REPORT OF THE

STANDING COMMITTEE ON LEGISLATION

IN RELATION TO

Criminal Law Amendment Bill (No 1) 1998

Presented by the Hon Bruce Donaldson (Chairman)

Report 42 May 1998

STANDING COMMITTEE ON LEGISLATION

Terms of Reference:

1 There is hereby appointed a standing committee to be known as the *Legislation Committee*.

2 The Committee consists of 5 members.

3 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.

4 A referral under clause 3 includes a recommittal.

5 The functions of the Committee are to consider and report on
- (a) Bills referred under this order;
- (b) what written laws of the State and spent or obsolete Acts of Parliament might be repealed from time to time;
- (c) what amendments of a technical or drafting nature might be made to the statute book;
- (d) the form and availability of written laws and their publication.

Members as at the date of this report:

Hon Bruce Donaldson MLC (Chairman)
Hon Bill Stretch MLC
Hon John Cowdell MLC
Hon Giz Watson MLC
Hon Derrick Tomlinson MLC

Participating member:

Hon Helen Hodgson MLC

Staff as at the date of this report:

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1. Executive summary and recommendations

1.1 The *Criminal Law Amendment Bill (No 1) 1998* ("*Bill*") introduces a number of amendments to the *Criminal Code* and the *Sentencing Act 1995*.

1.2 The amendments made by the *Bill* seek to:

- amend section 236 of the *Criminal Code* ("*Code*") dealing with the taking of forensic samples;
- amend Chapter XXXIIIB of the *Code* relating to the offence of stalking ; and
- amend the *Sentencing Act 1995* in relation to whole of life sentences.

1.3 The recommendations of the Committee are set out at paragraphs 3.18 to 3.28, 4.12 to 4.17 and 6.15 to 6.19.

1.4 In summary, the Committee's response to the amendments made by the *Bill* are as follows:

Proposed amendment to section 236 of the *Code* dealing with the taking of forensic samples

- The Committee recognises the need for an amendment to section 236 of the *Code* on the basis of the changes proposed by the Committee (refer paragraphs 3.18 to 3.28).
- The Committee recommends that in the interests of the efficient and more effective resolution of crime, a broader examination of forensic procedures and DNA profiling is warranted including its effect on civil liberties and responsibilities (refer paragraph 3.18).

Proposed amendment to Chapter XXXIIIB of the *Code* dealing with stalking

- The Committee recognises the need for an amendment to the *Code* dealing with the offence of stalking on the basis of the changes proposed by the Committee (refer paragraphs 4.12 to 4.17).
- The Committee recommends that further work be undertaken to examine the issue of stalking so that all likely manifestations of stalking are included in the legislation. Appropriate measures should be included to ensure that breaches of restraining orders under the *Restraining Orders Act 1997* and breaches of bail conditions under the *Bail Act 1982* trigger appropriate offences under stalking legislation (refer paragraph 4.11).

Proposed amendment to Section 91 of the *Sentencing Act 1995* **dealing with strict security life imprisonment**

- The majority of the Committee recognises the need for such an amendment but queries whether the proposed wording of clause 6 of the *Bill* is the most effective way to achieve this outcome (refer paragraphs 6.17 to 6.18).

2 Reference

2.1 The *Bill* was referred to the Legislation Committee on 12 March 1998 on a motion by the Attorney General, Hon Peter Foss with a reporting date of not later than 9 April 1998. On 8 April 1998, the Chairman of the Committee, Hon Bruce Donaldson moved for an extension of the reporting date to 7 May 1998.

Origin of the *Bill*

2.2 The *Bill* formed part of the *Criminal Law Amendment Bill 1997,* an omnibus Bill which was introduced on 11 November 1997 by motion of the Attorney General Hon Peter Foss, and read a second time in the Legislative Council on 11 November 1997.

2.3 The *Criminal Law Amendment Bill 1997* was divided on 12 March 1998 with the *Bill* being referred to the Legislation Committee before its second reading. No policy accompanied the Bill. Amendments to the *Bill* proposed by the Hon Helen Hodgson and the Hon Nick Griffiths and set out in the Supplementary Notice Paper dated 17 March 1998 were provided to the Committee.

3 Proposed amendment to section 236 of the *Code* dealing with the taking of forensic samples

3.1 Section 236 of the *Code* reads as follows:

"**Examination of person of accused persons in custody**

236. When a person is in lawful custody upon a charge of committing any offence, it is lawful for a police officer to search his person, and to take from him anything found upon his person, and to use such force as is reasonably necessary for that purpose.

When a person is in lawful custody upon a charge of committing any offence of such a nature and alleged to have been committed under such circumstances that there are reasonable grounds for believing that an examination of his person will afford evidence as to the commission of the offence, it is lawful for a legally qualified medical practitioner, acting at the request of a police officer, and for any person acting in good faith in his aid

and under his direction, to make such an examination of the person so in custody as is reasonably necessary in order to ascertain the facts which may afford such evidence, and to use such force as is reasonably necessary for that purpose."

3.2 Clause 3 of the *Bill* proposes to insert after the above two paragraphs the following paragraph:

> "When a person is in lawful custody upon a charge of committing any offence of such a nature and alleged to have been committed under such circumstances that there are reasonable grounds for believing that a sample of the person's blood, hair (from any part of the body), nails or saliva, or of any matter on the person's body or obtainable by a buccal swab, will afford evidence as to the commission of the offence, it is lawful for -
>
> (a) a legally qualified medical practitioner;
>
> (b) a nurse as defined in the *Nurses Act 1992*; or
>
> (c) any other person suitably qualified to do so,
>
> acting at the request of a police officer, and for any person acting in good faith in his aid and under his direction, to take the sample from the person so in custody and to use such force as is reasonably necessary for that purpose."

