PARLIAMENT OF WESTERN AUSTRALIA

THIRTY-SIXTH REPORT

OF THE

LEGISLATION COMMITTEE

IN RELATION TO THE

Sentencing Bill 1995

Presented by the Hon Derrick Tomlinson (Chairman)

36
October 1995

Members of the Committee

Hon Derrick Tomlinson, MLC (Chairman)
Hon Bill Stretch, MLC
Hon Ross Lightfoot, MLC
Hon John Cowdell, MLC
Hon Val Ferguson MLC

Staff of the Committee

Mr Stuart Kay (Advisory/Research Officer)
Ms Jan Paniperis (Committee Clerk)

Terms of Reference

A Bill originating in either House, other than a Bill which the Council may not amend, may be referred to the Committee after its second reading or during any subsequent stage by motion without notice... A referral under [this paragraph] includes a recommittal.

The functions of the Committee are to consider and report on Bills referred under this order.

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Report of the Legislative Council
Legislation Committee

in relation to the

Sentencing Bill 1995

1 Introduction

1.1 On 7 September 1995, the House resolved, on a motion by Hon Nick Griffiths:

> That the *Sentencing Bill 1995* be referred to the Legislation Committee for consideration of Clauses 3(3)(a), 3(3)(b), 14(3), 15, 16(2), 16(3), 22(5), 23(4), 27, 28, 29, 30, 38, 51, 58, 59, 87, 98, 99, 100, 101, 113, 122 and 144 and report not later than 12 October, but that consideration of the second reading debate by this House continue notwithstanding such referral.

1.2 Hon Nick Griffiths appeared before the Committee on 21 and 28 September to explain why he wished the Committee to consider the clauses referred to it.

1.3 The Committee sought submissions on the *Bill* from:

> The Hon Mr Justice David Malcolm AC, Chief Justice
> His Honour Judge Hammond, Chief Judge
> Mr Con Zempilas, Chief Stipendiary Magistrate
> Law Society of Western Australia
> Aboriginal Legal Service (ALS)

The Committee received submissions from all of these, except for the Chief Stipendiary Magistrate. The Acting Chief Justice responded on behalf of the Chief Justice. The submission from the Law Society was based on an earlier draft of the *Bill* and therefore was of limited assistance to the Committee.

2 Judicial Discretion

2.1 A number of the clauses which the Committee was asked to consider involve judicial discretion and some of the concerns raised by Mr Griffiths relate to the exercise of such discretion. The Committee considers that it would be undesirable to restrict judicial discretion where discretion is required to better serve the interests of justice. If it is found that changing circumstances and community values render the necessity for judicial discretion nugatory or undesirable or if discretions are being exercised improperly or in such a way as not to best serve the interests of justice, it would be open to the Parliament to restrict, modify or abolish those discretions at the relevant time. However, judicial discretions should not be so restricted, modified or abolished unless there is a clearly perceived need to do so. The justice administration system requires appropriate flexibility if it is adequately to deal with the myriad of circumstances with which it is presented.

3 Clauses 3(3)(a) & (b)

3.1 Clauses 3(3)(a) and (b) provide that the *Bill* does not apply to persons being punished for contempt by the Supreme Court or under relevant provisions of the *District Court of Western Australia Act 1969*, the *Justices Act 1902* or the *Local Courts Act 1904*. Mr Griffiths is of the view that the *Bill* should apply to such matters. On the other hand he considers that "contempt" should not be defined in the *Bill* as this would prevent the common law evolution of the concept. He also considers that the *Bill* should not apply to punishment for contempt of Parliament (cl 3(3)(c)).

