sentence, which in its totality reflects the law. In Thorn's case, a seven and a half year sentence was handed down when the maximum for sexual aggravation was 13.4 years—I will do the figures over lunch.

I will come to the minister's valid correction of my statement on the proclamation of the amendments to section 9AA of the Sentencing Act, which was a valid criticism, because they had not been proclaimed at the time of that sentencing, and I accept that. But at the time that amendment was made to the Sentencing Act, the Attorney General said—I will come to his speech in more detail later—that the government was giving statutory recognition and statutory fiat to what the judges were doing because the government agreed with what the judges were doing. The plea of guilty discount was not, as I incorrectly said, done at the command of the Barnett government because it had not been proclaimed, but the Barnett government did agree with what the judges had hitherto been doing at the command of the High Court—that is, giving a sentence discount for a plea of guilty. Was it a plea of guilty in Thorn's case?

Mrs L.M. Harvey: As I understand it, yes.

Mr J.R. QUIGLEY: So there was no trial. That is stated in paragraph 2. I am sorry to ask the minister that question. I should have just put it to the minister; I do not want to keep this going for longer than necessary. Mr Justice Buss said that the appellant was convicted on his own plea of guilty to six serious offences. By force of law, stemming from the High Court down, the court has to give recognition to the guilty plea. Take the 7.6 years and add 25 per cent to that 7.6 years, which I understand will not be done under the new legislation as there will be no discounts for pleas of guilty, and factor back in the discount for the plea of guilty and it takes the sentence back to 10 years. What did the minister say the mandated minimum sentence would be? She said it would be 10.5 years, did she not?

Mrs L.M. HARVEY: In the circumstances of the case of Thorn, the new mandatory minimum term would be 10.5 years.

Mr J.R. QUIGLEY: To understand the way that the court has structured the sentence of 7.6 years one has to factor back in the discount for the plea of guilty, which I agree will not apply under the minister's legislation, which takes the sentence back to 10 years. That can hardly be a criticism of the venerable Judges Wheeler, Buss and Miller; because if one reconstructs their sentence, it is 10 years. I realise there will be no discounts for pleading guilty but that is a different case. The minister's criticism of my criticism was that I got the maximum penalty wrong. The minister has been gracious enough to accept that it was not 20 years; it was 13.4 years by reason of the transitional provisions.

I have to say this about the transitional provisions: what a mess. I agree that Mr Porter, when he was Attorney General, came in and cleaned that up. I am not being party political, but the transitional provisions are a mess for their honours. That is what this Parliament delivered the judiciary. My objection to what the minister said is that while the judiciary is battling with the mess that goes out the chamber door, governments and politicians come into this Parliament and criticise their honours for doing their best to unscramble the eggs that were scrambled in this very chamber. I agree that Mr Porter untangled those transitional provisions. I agree that he did that, so I am not to be party political here. I am trying to be gracious and say that I am not being political

here, but the judges were delivered a very difficult set of laws by this Parliament, including the minister introducing this legislation. I am not being critical. Identifying the maximum penalty of 20 years when not really cognisant of the transitional provisions limiting that is artificial. People reading the Criminal Code at the time would have thought that the maximum penalty was 20 years, because they could not understand the transitional provisions. Is the minister gracious enough to accept with regard to the transitional provisions and the 25 per cent discount that the judges had to give at law on the plea of guilty, that their honours coming up with a penalty that equates to 10 years did not do a bad thing at all when this legislation's statutory minimum would be 10.5 years. Would the minister be gracious enough—not to the Labor Party—to at least make that acknowledgement to the noble and erstwhile people who are charged with trying to make sense of the laws that we deliver? They were doing their best under the laws that we delivered them. When I say we delivered, I appreciate that the minister was not in the Parliament at the time; but this Parliament delivered those laws. Does the minister acknowledge that the judges were doing their best with a difficult set of scrambled egg laws that we delivered their honours down the Terrace?

Mrs L.M. HARVEY: The member raised a couple of interesting points. He commented that the judiciary at the time was doing its best in its totality as a reflection of the law as it stood at the time. Indeed, that is what brings us into this chamber with the amendment currently before the house. When those sentences, which reflect the law at the time, are not consistent with community expectations, our job as elected members is to change that. That is what we do in his place: we set legislation. When the community says that it has had enough and that this is not consistent with what it agrees with and that these penalties do not reflect the seriousness of the offences offenders have been charged with and subsequently convicted of, it is time for us to act to change the legislation. That is why we do what we do in this place.

The member addressed discounts for guilty pleas. He is quite right that there was a bit of an ad hoc and almost rule-of-thumb approach to discounts given to offenders who affected a plea of guilty. That was about 25 per cent. The amendment the Attorney General brought to this place was to change the Sentencing Act 1995 around a plea of guilty that puts a head sentence for an offence that includes a fixed term, and that the court must not reduce the fixed term under subsection 2 by more than 25 per cent. Importantly, the amendment also qualifies that the sentence can only be reduced by 25 per cent when the offender pleads guilty or indicates that he or she would plead to guilty at the first reasonable opportunity. In those circumstances, it makes it incumbent on the offender to work towards the needs and alleviate the stress of the victim by a plea of guilty at the earliest possible point. That takes away at the first reasonable opportunity the victim's trauma of having to appear as a witness before the court et cetera.

The amendment to the Sentencing Act 1995 formalised that arrangement and put a caveat over that, which ensured that the offender would be eligible to receive that 25 per cent discount for an early guilty plea only if they ensured that they pleaded guilty at the first reasonable opportunity. The member for Butler said that the judiciary was imposing sentences that in their totality reflected the law at the time, but we have determined that that is not consistent with community expectations.

Debate interrupted, pursuant to standing orders.

[Continued on page 1662.]