SECOND SESSION OF THE THIRTY-SIXTH PARLIAMENT

REPORT OF THE

STANDING COMMITTEE ON UNIFORM LEGISLATION AND GENERAL PURPOSES

IN RELATION TO THE

CRIMINAL CODE AMENDMENT BILL 2003

Presented by Hon Adele Farina MLC (Chairman)

Report 12
December 2003

STANDING COMMITTEE ON UNIFORM LEGISLATION AND GENERAL PURPOSES

Date first appointed:

April 11 2002

Terms of Reference:

The following are extracts from Schedule 1 of the Legislative Council Standing Orders:

"**7. Uniform Legislation and General Purposes Committee**

7.1 A *Uniform Legislation and General Purposes Committee* is established.

7.2 The Committee consists of 3 members with power in the Committee to co-opt 2 additional members for a specific purpose or inquiry.

7.3 The functions of the Committee are –

(a) to consider and report on bills referred under SO 230A;

(b) of its own motion or on a reference from a minister, to consider or review the development and formulation of any proposal or agreement whose implementation would require the enactment of legislation made subject to SO 230A;

(c) to examine the provisions of any instrument that the Commonwealth has acceded to, or proposes to accede to, that imposes an obligation on the Commonwealth to give effect to the provisions of the instrument as part of the municipal law of Australia;

(d) to consider and report on any matter referred by the House.

7.4 For a purpose relating to the performance of its functions, the Committee may consult with a like committee of a House of the parliament of the Commonwealth, a state or a territory, and New Zealand and similarly, may participate in any conference or other meeting."

Members as at the time of this inquiry:

Hon Adele Farina MLC (Chairman)
Hon Paddy Embry MLC
Hon Simon O'Brien MLC

Staff as at the time of this inquiry:

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Glossary[1]

Crime	Conduct which violates the rights of the community at large, punishable by recognised criminal sanction upon proof of guilt in criminal proceedings generally initiated and prosecuted by officers of the State or its agencies or on admission of guilt.
Felony	Originally applied to common law offences punishable by the giving up of all the defendant's property; a denial of the right of inheritance, and the death penalty. The term now refers to more serious crimes such as murder or armed robbery but is not subject to the same punishment as defined felonies at common law.
Indictable Offence	Criminal offences of a more serious nature which are usually dealt with by a judge and jury in either the District or Supreme Court. In some instances, an election may be made to have an indictable offence dealt with summarily - in the lower courts without a jury, or by judge alone in the higher courts.
Misdemeanour	A crime for which the punishment at common law was a fine, imprisonment or both.
Summary offence	Criminal offences of a less serious or regulatory nature which are dealt with by justices of the peace or a magistrate in a court of petty sessions.
The Indictment	This is the document which sets out the charge against the accused in writing and, where a person is alleged to have committed an indictable offence, the trial will be conducted on indictment unless there is an express provision to the contrary.
Trial conducted on indictment	This means it will be conducted in the Supreme or District Court
Indictment	This term is defined in section 1 of *The Criminal Code* as meaning "a written charge preferred against an accused person in order to his trial before some court other than justices exercising summary jurisdiction".

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[1] Partly quoted from Appendix 2 of the Law Reform Commission of Western Australia Final Report, *Review of the Criminal and Civil Justice System in Western Australia*, Project 92, September 1999.

CONTENTS

SUMMARY OF RECOMMENDATIONS FOR THE

REPORT OF THE STANDING COMMITTEE ON UNIFORM LEGISLATION AND GENERAL PURPOSES

IN RELATION TO THE

CRIMINAL CODE AMENDMENT BILL 2003

RECOMMENDATIONS

Page 9

Recommendation 1: The Committee recommends that during debate in the Council on clause 6 of the Criminal Code Amendment Bill 2003, the responsible Minister explain the operation and reach of proposed section 21(4a).

Page 14

Recommendation 2: The Committee recommends that the proposed penalty for female genital mutilation in clause 23 of the Criminal Code Amendment Bill 2003 be increased to 20 years. This may be achieved by amending clause 23 of the Bill in the following manner:

Page 17, line 21 - To delete "10" and insert instead -

"20".

Page 22

Recommendation 3: The Committee recommends that clause 26 of the Criminal Code Amendment Bill 2003 be amended so that it reads as set out in paragraph 6.52. The statutory amendments required to effect these changes in the Council are contained in Appendix 2.

Page 22

Recommendation 4: The Committee recommends that if the Council rejects the Committee's proposed amendment to proposed section 331B, which inserts the phrase "by force or threats" as outlined in Recommendation 3, then clause 26 of the Criminal Code Amendment Bill 2003 concerning the definition of 'threat' be amended in the following manner:

Page 19, line 15 - To delete the line.

Page 32

Recommendation 5: The Committee recommends that during debate in the Council on the Criminal Code Amendment Bill 2003, the responsible Minister clarify the operation of clause 30 in light of the Committee's observations in paragraphs 6.53 to 6.59 and 6.81 to 6.89 of this report.

Page 32

Recommendation 6: The Committee recommends that during debate in the Council on clause 30 the responsible Minister clarify the operation of clause 30 and its interaction with Item 4, Schedule 3, addressing the Committee's observations in paragraphs 6.70 to 6.79 of this report.

Page 38

Recommendation 7: The Committee recommends that clause 76 of the Criminal Code Amendment Bill 2003 be amended so that it reads as set out in paragraph 6.108. Statutory amendments required to effect these changes in the Council are contained in Appendix 3.

Page 40

Recommendation 8: The Committee recommends that subject to recommendations 1 to 7, the Criminal Code Amendment Bill 2003 be passed.

REPORT OF THE STANDING COMMITTEE ON UNIFORM LEGISLATION AND GENERAL PURPOSES

IN RELATION TO THE

CRIMINAL CODE AMENDMENT BILL 2003

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1. REFERRAL OF THE BILL

1.1 On September 19 2003 the Criminal Code Amendment Bill 2003 (**Bill**) stood referred to the Uniform Legislation and General Purposes Committee (**Committee**) pursuant to standing order 230A. Standing order 230A(4) requires that the Committee report to the Legislative Council (**Council** or **House**) within 30 days of the first reading of the Bill. Pursuant to standing order 230A(5) the policy of the Bill is not a matter for inquiry by the Committee. On October 14 2003 the Council ordered that the time within which the Committee had to report the Bill to the Council be extended to November 12 2003. On November 11 2003, the Council granted a further extension to December 5 2003.

1.2 The purpose of the Bill is to amend *The Criminal Code* of Western Australia and make consequential amendments to various other Acts.[2]

2 INQUIRY PROCEDURE

2.1 On September 26 2003 the Committee wrote to Hon Jim McGinty MLA, Attorney General (**Attorney General**) seeking information about a number of aspects of the Bill and more particularly, requested copies of the relevant Standing Committee of Attorneys General (**SCAG**) agreements.

2.2 The Attorney General advised that in relation to Part 5 amendments on female genital mutilation and Part 6 amendments on sexual servitude, there was no 'national scheme' as such, rather, a cooperative approach to those matters. Further, none of the SCAG agreements were formal, written intergovernmental agreements or memorandums of understanding. In fact, they were *"…informal decisions..."* made at SCAG various meetings and therefore it was not possible to provide copies of those agreements to the Committee.[3] The Committee has previously expressed concern over the lack of formal documentation.[4]

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2 As stated in the Long Title.

3 Letter to the Committee from the Attorney General dated October 22 2003.

4 For example in, Legislative Council, Standing Committee on Uniform Legislation and General Purposes, *Report Number 11, Higher Education Bill 2003*, Western Australia, September 2003, pp7-10.

2.3 The Committee wrote again to the Attorney General requesting copies of the relevant SCAG Minutes.[5] These were provided on November 17 2003 and confirm agreement between the various Attorney Generals to implement legislation on the relevant subject matters. The Committee thanks the Attorney General for the provision of those Minutes.

2.4 The Committee invited the Law Society of Western Australia and the Criminal Lawyers Association to attend a public hearing on October 28 2003. Details of the inquiry were also placed on the parliamentary website at: www.parliament.wa.gov.au.

3 UNIFORM LEGISLATION

3.1 Some provisions in the Bill are an example of 'uniform legislation'. Uniform legislation arises out of national uniform schemes of legislation or may ratify or, give effect to an intergovernmental agreement to which Western Australia is a party.

Scrutiny of uniform legislation in the Western Australian Parliament

3.2 The scrutiny of uniform legislation is not new to the Western Australian Parliament. Since 1991 both the Council and Legislative Assembly have established procedures to assist Parliament in the scrutiny of uniform legislation.[6]

3.3 More recently during the Thirty-Sixth Parliament until the appointment of the Committee, the scrutiny of uniform legislation fell within the terms of reference for the Council Standing Committee on Legislation. In November 2001 the relevant Council standing order (standing order 230A) was amended to consolidate matters relevant to uniform legislation and to facilitate automatic referral of such bills to the Committee for inquiry and report within 30 days of a bill's first reading.

Legislative structures

3.4 National legislative schemes of uniform legislation have been addressed in a 1996 Position Paper on the Scrutiny of National Schemes of Legislation by the Working Party of Representatives of Scrutiny Committees throughout Australia (**1996 Position Paper**). The 1996 Position Paper emphasises that it does not oppose the concept of legislation with uniform application in all jurisdictions across Australia. However, it does question the mechanisms by which those uniform legislative schemes are made into law and advocates the recognition of the importance of the institution of Parliament.

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5 Letter to the Attorney General dated October 29 2003.

6 For discussion of the history behind the scrutiny of uniform legislation and standing order 230A refer to: Legislative Council, Standing Committee on Uniform Legislation and General Purposes, *Report No 2: The Work of the Committee during the First Session of the Thirty-Sixth Parliament – May 1 2001 to August 9 2002*, Western Australia, August 2002, pp5 - 6.

3.5 A common difficulty with most forms of national scheme legislation is that any proposed amendments may be met by an objection from the Executive on the basis that consistency with the legislative format agreed among the various Executive Governments is a 'given'.[7]

3.6 National legislative schemes, to the extent that they may introduce a uniform scheme or uniform laws throughout the Commonwealth (refer to standing order 230A(1)(b)), can take a number of forms. Nine different categories of legislative structures promoting uniformity in legislation, each with a varying degree of emphasis on national consistency or uniformity of laws and adaptability, have been identified. The legislative structures are summarised in Appendix 1.[8]

3.7 Although various provisions in the Bill do not reflect any particular one of the identified structures, those provisions are 'uniform legislation' within the meaning of standing order 230A by virtue of being pursuant to an informal intergovernmental agreement to which the Government of the State is a party: standing order 230A(1)(a).

Scrutiny principles

3.8 One of the recommendations of the 1996 Position Paper was the adoption of the following uniform scrutiny principles:

- does the Bill trespass unduly on personal rights and liberties?[9] and
- does the Bill inappropriately delegate legislative powers?[10]

3.9 In addition, in recent times, the Committee has considered the impact of any proposed legislation on the application of parliamentary privilege.[11] Although not adopted formally by the Council as part of the Committee's terms of reference, the principles can be applied as a convenient framework for the scrutiny of legislation.

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7 For example, refer to the Working Party of Representatives of Scrutiny of Legislation Committees throughout Australia, *Scrutiny of National Schemes of Legislation Position Paper*, October 1996, pp7 – 12.

8 Ibid. Also see reports of the Parliament of Western Australia, Legislative Assembly Standing Committee on Uniform Legislation and Intergovernmental Agreements.

9 For example: strict liability offences, reversal of the onus of proof, abrogation of the privilege against self-incrimination, inappropriate search and seizure powers, decision-making safeguards (that is: written decisions and reasons for decisions), personal privacy, decisions unduly dependent on administrative decisions.