3.3 The proposed amendment is in response to the decision of the Court of Criminal Appeal of the Western Australian Supreme Court in *King v R* (1996) 16 WAR 540, where the court expressed concerns about the taking of forensic samples under section 236 of the *Code*. Rowland J, with whom Ipp J agreed, indicated that he was unlikely to give a broad definition of the term "examination" and made the following comment:

> "I say no more about s236 other than to note that if it be thought desirable to continue what appears to be the general practice in this State of permitting investigating officers to demand samples from persons in custody on a charge of committing an offence, then it would be preferable for the legislature to make express that which has been taken for granted, but on which I have grave doubts."
>
> *King v R* (1996) 16 WAR 540 at 540 per Rowland J.

Wallwork J also gave a restrictive meaning to the term "examination":

> "With respect to s 236 of the *Criminal Code* (WA), which allows a search and "an examination of the person", in my view that section does not authorise the taking of a blood sample from a person without that person's consent."
>
> *King v R* (1996) 16 WAR 540 at 551 per Wallwork J.

3.4 In Western Australia, forensic samples have been taken by police as part of "an examination of the person" in reliance on the authority of *R v Franklin* (1979) 22 SASR 101, in which the South Australian Court of Criminal Appeal held that a statutory provision in substantially identical words to section 236 of the *Code* authorised the taking of forensic samples provided the conditions in the provision were fulfilled. The Court held that "an examination of the person" could be external, taking a hair sample for example, or internal, such as taking a blood sample.

3.5 The validity of the views expressed in *Franklin* is now in doubt following the comments made by the Full Court of the Western Australian Supreme Court in *King v R* as set out above, and the decision of the New South Wales Court of Criminal Appeal in *Fernando v Commissioner of Police* (1995) 78 A Crim R 64, which found that *Franklin* was wrongly decided and refused to follow it.

3.6 Following the *Fernando* decision, an amendment was quickly made to the New South Wales *Crimes Act 1900* to reverse the effect of the decision and to enable blood, hair or saliva samples to be taken in New South Wales without consent and with no additional safeguards added to the existing law. At the time of the introduction of the amendment on 1 June 1995, the Attorney General of New South Wales stated that it was an interim measure only pending the introduction of a more comprehensive legislative regime dealing with the subject of forensic procedures. As of the date of this report, New South Wales is still awaiting the more comprehensive legislative regime.

3.7 In South Australia, the response to uncertainty surrounding the decision in *Franklin* has been met with the introduction of a comprehensive act containing extensive safeguards, the *Criminal Law (Forensic Procedures) Act 1998*. This Act is based on the *Forensic Procedures Model Provisions* ("Model Bill") developed and approved in principle by the Model Criminal Code Officers' Committee of the Standing Committee of Attorneys-General. The Model Bill draws on the recommendations of the *Report on Body Samples and Examinations* published by the Victorian Consultative Committee on Police Powers on Investigation ("the Coldrey Report").

3.8 Victoria was the first State to enact comprehensive legislation dealing with forensic procedures, the *Crimes (Amendment) Act 1993* which was enacted following the publication of the Coldrey Report. These provisions were further strengthened by the *Crimes (Amendment) Act 1997*, which, among other things, amended the Victorian provisions enacted after the Coldrey Report to conform more closely with the Model Bill.

3.9 The Commonwealth Government has responded to the Model Bill by introducing the *Crimes Amendment (Forensic Procedures) Bill 1995*. This Bill lapsed when parliament was prorogued in 1996 and was reintroduced in substantially the same terms as the *Crimes Amendment (Forensic Procedures) Bill 1997* . This Bill is based on the Model Bill as amended by the recommendations of two reports by the Senate Legal and Constitutional Committee dated October 1995 and November 1997 respectively. The Bill is currently before the Senate for consideration.

3.10 The Victorian, South Australian and Commonwealth measures provide a comprehensive scheme for obtaining forensic samples from adults, children under the age of 18 years, and persons incapable of managing their own affairs. Each piece of legislation clearly sets out the powers and obligations of police when carrying out the procedures, and detail the many safeguards to protect the rights of individuals, with particular provisions for Aboriginal persons, Torres Strait Islanders, children and incapable persons. The safeguards include the right to an interpreter and the provision of full information about the relevant procedure and the suspect's rights in a language likely to be understood by the person. With limited exceptions, forensic procedures carried out in breach of the legislation will be inadmissible as evidence in a court.

3.11 The amendments to the New South Wales *Crime Act 1900* in response to the *Fernando* decision and the proposed amendment to the *Code* in response to the decision in *King v R* do not clearly set out the powers and obligations of the police when carrying out forensic procedures. Nor do they contain additional safeguards to protect the rights of the accused surrounding the taking and use of forensic samples.

3.12 In Western Australia at common law, without express statutory powers, there is no power to compel a suspect to provide a sample of his or her blood, hair, saliva or other bodily matter. Use of physical force to obtain such a sample, whether exercised by a police officer or by a doctor acting at the request of a police officer, may amount to an assault.