3.2 Insofar as cl 3(3)(a) is concerned, the Committee can see no difference in principle between contempt of the Supreme Court and contempt of the Parliament. The origin of Parliament's power to punish for contempt is probably to be found in the mediæval concept of parliament as a court of justice. The power to fine or imprison for contempt belongs at common law to all courts of record - thus parliament had power to punish for contempt[1]. Consequently, if Parliament is to be exempt from the operation of the *Bill*, there is no reason why the Supreme Court should not also be exempt from the operation of the *Bill*. In any event, the Committee can see no necessity at this time to subject sentencing principles for contempt of the Supreme Court to statutory control. Contempt proceedings in other judicial proceedings are statutory in nature as is reflected in cl 3(3)(b) of the *Bill*. The Committee does not consider it necessary to subject sentencing principles in such proceedings to statutory control at this time.

Recommendation 1

That clauses 3(3)(a) and (b) remain in the Bill unaltered.

4 Clause 14(3)

4.1 Clause 14(3) provides that a court may sentence an offender in her or his absence if this is necessary because of the offender's conduct. Mr Griffiths considers that an offender should always be present at her or his sentencing.

4.2 It would be unusual for an offender to be sentenced in her or his absence. However, there are extreme circumstances where this may be necessary - for example, where the offender is disorderly and disruptive. This clause reflects the current s 635 of the *Criminal Code* which provides that a trial may proceed in the absence of the offender if the offender conducts her- or himself in such a way that it would be impracticable for the offender to be present, and the court so orders.

Recommendation 2

That clause 14(3) remain in the Bill unaltered.

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[1] Boulton, CJ (Ed), *Erskine May's Treatise on the Law, Privileges, Proceedings and Usage of Parliament*, 21st Edition, 1989, p103.

5 Clause 15

5.1 Clause 15 provides that a court sentencing an offender may inform itself in any way it thinks fit. Mr Griffiths objects to this provision and considers that potentially it could be open to abuse. The ALS considers that an offender should have access to any material to be relied upon by the sentencing court.

5.2 The clause reflects a similar provision currently in s 656 of the *Criminal Code*. As was noted by the Acting Chief Justice, s 656 was amended to its present form in 1982 to overcome difficulties which emerged in the decision in *Morse v The Queen* [1977] WAR 151. If the provision were to be restricted it would increase the difficulty of and time taken in sentencing and may mean that complainants in sexual cases would be required to give evidence when otherwise they would not be so required.

Recommendation 3

That clause 15 remain in the Bill unaltered.

6 Clauses 16(2) & (3)

6.1 Clauses 16(2) and (3) provide that the sentencing of an offender must not be adjourned for more than 6 months after the offender is convicted, but that this requirement does not prevent an offender from being sentenced after 6 months after conviction. Mr Griffiths objects to the 6 month period as being arbitrary.

6.2 Judicial officers are expected to sentence offenders expeditiously. This provision provides a maximum time in which an offender must be sentenced, which reinforces the duty to sentence expeditiously.

Recommendation 4

That clauses 16(2) and (3) remain in the Bill unaltered.

7 Clause 22(5)

7.1 Clause 22(5) provides that a court may make a pre-sentence report available to the prosecutor and the offender on such conditions as it thinks fit. Mr Griffiths considers that pre-sentence reports should in all cases be available to the prosecutor and the offender. The ALS considers that pre-sentence reports should in all cases be available to the offender.

7.2 The Acting Chief Justice pointed out that the court may impose conditions on the availability of pre-sentence reports to, for example, protect the identity of informants. The Committee considers that, in the normal course of events, offenders should have access to pre-sentence reports, but accepts that it is important that it be open to judicial officers to impose restrictions on provision of pre-sentence reports or to deny provision of such reports in exceptional cases where this may prove necessary.

Recommendation 5

That clause 22(5) remain in the Bill unaltered.

8 Clause 23(4)

8.1 Clause 23(4) provides that the CEO (chief executive officer - presumably of the Ministry of Justice) must, at the request of the prosecutor, give the prosecutor information about the length of time an offender has spent in custody. Mr Griffiths considers that this right also should be extended to the defence.

