

PARLIAMENT OF WESTERN AUSTRALIA

LEGISLATIVE COUNCIL

REPORT

OF

STANDING COMMITTEE

ON

LEGISLATION

IN RELATION TO THE

CRIMINAL LAW AMENDMENT
BILL

Presented by the Hon Garry KELLY (CHAIRMAN)

JULY 1990

COMMITTEE MEMBERS

Chairman: Honourable Garry Kelly MLC
Members: Honourable John Caldwell MLC
Honourable Cheryl Davenport MLC
Honourable Peter Foss MLC
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After thorough consideration of the Criminal Law Amendment Bill 1990, the Standing Committee on Legislation has agreed to recommend the Bill to the House. The narrative report that follows gives a brief outline of the reasons for the Committee's various decisions on the Bill.

Clause 1

The Committee was concerned that provision was frequently being made for the proclamation of acts for reasons of administrative procedure without any justification being provided to Parliament as to why proclamation was necessary.

The constitutional participants in the making of an act are the two Houses of Parliament and the Queen. Regular recourse to proclamation virtually add a fourth participant - various levels of executive government. The Committee could see that there could be justification for proclamation - the Attorney General had suggested three, of which two were accepted by the Committee - where regulations needed to be made in order to make the act effectual, and where a new administrative structure had to be put in place.

If it was desired to provide for an act to be proclaimed then good reasons should be stated. The Committee has not yet received any evidence justifying proclamation in parts and very good reasons would need to be put forward.

Clause 1 provided for the bulk of the act to come into operation by proclamation.

The Attorney General said in evidence before the Committee that the Clause in the Bill is one designed for maximum flexibility and has not been abused in the past at the bureaucratic or government level.

The flexibility is required for the printing and distribution of the legislation to be completed before the Act becomes law. In relation to the proposed amendment the Attorney General said that the 56 days provided is supposed to be adequate for the printing and distribution to be completed - but it creates a problem if it is not so.

The Attorney General also said that the mechanical process of printing and distribution is the least part of the problem. The more important consideration is that of the drafting of regulations. The Attorney General said regulations cannot be drafted until the bill is passed because there is no guarantee that the bill would go through unamended. Another consideration is that effective operations of the bill may require a whole new administrative structure to be established.

Notwithstanding the points made by the Attorney General the committee majority decided to stand by its decision to have the Act come into effect 56 days after the Royal Assent and the Committee also made the general point that Acts should come into operation by proclamation only when there is ample justification of that process. The practice of part proclamation of Acts needs closer scrutiny.

Clause 4

Agreed to by the Committee after amendments by the Attorney General and further amendment by the Attorney General which was prompted by the deliberations of this Committee.

The Committee, in considering the proposed definition of "damage", requested consideration be given to whether the definition would, and if not, could apply so as to make it an offence to amend or obliterate electronic data.

Even with the Bill the Code did not provide for an offence in relation to the alteration or obliteration of electronically stored information unless it was for the purposes of obtaining property. It was considered that this should be covered by a general provision. The amendment made by the Committee to the definition was for this purpose.

Clause 8

Agreed to with the amendments and was the subject of discussion between the Committee and the Attorney General. It was considered that unofficial prosecutions should still require the permission of the Attorney General so as to protect judges from vexatious action by disappointed litigants wanting a second day in court.

Clause 14

Agreed to with the Attorney General's amendments.

Substitution of a new section 332(1) which is a definition of detaining a person. Unlike s.332(1) in the Bill, the new definition is affirmatively expressed and removes the possibility that a person who takes another away with the other's consent could be guilty of a s.332 offence.

Deletion of proposed s.332(3) which had the potential to apply to innocent people who although harbouring another at the request of the kidnapper, wish to release the person to the appropriate authorities, parents or guardians (e.g. grandmother retaining custody of a grandchild until she can return it to its parent). Persons who have the requisite intent will be guilty as accessories to a s.332(2) offence.

Replacing the definition of "threat" in proposed s.332(5) to cover the situation where a person is held and the threat is made against another.

Clause 17

The Clause has been redrafted on a number of occasions including an amendment to the Bill submitted to the House. On each occasion problems emerged. Before the Committee it became clear that the last draft omitted two very frequent types of threat - threat to cause injury to reputation and threat to financial wellbeing.

The Committee held the view that the existing Clause 338 in the Code was preferable because of its succinctness and broad terms, whereas the successive drafts to amend the section seeking to provide for all possibilities in fact exposed the likelihood of something being left out.

The Committee suggested to the Attorney that the Clause be withdrawn and the drafting reconsidered.

At the Attorney's request the Committee has accepted the present draft as further amended.

Clause 18

The general penalty has been increased from four to seven years and many of the circumstances which were stated to be special cases previously carried this penalty.

In general they had been deleted from the list of special cases but the Committee considered that some should be retained.

One of these, theft of wills, has had its penalty reduced from 14 to 10 years in line with the penalty applying for the remainder of special cases. Other special cases have had their penalty raised to 10 years.

Clause 24

Agreed to with Attorney General's amendments.

Replacement of proposed section 409(2) is a drafting matter.

Insertion of a new proposed section 409(3) is a result of removing (from clause 4) the proposed definition of "intent to defraud" which, in its final paragraph, contains a reference to it being immaterial that an accused person intends to give value for property, etc, obtained as a result of fraud.