In taking forensic samples from persons in custody under section 236 of the *Code*, the Police Service has relied on the extended definition of "an examination of a person" in custody as set out in the *Franklin* decision. *R v King* has now raised serious legal doubts over the validity of this interpretation.

3.13 The proposed amendment to section 236 of the *Code* seeks to make express these powers by making it lawful for specified persons to take forensic samples from persons who are lawfully held in custody upon a charge of committing an offence provided there are reasonable grounds for believing that the taking of the forensic sample will afford evidence as to the commission of the offence.

3.14 Clause 3 of the *Bill* makes it lawful for a legally qualified medical practitioner, a nurse as defined in the *Nurses Act 1992*, or any other person suitably qualified to do

so, acting at the request of a police officer, and for any person acting in good faith in his aid and under his direction, to take a sample of a person's blood, hair (from any part of the body), nails or saliva, or of any matter on the person's body or obtainable by a buccal swab from the person so in custody and to use such force as is reasonably necessary for that purpose.

Matters raised

3.15 The Committee has heard evidence from the Attorney General, Hon Peter Foss and the Commissioner for Police in Western Australia, Commissioner Falconer, on the matters raised in clause 3 of the *Bill*. Both witnesses considered clause 3 of the *Bill* to be an interim measure only to clarify the legality of the taking of forensic samples from persons lawfully held in custody. The amendments are seen as doing little more than formalising the existing practice, about which legal doubts have recently arisen.

The proposed amendments make express the powers of specified persons, acting at the request of a police officer, to take such forensic samples from suspects without their consent and using reasonable force where necessary. This raises questions of the infringement of civil liberties and responsibilities which have not been investigated at this stage.

3.16 The Commissioner for Police indicated that he would support the introduction of a much more comprehensive legislative regime which will more fully regulate this contentious area. The development of a scientific approach to criminal investigation through the use of DNA profiling as a technique for incriminating and exculpating those suspected of criminal offences represents, in the Commissioner's view, the greatest breakthrough in criminal investigative tools since fingerprinting techniques were pioneered almost 90 years ago.

3.17 The Commissioner for Police has foreshadowed his desire to establish a DNA database in Western Australia. Subsequently, the Committee heard evidence from Mr Alastair Ross, National Director of the Institute of Forensic Science, on the establishment of a national DNA database. The Model Bill and the legislative responses in Victoria, South Australia and the Commonwealth represent the first steps in establishing a cooperative scheme across Australia with the aim of establishing nationally consistent legislation. Anecdotal evidence from the United States of America and the United Kingdom indicate that the validity of results obtained by DNA technology require the creation of a large database, which means that in Australia the database must be national.

3.18 The Committee has heard evidence of the potential benefits from the employment of DNA technology in criminal investigation including the use of DNA profiling techniques to both exculpate and incriminate those suspected of criminal offences. Anecdotal evidence from the United Kingdom suggests that DNA technology has resulted in dramatically improved "clear up" rates in unsolved crimes.

The benefits of DNA technology and the rights of the community generally to an effective and efficient investigation of crime needs to be balanced against a number of civil rights and liberties vested in the citizen; notably the interests of privacy, the privilege against self incrimination and bodily integrity.

The proposed amendment to section 236 of the *Code* provides the legal authority for the taking of forensic samples. The Committee recommends that in the interests of the efficient and more effective resolution of crime, a broader examination of forensic procedures and DNA profiling is warranted including its effect on civil liberties and responsibilities.

Committee's recommendations

3.19 The Committee notes that the proposed amendment to section 236 of the *Code* is considered by the Attorney General and Commissioner for Police to be an interim measure only. Should Parliament wish to pass the existing clause 3 of the *Bill* as an interim measure only, the Committee recommends that the following amendments are made to the wording of the *Bill* .

3.20 Clause 3 of the *Bill* provides that a forensic sample may be taken by a legally qualified medical practitioner, a nurse as defined in the *Nurses Act 1992*, or any other person suitably qualified to do so, *and for any person acting in good faith in his aid and under his direction* (emphasis added). This phrase is, in the view of the Committee, ambiguous where it is to apply to three categories of persons. The Committee doubts the propriety of any person other than a medical practitioner registered under the *Medical Act 1894* to delegate powers in this way. As distinct categories of persons are included within the clause itself, the Committee considers that the phrase, highlighted above, should be deleted.

3.21 The Committee recommends that the phrase, "a legally qualified medical practitioner" is replaced with the phrase, "a medical practitioner registered under the *Medical Act 1894*".

3.22 Clause 3 of the *Bill* contains no definition of "any other person suitably qualified". The Committee recommends that a definition of "suitably qualified" is included within the *Bill*. By implication, a person "suitably qualified" would not hold a medical or nursing qualification. The Committee is concerned that the clause provides for the taking of intimate and intrusive forensic sample and that such samples may be taken by a person who is neither in possession of a nursing or medical qualification. The Committee therefore seeks to restrict the sample which a "suitably qualified" person could take to non intrusive, non intimate procedures.

3.23 The Committee is concerned that the ability to take samples "of any matter on the person's body" may be cast in terms too broadly and could include any bodily fluids or particles taken from any surface of the body. The taking of such samples may be

particularly intimate. Similarly, the taking of a sample by means of a buccal swab or a sample of blood may be particularly intrusive.