8.2 There is no reason in principle why the CEO should not also provide the relevant information to the defence if so requested. However, the defence should, in any event, be aware of the length of time an offender has spent in custody. If it is not so aware, the information would become available to it when the court is informed of it.

Recommendation 6

That clauses 23(4) remain in the Bill unaltered.

9 Clauses 27 - 30

9.1 Clauses 27 - 30 provide for mediation between offenders and victims. Mr Griffiths considers that great care should be taken when legislating in this area and that these provisions may go too far too soon. In particular, Mr Griffiths considers that there should not be any power to compel mediation. The ALS is of the view that the circumstances in which a court can or should order a mediation are not clear. The ALS agrees with Mr Griffiths that there should be no power to compel mediation.

9.2 The Committee has informally been advised by the Victim Offender Mediation Unit (VMU) on the current mediation process. That process is as follows. After a person is convicted, a pre-sentence report (PSR) may be ordered. All PSRs relating to non-violent offences must be sent to the VMU for screening for mediation. If the VMU considers that mediation may be appropriate, it contacts the offender to ascertain if the offender would be prepared to mediate. If the offender is prepared to mediate, the VMU contacts the victim to ascertain if the victim is prepared to mediate. The victim has the final say on whether mediation is to take place. The mediation may be either face-to-face or "shuttle" mediation (in which the mediator acts as intermediary and shuttles to and fro between the offender and the victim). Before mediation commences, the mediator will interview the offender and the victim individually to identify their individual concerns. Following this the mediation takes place and a report may be provided to the sentencing court.

9.3 This form of mediation is conducted after conviction. There are models elsewhere in the world for pre-conviction mediation. Juvenile Justice Teams conduct a form of pre-conviction mediation under the *Young Offenders Act 1994*. The main reasons that the post-conviction mediation model is in use at this time are that, as the offender has been convicted, the victim may feel that some justice has been done and will therefore be more prepared to mediate, and the offender too will have a greater incentive to mediate.

9.4 There is no legislation or subordinate legislation in place to regulate the mediation process. Mediators are members of the WA Dispute Resolution Service and must attend a 3 day training course and participate in ongoing training.

9.5 The Committee considers that there is insufficient detail in the mediation provisions regarding the mediation process and the circumstances in which it is intended to be used. In particular, the Committee considers further consideration needs to be given to the issue of compulsory mediation. For example, does cl 27(3), which provides that a mediator may give a mediation report to the court whether or not the court has ordered one, mean that a mediator has power to compel mediation?

9.6 Clause 30 provides that a court may make a mediation report available to the prosecutor and the offender. Consistent with the *Victims of Crimes Act 1994*, consideration should be given to whether or not a mediation report given to an offender should also be given to a victim. The ALS considers that a mediation report should in any event be given to the prosecutor and the offender.

Recommendation 7

That the mediation provisions of the* Bill *be reconsidered and more detail about the mediation system be included in the* Bill*. In particular, the* Bill *should contain provisions relating to:

(a) principles of mediation;

(b) which types of matters may be subject to mediation or an order for mediation;

(c) the role of the victim;

(d) powers of mediators; and

(e) who should be entitled to receive a copy of any mediation report.

10 Clause 38

10.1 Clause 38 provides for magisterial review of sentences of imprisonment made by justices. Mr Griffiths considers that justices who are not stipendiary magistrates should not have the power to imprison offenders in the first place. This view is supported by the ALS.

10.2 This provision was, subject to certain reservations regarding practical implementation of its terms, welcomed by the ALS as a means of reviewing sentences imposed by justices that

may be unwarranted. The Acting Chief Justice noted that the provision will obviate the need for appeals from sentence in many cases.

Recommendation 8

That clause 38 remain in the Bill unaltered.

11 Clause 51

11.1 Clause 51 relates to ensuring compliance with conditional release orders (CROs). Mr Griffiths expressed concern with 2 matters in particular: paragraph (1)(d) and subclause (6). Clause 51(1)(d) provides that a court may order an offender or a surety to deposit an amount of money with the court which will be forfeited to the Crown if while the CRO is in force the offender commits an offence or breaches a condition of the CRO. Clause 51(6) provides that no interest is to be paid on money deposited under cl 51.

