

EXPLANATORY MEMORANDUM

CRIMINAL LAW AMENDMENT (HOMICIDE) BILL 2008

Part 1 - Preliminary matters

1. Short Title

This clause cites the short title of the Act – *Criminal Law Amendment (Homicide) Act 2008*.

2. Commencement

Sections 1 and 2 of the Bill are to come into operation on the day on which the Act receives Royal Assent with the remaining sections to be proclaimed on a date or dates to be set.

Part 2 – The Criminal Code amended

In 2007 the Western Australian Law Reform Commission released a report for Project 97 containing a Review of the Law of Homicide. This Report considered all offences contained in the *Criminal Code* related to homicide, relevant defences to homicide and sentencing matters. Parts 2, 3 and 4 of this Bill implement generally several of the recommendations contained in the Report and other matters.

Division 1 – Preliminary matters

3. Code amended in this Part

This clause provides that the amendments in Part 2 of the Bill relate to *The Criminal Code*.

Division 2 – General amendments

4. Section 23 replaced by sections 23, 23A and 23B

This clause separates the constituent parts of the existing section 23 into three new sections. This is intended to clarify that the three concepts contained within the existing section 23 are distinct.

Proposed section 23 Intention and Motive

Proposed section 23 is comprised of the exact wording of the second and third paragraphs of the existing section 23.

Proposed section 23A Unwilled conduct

Proposed section 23A is comprised of the first paragraph of the existing section 23 except the parts of that paragraph dealing with accident.

Proposed section 23B Accident

This proposed provision incorporates that part of the existing section 23 regarding accident.

Proposed section 23B(3) provides that the egg-shell skull rule is an exception to the general test for accident. This section prevents an accused who has deliberately applied force to another person from relying on the defence of accident even where the death or grievous bodily harm of the other person would not have occurred but for the presence of a defect, weakness or abnormality in the victim. It is irrelevant whether or not death or grievous bodily harm was intended or foreseen by the person or reasonably foreseeable by a reasonable person.

The law of accident in proposed section 23B(1) is subject to the provisions dealing with negligent acts and omissions contained in Chapter XXVII of the *Code*.

Division 3 – Amendments about defences

5. Section 25 replaced Emergency

This proposed section replaces section 25 of the *Code*.

It provides that a person is not criminally responsible for an act done, or an omission made where the person believes on reasonable grounds that an emergency exists and that the doing of the act or the making of the omission is a necessary response to the emergency, and where the act or omission is a reasonable response in the circumstances as the person believed them to be.

If the relevant conduct falls within sections 32, 246, 247 or 248 of the *Code*, criminal responsibility must be determined by those provisions and not by the defence of emergency.

6. Section 31 repealed by sections 31 and 32

These amendments remove the existing test for duress in the existing section 31 and introduce a reformulated test for duress in proposed section 32. The defence of lawful authority is outlined in proposed section 31.

Proposed section 31 Lawful authority

Proposed section 31 incorporates subsections (1) and (2) of the existing section 31. This section clarifies that the question of whether an order is not manifestly unlawful is a question of law.

Proposed section 32 Duress

Proposed section 32 outlines the defence of duress. It provides that a person is not criminally responsible for an act done, or an omission made, under duress.

The proposed section provides that a person is not criminally responsible for an act or omission where the person believes on reasonable grounds that a threat has been made and that the act or omission is necessary to prevent the threat from being carried out, and where the act or omission was a reasonable response to the threat in the circumstances as the person believed them to be.

This new provision also provides that the defence of duress is not available where the accused is voluntarily associating with the person making the threat for the purpose of doing the act or making the omission or for the purpose of prosecuting an unlawful purpose.

To take modern means of communication into account, it is not necessary that the person making the threat is actually present. In addition, the threat is not restricted to a threat directed towards the accused, the threat is no longer restricted to threats of death or grievous bodily harm, and the threat of immediate harm is not required.

7. Section 244 amended Force against home invaders

Proposed section 244(1a) restricts the degree of force that an occupant can use against a home invader. Unless an occupant believes on reasonable grounds that a home invader is using or is likely to use or is threatening violence against a person, the occupant cannot use force that is intended, or likely, to cause death or grievous bodily harm to the home invader.

Proposed section 244(4) provides that a person assisting the occupant against a home invader can use the same degree of force that the occupant is entitled to use.

