CRIMINAL LAW AMENDMENT (HOMICIDE) BILL 2008

Introduction and First Reading

Bill introduced, on motion by **Mr J.A. McGinty (Attorney General)**, and read a first time.

Explanatory memorandum presented by the Attorney General.

Second Reading

MR J.A. McGINTY (Fremantle — Attorney General) [12.19 pm]: I move —

That the bill be now read a second time.

Law Reform Commission report: This bill introduces significant reforms to the law of homicide in accordance with the recommendations of the Law Reform Commission, in its comprehensive "Final Report: Review of the Law of Homicide". In April 2005, a reference was made to the Law Reform Commission of Western Australia to examine and report upon the law of homicide and to give consideration to the distinction between wilful murder and murder; the defences to homicide, including self-defence and provocation; the current penalty provisions relating to the law of homicide; and any related matter. The commission was further asked to report on the adequacy of the existing law, practices and procedures in relation to homicide offences and defences, and the desirability of changes to those laws.

In September 2007, following extensive consultation, the Law Reform Commission delivered its "Final Report: Review of the Law of Homicide". It is a comprehensive report in which the commission summarises the law in this state as well as other jurisdictions, analyses the adequacy of those laws and makes recommendations for change. The Law Reform Commission was guided by seven principles for reform: intentional killing should be distinguished from unintentional killing; the only lawful purpose for intentional killing is self-preservation or the protection of others; the only other excuses for intentional killing are mental impairment and immature age; there should be sufficient flexibility in sentencing to reflect the different circumstances of offences and the relevant culpability of offenders; the law of homicide should be as simple and clear as possible; reforms to the law of homicide should adequately reflect contemporary circumstances; and there should be no offences of defences that apply only to specific groups of people on the basis of gender or race. Those principles are self-evidently sensible and appropriate. The government considers that the recommendations made in the final report provide a sound package for the simplification and clarification of areas of law that have been difficult and complicated for all those involved in the criminal law process. Those difficulties and complications have often resulted in unjust outcomes.

Some of the key reforms implemented by this bill are the consolidation of wilful murder and murder into one crime of murder; increased flexibility in sentencing for murder, including the ability for judges to impose tougher sentences on murderers; the simplification and clarification of defences to murder; and the introduction of a new offence to deal with "one punch" homicide cases.

New offence and penalty for murder: Western Australia is the only state in Australia that currently has separate offences for wilful murder and murder. As recommended by the Law Reform Commission, this bill will consolidate the crime of wilful murder into the crime of murder. As highlighted by the Law Reform Commission in its report, there are many factors that affect the seriousness of a murder. It is not necessarily the case that murders committed with an intention to kill are the most serious crimes. Further, it is often difficult to distinguish between whether a person had an intention to kill someone or an intention to do them grievous bodily harm.

The problems encountered in prosecuting Dante Arthurs over the killing of an eight-year-old girl in a suburban shopping centre highlighted deficiencies with the current law that will not be repeated as a result of this change. In that case, the Director of Public Prosecutions did not pursue the more serious charge of wilful murder against Dante Arthurs because of concerns about proving that he intended to kill the girl. Instead, he accepted a guilty plea to the lesser charge of murder. The new, amalgamated offence of murder will simplify the law and make it clear that the intent required to establish murder must be either an intent to kill, an intent to cause bodily injury likely to endanger human life, or in the prosecution of an unlawful purpose likely to endanger human life. The Law Reform Commission recommended that an intention to cause a permanent injury to health should not constitute an element of murder and this is now no longer included in the crime of murder.

The bill will also consolidate and simplify the sentencing regime for murder, and will give courts the ability to impose tougher sentences on murderers. Under the proposed new laws, the court will have a full range of sentencing options available to it when dealing with all murderers. Under the current law, a person who is convicted of wilful murder—that is, the person intentionally kills another person—is liable to a mandatory sentence of strict security life imprisonment or life imprisonment. Presently, a person who is found guilty of the crime of murder is liable to a mandatory penalty of life imprisonment. The main difference between strict

security life imprisonment and life imprisonment is the difference between the minimum non-parole periods that must be set by the court. For strict security life imprisonment, the minimum non-parole period is between 20 years and 30 years. For life imprisonment for wilful murder, the minimum non-parole period is between 15 years and 19 years. For life imprisonment for murder, the minimum non-parole period is between seven years and 14 years. These differing periods are arbitrary and complicated. In keeping with the government's tough-on-crime policy, the new sentencing regime for murder is likely to lead to tougher sentences for murderers that are more in line with community expectations in ensuring that the punishment matches the seriousness of their crime. The consolidated crime of murder will now carry a presumptive penalty of life imprisonment with a minimum non-parole period of 10 years and no maximum. Courts will also be able to impose a whole-of-life sentence upon all murderers. Such sentences are currently only available when a person is guilty of wilful murder. Under the new laws, judges will be able to order any person who is guilty of murder to never be released. For people under the age of 18, the penalty for murder will be a maximum of life imprisonment or indefinite detention.