11.2 In its submission the ALS notes that the requirement of a deposit may discriminate against Aborigines and other impecunious persons, who are less likely to be able to make such a deposit. This may therefore make a court less willing to make a CRO in respect of Aboriginal or other impecunious offenders in some circumstances. Additionally, whilst under the *Bail Act 1982* a surety would only have to pay the amount of the surety to the Crown if the offender did not appear in court (s 35 *Bail Act 1982*), under cl 51(1) the money deposited by the surety is forfeit if the offender commits an offence or breaches a condition of the CRO. It may be demanding far too much of a surety to ensure that an offender does not breach any condition of her or his CRO. Furthermore, there is no scope in this provision for relief from forfeiture of the kind contained in the *Bail Act 1982* (s 49(1)(d)).

Recommendation 9

***That a provision similar to that in s 49(1) of the* Bail Act 1982 *relating to relief from forfeiture for sureties be included in cl 51 of the* Bill.**

12 Clause 58

12.1 Clause 58 provides that a court may, if an offence is punishable by imprisonment but the court imposes a fine rather than a sentence of imprisonment, order that an offender be imprisoned until the fine is paid. Mr Griffiths considers that this provision is contradictory in that it provides that a court may say, "we are going to fine you rather than imprison you, but we will imprison you anyway until the fine is paid".

12.2 Clause 58 reflects s 19(5) of the *Criminal Code* as it was amended by Act 92 of 1994. The Chief Judge considers that it is an "essential element in the fining armory [sic]" and is a useful alternative to imprisonment in a number of serious cases. The ALS considers that, among other things, the provision disadvantages offenders whose ability to pay a fine depends on them not being in custody. On balance the Committee acknowledges that the provision might give judicial officers some flexibility in sentencing but it is concerned that

the option of sentencing an offender to imprisonment even after exercising the option to fine rather than imprison an offender is contradictory. The Committee notes the proposed amendment to cl 58 of which the Minister for the Environment gave notice in a supplementary notice paper dated 17 October 1995, but nevertheless considers that the consequences of non-payment of fines are dealt with adequately by cl 59.

Recommendation 10

That clause 58 be deleted.

13 Clause 59

13.1 Clause 59 provides that a court may order that an offender be imprisoned if the fine imposed is not paid. Mr Griffiths considers that, like cl 58, this is internally contradictory. He also considers that the value of $50.00 equated to 1 day's liberty (cl 59(3)) is too low and has suggested that $200.00 may be a more appropriate figure (though he admits that this too is arbitrary).

13.2 Clause 59 reflects the current s 100 of the *Fines, Penalties and Infringement Notices Enforcement Act 1994.*

13.3 Whilst the Committee considers that setting a monetary value on liberty is at best a difficult and essentially arbitrary task, it agrees with Mr Griffiths that the amount of $50.00 set as the equivalent of 1 day's detention would seem to be too low. The Committee considers that the amount should be at least $100.00.

13.4 The Committee notes that cl 59(4), which provides that the amount of $50.00 may be amended by regulations, is a Henry VIII clause. Whilst the Committee can see the need for some flexibility in this area, it is concerned that a "price on liberty" can be set by regulations. It would not seem to be the case that this amount would require to be varied very frequently. Consequently, it could be done by legislative amendment. If, however, it was considered necessary to maintain this level of flexibility, the Committee considers that a minimum amount should nevertheless be specified in the *Bill*, so that the "price of liberty" never dropped below this minimum.

Recommendation 11

That:

(a) the amount specified in cl 59(3) be increased from $50.00 to at least $100.00; and

(b) (i) clause 59(4) be deleted; OR

(ii) a proviso be added to the end of cl 59(4) to the effect that the amount specified in regulations cannot be below the amount specified under paragraph (a) of this recommendation for the purposes of cl 59(3).