8. Sections 248, 249 and 250 replaced with section 248 Self-defence

This clause repeals the sections of the *Code* which deal with self-defence in provoked and unprovoked circumstances and aiding in self-defence. Provision for the matters contained in the existing section 250 has been made in clause 7 of this Bill.

The proposed section 248(2) provides that a harmful act is lawful if it is done in self-defence. There is no distinction between self-defence in provoked and unprovoked circumstances.

This new provision is not limited to circumstances of an assault against a person. It applies to any harmful act. A harmful act is an act which forms part of an offence under Part V of the *Code*, except offences contained in Chapter XXXV of the *Code*.

Under proposed section 248(4), a harmful act is done in self-defence where the person reasonably believes that the act is necessary to defend himself, herself or another

person from a harmful act, whether imminent or not, and where the person's harmful act is a reasonable response in the circumstances as the person believes them to be.

The reference to whether or not the threatened harmful act is imminent allows this defence to apply to the battered spouse scenario so long as the response is reasonable in the circumstances as the person believed them on reasonable grounds to be. The requirement that the response be reasonable would preclude pre-emptive attacks where it would instead be reasonable for police to be called.

Under proposed section 248(3), if a person acts in what would otherwise be self-defence and kills another person but the person's harmful act is not reasonable in the circumstances the person reasonably believed to exist, the person will be guilty of manslaughter instead of murder. This is known as the partial defence of excessive self-defence.

Under proposed section 248(5), a person's harmful act is not done in self-defence if it is done to defend himself, herself or another person from a harmful act which is lawful. Under proposed section 248(6), a harmful act is not lawful merely because the person is not criminally responsible for it.

9. Section 441 amended Defence of property

This clause amends the definition of "unlawful acts" for the purpose of Chapter XLV of the *Code*.

This clause is amended by replacing the existing subsection (3) with a new provision relating to the defence of property. This proposed section imposes a similar test for self-defence of property as is in proposed section 248(4) except that the person must reasonably believe that injury to himself, herself, someone else or property is imminent.

Division 4 – Amendments about homicide

10. Sections 278, 279 and 282 replaced by section 279 Murder

This clause repeals the crimes of wilful murder, murder and the penalty provision for murder and wilful murder and replaces these sections with a combined offence and penalty provision for murder.

Proposed section 279(1) provides that a person is guilty of murder if the person unlawfully kills another person and

- (a) the person intends to cause the death of the other person or another person,
- (b) the person intends to cause a bodily injury likely to endanger the life of the person killed or another person, or
- (c) the death is caused by an act likely to endanger human life done in the prosecution of an unlawful purpose.

Under proposed section 279(2), for the purposes of proposed sections 279(1)(a) and (b), it is immaterial that the person did not intend to hurt the person killed.

Under proposed section 279(3), for the purposes of proposed sections 279(1)(c), it is immaterial that the person did not intend to hurt anyone.

Under proposed section 279(4), an adult found guilty of murder must be sentenced to life imprisonment unless that sentence would be clearly unjust and the person is unlikely to be a threat to the safety of the community when the person is released, in which case the person can be imprisoned for up to 20 years.

Under proposed section 279(5), a child found guilty of murder can be sentenced for up to life imprisonment or be placed in detention in a place from time to time determined by the Governor or under another written law until released by order of the Governor.

Under proposed section 279(6), a court that does not sentence a person guilty of murder to life imprisonment must give written reasons explaining why life imprisonment was not imposed.

11. Sections 280 and 287 replaced by section 280 Manslaughter

This proposed section redefines the offence of manslaughter and incorporates the penalty provision previously located in the repealed section 287. The changes to the wording of the offence reflect the amendments in clause 10 this Bill which disposes of the distinction between murder and wilful murder.

12. Section 281 replaced Assault causing death

This proposed section introduces an offence of unlawful assault causing death. If a person unlawfully assaults another who dies as a direct or indirect result of the assault, the person is liable to imprisonment for a maximum of 10 years even if the person did not intend the death and the death was neither foreseen nor foreseeable. An example of a situation to which this proposed section would apply is the "one punch homicide" scenario where a person punches another person who falls and whose head hits a curb causing death.

13. Sections 281A and 287A repealed Infanticide repealed

This clause repeals the offence of, and penalty for infanticide.

14. Section 284 inserted Culpable driving of a conveyance

This proposed section introduces an offence of causing death by culpable driving of a conveyance other than a motor vehicle. The term "drive" is defined to include to pilot an aircraft and to navigate a vessel.

A person culpably drives a conveyance if the person drives it in a dangerous manner in all the circumstances.