10 For example: 'Henry VIII clauses', insufficient parliamentary scrutiny of the exercise of legislative power.

11 Legislative Council, Standing Committee on Uniform Legislation and General Purposes, *Report No 5: National Crime Authority (State Provisions) Amendment Bill 2002*, Western Australia, November 2002, pp7 – 10 and *Report Number 11: Higher Education Bill 2003*, Western Australia, September 16 2003.

Identification of bills subject to SO230A

3.10 The Committee has previously commented on the difficulty with the identification of bills subject to standing order 230A and it has expressed the desire that the Executive adopt practices to be mindful of the process of referral under that standing order.[12]

3.11 During the second reading of the Bill, Hon Bruce Donaldson MLC, on a point of order, queried whether standing order 230A applied to the Bill given that the responsible Minister's second reading speech mentioned that some amendments complemented commonwealth legislation. The Deputy President later confirmed that in part, the Bill arose as a result of an agreement entered into with other States and the Commonwealth and therefore standing order 230A applied.[13]

3.12 The identification of bills subject to standing order 230A was canvassed during the Committee's last inquiry into the Higher Education Bill 2003.[14] At that time, the Committee resolved to address this issue in a Special Report to the House addressing both identification of standing order 230A bills, reporting back periods and the provision of supporting documentation.

3.13 The point of order demonstrates the difficulties faced by the House in identifying bills to which standing order 230A applies. The Committee is of the view that there is a need for the relevance of standing order 230A to be addressed at the time a bill is introduced into the House.

4 OVERVIEW OF THE BILL

4.1 The Bill contains 8 Parts and 3 Schedules:

- Part 1 contains preliminary matters such as title and commencement date;
- Part 2 makes amendments to *The Criminal Code* in response to child sex tourism;
- Part 3 implements several recommendations from *The Criminal Code: A General Review, 1983* by his Honour Michael Murray QC, as he then was, (**Murray Report)** for amendment to *The Criminal Code* in relation to

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12 Legislative Council, Standing Committee on Uniform Legislation and General Purposes, *Report No 2: The Work of the Committee during the First Session of the Thirty-Sixth Parliament – May 1 2001 to August 9 2002*, Western Australia, August 2002.

13 Western Australia, *Parliamentary Debates (Hansard)*, Legislative Council, September 19 2003, p11598.

14 Legislative Council, Standing Committee on Uniform Legislation and General Purposes, *Report Number 11: Higher Education Bill 2003*, Western Australia, September 16 2003.

unlawful assemblies, breaches of the peace and other offences against public authority.[15]

- Part 4 is an amendment to *The Criminal Code* in relation to infanticide;

- Part 5 implements recommendations from the Murray Report for amendments to *The Criminal Code* in relation to offences of endangering life or health by repealing specific offences outlined in sections 304 to 313[16] as well as providing for a specific offence of female genital mutilation;

- Part 6 provides for a new crime of sexual servitude;

- Part 7 reforms the process for dealing with the trial of 'either-way' offences, that is, offences that may be tried either summarily in the Court of Petty Sessions or on indictment in the District Court; and

- Part 8 which makes a substantial number of amendments to *The Criminal Code* including such diverse matters as ensuring that government contractors are prohibited from disclosing official secrets; criminalising concealment of the death of a person; repealing anachronistic references to masters, servants and apprentices;[17] and clarifying that any animal being reared by aquaculture is capable of being stolen.

4.2 Three Schedules then make consequential amendments to 34 Acts.

5 BACKGROUND TO THE BILL

5.1 The Bill addresses deficiencies in Western Australia's criminal law that were identified by the Murray Report and various other individuals and bodies.[18] It also provides for amendments arising out of SCAG meetings held between 1993 and 1999.[19]

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15 *The Criminal Code: A General Review* commenced in 1980 and was presented to the Attorney General in June 1983.

16 The subject matter of those sections proposed to be repealed sections include endangering the life of children by exposure; the setting of mantraps; sending unseaworthy ships to sea; endangering steamships by tampering with machinery and landing explosives.

17 Such references were relevant in the days when apprentices were actually residing in the master's household and had no protection other than the criminal law.

18 For example, for the female genital mutilation amendments - the Model Criminal Code Officers Committee of the Standing Committee of Attorney- General and the Family Law Council.

19 These are the 1993 conference resulting in the Part 2 Child Sex Tourism amendments; the 1995 conference for the Part 5 Female Genital Mutilation amendments; and the 1999 conference for the Part 6 Sexual Servitude amendments.

6 SELECTED CLAUSES IN THE BILL

6.1 As an amending Bill with disparate subject matter the Committee resolved to focus its scrutiny on:

- those Parts and clauses which were responsive to decisions from SCAG meetings;
- the clauses dealing with the trial of offences that may be tried summarily or on indictment; and
- clauses concerning personal appearance at trial.

Part 2 of the Bill

Child Sex Tourism

6.2 The amendments in Part 2 arose out of a SCAG meeting first discussed in 1993 to criminalize child sex tourism. Part 2 introduces a new offence into *The Criminal Code* of facilitating sexual offences against children outside Western Australia and consequentially amends the *Travel Agents Act 1985*.

6.3 According to the Australian Institute of Criminology, a pervasive transnational market for the commercial sexual exploitation of children exists.[20] In response, 24 countries under the 1989 United Nations Convention on the Rights of the Child (**CRC**)[21] legislated to make child sex tourism a crime. The CRC has given rise to a legitimate expectation that the rights of children will be treated as a primary consideration.[22]

6.4 Research conducted by *Child Wise*, the Australian representative of *End Child Pornography and Trafficking* concluded that the sexual exploitation of children is an age-old practice that exists to some degree in every society.[23] However, there has been a rapid expansion of the commercial sexual exploitation of children in the last decade making it a problem of global proportions. Although it is impossible to verify

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20 Fiona David, Research Analyst, *Child Sex Tourism*, Australian Institute of Criminology, No. 156, June 2000, p1.

21 Article 34 of the CRC stipulates that State Parties have the obligation to protect children from all forms of sexual exploitation and abuse. Australia ratified the CRC on December 17 1990 and it entered into force on January 16 1991. The CRC is the principle international instrument governing the rights of the child and has been declared a 'relevant international instrument' for the purposes of the Commonwealth's *Human Rights and Equal Opportunity Commission Act 1986*.

22 *Minister for Immigration and Ethnic Affairs v Ah Hin Teoh* (1995) 183 CLR 273. However, as was noted in *S (A Child) v The Queen* (1995) WAR 392 the ratification by the Commonwealth of the International Declaration on the Rights of the Child or any other international treaty does not make them part of Australian municipal law.

23 End Child Pornography and Trafficking is an international organisation coordinating a global campaign in over 70 countries committed to ending the commercial sexual exploitation of children.

how many children are involved in commercial sexual exploitation, recent research and anecdotal evidence shows the numbers continue to increase. It is estimated millions of children are affected. Large well organised child sex industries have emerged in the poorer nations of Asia, Africa, Latin America and more recently in Eastern Europe, the Pacific region and Indo-China. However, increasing numbers of young people in developed countries are also at risk of experiencing sexual exploitation and abuse. [24]

6.5 Clause 4 of the Bill incorporates by reference, provisions in the *Crimes Act 1914* (Cth) following its amendment by the *Commonwealth (Child Sex Tourism) Amendment Act 1994*. Part IIIA Division 2 of the *Crimes Act 1914* (Cth) makes it an offence for an Australian citizen to engage in sexual activity in another country with a child under 16 years or for a person to encourage or benefit from the promotion of such activity.

6.6 The Commonwealth legislation has, between 1994 and 2003, resulted in 16 child sex tourism charges being laid against alleged offenders.[25] Of these, 13 resulted in prosecutions and three failed for lack of evidence.[26] The severest penalty handed down to date, is the Western Australian case of *Lee v The Queen*.[27] Lee was charged in 1997 with sexually assaulting young girls in Cambodia. He was arrested after bragging in the workplace about his exploits and showing pictures of the underage girls. He was convicted in May 1999 and sentenced to 14 years. After an appeal in 2000, his sentence was reduced to 11 years.

Can the Western Australian Parliament legislate extraterritorially?

6.7 Part 2 amendments invoke the legal presumption that a legislature does not intend to exceed its jurisdiction, otherwise:

> *Most statutes, if their general words were taken literally in their widest sense, would apply to the whole world, but they are always read as being prima facie restricted in their operation within territorial limits.*[28]

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24 For example, Child Wise's 1997 *Youth for Sale* national inquiry into the commercial sexual exploitation of children and young people throughout Australia found that of the 451 agencies surveyed, 258 were aware of incidences of young people engaging in commercial sexual exploitation, reporting 3100 young people confirmed or believed to be participating. This is in addition to 600 cases reported in the pilot study undertaken in Melbourne. A disturbing finding was that a few agencies reported children in the 10-12 years and under 10 years of age categories engaging in commercial sexual exploitation.

25 See net site: http://www.childwise.net/index.html.

26 Fiona David, Research Analyst, *Child Sex Tourism*, Australian Institute of Criminology, No. 156, June 2000, p1.

27 [2000] WASCA 73.

28 *Jumbanna Coal Mine NL v Victorian Coal Miners' Association* (1908) 6 CLR 309 at 363.

6.8 Clause 4 which inserts a proposed section 187 into *The Criminal Code* raises the question of whether the Western Australian Parliament can legislate beyond its territorial limits. Proposed section 187(1) refers to the doing of an act in a place outside Western Australia in respect of a child under the age of 16 years which if done in Western Australia would constitute an offence under Chapter XXXI of *The Criminal Code*. As Pearce and Geddes explain, the thinking underlying this approach is based on the 'comity of nations', that is, the legislature of one country is presumed not to deal with persons or matters the jurisdiction over which properly belongs to some other sovereign state.[29]

6.9 The philosophy underpinning Part 2 of the Bill is that countries are principally responsible for sexual abuse and the exploitation of children committed in that country. Laws with extraterritorial application, such as the offence in Part 2, are intended to fill the gap when countries are unwilling or unable to take action against known offenders. The rationale is that Western Australian child sex offenders should not escape justice simply because they are in a position to return to their home country.

6.10 In order for legislation such as clause 4 to validly operate extraterritorially, the High Court of Australia (**High Court**) held in *Pearce v Florenca*[30] that it is essential there be a connection between the enacting State and the extraterritorial persons, things, and events on which the state law operates.[31] Later, in the unanimous judgment of *Union Steamship Co of Australia Pty Ltd v King*[32] on this point, the High Court said it approved of the *Pearce v Florenca* approach. However, the High Court made the qualification that the requirement for a relevant connection between the circumstances on which the legislation operates and the State *"…should be liberally applied and that even a remote and general connection between the subject-matter of the legislation and the State will suffice."*[33] The High Court noted that this is in addition to the recognition in the constitutional rearrangements for Australia made in 1986 that State Parliaments have power to enact laws having an extraterritorial operation.[34]

6.11 The Committee concludes that the Parliament of Western Australia is able to legislate in terms of clause 4 as a nexus between the State of Western Australia and an extraterritorial offender is established. Section 12(2) of *The Criminal Code* reinforces

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29 DC Pearce and RS Geddes, *Statutory Interpretation in Australia*, Butterworths, 5th edition, 2001, p133.

30 (1976) 9 ALR 289.

31 *Pearce v Florenca* (1976) 9 ALR 289 at para 7.

32 (1988) 82 ALR 43.

33 at para 24.

34 *Australia Act 1986* (Cth) section 2(1). It states: *"It is hereby declared and enacted that the legislative powers of the Parliament of each State include full power to make laws for the peace, order and good government of that State that have extra-territorial operation."*

that an offence is committed even if the only thing that occurs in Western Australia is an event, caused by an act that occurs outside Western Australia.