The proposed changes to the law will significantly increase the power of judges to set non-parole periods that are commensurate with serious murders. At the same time, the bill recognises that there may be cases of murder for which it would be unjust to impose a sentence of life imprisonment because of the circumstances of the offence and the offender and because the offender was not likely to be a threat to the community when released. In those cases, new section 279(4) will provide the court with the discretion to impose a penalty of up to 20 years' imprisonment. There is a presumption that the court will impose a penalty of life imprisonment. When a court does not impose a penalty of life imprisonment, the court must give written reasons explaining why that was not done.

Finally, the proposed change will also remove a disincentive to plead guilty to a charge of wilful murder that exists under the current sentencing regime. This is expected to result in more guilty pleas and is likely to reduce the number of lengthy and costly murder trials and the burden that these trials create for the families of murder victims.

Another significant feature of the bill is the creation of two new offence provisions. I acknowledge the presence in the public gallery of a number of family members who have suffered the loss of a brother or a son as a result of one-punch murders.

One-punch homicide: The bill introduces a new offence of unlawful assault causing death in new section 281 of the Criminal Code. This new offence is to address the so-called one-punch homicide cases. An example of these types of cases is when a person who is punched falls to the ground and suffers a blow to the head from hitting the ground and dies. Western Australia will be the first state in Australia to introduce legislation that creates an offence to deal specifically with this issue. As the law currently applies, offenders who are charged with manslaughter in such cases are often acquitted on the basis that the death was an accident. A death will be an accident when it was not reasonably foreseeable that death would result as a consequence of the punch. Under the new provision, it will be irrelevant whether the death was foreseen or foreseeable, and it will also be irrelevant that the death was unintended. The offence will be committed when a person unlawfully assaults another person who dies as a direct or indirect result of the assault. This new offence reinforces community expectations that violent attacks, such as a blow to the head, are not acceptable behaviour and will ensure that people are held accountable for the full consequences of their violent behaviour. A person convicted of this offence will be liable to a penalty of 10 years' imprisonment.

Dangerous "driving" of a conveyance: A new offence will also be created to cover dangerous driving of conveyances other than motor vehicles. An offence will be committed when a person who, for example, pilots an aircraft dangerously or navigates a vessel dangerously and is involved in an incident and a person is directly or indirectly killed or suffers grievous bodily harm as a result. The penalties for this offence will be 10 years' imprisonment in the case of death and seven years' imprisonment in the case of grievous bodily harm. The offence of dangerous driving causing death or injury will remain in the Road Traffic Act pending a review of the operation of that provision, as recommended by the Law Reform Commission.

Alternative verdicts: This bill will also provide for offences to be automatic alternative charges. The inclusion of alternative offences is intended to overcome difficulties that may arise if, for example, a person is charged with murder and a jury does not consider that there is enough evidence to convict the offender of that charge. Under the proposed reforms, a jury will be able to convict a person of an alternative offence, such as manslaughter or assault causing death. This will rectify the present anomaly that has led to persons escaping liability despite their clear involvement in the death of another.

Infanticide: This bill will also remove the old-fashioned offence of infanticide from the Criminal Code. Currently, there is a separate offence in the Criminal Code in relation to mothers who kill their children. Section 281A of the Criminal Code provides that a woman or girl who kills her child when the balance of her mind is disturbed from the effect of giving birth or the effect of lactation following birth is guilty of infanticide instead of

wilful murder or murder. Section 287A provides that the maximum penalty for infanticide is seven years' imprisonment. This is an offence that is rarely charged.

Infanticide has traditionally been a separate offence because of compassion for mothers who, because of mental disorders, kill their babies. The Law Reform Commission recommended that infanticide should be repealed and that the crime be subsumed under the crime of murder. A mother genuinely incapacitated by a mental illness will be able to raise the defence of insanity.

The changes made in this bill to the sentencing options for murder, which I outlined before, give the courts greater sentencing discretion to allow them to deal appropriately with exceptional cases. It is considered that this gives the courts adequate discretion to deal with infanticide cases within the general offence of murder.

Dangerous driving: The Law Reform Commission noted that the penalties for the offence of dangerous driving causing death under section 59 of the Road Traffic Act are in need of reform. Currently, when dangerous driving causing death is committed in aggravating circumstances, the maximum penalty is 20 years' imprisonment in relation to death and 14 years in relation to grievous bodily harm. Aggravating circumstances are driving without the consent of the vehicle's owner, driving in excess of 45 kilometres an hour over the speed limit and driving while in pursuit by police.

In the absence of aggravating circumstances, the maximum penalty for dangerous driving causing death or injury is only four years' imprisonment, irrespective of whether death is caused or grievous bodily harm is caused and irrespective of how dangerous the driving is. For example, if a person, driving his own car at 100 kilometres per hour in a 60 kilometre-per-hour zone while four times over the legal blood alcohol limit, has a collision, killing the driver of the other vehicle, the maximum penalty available to such an offender is only four years' imprisonment. This bill will increase the penalty to 10 years' imprisonment for such a case. In the case of dangerous driving causing grievous bodily harm, the penalty is increased to seven years' imprisonment. The fine in the summary penalty is also increased from 160 penalty units to 360 penalty units and is in line with the proposed penalty for culpable driving of a conveyance.