Clause 25

Agreed to with Attorney General's amendments.

The Bill proposes to delete sections 417-423. The amendment will retain sections 418-422. Sections 418-422 deal with offences pertaining to companies. Though they are covered by the Companies (WA) Code, it may be that the Commonwealth companies legislation will not cover similar offences. Therefore sections 418-422 should be retained until the position regarding companies legislation in Australia is resolved.

New Clause 26

Agreed to. Amends section 421 to delete the requirement that "no proceedings under this section shall be commenced unless authorised by the Attorney General in writing."

Clause 28

Paragraph (f) allows the Prosecutor to determine that certain offences will be tried summarily. This in part replaces repealed section 378A.

The Court of Criminal Appeal held that section 378A created a new summary offence and abolished the indictable equivalent. This had ramifications in other offences.

The amendment continues the concept of an alternative summary offence but allows it to coexist with the indictable offence. The Prosecutor has the option as to the manner in which he will proceed.

The Committee however, did not accept a later suggested amendment which would have permitted a Court of Petty Sessions to remit the sentencing to a higher court which as a result would have deprived a defendant of his right to trial by jury but still expose the defendant to the penalty that would be imposed after trial by jury.

Amendment agreed to consequential to the amendment Clause 18.

Clause 29

Agreed to with Attorney General's amendments.

Changes to proposed amendments to section 426A (summary conviction for burglary and certain other offences) to equate the summary penalties for stealing and like offences with summary penalty for fraud (clause 24 - proposed section 409).

Clause 32

Agreed to with Attorney General's amendments.

Amendment to proposed section 440A(2) to increase the proposed penalty from 6 months or \$2,000 to 1 year or \$4,000.

Clause 33

Agreed to with Attorney General's amendments, subject to "damage" being redefined.

Clause 34

Agreed to with Attorney General's amendments.

Consequential renumbering - proposed s.445 to be s.444.

Clause 40 and 41

Agreed to with Attorney General's amendments.

The Bill proposes to delete the whole of chapters XLIX (clause 40) and L of the Code (clause 41). On reconsideration it has been thought advisable to retain s.488 (attempts to procure unauthorised status). These amendments have the effect of retaining s.488 in its present form except that it is proposed that the offence can be dealt with summarily.

New Clauses 42, 43 and 44

Agreed to. These amendments give effect to the amendments proposed by the Hon Max Evans and are consistent with the recommendations in the Murray Review of the Code.

They propose the conversion of offences in Chapter LV (corruption of agents, trustees, etc in whom confidence is reposed) from misdemeanours to crimes.

They propose to increase the penalties in s.538(a) from :

- * \$1,000 for a company to \$250,000; and
- * 2 years' imprisonment to 7 years.

They propose the deletion of s.544 (limit of time for prosecution). This is consistent with the Murray Review of the Code.

Clause 43

Agreed to with Attorney General's amendments.

Drafting amendment to proposed section 555A(3). To ensure that the time for commencing a prosecution for an attempt to commit a simple offence is the same as the time for commencing a prosecution for the simple offence.

Clause 44

This clause repeals existing s.557 and substitutes a new section. The Committee feels that the proposed section is too broad and is open to misuse. The Legislation Committee invites the Committee of the Whole to compare clause 44 with the existing s.557.

"557 Any person who makes, or knowingly has in his possession or under his control, any explosive substance under such circumstances as to give rise to a reasonable suspicion that he is not making it, or does not have it in his possession or under his control for a lawful object, unless he can show that he made it, or had it in his possession or under his control for a lawful purpose, is guilty of a crime, and is liable to imprisonment with hard labour for fourteen years, and forfeiture of the explosive substance.

In this section "explosive substance" includes any materials for making any explosive substance; also any apparatus, machine, implement, or materials used or intended to be used or adapted for causing or aiding in causing any explosion in or with any explosive substance; also any part of any such apparatus, machine, or implement."

Whereas the Committee could understand that the possession of explosives might readily raise a suspicion that the explosives were to be used for unlawful purposes, it felt the need for more justification than was stated in the Clause to extend the provision to all manner of things.

At the Committee's request the Attorney General sought from the Police advice as to specific instances in which this could be justified.

The advice from the Attorney General to the Committee by letter saying in effect that the proposed clause was a useful reserve to be used sparingly by the Police in addition to the provisions of the Police Act did not reassure the Committee

Clause 47

Agreed to with Attorney General's amendments.

Amendments to allow there to be an alternative verdict of receiving where a person is charged with stealing (s.378) or fraud (proposes s.409). This is in line with the proposals of the Murray Review of the Code.

Clause 53

Agreed to with Attorney General's amendments.

Amendment to increase the penalty to \$250,000 in the Bush Fires Act s.32 (lighting fires in circumstances likely to injure persons or property). This brings the penalty in line with the maximum pecuniary penalty in the Code (s.19).

New Clause 62

Agreed to. Consequential amendments to Schedule 4 of the *Child Welfare Act*.

Note that the title is amended to add *Child Welfare Act 1947*

The Committee took evidence from the Attorney General, Hon Joe Berinson QC MLC who was assisted by Dr Jim Thompson, and also from Mr Charles Luckman, Secretary of the Criminal Law Association, and were very ably assisted by Mr Greg Calcutt, Senior Parliamentary Counsel and Mr Patrick Tremlett, Parliamentary Counsel's Office.