If a person culpably drives a conveyance and the conveyance is involved in an incident which directly or indirectly causes death or grievous bodily harm to another person, the person is liable to 10 years imprisonment in the case of death and 7 years imprisonment in the case of grievous bodily harm. Summary penalties of imprisonment for 18 months and an \$18,000 fine are also provided.

A court convicting a person under this proposed section for an offence involving the culpable navigation of a vessel must disqualify the person from obtaining or holding a marine qualification to navigate vessels. The definition of "marine qualification" is to be amended to include the recently created recreational skipper's tickets.

Division 5 – Consequential amendments

15. Section 144 replaced

This clause removes reference to the penalty of strict security life imprisonment from the *Code*.

This clause also changes the wording of the provision from "rescues" to "frees".

16. Small amendments

This clause makes minor changes to sections of the *Code* as a result of the substantive amendments contained in Part II of this Bill.

Section 47(1), 48(1)(b), 125 and 134 of the *Code* are amended to remove the reference to strict security life imprisonment.

Section 277 of the *Code* is amended to remove reference to the crimes of wilful murder and infanticide.

Section 283 of the *Code* is amended to remove reference to infanticide.

17. Sections 739 and 740 and Schedule 1 inserted

This clause provides for a review of the effectiveness of the proposed amendments and also provide for transitional measures in relation to the crime of wilful murder and the administration of sentences of certain prisoners.

The Minister must carry out a review of the operation and effectiveness of the amendments to the *Code* and *Sentencing Act 1995* as soon as is practicable after the fifth anniversary of the commencement of the Act. The Minister must prepare a report based on the review and must cause it to be laid before both Houses of Parliament as soon as practicable after it has been prepared.

The transitional provisions provide the following:“

- If a person is charged on indictment for wilful murder and the trial has already commenced at the time of commencement, the trial will continue under the laws existing before commencement.
- If a person commits a wilful murder and has not been charged by indictment before commencement, the person will be charged under proposed section 279. It is irrelevant that the offence may have been committed before commencement.
- If a person is serving a life sentence for an offence other than wilful murder or murder before commencement, the person is eligible to be released on parole after serving 7 years of the sentence.
- A person who immediately before commencement is serving a sentence of life imprisonment for murder or wilful murder for which a minimum period was set under section 90 or 91(1) of the *Sentencing Act 1995* as they were then must not be released until that minimum period has been served.
- A person who immediately before commencement is serving a sentence of strict security life imprisonment for which an order was made under section 91(3) of the *Sentencing Act 1995* as it was before commencement is not to be released on parole.
- An order relating to a person to which these proposed provisions apply must be made in accordance with the *Sentence Administration Act 2003* Part 3.
- Any order made after commencement in the exercise of the Royal Prerogative of Mercy in relation to a person serving a sentence of strict security life imprisonment immediately before commencement is subject to section 142 of the *Sentencing Act 1995* as it was before commencement. That section requires an explanation of an order made to be tabled in each House of Parliament.
- If immediately before commencement a person is serving a sentence of life imprisonment imposed for murder or wilful murder, or of strict security life imprisonment imposed for wilful murder, the *Sentence Administration Act 2003* sections 12A, 25 and 26 as they were immediately before commencement apply to and in respect of the person. Section 12A relates to periodic reports about prisoners serving life terms or indefinite imprisonment while sections 25 and 26 relate to the granting of parole to prisoners serving life terms.

“Commencement” in relation to the transitional provisions, means the day on which the amendment Act, other than Part 1, comes into operation.

Part 3 – Sentencing Act 1995 amended

18. Act amended in this part

This clause provides that the proposed amendments in Part 3 of the Bill relate to the *Sentencing Act 1995*.

19. Sections 90 and 91 replaced by section 90

This clause repeals sections 90 and 91 of the *Sentencing Act 1995* which deal with life imprisonment and strict security life imprisonment respectively.

Proposed section 90(1) provides that the court has two options when sentencing an offender to life imprisonment:

- a) set a minimum non-parole period of ten years; or
- b) order that the offender is never to be released.

Proposed section 90(2) provides that the minimum period of imprisonment begins to run when the sentence of life imprisonment begins.

Under proposed section 90(3), a court must make an order that an offender is never to be released if it is necessary to do so to meet the community's interest in punishment and deterrence.

Under proposed section 90(4), when determining whether an order for the prisoner never to be released is necessary, the only matters to be taken into account are the circumstances of the commission of the offence and any aggravating factors.