If such broad powers are considered necessary, the Committee recommends that the procedures are undertaken by a qualified medical practitioner or nurse only and that safeguards are incorporated into the *Bill* in terms similar to those contained in the Model Bill which provide rigorous protections for intimate and intrusive procedures. For example, intimate forensic procedures must not be carried out by a person of the opposite sex, and all forensic procedures undertaken must avoid inflicting unnecessary physical harm, humiliation or embarrassment and must be consistent with appropriate medical standards.

3.24 The Committee is concerned that there is no provision in the *Bill* for the exemption from liability from civil or criminal proceedings for persons who carry out or who assist in carrying out forensic procedures for any act or omission on their part where the person genuinely believes that the forensic procedure is authorised. The Committee recommends that such an exemption is incorporated into the *Bill*.

3.25 The Committee is concerned that there is no legislative provision governing the keeping or destruction of forensic samples and associated records once taken. In relation to other identification evidence obtained by police officers, section 50AA of the *Police Act 1892* provides as follows:

"**Particulars of identity**

50AA. (1) Where any person is in lawful custody for any offence punishable on indictment or summary conviction, any officer or constable of the Police Force may take or cause to be taken all such particulars as he may think necessary or desirable for the identification of that person, including his photograph, measurements, fingerprints, and palmprints.

(2) Where the photographs, fingerprints, palmprints or other identification particulars of a person are taken under subsection (1) and that person is found not to be guilty of any offence arising out of the circumstances leading to the taking of those particulars, the original negatives and all other copies available of the photograph, fingerprints, palmprints and other particulars taken shall, if so requested by that person, be destroyed in his presence but not until the time for an appeal from the finding has expired or an appeal from the finding has been resolved in favour of the accused person."

The legislative regime for the record of particulars of identity, the keeping and destruction of photographic, fingerprint and palmprint evidence is more extensive than for other forensic material (such as the taking of samples of blood). The Committee recommends that a record of the taking of the forensic sample together with how the forensic material is to be dealt with, should be contained in the *Bill*.

3.26 The Committee is concerned that there is no provision for the destruction of forensic material, including the results of analysis of such material, collected from a person lawfully in custody even where the person has been acquitted. Commissioner Falconer, in his evidence to the Committee, supported the view of the Committee that forensic material, including the results and analysis of such material, should be automatically destroyed upon the acquittal of the accused person once the time of appeal has expired. The Committee recommends that the *Bill* is amended to insert a clause providing for the destruction of forensic material.

3.27 Subject to the above amendments being incorporated within the *Bill*, the Committee supports clause 3 of the *Bill*.

3.28 The Committee believes that it is appropriate for the broader issues surrounding the taking, storage, and use of forensic material to be investigated in greater detail before more comprehensive statutory measures are introduced.

4 Proposed amendment to Chapter XXXIIIB of the *Code*

4.1 Clause 4 of the *Bill* proposes to repeal Chapter XXXIIIB of the *Code* and substitute the following Chapter:

"CHAPTER XXXIIIB - STALKING

Interpretation

338D. (1) In this chapter -

"circumstances of aggravation" means circumstances in which -

(a) immediately before or during or immediately after the commission of the offence, the offender is armed with any dangerous or offensive weapon or instrument or pretends to be so armed; or

(b) the conduct of the offender in committing the offence constituted a breach of -

(I) an order made or registered under the *Restraining Orders Act 1997* or to which that Act applies; or

(ii) a condition on which bail has been granted to the offender;

"intimidate", in relation to a person, includes -

(a) to cause physical or mental harm to the person;

(b) to cause apprehension or fear in the person;

(c) to prevent the person from doing an act that the person is lawfully entitled to do, or to hinder the person in doing such an act;

(d) to compel the person to do an act that the person is lawfully entitled to abstain from doing;

"pursue", in relation to a person, means -

(a) to persistently contact the person, whether by telephone, fax or otherwise;

(b) to persistently follow the person;

(c) to persistently send unsolicited gifts to or leave such gifts for the person;

(d) to watch or beset the place where the person lives or works or happens to be, or the approaches to such a place.

(2) For the purpose of deciding whether an accused person has pursued another person -

(a) the accused is not to be regarded as having contacted or followed that person on a particular occasion if it is proved by or on behalf of the accused that on that occasion the accused did not intend to contact or follow that person;

(b) an act by the accused on a particular occasion is not to be taken into account for the purpose of deciding whether the accused watched or beset a place where that person lived, worked, or happened to be, or the approaches to such a place, if it is proved by or on behalf of the

accused that on that occasion the accused did not know it was such a place.

Stalking

338E. (1) A person who pursues another person with intent to intimidate that person or a third person, is guilty of a crime and is liable -

(a) where the offence is committed in circumstances of aggravation, to imprisonment for 8 years; and

(b) in any other case, to imprisonment for 3 years.

Summary conviction penalty:

(c) in a case to which paragraph (a) applies: Imprisonment for 2 years or a fine of $8,000;

(d) in a case to which paragraph (b) applies: Imprisonment for 18 months or a fine of $6,000.

(2) A person who pursues another person in a manner that could reasonably be expected to intimidate, and that does in fact intimidate, that person or a third person is guilty of a simple offence.

Penalty: Imprisonment for 12 months or a fine of $4,000.

(3) It is a defence to a charge under this section to prove that the accused person acted with lawful authority."

4.2 The proposed amendments are in response to recent decisions of Magistrates in the Court of Petty Sessions where conduct which caused apprehension and fear to another person was found not to fall within the existing provisions of the *Code* relating to stalking as the Court found insufficient evidence that the accused intended to cause harm or fear to the complainant.