Consequential amendments to the Travel Agents Act 1985

6.12 Clause 6 of the Bill inserts a proposed new section 21(4a) into the *Travel Agents Act 1985*. It states:

> *If it appears to the Chairman,*[35] *whether or not as a result of an objection lodged under subsection (1), that there are any grounds for believing that a licensee has been found guilty of an offence under section 187 of The Criminal Code or section 50DA or 50DB of the Crimes Act 1914 of the Commonwealth, the Chairman shall arrange for the Tribunal to hold an inquiry into the truth of the matter.*

6.13 The Committee queried the phrase *"the truth of the matter"* and the rationale for this clause given that the only ground for believing that a licensee has been found guilty of an offence is the conviction itself. Such a conviction is a matter of public record, easily accessed by the Chairman without any need for a Tribunal to conduct an inquiry. As the *"the truth of the matter"* lies in a publicly recorded conviction, this begs the question of why is the Chairman holding an inquiry. It appeared to the Committee that the Chairman may be exceeding jurisdiction by encroaching on the role of the judiciary whose task it is to determine "the truth" and in fact has determined the truth.

6.14 The Committee wrote to the Attorney General asking for clarification of this clause. Mr George Tannin SC, Crown Solicitor's Office, explained that proposed new section 21(4a) was copied from Victoria's *Travel Agents Act 1986.* Mr Tannin said it "*…is not designed to create an inquisitorial function to determine whether or not a licensee should be found guilty on the evidence."* [36] Mr Tannin was of the view that as a matter of caution and to dispel any doubt about the Chairman's function, this could be noted during parliamentary debate.

Recommendation 1: The Committee recommends that during debate in the Council on clause 6 of the Criminal Code Amendment Bill 2003, the responsible Minister explain the operation and reach of proposed section 21(4a).

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35 'Chairman' means the Chairman of the Commercial Tribunal of Western Australia established under the *Commercial Tribunal Act 1984*

36 Mr George Tannin SC, Crown Solicitor's Office, *Transcript of Evidence*, November 17 2003, p2.

Part 5 of the Bill

6.15 The amendments in Part 5 are based on the Murray Report recommendation that many specific, narrow provisions prohibiting acts causing bodily harm, endangering human life or health should be repealed and replaced with more general offences.

Clause 22 - proposed section 305(5)

6.16 The amendment in clause 22 regarding proposed section 305(5) is required as a result of the application of the *esjudem generis* rule of statutory interpretation. This rule means that general terms at the end of a list of items are narrowed in kind. Historically, this restricted current section 305 to dangerous traps which are 'engines'.[37] Proposed section 305(1) amends the definition of a dangerous thing to the wider *"…any article, device, substance, or thing that by reason of its nature (whether chemical, electrical, electronic, mechanical, or otherwise), situation, operation or condition, may endanger the life, health or safety of a person"*[38]

6.17 The proposed amendment enlarges the application of this section to 'things' that are presently unaffected by the operation of section 305. Previously, it was a defence if the 'dangerous thing' was not an engine. However, the proposed changes remove this defence.

6.18 The protection afforded by proposed section 305(5) in clause 22 of the Bill is not a significant departure from current section 305 of *The Criminal Code* which already allows for spring-guns, mantraps, or engines (changed in the Bill to the wider "*dangerous thing*")[39] to be set to protect a dwelling at night. Thus, the substantive changes only occur to the definition of the 'trap' and that they are now set to protect occupants rather than the dwelling itself.

Female Genital Mutilation

6.19 In Part 5, a proposed new section 306 is inserted making female genital mutilation (**FGM**) a crime. FGM is a collective term given to several traditional practices that involve the cutting of the external female genitalia. Amnesty International reports that the practice of FGM is linked in many countries with rites of passage for women. It is reported to be prevalent in countries including Burkina Faso, Chad, Djibouti, Egypt,

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37 The Murray Report at page 204 noted in 1983 that the section *"..had not been updated for years..."* and *"…refers only to mechanical devices, taking no account of electronic, electrical or chemical devices."* The Murray Report referred to two cases, one of which had traps made of electrical circuits which was successfully handled in the District Court as an attempted assault but a second case meant no indictment could be laid.

38 Proposed section 305(1).

39 A new broader provision dealing with setting mantraps is proposed to remedy a deficiency in the existing section which limits dangerous traps to those that can be defined as "engines".

Eritrea, Gambia, Ethiopia, Mali, Nigeria, Sierra Leone, Somalia and parts of Sudan and is also reported from some communities in South Asia.[40] According to the World Health Organization, two million girls each year are put through this terrifying and painful experience. Worldwide some 100 to 140 million women have undergone some form of the practice which continues within a complex web of social, cultural and economic justification.[41]

6.20 For Western Australia, precise statistics are difficult to obtain. However, the Attorney General commented on his anecdotal knowledge of approximately 72 women presenting to *King Edward Memorial Hospital for Women* during the previous two years for treatment relating to pregnancy, who had been identified by medical staff as genitally mutilated.[42]

6.21 The Royal Australian College of Obstetricians and Gynaecologists describes FGM as a centuries old practice, predating most contemporary religions, sustained by complex and potent beliefs.[43] It has been highlighted in Australia as both a health, social and legal issue as a result of increasing numbers of people migrating to Australia from communities that practice FGM.[44] Historically, western medicine has not been immune from the practice, for example, clitoridectomy had been used up to the late 1950s as a treatment for nymphomania, promiscuity and masturbation.[45]

6.22 On July 14 1995, SCAG endorsed the Model Female Genital Mutilation provisions prepared by the Model Criminal Code Officers Committee of the Standing Committee of Attorneys General as the basis for uniform national legislation to criminalize this cultural practice. In the Second Reading Speech, the Leader of the House, Hon Kim Chance MLC, noted that all Australian jurisdictions have now criminalized FGM. It breaches numerous international human rights contained in a number of human rights instruments to which Australia is a party.[46]

6.23 The proposed new section prohibits the performance of FGM on another person and prohibits taking a child or arranging to take a child from Western Australia with the

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40 http://www.amnesty.org.au/women/resources-fgm.html viewed on October 16 2003.

41 http://www.amnesty.org.au/women/resources-fgm.html viewed on October 16 2003.

42 Western Australia, *Parliamentary Debates (Hansard)*, Legislative Assembly, September 11 2003, p 11131.

43 The Royal Australian College of Obstetricians and Gynaecologists, *Female Genital Mutilation* 1997 viewed at www.ranzcog.edu.au.

44 The 1996 Census indicated that there were over 120,000 women in Australia who were born in countries where the practice of FGM has been reported. No statistics are available from the 2001 Census.

45 The Royal Australian College of Obstetricians and Gynaecologists, *Female Genital Mutilation* 1997 viewed at www.ranzcog.edu.au.

46 For example, the United Nations General Assembly Declaration "Violence against Women", December 1993.

intention of subjecting them to the practice. It is no defence to a charge of performing FGM that the person on whom the procedure was performed or a parent or guardian of that person consented to the act. However, like other jurisdictions, proposed section 306 excludes from the offence, a reassignment procedure within the meaning of the *Gender Reassignment Act 2000* (WA) or a medical procedure carried out for proper medical purposes.

6.24 Arguably, the practice could currently be caught by the grievous bodily harm provisions in section 297 of *The Criminal Code.* The Attorney General advised the Committee that other possible provisions available were unlawful wounding in section 301 and doing an unlawful act to cause bodily harm in section 306.[47]

6.25 The Attorney General stated that in the past four years, no cases have been laid under the grievous bodily harm provisions in *The Criminal Code.*[48] However, despite the dearth of charges[49] and similar to child sex tourism, the Committee considers that it is preferable to create a specific offence to send a clear message to the community that FGM will not be tolerated.[50]

The Penalty for Female Genital Mutilation

6.26 The Committee has concerns about the proposed penalty for FGM. Clause 23 inserts a new section 306(2) into *The Criminal Code* making the penalty 10 years imprisonment. The Committee considers this may be an inadequate punishment and may not act as deterrent to those cultural groups practising FGM in Western Australia.

6.27 The life long complications of FGM for its victims include vulval scarring and pain; pelvic and urinary tract infection, obstructed menstrual and urinary flow, urinary and faecal fistulae, obstructed miscarriage and childbirth, vaginal and perineal damage at childbirth and sexual difficulties.[51] In the Committee's view, the penalty should reflect the seriousness of the crime and these life long impacts on the victim.

6.28 There is a diverse range of terms of imprisonment for this crime across other jurisdictions. For example:

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47 Letter to the Committee dated October 22 2003.

48 Western Australia, *Parliamentary Debates (Hansard)*, Legislative Assembly, September 11 2003, p 11131.

49 Interestingly in the United Kingdom, express FGM legislation was passed in 1985 but to date, there has not been one prosecution.

50 The Attorney General also advised in his letter to the Committee dated October 22 2003 that the Family Law Council in its report on FGM to the Federal Attorney General concluded that specific legislation was necessary.

51 The Royal Australian College of Obstetricians and Gynaecologists, *Female Genital Mutilation* 1997 viewed at www.ranzcog.edu.au.

- the Australian Capital Territory[52] - 15 years;
- the Northern Territory[53] - 14 years;
- New South Wales[54] - 7 years;
- Queensland[55] - 14 years;
- South Australia[56] - 7 years;
- Tasmania[57] - 21 years; and
- Victoria[58] (Level 4 imprisonment) - 15 years maximum.

6.29 The Law Society of Western Australia considers the penalty for FGM to be inadequate, pointing out that where it will be placed in *The Criminal Code*:

> *It carries the same punishment for example as the indecent recording* [by photograph or other means] *of a child who is under the care supervision or authority of the offender. Although both forms of behaviour are abhorrent, they are arguably far from equivalent in their effect on the child*[59]

6.30 As stated at paragraph 6.24, FGM can currently be captured by the grievous bodily harm provisions under section 297 of *The Criminal Code*, which carries 10 years imprisonment. This may be the source of the 10 year penalty for the new crime of FGM. However, in the Committee's view, it is arguable that the practice of FGM, which is essentially a violation of the right to physical integrity, should be equated with the crime of *intentional* grievous bodily harm under section 294 because of its deliberate nature. Section 294 states:

> *Any person who, with intent to maim, disfigure, or disable any person, or to do some grievous bodily harm to any person, …—*

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52 *Crimes Act 1900* (ACT) section 92W.

53 *Criminal Code Act* (NT) section 186(1).

54 *Crimes Act 1900* (NSW) section 45(1).

55 *Criminal Code Act 1899* (Qld) section 323A(1).

56 *Criminal Law Consolidation Act 1935* (SA) section 33A.

57 *Criminal Code Act 1924* (Tas) section 178A(1) in conjunction with section 389(3).

58 *Crimes Act 1958* (Vic) section 32(1).

59 The Law Society of Western Australia, Submission, February 21 2003, p4.

> *(1) Unlawfully wounds or does any grievous bodily harm to any person by any means whatever; …or*
>
> *(6) Puts any corrosive fluid or any destructive or explosive substance in any place; …*
>
> *is guilty of a crime, and is liable to imprisonment for 20 years.*

6.31 Like intentional grievous bodily harm under section 294, the crime of FGM contains elements such as a deliberate 'disfigurement' or 'maiming'. The World Health Organisation has classified the practice of FGM into 4 types. Of particular relevance for present purposes is Type IV, which includes the introduction of corrosive substances or herbs into the vagina to cause bleeding or for the purposes of tightening or narrowing it. Another example is the cauterisation by burning, of the clitoris and surrounding tissue.

6.32 In other jurisdictions, the penalty for intentional grievous bodily harm differs. For example, in the Australian Capital Territory the penalty is 15 years,[60] the Northern Territory, life imprisonment,[61] NSW, 25 years,[62] Queensland, life imprisonment,[63] South Australia, life imprisonment,[64] Tasmania, 21 years,[65] and Victoria,[66] a level 3 imprisonment of 20 years maximum.

6.33 The Committee considers that 10 years imprisonment is an insufficient deterrent to eradicate the practice of FGM and recommends that the penalty in proposed new section 306(2) in clause 23 be increased to 20 years.