Amendment of defences to murder: This bill also introduces a significant number of amendments to the defences that are available to people who kill. The bill follows the recommendations of the Law Reform Commission, which was guided by the principle that the only lawful purpose for intentional killing is self-preservation or the protection of others.

Repeal of defence of provocation: The proposed bill will abolish the partial defence of provocation. Under the current section 281 of the Criminal Code, a person who kills another in circumstances that would constitute wilful murder or murder is guilty only of manslaughter if the person acted "in the heat of passion caused by a sudden provocation before there is time for his passion to cool".

The DEPUTY SPEAKER: Members on my left, your voices are competing with the minister. Would you take your conversations outside, please.

Mr J.A. McGINTY: If an offender was provoked by the victim, it is considered that this, as well as any other relevant circumstance, is most appropriately taken into account when sentencing the offender.

Self-defence: The current test for self-defence is complicated and the proposed reforms are intended to simplify and clarify the law. As it currently exists, the test for whether self-defence is lawful depends on whether the force used is against a provoked or an unprovoked assault and on whether the force is likely to cause death or grievous bodily harm. As well as removing old-fashioned language, the new provision will remove reference to provocation.

The self-defence provision in section 248 will contain concepts that are new to the law of Western Australia. The test for whether an act is done in self-defence will follow the example of the model Criminal Code. It incorporates a subjective element of whether the person believes on reasonable grounds that the act of self-defence is necessary and an objective element of whether the force used was reasonable in the circumstances that the accused believed on reasonable grounds existed at the time. Similar tests will apply to the newly framed defences of emergency and duress in the proposed new sections 25 and 32 respectively. The new tests are intended to simplify and clarify the law of self-defence.

Another important change contained in this bill is that the harmful act that the person believes it is necessary to act against in self-defence will not have to be imminent. The Law Reform Commission noted that the concept of imminence is currently a barrier for women, particularly in domestic violence situations, relying on self-defence because women do not necessarily respond to an imminent attack, as to do so may place them in even more danger. The commission also noted that imminence is hard to reconcile with the constant nature of domestic violence.

By providing that the threat need not be imminent, the defence will more readily apply to women who are the victims of domestic violence in the so-called "battered spouse" situation. It will still be necessary for persons to show that there are reasonable grounds for the person's belief that the act of self-defence was necessary and that the force used must be objectively reasonable in the circumstances the person believed to exist. It is not expected that this provision will apply to situations in which it would be reasonable for the person to take other steps, such as going to the police or escaping from the harmful situation.

New partial defence of excessive self-defence: The bill will introduce a new partial defence of excessive self-defence. A person who kills another person under circumstances of excessive self-defence will be found guilty of manslaughter rather than murder. The defence will apply in circumstances in which a person genuinely believes that it is necessary to act in self-defence but the amount of force used is not objectively reasonable and the use of that force results in death. It is anticipated that this provision will also result in more offenders pleading guilty; therefore, reducing the number of trials.

Defence against home invasion: This bill will amend the defence against home invasion found in section 244 of the Criminal Code. It will adopt the Law Reform Commission's recommendation by amending that provision to ensure that force intending to cause death or grievous bodily harm cannot be used when all that is being protected is property. This amendment will not affect an occupant's right to use lethal force when the occupant reasonably believes that violence is likely or is threatened.

Other amendments: Under the amendments introduced by this bill, section 23 of the Criminal Code is separated into its three constituent parts in order to clarify its meanings.

The DEPUTY SPEAKER: Minister for Planning and Infrastructure, you need to lower your voice.

Mr J.A. McGINTY: In addition, the egg-shell skull rule is incorporated into the Criminal Code. Under that common law principle, a person is not excused from criminal responsibility for causing death or grievous bodily harm by a direct application of force merely because the victim had an unforeseeable abnormality, defect or weakness.

In the case of duress, there will be exceptions when the person is voluntarily associating with the person making the threat and when the association is for the purpose of doing the act or making the omission that creates the offence or when the association is for an unlawful purpose in which it is likely that such a threat would be made. Thus, for example, a person who joins in a bank robbery would not be able to rely on the defence of duress if an accomplice threatened to shoot the person if he or she did not harm a bank teller.

Other areas for review: It must be noted that the Law Reform Commission has made recommendations for more detailed reviews of some areas of law. For example, it has recommended that a review be conducted of cases involving the amendments to sections 59 and 59B of the Road Traffic Act 1974 to determine whether amendments made to those sections in 2004 have operated unfairly to any accused.

In another recommendation, the Law Reform Commission suggested that an inquiry be established to look into the difficult area of euthanasia and suicide pacts and how the law should respond to these killings. While these recommendations are not the subject of any clauses in this bill, the government will carry out such reviews and inquiries in due course.

This bill provides yet another step in the government's reform of the criminal justice system in Western Australia in line with the government's tough-on-crime policy. I commend this bill to the house.

Debate adjourned, on motion by **Dr G.G. Jacobs**.