14 Clause 87

14.1 Clause 87(d) provides that, where an offender has spent time in custody, a court may order that a sentence of imprisonment is to be taken to commence on the day that custody began or a later day which is not later than the date of the sentence. The purpose of this is to remove anomalous differences in total time spent in custody between offenders who have and have not spent time in custody before the sentencing, as a result of calculation of such things as remissions. Formerly, an offender who had spent time in custody before sentencing would spend a longer time in custody than would an offender who received the same sentence but commenced time in custody after sentencing. Mr Griffiths is of the view that all scope for such differences should be eliminated.

14.2 The Committee considers that all time spent in custody in respect of a particular offence should be taken into account in calculation of a sentence.

Recommendation 12

That all time spent in custody in respect of a particular offence should be taken into account in calculation of a sentence. For this purpose the Committee suggests that cl 87 could be amended to read as follows:

87 If when an offender is being sentenced to imprisonment for an offence he or she has previously spent time in custody in respect of that offence and for no other reason, the court shall take that time into account -

(a) if it imposes a fixed term, by reducing that term by an appropriate period; or

(b) by ordering that the term it imposes is to be taken to have begun on the day when that custody began.

15 Clauses 98 - 101

15.1 Clauses 98 - 101 comprise Part 14 of the *Bill* which relates to indefinite (or indeterminate) imprisonment of offenders. Mr Griffiths is opposed to indefinite imprisonment on principle. He is also opposed to the changes that these provisions make to the existing regime of indefinite imprisonment (contained in ss 661 - 665 of the *Criminal Code*) and, in particular, to the fact that a sentence of indefinite imprisonment is added to a definite sentence of imprisonment.

15.2 In her book *Sentencing in Western Australia*, Mary Daunton-Fear says, in respect of indefinite imprisonment:

> Criticisms of the indeterminate sentence vary depending upon the purpose that it is sought to achieve. The criticisms are, perhaps, most vigorous where it is invoked in the hope of reformation or cure, and it is significant that in jurisdictions where the indeterminate sentence is available, the incidence of reference to reformation as an aim of the sentence is declining, both on the part of legislatures and on the part of

> members of the judiciary. More frequently, the sentence is perceived as a means of achieving at least short-term crime prevention.
>
> There are a number of factors at work in relation to the growing disenchantment with the indeterminate sentence. Firstly, it is clear that for many offenders, anti-social patterns of behaviour are firmly established by the time the first gaol sentence is imposed. By the time an offender is eligible for declaration as an habitual criminal, it is especially difficult to provide an incentive to reform. Secondly... [in] practice, offenders sentenced indeterminately are detained in the same gaols[2] as those serving fixed terms. Bitterness is rife, and as Eidelberg commented: "When external punishment stimulates defiance, it loses its value as a crime-preventing method." If this be correct, reformation is an even more forlorn hope than crime prevention. Thirdly, it seems improbable that the indeterminate sentence nurtures the maintenance and growth of the defendant's vital contacts with the law-abiding community... Neither the prisoner nor his relatives can make realistic plans for the future, and the uncertainty would appear to threaten marriages, parent-child relationships and the chances of employment... Certainly, these factors militate against the reformative potential of imposing on habitual criminals a sentence without a maximum, and they may aggravate rather than reduce anti-social tendencies.
>
> Of course, it may well be argued that even if the indeterminate sentence is not reformative or, in the long term, in the interests of crime prevention, at least it keeps the offender away from the community during the currency of his sentence. But are the short-term gains worthwhile if the long-term losses to the safety of the community are likely to be even greater? And perhaps an even more significant question involves the ethics of incarceration for the purposes of crime prevention. Is the community entitled to disregard altogether the limitations of a tariff system of measurement, which would seek to relate the severity of the crime actually committed to the length of the sentence that the offender serves.[3]

15.3 In *Chester v The Queen*[4], a Western Australian case appealed from the Western Australian Court of Criminal Appeal to the High Court, the High Court considered s 662 of the *Criminal Code*. In their joint judgment, Mason CJ and Brennan, Deane, Toohey and Gaudron JJ made the following observations on the origin of s 662:

> The Solicitor-General [for Western Australia], during the course of his

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2 It was originally intended that persons sentenced to indeterminate detention were to be detained in special reformatory prisons: Morgan, N, *Parole and Sentencing in Western Australia* (1922) 22 UWALR 94, 101.