Recommendation 2: The Committee recommends that the proposed penalty for female genital mutilation in clause 23 of the Criminal Code Amendment Bill 2003 be increased to 20 years. This may be achieved by amending clause 23 of the Bill in the following manner:

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60 *Crimes Act 1900* (ACT) section 19.

61 *Criminal Code Act* (NT) section 177. Attempted grievous harm carries 7 years imprisonment under section 278.

62 *Crimes Act 1900* (NSW) section 33.

63 *Criminal Code Act 1899* (Qld) section 317. Attempted grievous bodily harm carries 7 years imprisonment under section 536.

64 *Criminal Law Consolidation Act 1935* (SA) section 270A(3)(b). Attempted grievous bodily harm carries 12 years imprisonment.

65 *Criminal Code Act 1924* (Tas) section 170 in conjunction with section 389(3). The penalty for attempted grievous bodily harm under section 342 appears to be at the discretion of the judge.

66 *Crimes Act 1958* (Vic) section 16. Causing serious injury under section 321P, the equivalent of grievous bodily harm, is a level 4 imprisonment of 15 years maximum.

Page 17, line 21 - To delete "10" and insert instead -

"20".

Male Genital Mutilation

6.34 The Committee draws to the attention of the House the matter of male genital mutilation, euphemistically called male circumcision.

6.35 The Attorney General pointed out in his preliminary advice to the Committee that it may be discriminatory to criminalize FGM but not male genital mutilation. One legal commentator referred to this as "legal gender bias".[67] Male circumcision is practised in Western Australia for religious and health reasons even though *"…no national or international medical association in the modern industrialised world endorses routine infant circumcision. Hence, laws against FGM which do not simultaneously prohibit male genital mutilation may contravene principles of equal protection in human rights law."*[68]

6.36 The Committee wrote to the Attorney General asking why male genital mutilation was not included in the Bill. The Attorney General said that a divergence of medical opinion about the practice of male circumcision, had led to the Government making a policy decision not to expressly criminalize male circumcision alongside FGM.[69] Mr George Tannin SC, Crown Solicitor's Office admitted that there is an inconsistency in the proposed legislation and that the Committee's *"…concern is an absolutely valid one"*.[70] However, as a policy decision, the Committee accepts that this matter is beyond its terms of reference.

Part 6 of the Bill

Sexual servitude

6.37 In response to Australia's obligations under a number of international instruments,[71] SCAG agreed to the enacting of commonwealth and state legislation to criminalize the practice of sexual servitude. In 1999, the Commonwealth passed the *Criminal Code*

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67 Christine Mason, 'Exorcising Excision: Medico-Legal Issues Arising from Male and Female Genital Surgery in Australia', 9 *Journal of Law and Medicine*, 2001, p58.

68 Letter to the Committee dated October 22 2003 at p3.

69 Letter from the Attorney General to the Committee, November 17 2003, p3.

70 Mr George Tannin SC, Crown Solicitor's Office, *Transcript of Evidence*, November 17 2003, p14.

71 The most recent international standard is the "Protocol to prevent, Suppress and Punish Trafficking in Persons, especially Women and Children", Supplementing the United Nations Convention Against Transnational Organised Crime. This Protocol was signed by Australia in December 11 2002 but is not yet ratified.

Amendment (Slavery and Sexual Servitude) Act 1999. However, that Act is limited to offences in which part of the offence occurred in a place outside Australia. Consequently, Western Australia needed to enact legislation to criminalize this offence when it occurs wholly or partly within the State.

6.38 Mr Barry Matthews, Commissioner of Police, in a submission to a current Commonwealth Parliamentary Joint Committee Inquiry into trafficking in women for sexual servitude, said the existence of sexual servitude first came to the attention of the Western Australian Police Service in 1999. [72] Three female Thai nationals sought assistance to return home and claimed to have been deceptively recruited overseas to work in the sex industry in Australia.[73] However, the allegations were not substantiated.[74] Mr Matthews stated that recent investigations had not uncovered any definite instances of females or children being forced to work in the sex industry. Several Asian females from China and Thailand had been detained under Commonwealth legislation but in all instances these women were over 18 and declined to discuss their situation.

Clause 26

6.39 The Committee has concerns with the following five aspects of clause 26.

The definition of 'commercial sexual service'

6.40 It is the Committee's view that the use of the term 'commercial' is misplaced. 'Sexual service' is not, of itself commercial for the person providing the service, rather the commerciality of it attaches to the use to which the service is being put by the person making and operating the business.

6.41 Further, as the definition presently reads, there is nothing to indicate that a person providing the service must be physically present. For example, it could be the display of a person's body in a photograph or video that is providing the gratification. The Committee presumes that Parliament intended physical presence of a person's body to be a factor within the definition. Additionally, because the definition does not appear to require the physical presence of a person's body, and presuming Parliament intends

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72 Mr Barry Matthews, Submission Number 7, Commonwealth Parliamentary Joint Committee on the Australian Crime Commission, Inquiry into Trafficking in Women for Sexual Servitude, September 11 2003, p.1.

73 Ms Radhika Coomaraswamy, the *United Nations Special Rapporteur on Violence against Women, its Causes and Consequences*, has pointed out that most women and girls are lured through false promises of decent working conditions at relatively good pay as nannies, maids, dancers, factory workers, restaurants workers, sales clerks or models.

74 Mr Barry Matthews, Submission Number 7, Commonwealth Parliamentary Joint Committee on the Australian Crime Commission, Inquiry into Trafficking in Women for Sexual Servitude, September 11 2003, p. 1.

to capture debt bondage in brothels, the definition needs to be expanded to include acts of prostitution as defined in the *Prostitution Act 2000*.

6.42 For these reasons, the Committee has proposed an amendment to the definition of 'commercial sexual service'. [See Recommendation 3, proposed section 331A(1) and (2)]

The definition of 'threat'

6.43 Clause 26 contains four new definitions applicable to proposed sections 331B to 331D of *The Criminal Code*. However, one of these, the term 'threat', is not expressed anywhere in sections 331B, 331C or 331D. The Committee therefore recommends the deletion of that definition if the Council rejects the Committee's proposed amendment to section 331B as outlined in Recommendation 3.

Proposed section 331B

6.44 This proposed section deals with the concept of compelling a person into sexual servitude and is designed to capture those in debt bondage. However, the term 'compel' is not defined in *The Criminal Code* and hence its ordinary, dictionary meaning applies. The Oxford Dictionary refers to a 'forcing', 'obliging' or 'persuading'. This would not cover intimidation or blackmail. For this reason, the Committee has proposed an amendment to the provision, specifically, the inclusion of the phrase: *"by force or threats"* so as to cover the field of the types of compelling a person in debt bondage is likely to encounter. [See Recommendation 3, proposed section 331A(1) and (2)]

Proposed section 331D

6.45 It states:

> *A person who-*
>
> > *(a) offers another person (the "victim") employment or some other form of engagement to provide personal services;*
> >
> > *(b) at the time of making the offer knows-*
> >
> > > *(i) that the victim will in the course of or in connection with the employment or engagement be asked or expected to provide a commercial sexual service;*
> > >
> > > *and*

> *(ii) that the continuation of the employment or engagement, or the victim's advancement in the employment or engagement, will be dependent on the victim's preparedness to provide a commercial sexual service;*
>
> *and*
>
> *(c) does not disclose that knowledge to the victim at the time of making the offer,*
>
> *is guilty of a crime and is liable-*
>
> *(d) if the victim is a child or an incapable person, to imprisonment for 20 years; or*
>
> *(e) otherwise to imprisonment for 7 years.*

6.46 The Committee has concerns with this new provision in relation to a child victim. To be guilty of the crime of deceptive recruiting for commercial sexual services, the prosecution would need to establish each of its three elements.[75] These are that:

- an offer of employment to provide personal services was made to a child;
- the person offering employment knew that the child would be expected to provide personal services of a commercial sexual nature and also knew that continuing employment depended on the child being prepared to provide that service; and
- the person offering employment did not disclose that knowledge to the child.

6.47 In the Committee's view, the third element unwittingly provides the recruiter with a defence. It implies that where the recruiter does disclose this knowledge to the child, then not all three elements would be met and a prosecution consequently fails. The defence is that the recruiter did in fact disclose the requisite knowledge to the child. In this situation, whether the child understood the nature of the employment would be irrelevant because all the subsection requires is the fact of disclosure. In the Committee's view, such knowledge of the nature of the employment, once disclosed by the recruiter, cannot be imputed to a child. Given that the penalty for new section 331D is 20 years imprisonment, this third element could provide a potential loophole defence for offenders.

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[75] As required by section 12(1) of *The Criminal Code.*

6.48 The Committee considered that other provisions in Chapter XXXI of *The Criminal Code* may provide some relief. For example, section 319(2)(c) which states that a child under the age of 13 years is incapable of consenting to an act which constitutes an offence against the child. Further, section 320(3) states that a person who procures a child to engage in sexual behaviour is guilty of a crime. Recruiting is analogous with procuring.

6.49 However, given that these proposed amendments concern a particular sub set of sexual offending under *The Criminal Code*, that is, the recruiting of children into sexual servitude, the Committee is of the view that proposed new section 331D does not go far enough. It should, at first instance, be a crime to recruit a child into providing commercial sexual services, not a crime if the recruiting was merely deceptive. An express provision similar to the South Australian legislation would be useful. In section 68 of South Australia's *Criminal Law Consolidation Act 1935*, there are a number of specific provisions concerning the 'use of children in commercial sexual services', making it clear that it is a crime to recruit children.

6.50 The Committee wrote to the Attorney General with its view of proposed section 331D. Mr George Tannin SC, Crown Solicitor's Office, stated that he had advised the Attorney General that proposed section 331D was problematic and that an amendment was required.[76] Two suggestions were made. First, an amendment so that section 331D(c) not apply to a child victim. Alternatively, a new section 331E could be inserted, drafted similarly to section 68 of South Australia's *Criminal Law Consolidation Act 1935*. [See Recommendation 3, proposed section 331A and D]

Consent and the incapable person or child in proposed section 331D

6.51 The Committee noted that both an incapable person and a child under the age of 18 years lack contractual capacity and therefore cannot enter into binding contracts to provide sexual services. This means that such contracts would be void at law. However, those contracts could be entered into by the parents of a child or the attorney of an incapable person. The Committee observed that none of the other jurisdictions have provided for this contingency and have proposed an amendment to proposed section 331D to deny a defence to parents or an attorney who enter into contracts on behalf of, respectively, a child under 18 years or an incapable person.

6.52 The Committee recommends that clause 26 of the Criminal Code Amendment Bill 2003 be amended so that it reads as follows:

[Note: Words proposed to be inserted are shown in **bold underlined**. Words proposed to be struck out are shown in [*square brackets italics*]. The statutory amendments required to effect these changes in the Council are contained in Appendix 2.]

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[76] Mr George Tannin SC, Crown Solicitor's Office, *Transcript of Evidence*, November 17 2003, p4.

" Part 6 - Amendments about sexual servitude

26. Sections 331A, 331B, 331C and 331D inserted

After section 331 the following sections are inserted in Chapter XXXI —

" **331A. Interpretation for s. 331B to 331D**

(1) In sections 331B to 331D —

"child" means a person under the age of 18 years;

"[*commercial*] sexual service" means **—**

(a) the [*commercial*] use or display**, for reward or valuable consideration,** of the body of [*the*] **a** person [*providing the service for the*] **to others then present for the purpose of, or so as to cause, their** sexual arousal or sexual gratification [*of others*];

(b) an act of prostitution within the meaning of section 3 of the *Prostitution Act 2000;*

"incapable person" has the meaning given by section 330(1);

"threat" has the meaning given by section 338.

(2) For the purposes of paragraph (a) of the definition of a sexual service —

(a) it is not an essential element that the person whose body is being used or displayed is physically present and visible to those for whom the service is provided;

(b) it may be provided by the use of photographs or other forms of graphic representation, or by any electronic medium used to store, retrieve and reproduce images whether or not a particular reproduction is accompanied by sound.