20. Section 96 replaced

This clause replaces section 96 of the *Sentencing Act 1995*. Proposed section 96 provides for matters relating to the release of prisoners serving a life term.

A person serving a sentence of life imprisonment for an offence other than murder is not to be released before he or she has served 7 years of the sentence.

A person serving a sentence of life imprisonment for murder for which a minimum period has been set by the court is not to be released before he or she has served the minimum period.

A person who is sentenced to life imprisonment for murder and ordered never to be released is not to be released.

Any order for release under the section must be made in accordance with Part 3 of the *Sentence Administration Act 2003*.

21. Section 107 amended

This clause provides for proposed minor amendments to section 107 of the *Sentencing Act 1995* which, together with amendments to the *Western Australian Marine Act 1982*, will provide that when a person is convicted under proposed section 284 for culpable driving of a conveyance causing death or grievous bodily harm involving the

navigation of a vessel, an order can be made to disqualify the person from holding or obtaining a recreational skipper's ticket.

22. Consequential amendments

This clause makes consequential amendments relating to the removal of reference to "a life term" and "strict security life imprisonment" in the *Sentencing Act 1995*.

The proposed amendments in clauses 22(1)(a), (b) and (c) and clause 22(2) reflect the proposed amendments in clause 19 of this Bill relating to life imprisonment.

The proposed amendment is clause 22(1)(d) reflects the proposed amendment in clause 10 of this Bill which repeals section 282 of the *Code*.

The proposed amendment in clause 22(3) reflects the amendments in clause 19 of this Bill relating to orders that some offenders sentenced to life imprisonment are never to be released. This amendment establishes that if the Minister exercises the Royal Prerogative of Mercy in relation to such an offender, the Minister must cause a copy of the order and the reasons giving rise to it to be tabled before each House of Parliament within 14 sitting days of that House after the order is made.

Part 4 – Various other Acts amended

23. *Adoption Act 1994*

This clause amends the *Adoption Act 1994* to reflect the proposed amendments to the *Sentencing Act 1995* in clause 19 of this Bill relating to strict security life imprisonment.

24. *Bail Act 1982*

This clause amends the *Bail Act 1982* to reflect the proposed amendments to the *Criminal Code* in clauses 10, 11 and 12 of this Bill relating to wilful murder and the repeal and replacement of several sections of the *Criminal Code*.

25. *Community Protection (Offender Reporting) Act 2004*

This clause amends some of the schedules to the *Community Protection (Offender Reporting) Act 2004* to reflect the proposed amendments to the *Code* in clause 10 of this Bill relating to the repeal of several sections of the *Criminal Code*.

26. *Corruption and Crime Commission Act 2003*

This clause amends a schedule to the *Corruption and Crime Commission Act 2003* to reflect the proposed amendments to the *Criminal Code* in clauses 10 and 13 of this Bill relating to the repeal of the crimes of wilful murder and infanticide.

27. *Criminal Code Act 1913*

This clause amends the *Criminal Code Act 1913* to reflect the proposed amendments to the *Criminal Code* in clause 10 of this Bill relating to the repeal of the crime of wilful murder.

28. *Criminal Investigation (Identifying People) Act 2002*

This clause amends the *Criminal Investigation (Identifying People) Act 2002* to reflect the proposed amendments to the *Sentencing Act 1995* in clause 19 of this Bill relating to strict security life imprisonment.

29. *Criminal Law (Mentally Impaired Accused) Act 1996*

This clause amends the *Criminal Law (Mentally Impaired Accused) Act 1996* to reflect the proposed amendments to the *Criminal Code* in clauses 10, 11 and 12 of this Bill relating to the repeal of several sections of the *Code*.

30. *Criminal Procedure Act 2004*

This clause amends the *Criminal Procedure Act 2004* to reflect the proposed amendments to the *Criminal Code* in clause 10 of this Bill relating to wilful murder.

31. *District Court of Western Australia Act 1969*

This clause amends the *District Court of Western Australia Act 1969* to reflect the proposed amendments to the *Sentencing Act 1995* in clause 19 of this Bill relating to strict security life imprisonment.

32. *Electoral Act 1907*

This clause amends the *Electoral Act 1907* to reflect the proposed amendments to the *Criminal Code* in clause 10 of this Bill relating to the repeal of several sections of the *Criminal Code*.