3 Daunton-Fear, M, *Sentencing in Western Australia*, University of Queensland Press, 1977, pp 84-86.

4 (1988) 165 CLR 611

> argument, suggested that, when it was initially introduced, s. 662 was intended to serve a purpose in contributing to the reform or improvement of a person who had a propensity to commit serious crimes. Why indeterminate detention would bring about reform or improvement was not satisfactorily explained. Conceding that the section serves no such purpose now, the Solicitor-General submitted that the object of the provision is also to protect the public from persons who have a propensity to commit serious crimes...
>
> The notion that s. 662 was designed for the protection of the public from persons with a propensity to commit serious crimes derives no doubt from the fact that the exercise of the power is conditioned on conviction for an indictable offence and from the requirement that the court will have regard to the offender's antecedents and the characteristics and circumstances mentioned in the section. However, these elements are a slender foundation for the proposition that the court should exercise the power to direct detention of a person who has a propensity to commit serious crimes not amounting to crimes of violence. The fundamental principle of proportionality does not permit the increase of a sentence of imprisonment beyond what is proportional to the crime merely for the purpose of extending the protection of society from the recidivism of the offender... In the light of this background of settled fundamental legal principle, the power to direct or sentence to detention contained in s. 662 should be confined to very exceptional cases where the exercise of the power is demonstrably necessary to protect society from physical harm. The extension of a sentence of imprisonment which would violate the principle of proportionality can scarcely be justified on the ground that it is necessary to protect society from crime which is serious but non-violent...
>
> The stark and extraordinary nature of punishment by way of indeterminate detention, the term of which is terminable by executive, not by judicial, decision, requires that the sentencing judge be clearly satisfied by cogent evidence that the convicted person is a constant danger to the community in the sense already explained.[5]

15.4 Part 14 of the *Bill* appears not to be based on concepts of reformation of an offender and eliminates the question of whether or not a person is a "habitual criminal". Rather, a court may sentence an offender to a period of indeterminate detention if it is satisfied that an offender is "a danger to society, or a part of it" (cl 98). A number of criteria that a court is to take into account when considering whether an offender is a danger to society are enumerated. They are:

"(a) the exceptional seriousness of the offence;

(b) the risk that the offender will commit other indictable offences;

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[5] (1988) 165 CLR 611, 617-619

(c) the character of the offender and in particular -

(i) any psychological, psychiatric or medical condition affecting the offender;

(ii) the number and seriousness of other offences of which the offender has been convicted;

(d) any other exceptional circumstances."

15.5 These criteria give rise to a number of questions and issues, including: What constitutes exceptional seriousness? (Is it limited to crimes of violence?); How does the sentencing authority assess the risk of re-offending, particularly given that the period of indefinite detention may commence after an offender has already spent, for example, 10 years in prison?; The fact that the offender's prior criminal record is to be taken into account may be contrary to the principle that an offender's prior criminal record, while it may be taken into account in determining sentence, should not be given such weight that it leads to the imposition of a penalty which is disproportionate to the gravity of the current offence[6].