331B. Sexual servitude

A person who compels another person **by force or threats** to provide or to continue to provide a [*commercial*] sexual service is guilty of a crime and is liable —

(a) if the other person is a child or an incapable person, to imprisonment for 20 years; or

(b) otherwise, to imprisonment for 14 years.

331C. Conducting business involving sexual servitude

(1) In this section —

"conducting a business" includes —

(a) taking part in the management of the business;

(b) exercising control or direction over the business; and

(c) providing finance for the business.

(2) A person who conducts a business that involves any other person being compelled to provide or to continue to provide a [*commercial*] sexual service is guilty of a crime and is liable —

(a) if the other person is a child or an incapable person, to imprisonment for 20 years; or

(b) otherwise, to imprisonment for 14 years.

331D. Deceptive recruiting for commercial sexual services

(1) A person who —

(a) offers another person (the **"victim"**) employment or some other form of engagement [*to provide personal services*] **for reward; and**

(b) at the time of making the offer knows —

(i) that the victim will in the course of or in connection with the employment or engagement be asked or expected to provide a [*commercial*] sexual service; and

(ii) that the continuation of the employment or engagement, or the victim's advancement in the employment or engagement, will be dependent on the victim's preparedness to provide a [*commercial*] sexual service;

[*and*

(c) does not disclose that knowledge to the victim at the time of making the offer,]

is guilty of a crime and is liable —

(d) if the victim is a child or an incapable person, to imprisonment for 20 years; or

(e) otherwise, to imprisonment for 7 years**,**

and it is not a defence that –

(f) one or both parents or the legal guardian of a child; or

(g) the legal guardian of, or a person with power of attorney with respect to, an incapable person,

purported to consent to, or accept, an offer so as to bind the child or capable person to its terms.

(2) It is a defence for a person charged under subsection (1) to prove that the matters described in paragraph (b)(i), (ii) were disclosed to, and understood by, the victim.

"

Recommendation 3: The Committee recommends that clause 26 of the Criminal Code Amendment Bill 2003 be amended so that it reads as set out in paragraph 6.52. The statutory amendments required to effect these changes in the Council are contained in Appendix 2.

Recommendation 4: The Committee recommends that if the Council rejects the Committee's proposed amendment to proposed section 331B, which inserts the phrase "by force or threats" as outlined in Recommendation 3, then clause 26 of the Criminal Code Amendment Bill 2003 concerning the definition of 'threat' be amended in the following manner:

Page 19, line 15 - To delete the line.

Part 7 of the Bill

Does clause 30 unduly trespass on personal rights?

6.53 Part 7 contains amendments about the summary trial of indictable offences. Clause 30 of the Bill, which repeals current section 5 in *The Criminal Code* concerning the meaning and effect of the term 'summary conviction penalty', calls into question the scrutiny principle that the clause may unduly trespass on personal rights and liberties.[77]

6.54 Currently, section 5 of *The Criminal Code* states that where a person is charged before a court of petty sessions with an offence and the court considers that the charge can be adequately dealt with summarily, the charge may be dealt with summarily at the election of the person charged. These charges are referred to as 'either way' offences

[77] As stated at paragraph 3.8, the Committee generally scrutinises every bill against two uniform scrutiny principles derived from the 1996 Position Paper.

because they can be dealt with 'either' summarily before a judge alone in a Court of Petty Sessions[78] or on indictment before a judge and jury in the District Court.

6.55 The proposed amendment to section 5 will abolish the defendant's statutory right to election and instead, provide a Magistrate with a discretion to decide whether the offence is to be heard summarily or on indictment.

6.56 The proposed amendments had their genesis in the Murray Report, including changes in the summary trial of indictable offences. Recommendation 2 for example, stated: *"Enact one comprehensive scheme of procedure for dealing summarily with indictable offences, and rationalise and extend the offences which may be so dealt with"*. Recommendation 46 stated: *"Generally do not permit trial by jury for minor cases of stealing and the like."*

6.57 According to the Attorney General, impetus also came from developments in United Kingdom legislation, some case law and exegesis by criminal law commentators.[79] By contrast, the Law Reform Commission of Western Australia in its 1999 Final Report, *Review of the Criminal and Civil Justice System in Western Australia*, recommended: *"Where trial by judge alone or magistrate is available it should be at the election of the defendant, unless opposed by the prosecution, in which case the issue is to be determined by the court."*[80]

6.58 The defendant's right to election has been in *The Criminal Code* since 1994. Originally, *The Criminal Code* categorised offences into three groups - crimes, misdemeanours and simple offences. Simple offences were dealt with summarily by a Magistrate and indictable offences, (crimes and misdemeanours) on indictment in the Supreme or District Courts. Then, in 1994, amendments were introduced to allow some of those indictable offences to be dealt with summarily at the election of the person charged.

6.59 Election was first mooted in the 1970s by the then Attorney General of Victoria, Hon Haddon Strong MLA. At the time, it was seen as adding to the civil rights of an accused. However, the concept was ultimately rejected by the Victorian Parliament. In 1984, South Australia introduced trial by judge alone; NSW in 1990; and the Australian Capital Territory in 1993. When introduced in Western Australia in 1994, the then Attorney General, Mrs Cheryl Edwardes MLA, pointed out that the right was accompanied by important safeguards. One of these was that the accused would be

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78 Courts of Petty Sessions are sometimes referred to as police courts, lower courts or Magistrate's courts. These courts deal with charges of simple offences against adult persons, indictable offences triable summarily, preliminary proceedings relating to indictable offences, and matters of an administrative or licensing nature.

79 Western Australia, *Parliamentary Debates (Hansard)*, Legislative Assembly, April 3 2003, p6169.

80 Law Reform Commission of Western Australia, Final Report, *Review of the Criminal and Civil Justice System in Western Australia*, Project 92, September 1999, Recommendation 277 (3).

the only person to waive the right to trial by jury.[81] Debate at the time emphasised the fact that defendants would be making the choice.

6.60 This history indicates that what began as essentially a development in civil rights for defendants has now been weakened by abolishing election. In the Committee's view, this represents a serious diminution of what was considered to be the creation of more rights for defendants. Erosion of trial by jury is its collateral damage.

6.61 A similar scheme is proposed for defendants in the Children's Court. Under amendments to sections 19B(1), (2) and (3) of the *Children's Court of Western Australia Act 1988*, a child defendant will no longer be able to elect a trial before the President of the Children's Court or the District Court. The President of the Children's Court will first assess whether the child can, in the circumstances of the case, make an election.[82]

6.62 The Second Reading Speech of the Leader of the House, Hon Kim Chance MLC, indicated that these amendments have been justified on grounds of efficiency, cost effectiveness[83] and to divert the workload of the District Court into the Petty Sessions system.[84] During debate in the Legislative Assembly, the Attorney General tabled a paper which shows the following trial statistics of defendants sentenced in the two court systems.[85]

Number of defendants	Financial Year 1999/2000	Calendar Year 2002
Sentenced in a Court of Petty Sessions	7,318	10,229
Sentenced in the District Court	818	823[86]

81 Western Australia, *Parliamentary Debates (Hansard)*, Legislative Assembly, October 27 1994, p6289.

82 The Attorney General commented during debate in the Legislative Assembly that child defendants think they may have a better chance in terms of conviction by coming before a jury rather than a judicial officer sitting alone.

83 At para 30.4, the Law Reform Commission of Western Australia in its Final Report, *Review of the Criminal and Civil Justice System in Western Australia*, Project 92, September 1999 said: *"…there is evidence that the abolition of trial by jury may reduce the costs and delays associated with the criminal justice system, but saving money and promptness should not override the more fundamental objectives of the justice system."*

84 Western Australia, *Parliamentary Debates (Hansard)*, Legislative Council, September 19 2003, p11583.

85 Tabled Paper Number 1477, provided by Mr Gary Thompson, Executive Director, Court Services, dated September 11 2003.

86 According to Tabled Paper Number 1477, provided by Mr Gary Thompson, Executive Director, Court Services, dated September 11 2003, results from the 1999/2000 analysis indicate that approximately 80% of defendants sentenced in the District Court received an imprisonment penalty.

6.63 According to the Attorney General, the rationale for abolishing election is that many defendants are opting for jury trial only to 'play the system', delay punishment,[87] waste taxpayers' money and cause distress to victims and witnesses. The current system enables the accused to decide the mode of trial in pursuit of his or her personal interests, such as a belief that a jury trial will increase the chances of success. It is arguable that this is inappropriate and a system which enables the court to decide the mode of trial on the basis of clearly stated criteria, is a better way to ensure justice and fairness.[88] By eliminating the right of election for a large class of 'middle-ranking' offences such as public order offences, more money can be saved and justice speedily dispensed.

6.64 Mr George Tannin SC, Crown Solicitor's Office, reinforced the efficiency argument. At a Committee hearing Mr Tannin said:

> *Those accused who are well resourced can effectively elect trial by jury on quite minor matters, tying up important District Court time. … Presently a lot of offences go to trial in the District Court which is an expensive and time consuming process because it requires juries to be summoned and processes to be taken which are disruptive of communities. We are not taking away the right to trial but preserving the interests of justice by preserving the efficiency of justice and making better use of the resources we have in the summary courts.*[89]

6.65 The Committee conducted a hearing with the Law Society of Western Australia and the Criminal Lawyers Association of Western Australia to ascertain their views on clause 30. Mr Hylton Quail, President, Criminal Lawyers Association of Western Australia, commented on the argument that defendants are playing the system and delaying punishment by opting for jury trial in the belief that there is a greater chance of success. Mr Quail said that an accused is entitled to this belief and should not be criticised for it because underlying this personal belief is the presumption of innocence.

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87 This argument is that a vital witness may die, fall ill, fail to appear at trial, retract a statement or be intimidated. Mr John Prior, Convenor, Law Society of Western Australia Criminal Law Committee, *Transcript of Evidence*, October 28 2003, p2 said that "*... realistically, in the Perth District Court it takes a minimum of 18 months from the time of presentation of the indictment to get a trial and up to 2 years if the time is taken from the date the accused is charged."*

88 Western Australia, *Parliamentary Debates (Hansard)*, Legislative Assembly, September 11 2003.

89 Mr George Tannin SC, Crown Solicitor's Office, *Transcript of Evidence*, November 17 2003, p.9.

6.66 The right of a person to be presumed innocent is a basic principle of the common law.[90] This presumption is particularly strong if the accused is unrepresented and the charge is preferred by the police.[91] In *Chamberlain v The Queen*,[92] the High Court referred to it as the *"forgotten presumption"*.[93] In *Perry v The Queen*[94] Justice Murphy spoke of how the presumption tends to be *"…indirectly and subtly undermined from the outset by reference to a sequence of events which according to common human experience would not occur unless the accused were guilty."*[95] Justice Murphy warned of the danger of brushing aside the presumption and that *"No one should be found guilty on appearances, suspicions, conjecture or anything but evidence establishing guilt beyond a reasonable doubt."*[96]

6.67 Mr Hylton Quail, President, Criminal Lawyers Association of Western Australia, said:

> *The accused is entitled to the presumption of innocence … In our view, it is repugnant, and it actually undermines the jury system, to suggest that the right of election to a trial by jury should be abolished because you believe the person has chosen that because he thinks he may get a fairer trial.*[97]

6.68 Mr John Prior, Convenor, Law Society of Western Australia Criminal Law Committee, supported this view. Mr Prior said it was easy to forget this presumption in the push for higher conviction rates that occur in the Courts of Petty Sessions compared with figures of 50-60% over the past 5 to 10 years in the jury courts. Mr Prior admitted that if a community wants more convictions, then sending offenders before a Magistrate alone made sense: *"It is a lot harder to get a conviction in front of a jury because you have to satisfy 12 people beyond reasonable doubt, not one person."*[98]

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90 *Woolmington v DPP* [1935] AC 462 at 481. Although *The Criminal Code* supersedes the common law to the extent that they conflict, in the 1995 case of *Boxer v R* (14 WAR 505), Malcolm CJ said: *"While bearing in mind that the relevant provision* [concerning in that case, unlawful assemblies] *is contained in a code,* [the provisions] *should be construed in the light of the principles developed in the authorities dealing with the common law."* (at p510)

91 *Hallahan v Campbell; Ex parte Campbell* [1964] QWN 17; *Heffernan v Ward* [1959] Qd R 12; (1958) 53 QJPR 62.

