

**CRIMINAL CODE AMENDMENT BILL (NO. 2) 2011**

*Introduction and First Reading*

Bill introduced, on motion by **Hon Alison Xamon**, and read a first time.

*Second Reading*

**HON ALISON XAMON (East Metropolitan)** [10.08 am]: I move —

That the bill be now read a second time.

The Criminal Code Amendment Bill (No. 2) 2011 seeks to amend the Criminal Code to ensure that mandatory sentencing provisions for assault on a public officer do not apply to persons whose judgement or behaviour at the time of the offence was impaired to a significant extent by mental impairment. Mental impairment is defined in the Criminal Code as “intellectual disability, mental illness, brain damage or senility”. For the purposes of this bill, I have also sought to define mental impairment in reference to the Mental Health Act 1996, which is not inconsistent with the definitions included within the Criminal Code.

In 2009, the Criminal Code Amendment Bill 2008 was debated and passed. This legislation introduced mandatory sentencing provisions for people convicted of assaulting or causing bodily harm to police officers, ambulance officers, transit guards, court security officers or prison officers, and also introduced the new sections 297 and 318 of the Criminal Code. During debate on that bill, I raised my concerns about the potentially negative impact that mandatory sentencing could have on some of the most vulnerable members of our community, in particular those persons who commit an assault and who, at the time, were suffering from a mental illness and were not cognisant of the implications of their behaviour. Unfortunately, these concerns were not shared at the time of the debate and the Greens (WA) were the only party to vote against this legislation.

We have now had enough time to see the effects of mandatory sentencing on our community. We are witnessing some foreseeable negative outcomes in the form of persons with a mental illness being sent to jail rather than receiving much-needed treatment. We are also witnessing other negative outcomes such as carers and loved ones of persons with a mental illness no longer having the confidence to call for assistance from our public officers in the event of a crisis. These outcomes were predictable and are wholly unacceptable. They must be addressed urgently.

After the mandatory sentencing provisions became law, it came to the public’s attention that the first two people to face these charges suffered from a mental illness, which, although disappointing, did not come as a surprise to others. After negative media ensued, prosecutors made the decision to downgrade the charges so that a mandatory jail term was no longer a threat. In this case it was the police, or the prosecution, who made the decision to take mandatory jail off the table. But this is the fundamental problem with mandatory sentencing legislation: the discretion that should rightly be with our courts, our judiciary, is available only to police and the prosecution. It is not appropriate that the discretion whether to send someone to jail lies with them and not with our judiciary. These decisions should not be made away from public scrutiny. This strikes at the fundamental safeguards of our legal system. It is law by the police, not law by the courts.

I have been raising my concerns for some time now about the power of police to pursue mandatory detention for people with a mental illness. In response, I have heard claims from government that it is not a problem as the prosecutorial guidelines apparently stipulate that if it is determined that an offender has a mental illness, mandatory sentencing charges will not be pursued. This response is completely inadequate and offers little reassurance. For starters, guidelines can be changed or ignored.

I have also spoken with parents whose children are currently in jail under mandatory sentencing provisions, and who have outlined known histories of their child’s mental illness, often coupled with a history of substance abuse. Clearly, some people have fallen through the cracks, despite government claims. To further explain, these offenders have committed assault whilst under the influence of drugs or alcohol. Substance abuse is not an excuse under the law, nor is there a suggestion that it should be, but in some instances substance abuse is a symptom of deeper underlying mental issues that often remain untreated. When the facts of an offence are not in dispute, mandatory jail follows. If discretion was available to look at the entire picture, perhaps these people would be compelled to receive much-needed treatment instead, and the cycle of violence would be addressed. Additionally, of deep concern are the families and carers who will no longer call the police or an ambulance if their loved ones are in the throes of a psychotic episode. These are people who should be entitled to expect broader assistance and who should have confidence that the system will protect them and their loved ones, but that confidence has been lost with the threat of jail hanging over their heads should their loved ones, without criminal intent or an understanding of the consequences of their actions, cause harm to a public officer.

People who suffer from a serious mental illness and who need immediate assessment or hospitalisation are generally transported by ambulance or police van. This often occurs in a highly charged atmosphere and is a high

anxiety situation. The unwell person may have a lack of insight into their illness and may require forcible transportation. Under these circumstances, the chance of them lashing out is not hard to imagine. Some may argue that such a situation is not a place for police or ambulance officers—they may be right—but there is currently little alternative. Until there is, we turn to these public officers for help. For families who expect to be able to call on our public officers for help, no amount of verbal assurance by government and waving around of guidelines will restore that confidence. Put simply, the law is wrong and the law must be changed.