15.6 Provision for indefinite sentences has long been a part of Western Australian law. It seems that the basis for imposition of such sentences has changed over time from one principally of reformation of the offender to one principally of protection of society. This change of basis does not sit well with some of the traditional principles of sentencing and it is inconsistent with Article 10(3) of the *International Covenant on Civil and Political Rights*[7]. The only guidance in the second reading speech for the *Bill* which is to be found as to the reason for the change to the indefinite sentencing provisions is that they "will give effect to the Coalition's commitment in its Law and Justice policy to reform this State's patchwork of sentencing laws... [and] to provide sentencing authorities with a more complete range of sentencing options".

15.7 It seems to be accepted that protection of society is a legitimate concern for a sentencing authority within the range of broader sentencing principles. However, a practical difficulty with replacing the concept of proportionality between the offence committed and the sentence imposed with the concept of protection of society is the difficulty of predicting criminal behaviour. Studies have shown that it is not possible precisely to predict future criminal behaviour and that there is a significant rate of false prediction, either wrongly predicting that an offender will re-offend, or failing to predict that an offender will commit further crimes[8].

15.8 The Committee accepts that there is a trend in Australia to provide sentencing options, such as indefinite imprisonment, for the protection of society. However, the desire for protection

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6 *Veen v The Queen* (1978) 143 CLR 458 and *Veen v The Queen (No 2)* (1988) 164 CLR 465.

7 Article 10(3) of the *International Covenant on Civil and Political Rights* relevantly provides:

> The penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation.

8 Freiberg, A, *Changes in Approaches to Sentencing*, Legaldate 6(4), September 1994, p 2.

of society must be balanced against, relevantly, broader principles of sentencing, including the principle of proportionality. Clearly it is the Government's policy to maintain a system of sentencing in which indefinite imprisonment is an option. In these circumstances it is important that there are adequate safeguards built into the system. Such safeguards could include limiting the circumstances in which an indefinite sentence could be given and providing for regular reviews of indefinite sentences.

15.9 The criteria which a court must consider before making an order for an indefinite sentence provide some limitations on the circumstances in which such an order can be made. Some guidance as to a more specific restriction of the circumstances in which an indefinite sentence can be given can be found in the High Court decision in *Chester v The Queen*. If the principal purpose of an indefinite sentence is to protect society, then the circumstances in which such a sentence is given should be limited to those where there is "cogent evidence that the convicted person is a constant danger to the community" in the sense that he or she is likely to be violent and cause physical harm to persons in the future.

Recommendation 13

That the circumstances in which an indefinite sentence can be given be limited to cases in which there is cogent evidence that the offender is a constant danger to society in the sense that he or she will cause physical harm to persons in the future. One way of implementing this recommendation may be to amend cl 98(2) of the* Bill*:

(a) by deleting "on the balance of probabilites" and substituting "by cogent evidence"; and

(b) by deleting paragraph (b) and substituting "the risk that the offender will commit other offences causing serious physical harm to persons;".

15.10 As to reviews of an indefinite sentence, this could be done by the sentencing court or the Parole Board. The current system provides for annual or biennial review of indefinite sentences by the Parole Board. Clause 19 of the *Sentence Administration Bill 1995* provides that a term of indefinite imprisonment is to be reviewed after the first year and then every 3 years after that. The Committee considers that triennial review of indefinite sentences is inadequate. If, as Daunton-Fear contends, bitterness and resentment arise because of the uncertainty of an indefinite sentence, to prolong the period between reviews of the sentence may aggravate the situation and make it more difficult for an offender to re-enter the community at some time in the future. On the other hand, annual refusal of termination of the sentence may have the same effect. Consequently the Committee considers that this matter needs to be given more attention.

15.11 In the interim, the Committee considers that reviews of indefinite sentences should be conducted at the end of the first year of the sentence and annually, or at least every 2 years,

thereafter. It may be desirable for the sentencing court to conduct the first such review, particularly if there is a long time between the date of sentencing and the end of the first year of the indefinite sentence. This would enable the court, rather than an executive body, to consider the continuing appropriateness of the sentence 1 year after it first comes into effect.

Recommendation 14

That indefinite sentences be reviewed at the end of their first year by the sentencing court and annually thereafter by the Parole Board.