92 No.2 (1984) 153 CLR 521.

93 Ibid at p570.

94 (1982) 150 CLR 580.

95 Ibid at para 11.

96 Ibid at para 10.

97 Mr Hylton Quail, President, Criminal Lawyers Association of Western Australia, *Transcript of Evidence*, October 28 2003, p.4.

98 Mr John Prior, Convenor, Law Society of Western Australia Criminal Law Committee, *Transcript of Evidence*, October 28 2003, p2.

6.69 The arguments for continuing to support a defendant's right of election were summarised by Mr Bruce Holder QC in an article titled: *The Importance of Preserving the Jury System and the Right of Election for Trial*.[99] Mr Holder said: [100]

- The effect of an apparently inconsequential crime on a particular victim, and the effect on a particular defendant of a conviction, may have no relationship. Offences often described as petty may have devastating consequences for the defendant as much as for the victims. The consequences to a defendant, sometimes an innocent one, may last a lifetime.

- A conviction by a jury is usually something that even a convicted defendant can live with, however he may resent it. He feels he has a better chance of being understood by a jury and that there is some justice in that. The decision of a less representative tribunal may ultimately do little to rehabilitate an offender and may serve to increase his sense of separateness from society.

- Seeing justice done is equally important to most people. Any judgement by a cross section of society is far more satisfactory than a system of justice that depends on the State for the selection of its fact finders as well as its investigator, prosecutor and sentencer.

- The person principally affected by the decision to prosecute is the defendant himself. He did not ask to be charged, and at the point when mode of trial is decided, the law deems him to be innocent. He has a diminishing number of protections available to him now and needs a right to a jury trial more than ever before.

6.70 The Committee considers that the 'diminishing number of protections' argument is particularly pertinent in the case of young offender defendants who enter the criminal justice system already vulnerable and disadvantaged by dysfunctional families and substance abuse. According to Hon Judge Kate O'Brien, President of the Children's Court, many of these offenders come before that Court with no significant adult in attendance to guide, instruct and support them. More often than not, the only adult present in court, is a Juvenile Justice Officer.[101]

6.71 Item 4, Schedule 3 of the Bill provides for amendments to the *Children's Court of Western Australia Act 1988*, modifying the current right child defendants enjoy to make an election. The Schedule amends section 19B of the *Children's Court of*

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99 *Criminal Law Review* 1997 pp875-881.

100 Ibid at p881.

101 Hon Judge Kate O'Brien, Guest Speaker, *Youth Affairs Council of Western Australia Conference*, October 1 2003.

Western Australia Act 1988. The rationale is to align the Children's Court with other criminal courts.

6.72 Currently, section 19B(1) of the *Children's Court of Western Australia Act 1988* enables a child to elect to be tried by the District or Supreme Court when charged with an indictable offence not triable summarily. If no election is made, the Children's Court may hear the charge. Similar to the adult courts, the child makes the election, not the Court. Current section 19B(1) emphasises that it is the child who makes the election. What has changed is that a test is now proposed whereby the Court will determine whether the charge should be referred to a superior court.

6.73 Proposed section 19B(1)(a) requires the Court to assess the circumstances of the alleged offence. Where the Court finds that the circumstances are of such a nature that, if an adult were charged with it, the offence would have to be tried on indictment; then the child can elect access to the superior courts. However, the Court makes that preliminary assessment, before allowing the child to elect.

6.74 Section 19B(1)(b) provides an alternative scenario. It requires the Court to assess the circumstances of the alleged offence by taking into account two factors. These are:

- that if an adult were charged with the same offence, it could, because of section 5 of *The Criminal Code*, be tried 'either way'; and
- the Court, having given both the prosecutor and the defendant an opportunity to make submissions, decides that the charge is to be tried on indictment.

6.75 Again, after making that assessment, the child may elect to be tried on indictment but it is the Court that makes the decision as to whether or not the child can be put in the position so as to then make the election.

6.76 Proposed section 19B(2) refers to the Court assessing that the circumstances of the alleged offence are such that the child is *not* entitled to make an election under 19B(1). In that situation, the Court will hear and determine the charge summarily.

6.77 The Committee sought further clarification from the Attorney General on the proposed amendments to the *Children's Court of Western Australia Act 1988*. The Attorney General said proposed new section 19B(1):

> *Leaves untouched the right of the child defendants to elect, when charged with offences that must ordinarily be tried on indictment, whether to have the charge determined by judge alone in the Children's Court or by judge and jury.*
>
> *Abolishes the right of child defendants to elect, when charged with either way offences, whether to have the charge determined by judge*

alone or by judge and jury. This is to make section 19B consistent with proposed new section 5 of the Code, which abolishes the right of adult defendants to elect, when charged with either way offences, whether to have the charge determined by judge alone or by judge and jury.

Creates a new right of election for child defendants. Under proposed new section 5 of the Code all adult defendants charged with either way offences will be tried by magistrate alone, unless a court of Petty sessions decides, in accordance with a number of statutory criteria, that they should be tried before judge and jury. Under proposed new section 19B of the CCWAA, all child defendants charged with either way offences will be tried by judge alone in the Children's Court unless the Court decides, in accordance with number of statutory criteria, that the offence warrants trial by judge and jury. When the Court so decides, proposed new section 19B provides child defendants with the right to elect whether to be tried by judge and jury or whether to be tried by judge alone in the Children's Court.[102]

6.78 The Committee wrote to the Children's Court of Western Australia requesting an opinion of the proposed amendments to the *Children's Court of Western Australia Act 1988.* Acting President, Judge Valerie French stated that the proposed amendments *"…will not impact on young persons appearing before the Court in any adverse way and I have no objections to the amendments"*.[103]

6.79 The Committee finds that the consequential amendments to the *Children's Court of Western Australia Act 1988* are confusing. It has been argued that the amendments are being made to ensure consistency with changes to the right of election for adult defendants. The proposed amendments appear to be removing an existing right of election for child defendants and conferring a new right of election similar to the one extinguished. Whether or not that is the case is the cause of confusion.

6.80 The Committee recommends that during debate in the Council the responsible Minister clarify the intended operation of Item 4, Schedule 3.

6.81 The Committee heard evidence from Mr George Tannin SC, Crown Solicitor's Office, that concomitant with the changes and increase in effect of the jurisdiction of the summary courts, there are a raft of changes dealing with an increased capacity by

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102 Letter to the Committee from the Attorney General, November 24 2003, p2.

103 Letter from Acting President, Judge Valerie French, Children's Court of Western Australia, November 18 2003.

those courts to punish offences. Some summary level penalties have increased from between one and five years. [104]

6.82 The Committee is concerned for defendants in the situation where a Magistrate determines that sentencing should be remitted to a superior court because of the nature of the evidence that has emerged. The defendant is placed in the position where he receives a higher penalty yet is denied the right to trial by his peers in that court. Although arguably a policy matter, the Committee suggests that is a further diminution of the current statutory protections enjoyed by defendants.

6.83 The Committee is mindful that if the House retains the right of election for adult defendants, the amendments to the *Children's Court of Western Australia Act 1988* will wither away because they are merely consequential upon the amendments to section 5 of *The Criminal Code* being passed. However, during debate on clause 30 the Committee recommends that the responsible Minister provide clarification to the House on the operation of clause 30 and its specific interaction with Item 4, Schedule 3, concerning child defendants under the *Children's Court of Western Australia Act* 1988.

Erosion of the system of jury trial

6.84 As stated at paragraph 6.60, erosion of trial by jury is the collateral damage from abolishing the defendant's current statutory right to election. Further, the Committee questions whether abolition may have an adverse impact on the defendant's right to a fair trial, a right which has emerged over a 20 year period of Australian case law and centuries of common law. [105]

6.85 The Magna Charta, that great charter of liberties, which first curtailed the power of the state in 1215, promised that: "*No free man shall be arrested or imprisoned or disseised* [dispossessed] *or outlawed or exiled or in any way victimised, neither will we attack him or send anyone to attack him, except by the lawful judgment of his peers or by the law of the land.*"[106]

6.86 Sir Patrick Devlin, Law Lord and jurist in his book, *Trial By Jury*, said:

> *The object of any tyrant in Whitehall would be to overthrow or diminish trial by jury; for no tyrant could afford to leave a subject's freedom in the hands of twelve of his countrymen. So that trial by*

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104 Mr George Tannin SC, Crown Solicitor's Office, *Transcript of Evidence,* November 17 2003, p10.

105 *Barton v The Queen* (1980) 147 CLR 75, *Jago v District Court of NSW* (1989) 168 CLR 23 and *Dietrich v The Queen* (1992) 177 CLR 292.

106 Quoted in *The Economist (US)*, January 13, 2001 p4.

> *jury is more than an instrument of justice and more than one wheel of the constitution: it is the lamp that shows that freedom lives."*[107]

6.87 Clause 30 has, in part, been modelled on United Kingdom legislation which, to date, has been unsuccessful in implementation. The United Kingdom first announced plans to eliminate the right of defendants to choose a jury trial in cases that deal with a host of middle-ranking crimes such as theft, indecency, possession of an offensive weapon or soft drugs in May 1999. Since that time, the United Kingdom government has introduced legislation on three occasions regarding this subject matter.[108] On two occasions the plan to limit jury trials has floundered in the face of a storm of criticism from the legal profession and civil liberties groups.[109] Critics of the legislation claimed the idea was ill-conceived and unjust, that trial by jury had long been a cornerstone of British justice and that fundamental rights to justice cannot be driven by administrative convenience. *The Economist Newspaper* commented at the time:

> *There is little evidence that the right to a jury trial is being widely abused. Of more than 400,000 defendants a year with the right to choose a jury trial, only 18,500 do so and this number has halved in the past 10 years. Many of these defendants do later plead guilty before their trial begins, as Mr Straw*[110] *complains, but half of them do so after the charges against them have been reduced. Some defendants may be "playing" the system, but the right has been a check against sloppy work by police and prosecutors, who often overcharge defendants (especially from ethnic minorities, according to the Home Office's own research). If Mr Straw gets his way, miscarriages of justice, not cost savings, are the most likely result.*[111]

6.88 Other Australian jurisdictions, such as the Australian Capital Territory,[112] New South Wales,[113] South Australia[114] and Queensland have a right of election in their respective

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107 *Trial By Jury*, London, 1956, p164.

108 Under Home Secretaries: Mr Michael Howard, Mr Jack Straw and currently, Mr David Blunkett. The impetus for the legislation was a 1993 Royal Commission on Criminal Justice and the 1997 Narey Review of Delay in the Criminal Justice System, Home Office, February 1997.

109 The Criminal Justice (Mode of Trial) (No 2) Bill (UK) was eventually withdrawn from the House of Commons in December 2000.

110 Mr Straw was the Home Secretary at the time.

111 (US), March 11 2000 v354 i8161 p24.

112 *Supreme Court Act 1933* (ACT) section 68B.

113 *Criminal Procedure Act 1986* (NSW) section 32 (with consent of prosecutor). There is also a procedure for the Supreme Court to deal with certain offences summarily on the election of the accused under section 475A of the *Crimes Act 1900* (NSW*)* and the *Supreme Court (Summary Jurisdiction) Act* (NSW) *1967*

114 Section 7 of the *Juries Act 1927* (SA) but not for minor indictable offences where the defendant has elected trial in the District Court.

legislation.[115] The Committee is not aware of any proposal to amend these jurisdictions' legislation.