Public confidence is restored by changing the law, but in no way does it diminish the seriousness of assaults against public officers. Our public officers, like all workers, have the right to be safe at work and to return home safely at the end of the day. The threat of mandatory sentencing was always promoted as a solution to assaults on our public officers by virtue of its alleged deterrent qualities. If that is the case, and mandatory sentencing for assaults on a public officer has been successful as a deterrent, it will still not be the case for those experiencing a mental illness and whose judgement or behaviour at the time of the offence was impaired to a significant extent. These people are not in charge of their faculties and they are not making the decision to assault anyone with a rational mind. They are not, nor should they be, held automatically criminally culpable for their actions. Of course, this does not mean that they cannot, or even that they should not, be charged. If someone is insane, their defence will plead as such. Most people who experience mental illness, even acute mental illness, do not live their entire lives in the grip of mental illness and are not insane. Mental illness can be much like physical illness—it can wax and wane throughout the course of people’s lives. For these people, if their only choice is a mandatory jail term or an indefinite term in a mental health facility, then that is no choice at all—it is manifestly unjust.

However, if this bill is successful, it is not a “get out of jail free card” either. People may still find themselves on the receiving end of regular assault charges or grievous bodily harm charges. They may still find themselves going to jail, perhaps even for as long as they would have had they been subject to the mandatory terms, or longer. The point is: sentences will be determined by a judge after full consideration of all the facts and mitigating factors. People may also find themselves the subject of a compulsory treatment order, which may send them on the path to wellness. For a person with a mental illness who has committed an offence, there can be any number of appropriate penalties or orders that may be far more suitable than jail.

This bill is also not an excuse for anyone living with a mental illness to be free of penalty if they assault a public officer. Mental illness, and its severity, occurs on a continuum. Simply living with a minor illness is not a defence in itself. The wording of the bill stipulates —

... judgment or behaviour at the time of the offence was impaired to a significant extent by mental impairment.

The same definition is within the Mental Health Act 1996 and has been well tested in law. Existing definitions within the Criminal Code also make clear what constitutes mental illness, including, importantly, what does not. Again, these definitions have been well tested in law.

In the 2009–10 annual report of the Council of Official Visitors, specific mention was made of concerns about the effect that the introduction of mandatory sentencing had had particularly on the families of those with a mental illness. One of the report’s recommendations was that legislative amendment be sought. It is significant that bipartisan statutory bodies are joining the chorus of concern about these laws, and they should not be dismissed. The Minister for Police and the Attorney General have been trying to put people’s minds at ease about these laws. Some funding has been provided to mental health justice services. The Minister for Police has given statements about the training in mental health issues that officers receive. We have been told that offences will be dealt with on a case-by-case basis. We have been given assurances that police prosecutors will take circumstances such as mental impairment into account when deciding whether to proceed with a prosecution. There is no doubt that training for police and funding for mental health justice services are welcome, but there is clearly much room for improvement. They are both very important areas, but none of these things actually deals with the core concern. If the government did not intend people suffering from a significant mental impairment at the time of an offence to be subject to mandatory sentencing, a provision should have been included in the legislation. I am calling on the government to remove all doubt, and to change the law so that this intention is clear.

We have recently debated and seen unanimous support for the creation of a mental health court or diversionary program. Fundamentally, the proposal to establish a mental health court is about allowing our courts discretion to provide appropriate help, support and treatment when people suffering from a mental illness come before the justice system. However, the proposal for court diversion programs, such as the Drug Court and a mental health court, is incompatible with the idea of mandatory sentencing. The strength of these programs is in their flexibility and the opportunity to tailor a court response to an individual’s needs, whether that be medical treatment, access to support programs, assistance with accommodation, or employment. Mandatory sentencing

has no flexibility whatsoever to take into account individual circumstances and needs, and is completely inconsistent with this approach to addressing offending behaviours.

I have stood in this place and heard much talk about the government's commitment to mental health. Any inroads we make in the treatment of mental illness are for nothing if they are not supported by similar improvements in the treatment of the mentally ill within the justice system. People with serious mental illness are among the most vulnerable in our society. Their health and social outcomes are significantly worse than that of other members of our population. We should not be criminalising mental illness. Simply, if it was never the government's intention to capture people with a mental illness through the introduction of the mandatory sentencing provisions, members have no reason not to support this bill. Of course, if the motivation behind sending people with a mental illness to jail is vengeance, the proponents of mandatory sentencing laws should state that and not hide behind the claim that these laws are about deterrence. For those people who are driven by revenge, this bill will clearly not be satisfactory.

I am not the first person to say that our prisons should not be the state's largest psychiatric hospital. Mandatory sentencing has a particularly unjust impact on those with mental illness. It also has a terrible impact on the peace of mind and the personal safety of not only the mentally ill but also their carers and loved ones.

This bill is not excusing violence, or saying that it is acceptable for our police and other public officers to be in harm's way. It is about allowing for the judiciary to determine whether mental illness played a central role, or was at least a factor to some degree, in the committing of an offence and, if so, to decide the appropriate punishment and outcome for the offender. I commend the bill to the house.

Debate adjourned, pursuant to standing orders.