16 **Clause 113**

16.1 Clause 113 provides that a court may reduce the amount to be paid to a victim under a compensation order if:

> "(a) any behaviour, condition, attitude or disposition of the victim contributed directly or indirectly to the loss or damage suffered;
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> (b) the offence was not reported promptly to the police;
>
> (c) the victim did not take reasonable steps to assist in the identification, apprehension or prosecution of the offender;
>
> (d) because of any relationship or connection between the offender and the victim, it would be just to do so."

Mr Griffiths is concerned that there is a possibility that this may adversely impact on, in particular, victims of domestic violence.

16.2 The Committee agrees that it is possible that some victims, such as victims of domestic violence, possibly could be disadvantaged by these provisions, particularly in light of some of the comments reported to be made by some judges in other States in recent years. It is difficult to predict precisely in what circumstances such a situation may arise. Consequently, the Committee considers that the operation of these provisions should be monitored, but makes no recommendation for alteration of the substance of the provisions. However, the Committee considers that a minor amendment is required to clarify the meaning of the clause.

Recommendation 15

That the word "or" be added at the end of paragraph (c) of clause 113 and that the operation of these provisions be reviewed 12 months after the* Bill *comes into operation.

17 Clause 122

17.1 Clause 122 provides that persons who do not comply with restitution orders without lawful excuse commit an offence. The burden of proving that the person has a lawful excuse is placed on the person claiming it. Mr Griffiths objects to the fact that the offence is punishable as a contempt of the Supreme Court and is therefore not subject to the sentencing principles in cl 6 of the *Bill* and also that the burden of proof is placed on the person claiming the excuse.

17.2 By a supplementary notice paper dated 17 October 1995, the Minister for the Environment, Hon Peter Foss MLC, gave notice that he would move in committee that, among other things, cl 122 be amended deleting paragraph (b) and substituting the following paragraph:

> "(b) after summary conviction by the court that imposed the order, a fine of $10,000 or imprisonment for 12 months."

17.3 The Committee can see no reason why failure to comply with a restitution order (an order of a court) cannot be punished by the Supreme Court as a contempt of that court. It would appear that the sentencing principles contained in the *Bill* would apply to a conviction under cl 122(b) as it is proposed to be amended in committee. The Committee does not consider it improper for the burden of proof of excuse to be placed on the party claiming the excuse[9].

Recommendation 16

That clause 122, as it is proposed to be amended in committee, remain in the Bill.

18 Clause 144

18.1 Clause 144 provides that the Chief Justice of Western Australia may report in writing to the Parliament on any matter connected with sentencing that he or she considers should be brought to the attention of Parliament. Mr Griffiths considers that it is not appropriate for the Chief Justice to report to Parliament as it undermines the status and position of members of Parliament and the role of the judiciary.

18.2 The Committee considers that it does not undermine the status and position of members of Parliament to have the Chief Justice report to Parliament. The judiciary holds a unique position in our society as one of the three great arms of government (the other 2 being the legislature and the executive). Whilst Parliament is responsible for making the *Sentencing Bill 1995*, in practice it will be to a great extent applied and implemented by the judiciary: it is one of the main functions of judges to sentence offenders. It would seem to make sense that the Chief Justice, as head of the judiciary in Western Australia, be empowered by Parliament formally to report to Parliament on matters which directly concern the day to day operation of the *Bill*. In his submission to the Committee the Acting Chief Justice expressed no concerns that the provision would compromise the independence of the judiciary and noted that it would provide a useful mechanism for highlighting shortcomings

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[9] See, for example, Stone, *Burden of Proof and the Judicial Process*, (1944) 60 LQR 260: "[W]here the opponent, in reply to the party's invocation of a general rule, relies upon an exception to that rule, he has the burden of proving the facts which bring the exception into play."

in the *Bill*.

Recommendation 17

That clause 144 remain in the Bill unaltered.