6.89 The Committee notes that abolishing election may have consequences for the confidence of the general public in the system of criminal justice in Western Australia and in particular trial by jury. Like the United Kingdom, Western Australia has a deep attachment to jury trial as emphasised by the three witnesses who gave evidence at a Committee hearing.[116] Trial by one's peers is seen as a cornerstone of our democratic process, its retention is important because it allows the presentation of society's viewpoint in the justice system.[117]

Recommendation 5: The Committee recommends that during debate in the Council on the Criminal Code Amendment Bill 2003, the responsible Minister clarify the operation of clause 30 in light of the Committee's observations in paragraphs 6.53 to 6.59 and 6.81 to 6.89 of this report.

Recommendation 6: The Committee recommends that during debate in the Council on clause 30 the responsible Minister clarify the operation of clause 30 and its interaction with Item 4, Schedule 3, addressing the Committee's observations in paragraphs 6.70 to 6.79 of this report.

Creating more 'either way' offences

6.90 Part 7 reclassifies some indictable offences as either-way offences as a device to divert less serious indictable matters into the summary courts.[118] At the same time a Court of Petty Sessions can decide that a matter cannot be dealt with in a summary way. Part 7 also creates several new 'either-way offences'. These are:

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115 Under section 70 of the *Juvenile Justice Act 1992*, a child may elect at committal for trial by judge and jury or trial by Children's Court judge alone. Here, the child may withdraw the election to be tried by judge alone under section 72(4) and the Crown may apply for the matter to be transferred to the normal jurisdiction where there is a trial of a co-accused under section 74.

116 For example, Mr Hylton Quail, President, Criminal Lawyers Association of Western Australia, *Transcript of Evidence*, October 28 2003, said at p3: *"Juries are a lot fresher in their approach and more willing to entertain arguments that perhaps Magistrates will not. Magistrates are still by and large Anglo-Saxon men. Juries are a lot more representative. People elect to have jury trials because they think they will get a fairer trial."*

117 The Law Reform Commission of Western Australia Final Report, *Review of the Criminal and Civil Justice System in Western Australia*, Project 92, September 1999 described the jury as the *"…quintessential link between the community and the criminal justice system"*. At para 30.5 on p258.

118 For example, sections 63 to 67 of *The Criminal Code* create offences relating to unlawful assemblies, riots and other breaches of the peace. Currently, these offences must all be dealt with on indictment.

- section 360 - Unlawful publication of defamatory matter;
- section 361 - Defamation of Members of Parliament by strangers;
- section 444 - Criminal damage;
- section 552 - Attempts to commit indictable offences;
- section 553 - Incitement to commit indictable offences;
- section 558 - Conspiracy to commit indictable offences; and
- section 562 - Accessories after the fact to indictable offences.

6.91 Mr Hylton Quail, President, Criminal Lawyers Association of Western Australia, stated that the Association does not have a problem with additions to the 'either way' list. In fact, the Association approves of aggravated burglary in company being added. Mr Quail commented that this will dramatically reduce the workload of the District Court. In the Association's view, other offences could have been added, for example, threatening to kill.

6.92 The Committee draws to the attention of the House, Justice Murphy's comments from over 20 years ago in *Barton v The Queen*,[119] where he lamented on a *"…marked trend in recent years in Australia to turn indictable offences into summary ones, and in the creation of new offences, to make them summary rather than indictable."* Justice Murphy was of the view that this trend to replace indictable offences by summary ones *"…seriously erodes the institution of trial by jury, which is the most important safeguard for the liberties of the people."*

Part 8 of the Bill

Presence of the accused at trial - clause 76

6.93 Section 635 of *The Criminal Code* currently requires an accused to be present for trial. This requirement is expressed to be subject to two exceptions, namely -

- the court may order the accused to be removed and may direct the trial to proceed in the absence of the accused where the conduct of the accused would render the continuance of the proceedings impracticable; and
- the court may, in any case, if it thinks fit, permit a person charged with a misdemeanour to be absent during the whole or part of the trial on such conditions as it thinks fit.

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[119] (1980) 147 CLR 75 at para 8.

6.94 Clause 76 of the Bill proposes to repeal section 635 of *The Criminal Code* and replace it with a new section 635. Proposed new subsection (4) will allow a court to order the trial to proceed in the absence of an accused if it is satisfied that the interests of the accused will not be prejudiced, and that it is necessary for the proper administration of justice that the trial proceed in the absence of the accused.

6.95 According to common law and current section 635 of *The Criminal Code*, an accused has a right to be present at their trial, except where they cause enough of a disruption to make their presence impracticable.

> *An accused person must be given every opportunity to hear all that is alleged against him … but if he shows, by his conduct, that not only does he not desire to avail himself of such opportunity but he is determined that the jury shall not hear the evidence against him and that the orderly procedure of a trial is not to be permitted to function, then he voluntarily abandons his rights.*[120]

6.96 Proposed section 635 also gives an accused a right to be present at their trial and proposed section 635(5), which rephrases the current section 635, allows for the trial to continue in an accused person's absence due to their disruptive behaviour,

> *…if an accused person conducts himself or herself in a manner that makes it impracticable to continue proceedings in his or her presence, the court may order the accused person to be removed and the proceedings to proceed in his or her absence.*[121]

6.97 However, proposed section 635(4) introduces the ability to allow a trial to continue in the accused person's absence. A Court has to be satisfied that the interests of the accused will not be prejudiced and that it is necessary for the proper administration of justice that the trial proceed in the absence of the accused. The Committee queries that if disruption is covered by subsection (5) and an accused has the right to be present at their trial, what other circumstances could possibly allow a trial to proceed in their absence in the circumstances outlined in proposed section 635(4)?

6.98 The Committee is aware that part of the impetus for proposed section 635(4) was a result of difficulties encountered in a trial of multiple accused persons where one of the accused fell ill[122]. However, the scope of proposed section 635(4) is very wide, as it is not limited to multiple accused persons or specific incidents. Where there is one accused, it appears that sickness would be insufficient to continue the trial in their

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120 *David Harold Eastman v The Queen* (1997) 76 FCR 9; (1997) 158 ALR 107. Also *R v McHardie and Danielson* [1983] 2 NSWLR 733 at 739.

121 Proposed section 635(5)

122 Clause Notes to the Bill, p23.

absence. Case law indicates that the only time an accused person's interests would not be prejudiced by trial in their absence and is necessary for the proper administration of justice, is where they provide enough of a disruption to abandon that right.[123]

6.99 In the Committee's view, the only foreseeable application of proposed section 635(4) in the situation of illness, might be circumstances where the accused forces their illness through the ingestion of substances to cause the sickness. However, this could arguably fall under conduct of *"…a manner that makes it impracticable to continue proceedings in his or her presence."*[124]

6.100 The Clause Notes to the Bill indicate that Queensland's *Criminal Code Act 1899* served as a model for the proposed amendment. However, the Queensland reference is different in that it reads:

> *Where 2 or more accused persons are charged in the 1 indictment, if it is made to appear to the court that any of them is unable to be present by reason of the person's illness or infirmity, the court may permit the person to be absent during the whole or any part of the trial…*[125]

6.101 The Queensland legislation specifically refers to illness or infirmity and only applies in cases of two or more accused persons. Although the Clause Notes stated that the proposed section would be "…*similar in effect to section 617(3) of the Queensland Code*"[126] it was indicated by Mr George Tannin SC, Crown Solicitor's Office, that the intent was to make the proposed section wider than the similar Queensland section. Thus, the proposed section was not intended to be limited to '2 or more accused' or to circumstances of 'illness or infirmity', which makes the proposed section 635(4) very different to Queensland's section 617(3) in contradiction to the Clause Notes.

6.102 Furthermore, it was suggested that where there were multiple accused, the end result of the proposed section would be a separate trial for the absent accused at a subsequent date.[127] Mr Tannin stated that the "…*trial would proceed in the absence of the accused* [and] *would be treated as a trial against all accused*."[128].

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123 *R v Vernell* [1953] ALR 1139; *R v Cornwell* [1972] 2 NSWLR 1.

124 Proposed section 635(5) - for support for this proposition see *R v Stuart and Finch* [1974] Qd R 297 where one accused swallowed metal objects requiring his hospitalisation. There was no evidence that the accused was mentally disturbed. He was found to have caused sufficient disruption to have the trial of his co-accused continue in his absence.

125 *Criminal Code Act 1899* (Qld) section 617.

126 At p23.

127 Mr Hylton Quail, President, Criminal Lawyers Association of Western Australia, *Transcript of Evidence*, October 28 2003, p6.

128 Mr George Tannin SC, Crown Solicitor's Office, *Transcript of Evidence*, November 17 2003, p6.

6.103 Witnesses from the Law Society of Western Australia and the Criminal Lawyers Association of Western Australia expressed concern about proposed section 635(4). Mr Ian Weldon, Treasurer, Law Society of Western Australia, doubted whether a conviction arising out of trial held in the absence of the accused (except in the case of disruption[129]) would survive an appeal to the High Court.[130]

6.104 Mr John Prior, Convenor, Law Society of Western Australia Criminal Law Committee, raised the issue of whether proposed section 635(4) presumes that the accused is represented. If unrepresented, this may have ramifications for the proper administration of justice if a judge continued a trial with an absent, unrepresented accused.[131] Mr George Tannin SC, Crown Solicitor's Office, agreed with this proposition and indicated that the provisos of proposed section 635(4)(a) and 635(4)(b) would mean that the trial could not continue in the absence of an unrepresented accused person.

6.105 Although aware of the underlying reasons for proposed section 635(4), the Committee considers that there is doubt as to whether it would actually apply in the circumstances of illness. Even if the proposed section did specifically mention illness, it would be difficult to foresee circumstances of non-intentional illness that would not still require an accused person's presence at trial. To do otherwise may prejudice the accused person's interests and call into question the proper administration of justice. Where the illness was intentional then *R v Stuart and Finch*[132] would provide support for the proposition that the disruption provisions of proposed section 635 would apply instead.

6.106 Mr George Tannin SC, Crown Solicitor's Office, explained that it was intended that the scope of the proposed section 635(4) be very wide. Mr Tannin stated that "…*it* [was] *drafted to cover all possible circumstances which might require an accused not to be present*".[133] However, as mentioned previously the disruption provisions of proposed section 635 should outline the legitimate reasons for continuing a trial in an accused person's absence. When pressed for possible examples where a trial could continue in an accused persons absence, Mr Tannin continually referred to situations where an accused person was disruptive.[134] The only other example Mr Tannin

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129 For an example where a trial for multiple accused persons was held in the absence of one due to disruption see *R v Stuart and Finch* [1974] Qd R 297.

130 Mr Ian Weldon, Treasurer, Law Society of Western Australia, *Transcript of Evidence*, October 28 2003, p12.

131 Mr John Prior, Convenor, Law Society of Western Australia Criminal Law Committee, *Transcript of Evidence*, October 28 2003, p13.

132 [1974] Qd R 297

133 Mr George Tannin SC, Crown Solicitor's Office, *Transcript of Evidence*, November 17 2003, p6.

134 Mr George Tannin SC, Crown Solicitor's Office, *Transcript of Evidence*, November 17 2003, p6.

mentioned was the Diplock courts in Northern Ireland[135], which the Committee views as irrelevant as it is erroneous to equate the operation of a single section (such as proposed section 635(5)) to an entire court which had altered its procedural rules to deal specifically with suspected terrorists.[136] Therefore, Mr Tannin was unable to provide an example (other than disruptive accused persons - which is considered by the proposed section 635(5)) where this section would operate.

6.107 The Committee finds that the Clause Notes refer to an intention that the proposed amendments be similar to section 617(3) of Queensland's *Criminal Code Act 1899*. The actual operation of proposed section 635(4) is much wider than the Queensland provision. Therefore, the Committee recommends that clause 76 be redrafted to closely mirror the Queensland section.