4.3 In introducing a new simple offence of stalking, the entire Chapter of the *Code* relating to stalking has been redrafted to make the offence of stalking more readily understandable. The new provision, which requires no intent on the part of the accused, provides for a simple offence of stalking where the conduct of the accused could reasonably be expected to intimidate and does in fact intimidate that person or a third party. The new Chapter of the *Code* including the new simple offence is contained within clause 4 of the *Bill*.

Matters raised

4.4 The Committee has taken evidence from Dr Ananth Pullela, Senior Forensic Psychiatrist at the Ministry of Justice and Health Department of Western Australia, the Attorney General, Hon Peter Foss and Dr Judyth Watson on the topic of stalking. The Committee has also reviewed the offence of stalking in other Australian jurisdictions, examined the Model Antistalking Code promulgated by the United States Department of Justice for adoption by the individual States and the recently enacted United Kingdom legislation contained in the *Protection from Harassment Act 1997*.

4.5 This evidence has led the Committee to consider the offence of stalking in a broader context. In addition to the inclusion of the new simple offence of stalking, the Committee has considered the need for legislation of this nature to provide greater certainty as to the protection of victims of stalking and harassment in general. The civil courts have granted injunctions, through the *Restraining Orders Act 1997* and other measures, to prevent the repetition of such behaviour and criminal courts have, in some cases, equated severe psychological harm to bodily harm. However, the extent to which the courts are prepared, or are able, to provide relief in these circumstances remains unclear.

4.6 The Committee believes that greater certainty could be obtained through the creation of a broader based statutory remedy which encompasses not only stalking, but other conduct which, for want of a better term, may encompass elements of harassment.

4.7 The effect of the creation of a broader statutory regime will not only create a certain basis for victims to take action in the civil court, it also provides an opportunity to provide statutory defences to such actions in order to protect the police, security agencies and others such as journalists, private investigators and debt collectors, whose legitimate activities might, on occasions, resemble the conduct pursued by stalkers.

4.8 Criminal proceedings are in many respects a blunt instrument for seeking redress from alleged incidents of stalking. The psychological harm inflicted on the victim before an action can be brought militates against the use of criminal sanctions as an effective deterrent. Criminal proceedings cannot always protect a victim from anticipated harm. Neither can the criminal law provide protection for someone who might reasonably expect that they may be subject to stalking in the future. The Committee believes that the victims of stalking should be able to seek the protection of the law at an earlier stage, before the harm inflicted on them reaches such a serious level.

4.9 The Court must be satisfied beyond reasonable doubt for criminal proceedings. However, under civil proceedings, if the Court is satisfied on the balance of probabilities that the defendant engaged in conduct of stalking, it should be able to order the defendant to compensate the victim for the distress and disturbance caused

by the defendant's conduct and to grant an injunction preventing the carrying out of any specified activity which would amount to stalking. Civil proceedings would allow the Court to fashion a remedy to accord with the precise circumstances of the case.

4.10 To this end, the Committee believes that clause 4 of the *Bill* should encompass aspects of the *Restraining Orders Act 1997* and the *Bail Act 1982* as breaches of bail conditions or restraining orders often lead to conduct which amounts to an offence under the stalking legislation. The Committee believes that it is right that provisions dealing with stalking should be available under both civil and criminal law.

4.11 **The Committee recognises the need for an amendment to the *Code* dealing with the offence of stalking on the basis of the changes proposed by the Committee (refer paragraphs 4.12 to 4.17).**

The Committee recommends that further work be undertaken to examine the issue of stalking so that all likely manifestations of stalking are included in the legislation. Appropriate measures should be included to ensure that breaches of restraining orders under the *Restraining Orders Act 1997* and breaches of bail conditions under the *Bail Act 1982* trigger appropriate offences under stalking legislation.

Committee's recommendations

4.12 Should Parliament wish to pass the existing clause 4 of the *Bill* as an interim measure only, the Committee recommends that the following amendments are made to the wording of the *Bill* .

4.13 The term "pursue" should be replaced. The Oxford English Dictionary defines "pursue" as to follow with intent whereas this *Bill* provides a simple offence of stalking where no intent is necessary. The Committee suggests that "harass" might be more appropriate terminology.

4.14 The definition section "pursue" should be amended to include written, indirect and esoteric communications, and add to the definition as (e) "do any of the foregoing in breach of a restraining order or bail condition".

4.15 Evidence taken by the Committee indicates that clause 4 of the *Bill*, as presently drafted fails to include within its definitions the scope of conduct (eg, indirect or esoteric communications) which should be included as an offence.

4.16 In light of the evidence of Dr Ananth Pullela, Senior Forensic Psychiatrist at the Ministry of Justice and Health Department of Western Australia, consideration should be given as to whether in certain circumstances, the offence of stalking should involve a pre-sentence psychiatric report.

4.17 The Committee believes that it is preferable for clause 4 of the *Bill* not to be adopted in its current format because of deficiencies identified as to its effectiveness in operation. However, if Parliament sees the need for an urgent interim measure, clause 4 of the *Bill* should be enacted with the suggested amendments set out above.

5 Proposed insertion of Section 598AA of the *Code*

5.1 Clause 5 of the *Bill* proposes to insert the following section after section 598A of the *Code*:

"**Stalking; alternative verdict**

598AA. (1) Upon an indictment charging a person with an offence under section 338E (1) the person may be convicted of a simple offence under section 338E (2).