33. *Evidence Act 1906*

This clause amends the *Evidence Act 1906* to reflect the proposed amendments to the *Criminal Code* in clauses 10, 11, 12 and 15 of this Bill.

34. *Health Act 1911*

This clause amends the *Health Act 1911* to reflect the proposed amendments to section 23 of the *Criminal Code* in clause 4 of this Bill.

35. *Interpretation Act 1984*

This clause amends the *Interpretation Act 1984* by inserting a definition of death which is consistent with the definition adopted by all other jurisdictions in Australia except for Queensland which has no definition. The provision provides that for the purposes of the law, a person is dead when there is an irreversible cessation of all function of the person's brain or irreversible cessation of circulation of blood in the person's body.

36. *Prisons Act 1981*

This clause replaces section 16(6) of the *Prisons Act 1981* in relation to the serving of all or part of a prison sentence in a lock-up.

This clause removes reference to strict security life imprisonment in accordance with clause 19 of this Bill and specifies that prisoners who are required to spend more than 20 years in custody before being eligible for parole or prisoners who are to spend their whole life in custody are not to serve all or part of their sentence in a lock-up. This restriction also applies to a prisoner whose release is to be determined by the Governor.

37. *Restraining Orders Act 1997*

This clause amends the *Restraining Orders Act 1997* to reflect the proposed amendments to the *Criminal Code* in clause 13 of this Bill relating to the repeal of the crime of infanticide.

38. *Road Traffic Act 1974*

This clause raises the penalties for the offence of dangerous driving causing death or injury.

The penalty for the offence of dangerous driving causing grievous bodily harm is increased from four years imprisonment to seven years imprisonment with a fine of any amount.

The penalty for dangerous driving causing death is increased from four years imprisonment to ten years imprisonment with a fine of any amount.

The fine available in the summary penalty is increased from 160 penalty units to 360 penalty units to equate with the summary penalty available under proposed section 284.

39. *Sentence Administration Act 2003*

This clause makes several amendments to the *Sentencing Administration Act 2003*. It amends the definitions to provide for prisoners held at the Governor's pleasure under

both the existing section 282 of the *Criminal Code* and the proposed section 279(5)(b) of the *Criminal Code*. The definition of "prisoner" is also amended to reflect a prisoner at the Governor's pleasure.

Section 11 of the *Sentence Administration Act 2003* is amended to provide that the Minister can request the CEO to provide a report on where a prisoner held at the Governor's pleasure is held. Proposed sections 39(4), 39(5) and 39(10) amend provisions of the *Sentencing Administration Act 2003* relating to the existing section 282.

The table in section 12A of the *Sentencing Administration Act 2003* is amended by inserting a new table which does not refer to wilful murder or strict security life imprisonment. This proposed table contains references which reflect the new minimum period sentencing regime.

This clause removes reference to life terms and repeals section 26 of the *Sentencing Administration Act 2003*.

Proposed section 25(1) relates to parole orders for prisoners serving life imprisonment for murder. It reflects the proposed regime of minimum sentences to be imposed by the courts for murder.

Proposed section 25(1a) relates to parole orders for prisoners serving life imprisonment for offences other than murder. It reflects the change to former section 96 of the *Sentencing Act 1995*.

The proposed amendments to sections 68(2) and 69(2) of the Act reflect the change of reference from "life term" to "life imprisonment" and in the case of section 68(2) from "early release order" to "parole order".

40. *Working with Children (Criminal Record Checking) Act 2004*

This clause amends the *Working with Children (Criminal Record Checking) Act 2004* to reflect the proposed amendments to the *Criminal Code* in clauses 10, 11 and 12 of this Bill relating to the repeal of several sections of the *Criminal Code*. The offence under proposed section 281 is included in Schedule 2.

41. *Young Offender's Act 1994*

Proposed section 179(6) deletes the reference to strict security life imprisonment and reflects the new regime regarding persons whose release is to be determined by the Governor.

Other amendments to the *Young Offender's Act 1994* reflect the repeal of strict security life imprisonment and amendments to reflect the repeal of several sections of the *Criminal Code* and in some cases, their replacement.

An amendment to Schedule 1 item 1 is made to reflect the changes to section 144 of the *Criminal Code* made in clause 15 of this Bill.

References to wilful murder and infanticide are removed from section 189(1) of the *Young Offender's Act 1994* and a reference to attempted murder is included in that provision.

Schedule 2 to the Young Offenders Act 1994 is amended to reflect the proposed removal of wilful murder from the Criminal Code and to include the offence under proposed section 281.