6.108 If amended as recommended by the Committee, clause 76 of the Criminal Code Amendment Bill 2003 will read as follows:

[Note: Words proposed to be inserted are shown in **bold underlined**. Words proposed to be struck out are shown in [*square brackets italics*]. Statutory amendments required to effect these changes in the Legislative Council are contained in Appendix 3.]

"635. ***[Accused's presence at proceedings]*** **Presence of accused**

(1) In this section -
"proceedings" includes proceedings under section 611A, at trial, and under the *Bail Act 1982*, the *Evidence Act 1906*, the *Sentencing Act 1995* or the *Young Offenders Act 1994*.

[*(2) This section applies whether an accused person is being tried alone or with others.*]

[*(3)*] **(2)**Proceedings that relate to an accused person must take place in [*his or her*] **the** presence **of the accused person** unless this section or the *Sentencing Act 1995* provides otherwise.

[(4) The court may order proceedings that relate to an accused person to proceed in his or her absence if it is satisfied –
(a) that the accused person's interests will not be prejudiced by his or her absence; and

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135 Mr George Tannin SC, Crown Solicitor's Office, *Transcript of Evidence*, November 17 2003, p6 said: *"In the 1970s what were known as the Diplock courts in Ireland regularly had trials with IRA accused who were not present simply because the situation was so dangerous."*

136 For further information on the changes that were recommended see Dr Martin Melaugh, *Report of the Commission to Consider Legal Procedures to deal with Terrorist Activities in Northern Ireland*, 2003 CAIN Web Service <http://cain.ulst.ac.uk/hmso/diplock.htm#2> viewed on November 21 2003.

(b) that it is necessary for the proper administration of justice that the proceedings proceed in the absence of the accused person.]

[(5) Notwithstanding subsection (4), if an accused person conducts himself or herself in a manner that makes it impracticable to continue proceedings in his or her presence, the court may order the accused person to be removed and the proceedings to proceed in his or her absence.]

(3) If an accused person so conducts himself or herself as to render the continuance of the proceedings in the person's presence impracticable, the court may order the person to be removed and may direct the trial to proceed in the person's absence.

(4) Where 2 or more accused persons are tried jointly and the Court is satisfied, that any of them is unable to be present by reason of the person's illness or infirmity, the court may permit the person to be absent during that part of the trial as may be necessary if -

(a) the interests of the accused person will not be prejudiced by the trial proceeding in the person's absence; and

(b) the interests of justice require that the trial should proceed in the person's absence.

(5) The court may in any case permit an accused person to be absent during the whole or any part of the trial on such conditions as it thinks fit.

(6) If an accused person absents himself or herself during *[proceedings]* **the trial** without leave, the court may direct a warrant to be issued to arrest the [*accused*] person and bring [*him or her*] **the person** before the court forthwith.

(7) Nothing in this section prevents a court from taking evidence from an accused person by video link or audio link under section 121 of the *Evidence Act 1906*.

"

Recommendation 7: The Committee recommends that clause 76 of the Criminal Code Amendment Bill 2003 be amended so that it reads as set out in paragraph 6.108. Statutory amendments required to effect these changes in the Council are contained in Appendix 3.

Schedule 3 of the Bill

6.109 Schedule 3, Item 19 of the Bill proposes to amend the *National Crime Authority (State Provisions) Act 1985*. However, the Committee questioned whether amendments can be made to the *National Crime Authority (State Provisions) Act 1985* given that the National Crime Authority no longer exists.

6.110 Legislation enacting the Commonwealth National Crime Authority was not repealed but renamed as the *Australian Crime Commission Act 2002* under the *Australian Crime Commission Establishment Act 2002*.

6.111 The National Crime Authority Amendment Bill 2002 (**Amendment Bill**) was introduced into the Western Australian Parliament in March 2003 and reported on by the Uniform Legislation and General Purposes Committee in November 2002. The Amendment Bill was introduced into the Parliament before the *Australian Crime Commission Establishment Act 2002* was introduced into the Commonwealth Parliament. The Amendment Bill addresses increased powers for the National Crime Authority. The Amendment Bill remains in the Legislative Council and has not been progressed due to the expectation of an Australian Crime Commission (State Provisions) Bill that has not yet been introduced into the Parliament.

6.112 It does not appear that the Australian Crime Commission is simply the National Crime Authority continuing in existence with a mere change of name. For this reason, the Committee sought clarification from the Attorney General about the operation of the *National Crime Authority (State Provisions) Act 1985* in view of the changes to the Commonwealth legislation.

6.113 The Attorney General agreed that the current effect of the *National Crime Authority (State Provisions) Act 1985* is uncertain but claims it is fair to assume that it may have some ongoing effect. The Attorney General confirmed that a bill to repeal the *National Crime Authority (State Provisions) Act 1985* is likely to be introduced before the end of 2003. Assuming that the present Bill is enacted before the *National Crime Authority (State Provisions) Act 1985* is repealed, then it is *"…proper that the National Crime Authority (State Provisions) Act 1985 be amended pursuant to Item 19 of Schedule 3 even though it may have limited ongoing effect."*[137]

[137] Letter to the Committee dated November 24 2003, p.3.

Recommendation 8: The Committee recommends that subject to recommendations 1 to 7, the Criminal Code Amendment Bill 2003 be passed.

Hon Adele Farina MLC

Date: December 2 2003

APPENDIX 1

IDENTIFIED STRUCTURES FOR UNIFORM LEGISLATION

APPENDIX 1

IDENTIFIED STRUCTURES FOR UNIFORM LEGISLATION

The former Legislative Assembly Standing Committee on Uniform Legislation and Intergovernmental Agreements identified and classified nine legislative structures relevant to the issue of uniformity in legislation which were endorsed by the 1996 Position Paper. A brief description of each is provided below.

Structure 1: *Complementary Commonwealth-State or Co-operative Legislation.* The Commonwealth passes legislation, and each State or Territory passes legislation which interlocks with it and which is restricted in its operation to matters not falling within the Commonwealth's constitutional powers.

Structure 2: *Complementary* or *Mirror Legislation*. For matters which involve dual, overlapping, or uncertain division of constitutional powers, essentially identical legislation is passed in each jurisdiction.

Structure 3: *Template, Co-operative, Applied* or *Adopted Complementary Legislation.* Here a jurisdiction enacts the main piece of legislation, with the other jurisdictions passing Acts which do not replicate, but merely adopt that Act and subsequent amendments as their own.

Structure 4: *Referral of Power*. The Commonwealth enacts national legislation following a referral of relevant State power to it under section 51 (xxxvii) of the Australian Constitution.

Structure 5: *Alternative Consistent Legislation.* Host legislation in one jurisdiction is utilised by other jurisdictions which pass legislation stating that certain matters will be lawful in their own jurisdictions if they would be lawful in the host jurisdiction. The non-host jurisdictions cleanse their own statute books of provisions inconsistent with the pertinent host legislation.

Structure 6: *Mutual Recognition*. Recognises the rules and regulation of other jurisdictions. Mutual recognition of regulations enables goods or services to be traded across jurisdictions. For example, if goods or services to be traded comply with the legislation in their jurisdiction of origin they need not comply with inconsistent requirements otherwise operable in a second jurisdiction, into which they are imported or sold.

Structure 7: *Unilateralism.* Each jurisdiction goes its own way. In effect, this is the antithesis of uniformity.

Structure 8: *Non-Binding National Standards Model*. Each jurisdiction passes its own legislation but a national authority is appointed to make decisions under that legislation. Such decisions are, however, variable by the respective State or Territory Ministers.

Structure 9: *Adoptive Recognition.* A jurisdiction may choose to recognise the decision making process of another jurisdiction as meeting the requirements of its own legislation regardless of whether this recognition is mutual.

APPENDIX 2

STATUTORY AMENDMENTS IN RELATION TO RECOMMENDATION 3 - CLAUSE 26

APPENDIX 2

STATUTORY AMENDMENTS IN RELATION TO CLAUSE 26 TO EFFECT THE CHANGES IN COMMITTEE RECOMMENDATION 3

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1. Page 19, line 7 – To insert before "In" the subsection designation "(1)".

2. Page 19, line 9 – To delete the word "commercial" where it appears in both places.

3. Page 19, line 9 – To insert after "means" -
   " -
   (a)
   ".

4. Page 19, line 10 – To insert after "display" -
   " , for reward or valuable consideration, ".

5. Page 19, line 10 – To delete "the" and insert instead "a".

6. Page 19, lines 10 and 11 – To delete "providing the service for the" and insert instead -
   "
   to others then present for the purpose of, or so as to cause, their
   ".

7. Page 19, line 12 - To delete "of others".

8. Page 19, after line 12 – To insert -
   "
   (b) an act of prostitution within the meaning of section 3 of the *Prostitution Act 2000*;
   ".

9. Page 19, after line 15 – To insert -
   "
   (2) For the purposes of paragraph (a) of the definition of a sexual service —
   (a) it is not an essential element that the person whose body is being used or displayed is physically present and visible to those for whom the service is provided;
   (b) it may be provided by the use of photographs or other forms of graphic representation, or by any electronic medium used to store, retrieve and reproduce images whether or not a particular reproduction is accompanied by sound.
   ".

10. Page 19, line 17 – To insert after "person" where it second appears -
    " by force or threats ".

11. Page 19, line 18 – To delete “commercial”.

12. Page 20, line 4 – To delete “commercial”.

13. Page 20, line 10 – To insert before “A” the subsection designation “(1)”.

14. Page 20, line 13 – To delete “to provide personal services” and insert instead -
“ for reward; and ”.

15. Page 20, line 18 – To delete “commercial”.

16. Page 20, line 25 – To delete “commercial”.

17. Page 20, lines 26 to 28– To delete the lines.

18. Page 21, line 1 – To insert after “years” -
“

,
and it is not a defence that —
(f) one or both parents or the legal guardian of a child; or
(g) the legal guardian of, or a person with power of attorney with respect to, an incapable person,
purported to consent to, or accept, an offer so as to bind the child or incapable person to its terms.

(2) It is a defence for a person charged under subsection (1) to prove that the matters described in paragraph (b)(i), (ii) were disclosed to, and understood by, the victim.

”.

APPENDIX 3

STATUTORY AMENDMENTS IN RELATION TO RECOMMENDATION 7 - CLAUSE 76

APPENDIX 3

STATUTORY AMENDMENTS IN RELATION TO CLAUSE 76 TO EFFECT THE CHANGES IN COMMITTEE RECOMMENDATION 7

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1. Page 47, line 17- To delete "**Accused's presence at proceedings**" and insert instead -

   " **Presence of accused** ".

2. Page 47, lines 23 and 24 – To delete subclause(2).

3. Page 47, line 26 – To delete "his or her" and insert instead –

   " the ".

4. Page 47, line 26 – To insert after "presence" –

   " of the accused person ".

5. Page 48, lines 1 to 14 – To delete the lines and insert instead -

   "

   (3) If an accused person so conducts himself or herself as to render the continuance of the proceedings in the person's presence impracticable, the court may order the person to be removed and may direct the trial to proceed in the person's absence.

   (4) Where 2 or more accused persons are tried jointly and the Court is satisfied, that any of them is unable to be present by reason of the person's illness or infirmity, the court may permit the person to be absent during that part of the trial as may be necessary if —

   (a) the interests of the accused person will not be prejudiced by the trial proceeding in the person's absence; and

   (b) the interests of justice require that the trial should proceed in the person's absence.

   (5) The court may in any case permit an accused person to be absent during the whole or any part of the trial on such conditions as it thinks fit.

   ".

6. Page 48, line 16 – To delete "proceedings" and insert instead -

   " the trial ".

7. Page 48, line 17 – To delete "accused".

8. Page 48, line 18 – To delete "him or her" and insert instead -

   " the person ".