(2) Where a charge under section 338E (1) is dealt with summarily the person charged may be convicted summarily of an offence under section 338E (2)."

5.2 In light of the proposed insertion of the simple offence of stalking under clause 4 of the *Bill* and subject to the recommended amendments to clause 4 of the *Bill* as set out above, the Committee supports the proposed insertion of a new section 598AA of the *Code* as set out in clause 5 of the *Bill*.

6 Proposed amendment to Section 91 of the *Sentencing Act 1995*

6.1 Section 91 of the *Sentencing Act 1995* reads as follows:

"Imposing strict security life imprisonment

91. (1) A court that sentences an offender to strict security life imprisonment must, unless it makes an order under subsection (3), set a minimum period of at least 20 and not more than 30 years that the offender must serve before being eligible for release on parole.

(2) The minimum period begins to run when the term of strict security life imprisonment begins.

(3) A court that sentences an offender to strict security life imprisonment may, if it decides it is appropriate to do so, order that the offender is not to be paroled.

6.2 Clause 6 of the *Bill* proposes to repeal section 91 (3) of the *Sentencing Act 1995* and substitute the following subsections:

> "(3) A court that sentences an offender to strict security life imprisonment must order that the offender be imprisoned for the whole of the offender's life if it is necessary to do so in order to meet the community's interest in retribution, punishment and deterrence.
>
> (4) In determining whether an offence is one for which an order under subsection (3) is necessary, the only matters relating to the offence that are to be taken into account are -
>
> (a) the circumstances of the commission of the offence; and
>
> (b) any aggravating factors."

6.3 Clause 6 of the *Bill* seeks to overcome by legislation the decision of the High Court in *Mitchell v R* (1996) 184 CLR 333 which reversed a decision of the Court of Criminal Appeal of the Western Australian Supreme Court in *R v Mitchell* (1994) 72 A Crim R 200.

6.4 The accused, William Patrick Mitchell, pleaded guilty to four counts of wilful murder, and under section 282 of the *Code*, he was liable to a mandatory punishment of "strict security life imprisonment" or "life imprisonment". The distinction between these two categories of punishment lies in the operation of the parole system which is provided for in the *Sentencing Act 1995*. The trial judge at first instance, Owen J sentenced the accused to strict security life imprisonment on each of the four counts of wilful murder. However, Owen J declined to make an order under what is now section 91(3) of the *Sentencing Act 1995* that the accused not be eligible for parole.

6.5 Section 91(3) of the *Sentencing Act 1995* provides that:

> "A court that sentences an offender to strict security life imprisonment may, if it decides it is appropriate to do so, order that the offender is not to be paroled."

There is no further statement within section 91 of the *Sentencing Act 1995* as to the content of the term "appropriate".

6.6 By contrast, section 89 of the *Sentencing Act 1995* provides as follows:
"Offender may be made eligible for parole

> **89.** (1) A court sentencing an offender to one or more fixed terms may, if it considers that it is appropriate to do so, order that the offender be eligible for parole by making a parole eligibility order.
>
> (2) In determining whether it is appropriate to make a parole eligibility order, a court may have regard to all or any of the following:
>
> (a) the seriousness and nature of the offence;
>
> (b) the circumstances of the commission of the offence;
>
> (c) the offender's antecedents;
>
> (d) circumstances relevant to the offender or which, in the court's opinion, might be relevant to the offender at the time when the offender would be eligible for release on parole if a parole eligibility order were made;
>
> (e) any other reason the court decides is relevant."

6.7 Owen J, when considering the question of eligibility for parole, noted that s 40D(2a) of the *Offenders Community Corrections Act* ,the equivalent to section 91(3) of the *Sentencing Act 1995,* was silent as to the test to be applied in deciding whether to make an order that the offender not be paroled, but concluded that, in considering the appropriate disposition, the court should have regard to all those factors to which it normally paid heed in ensuring that, so far as possible, the penalty met the objects for which the sentence was imposed. He concluded:

> "Because it is related to parole, this will include matters such as the nature of the offence, the circumstances of the offence, the antecedents of the offender as well as matters that might be relevant at the time when the prisoner is due to be considered for parole if appropriate. Put slightly differently, when considering an order under s 40D(2a) [of the *Offenders Community Corrections Act* , the equivalent to section 91(3) of the *Sentencing Act 1995*] the court must examine the place which parole, with its emphasis on rehabilitation of the offender, should take in the overall mix of factors which together make up the sentencing process."

6.8 Owen J continued:

> "As I have already said, I am not able to say that you will always be a danger to the public. ... *I can not prognosticate twenty years or more into the future on the basis of the materials before me ... If I were to make a decision now it would be that you not be released because I have little confidence in your commitment to free yourself from drugs. In light of the expert evidence I am unable to say that this would be the case in twenty years or more from now*.

> [emphasis added] ... So far as I am concerned you will never be released. That is the function of strict security life imprisonment. If, at a time in excess of twenty years, the executive arm of government, based on facts which are unascertainable now but which will be apparent then, takes the view that you do not constitute a danger to the public and are otherwise deserving of release on licence, then that is a decision that it will take. The fulfilment of the goal of public safety lies in that decision."

6.9 The Crown appealed against the sentencing decision to the Court of Criminal Appeal which was reported as *R v William Patrick Mitchell* (1994) 72 A Crim R 200. A majority of the Court of Criminal Appeal (Kennedy and Ipp JJ, Murray J dissenting) concluded that the judge at first instance (Owen J) had erred in the exercise of a discretion given to him under s 40D(2a) of the *Offenders Community Corrections Act* [the equivalent to section 91(3) of the *Sentencing Act 1995*] in failing to give sufficient weight to the circumstances of the commission of the offences. Ipp J went even further than Kennedy J by stating:

> "With great respect to his Honour [Owen J], I have come to a different conclusion. In my opinion, the overriding factor in determining whether the court should exercise its power under s 40D(2a) [of the *Offenders Community Corrections Act* , the equivalent to section 91(3) of the *Sentencing Act 1995*] is *risk to the community* (emphasis added) not matters relating to the punishment of the offender."
>
> *R v William Patrick Mitchell* (1994) 72 A Crim R 200 per Ipp J at 225.

Ipp J continued:

> "I should also say that I agree with Kennedy J that the learned sentencing judge did not give sufficient weight to the circumstances of the offences. Whatever adjectives are used they will not be able, accurately, to convey the enormity of the evil committed and the suffering caused by the respondent. In my opinion, in the present case, the circumstances of the offences override all other considerations."
>
> *R v William Patrick Mitchell* (1994) 72 A Crim R 200 per Ipp J at 225.

6.10 Kennedy J also alluded to the intention of Parliament in enacting s 40D(2a) of the *Offenders Community Corrections Act* by referring to the following extract from the Second Reading Speech of the Minister introducing the amendment:

> "Whole of life imprisonment is provided for by investing the Supreme Court with the power, when imposing a sentence of strict security life imprisonment, to order that the offender is not to be eligible for parole at any time. Such an order is to be made at the Court's discretion. Given the

> extreme nature of such an order, it is expected that its application would be limited to those cases where the circumstances of the offence were of the very worst kind or where considerations of public safety would always militate against the release of the offender."
>
> *R v William Patrick Mitchell* (1994) 72 A Crim R 200 per Kennedy J at 206

6.11 Kennedy J was unable to accept from the above extract that the Minister intended to convey that the circumstances of the offence in question may be considered on their own however important they may be in a particular case. Kennedy J then quoted an extract of a decision of the High Court which considered the ability to permit reference to the Minister's Second Reading Speech under s 15AB of the *Acts Interpretation Act 1901* (Cth) from which s 19 of the *Interpretation Act 1984* (WA) is derived:

> "The words of the Minister must not be substituted for the text of the law. Particularly is this so when the intention stated by the Minister but unexpressed in the law is restrictive of the liberty of the individual. *It is always possible that through oversight or inadvertence the clear intention of the Parliament fails to be translated into the text of the law* (emphasis added). However unfortunate it may be when that happens, the task of the Court remains clear. The function of the Court is to give effect to the will of the Parliament as expressed in the law."
>
> *Re Bolton; Ex parte Beane* (1987) 162 CLR 514 at 518 per Mason CJ Wilson and Dawson JJ.

For the reasons set out above, Kennedy J concluded that he could not have regard to the Minister's Second Reading Speech in discerning the intent of Parliament.

6.12 The High Court rejected the decision of the Criminal Court of Appeal on the basis that the appellate court had wrongly construed the meaning of s 40D(2a) of the *Offenders Community Corrections Act* (what is now section 91(3) of the *Sentencing Act 1995)* by suggesting that the section required the exercise of a discretion and the sentencing judge, Owen J, had erred in the exercise of that discretion. The High Court stated that the only grounds for appeal were whether the trial judge had fallen into an appealable error in the construction and application to the facts of the phrase "considers ... appropriate" as that phrase is used in section 40D(2a) of the *Offenders Community Corrections Act*. The High Court considered that this phrase connoted the striking of a balance between relevant considerations so as to provide the outcome which is fit and proper. Having reviewed the range of matters to which the sentencing judge had regard to, the Court concluded that the sentencing judge did no more than strike a balance between the competing considerations, and that he had not failed to give "significant weight" to the circumstances of the offences. The Court further found that contrary to the argument advanced by Ipp J., there was no "overriding factor" contained within the legislation. The Court therefore concluded

that the sentencing judge had not fallen into appealable error and set aside the order of the Court of Criminal Appeal that the appellant be not eligible for parole.

6.13 Clause 6 of the *Bill* seeks to rectify this position by ensuring that a trial judge must solely have regard to the circumstances of the commission of the offence and any aggravating factors in determining whether an offence is such that a sentence of strict security life imprisonment without eligibility for parole should be granted.

6.14 The expressed intention of clause 6 of the *Bill* as conveyed by the Attorney General to the Committee is to remove from consideration by the trial judge factors which would ordinarily be used for determining eligibility for parole and limit the trial judge to a consideration of factors bearing on the community's interest in retribution, punishment and deterrence. Put at its simplest, the trial judge is to disregard factors militating in favour of the possibility of parole (such as the rehabilitation of the accused) when sentencing.

Committee's recommendations

6.15 **The majority of the Committee recognises the need for such an amendment but queries whether the proposed wording of clause 6 of the *Bill* is the most effective way to achieve this outcome (refer paragraphs 6.17 and 6.18).**

6.16 If the intention of proposed section 91(4) of the *Sentencing Act 1995* is to restrict the considerations which a sentencing judge must have regard to when sentencing an offender to strict security life imprisonment, it appears that this restriction operates on the offence itself and a sentencing judge will still be obliged to consider a range of factors in determining whether the offender should be sentenced under the proposed section 91(3) taking into account what the sentencing judge considers necessary *to meet the community's interest in retribution, punishment and deterrence* (emphasis added). The *Sentencing Act 1995* is silent on what factors the sentencing judge should consider in determining what is in the "community's interest". For example, uncontested evidence that in 20 years time an offender may no longer be a danger to the community may justify a finding by the trial judge that the community's interest is not served by incarcerating for life an offender who may no longer present a danger to the community.

6.17 The Committee consider that the use of the term "retribution" to be inappropriate in a statute which deals with sentencing. The Oxford English Dictionary defines retribution to include vengeance.

The Committee recommends the deletion of the word "retribution" from proposed section 91(3) of the *Sentencing Act 1995*.

6.18 The Committee suggests that the following wording may better achieve the stated intention for amending the section:

"(3) A court that sentences an offender to strict security life imprisonment must, if it decides it is appropriate to do so, order that the offender is not to be paroled.

(4) In determining whether it is appropriate to order that an offender is not to be paroled, the sole matters that a court must have regard to are:

(a) the circumstances of the commission of the offence; and

(b) any aggravating factors."

6.19 Subject to the above amendments and qualifications, the majority of the Committee supports clause 6 of the *Bill*.

STANDING COMMITTEE ON LEGISLATION

REPORT ON THE *Criminal Law Amendment Bill (No 1) 1998*

HON GIZ WATSON MLC

MINORITY REPORT

I agree with the findings and recommendations of the Committee contained in the main report. However, I do not support the views of the majority of the Committee with regard to clause 6 of the *Bill*. One of the recommendations of the *Report of the Review of Remission and Parole* prepared by the Western Australian Ministry of Justice was that:

> "The Sentencing Court be given greater discretion to determine that an offender is ineligible for parole and that statutory provision be made to that effect."
>
> *Report of the Review of Remission and Parole*, Western Australian Ministry of Justice, March 1998 at p 45

The sentencing judge already has the power under section 91(3) of the *Sentencing Act 1995* to order that offenders never be released.

The proposed amendment to section 91(3) of the *Sentencing Act 1995* and contained in clause 6 of the *Bill* proposes a "guided discretion" which limits the range of factors a sentencing judge may consider in exercising her or his discretion whether to sentence the offender for the whole of the offender's life.

Such sentences will only be imposed by judges of the Supreme Court, who invariably are persons of great experience and sound judgement. It is appropriate that the sentencing judge exercises this discretion having regard to *all relevant factors* and not be constrained either in the range of factors to be considered or in any other way in exercising that discretion.

For the above reasons, I do not support clause 6 of the *Bill*.

REFERENCES

- *Crimes Act 1900 (NSW)*
- *Crimes Act 1958 (Vic)*
- *Crimes Act 1914 (Cth)*
- *Crimes (Amendment) Act 1997 (Vic)*
- *Crimes (Amendment) Act 1997 (Vic)* - Second Reading Speech
- *Crimes Amendment (Forensic Procedures) Bill 1997 (Cth)*
- *Crimes Amendment (Forensic Procedures) Bill 1997 (Cth)* - Second Reading Speech
- *Crimes Amendment (Forensic Procedures) Bill 1995 (Cth)* - Report by the Senate Legal and Constitutional Legislation Committee, October 1995
- *Crimes Amendment (Forensic Procedures) Bill 1997 (Cth)* - Report by the Senate Legal and Constitutional Legislation Committee, November 1997
- *Crimes Amendment (Forensic Procedures) Bill 1997 (Cth)* , Senate Committee for the Scrutiny of Bills - Ninth Report of 1997, 18 June 1997
- *Crimes Amendment (Mandatory Life Sentences) Act 1996 (NSW)*
- *Crimes Amendment (Mandatory Life Sentences) Bill 1996 (NSW)*
- *Crimes Amendment (Mandatory Life Sentences) Bill 1996 (NSW)* - Second Reading Speech
- *Criminal Code Act 1899 (Qld)*
- *Criminal Code Amendment Act 1994 (NT)*
- *Criminal Evidence Amendment Bill 1997 (UK)* - Second Reading Speech
- *Criminal Evidence Amendment Act 1997 (UK)*
- *Criminal Investigation - An Interim Report, Report No. 2*, Australian Law Reform Commission, Australian Government Publishing Service, Canberra, 1975
- *Criminal Law Consolidation Act 1935 (SA)*

- *Criminal Law (Forensic Procedures) Act 1998 (SA)*
- *Criminal Law (Forensic Procedures) Act 1998 (SA)* - Second Reading Speech
- *Criminal Legislation Amendment Act 1995 (NSW)*
- *Criminal Legislation Amendment Bill 1995 (NSW)*
- *Criminal Legislation Amendment Bill 1995 (NSW)* - Second Reading Speech
- *Forensic Procedures Model Provisions*, Model Criminal Code Officer's Committee of the Standing Committee of Attorney's-General ("Model Bill")
- *Protection from Harassment Act 1997 (UK)*
- *Protection from Harassment Bill 1997 (UK)* - Second Reading Speech
- *Report on Body Samples and Examinations*, Consultative Committee on Police Powers of Investigation, Victoria, September 1989 ("the Coldrey Report")
- *Report of the Review of Remission and Parole*, Western Australian Ministry of Justice, March 1998
- *Sentencing Act 1991 (Vic)*
- *The Criminal Code - A General Review Volume 1 and 2*, Western Australia, 1983 ("the Murray Report")