CRIMINAL LAW AMENDMENT (HOME BURGLARY AND OTHER OFFENCES) BILL 2014

Consideration in Detail

Resumed from an earlier stage of the sitting.

Clause 3: Act amended —

Debate was interrupted after the clause had been partly considered.

Mr J.R. QUIGLEY: In an earlier answer about the need for this legislation, the minister said that there is a database of cases upon which she relied to identify the insufficiency or inadequacy of the sentencing practices of the judiciary of this city. She referred me to a database on the Department of the Attorney General website. I have been looking on the Department of the Attorney General website to locate this database so that we can look at those sentences against the assertions she made in this chamber. I have "Statistics" open on the Department of the Attorney General, but there does not appear to be a database such as described by the minister's good self. I wonder whether the minister could take me to the database or make available to me the database to which she referred.

Mrs L.M. HARVEY: I refer the member to the Department of the Attorney General website. Perhaps he might need assistance in navigating that website because my advisers during the break simply went to the website and downloaded the reports from the website. There is "Report on Criminal Cases in the Children's Court of Western Australia 2009/10 to 2013/14", "Report on Criminal Cases in the District Court of Western Australia 2009/10 to 2013/14" and "Report on Criminal Cases in the Magistrates Court of Western Australia 2009/10 to 2013/14". I suggest to the member that they are on the webpage under a subsection called "Reports" and they are freely available to any member of the community who chooses to access them.

Mr J.R. QUIGLEY: Does the minister mind if we look at what she has printed, to which she referred? She has printed it out; does she mind if I have a look?

Mrs L.M. Harvey: I have printed it out. I would prefer it if we could get some copies of the report made for the member for Butler. Do I need to table those reports to do that?

The ACTING SPEAKER: No; that is fine.

Mrs L.M. Harvey: They are freely available through the website by navigating that webpage.

The ACTING SPEAKER: Could one of you stand, please?

Mrs L.M. HARVEY: For the benefit of members who are interested in accessing that web page, which contains a wealth of information, they can go to the Department of the Attorney General website and access a range of reports that are incredibly interesting on the status of matters that go through the court system and, I might add, a range of other issues. However, I will have those printed for the benefit of the member for Butler.

Mr J.R. QUIGLEY: I will need to come back to that when I have had the opportunity of seeing it.

The ACTING SPEAKER: The question is that this part amends the Criminal Code. Member for Butler, your comments have to be directed to the clause.

Mr J.R. QUIGLEY: I understood the minister's answer earlier this afternoon to say that in the first year the estimated cost for the government will be $13.92 million and by the fourth year that will rise to $42.3 million. I now refer to the statement of the commissioner of the WA Department of Corrective Services, Mr James McMahon, who said during the estimates hearings that it would put 206 adults and 60 juveniles behind bars within four years at a cost of $93 million. That sum has not been provided for in the budget. Does the minister agree that it is going to cost $93 million over the four years?

Mrs L.M. HARVEY: It is clear that the member for Butler was not listening to my response to the member for Warnbro's question earlier. That figure of $93 million was the approximate capital cost should a new detention centre be required; however, we do not anticipate that. The cost that we have been given by the Department of Corrective Services is based on 56 adult prison beds and 29 juvenile beds in the first year, and we have estimated that on the average minimum sentence for adult repeat offenders increasing from 15 to 24 months and for juvenile repeat offenders increasing from five to 12 months. It is also estimated that there will be a small increase in the bed impacts arising from the 75 per cent mandatory minimum sentences for certain offences. Those costs are $13.92 million in the first year, increasing to $42.98 million in the fourth year. But I caveat those as estimates, because, as I said in my previous answer to the member for Warnbro, it is very difficult to try to ascertain the deterrent effect of legislation such as this and the consequential change in criminal offending behaviour.

That said, member for Butler, although we have the costs and we have some estimates of an increase in requirements for prisoner beds, we have had discussions about the reports that were used and the research that was done in putting this legislation together and at the end of the day the government has put a policy to the community. We have been elected on a mandate. We have made a decision as a government that we are going to present this piece of legislation to the Parliament and enact it. That is our call and we have made that call based on our consultation with the community and its request for us to take these steps. It is voting for us to take this step and delivering us a mandate to implement this legislation. It is our call; we have made it; we stand by it.

Mr J.R. QUIGLEY: The minister talks about the mandate, which we respect. As I said before, and as the minister has acknowledged, we have not spoken against it.

Mr C.J. Barnett: Barely supported. You frustrated this legislation throughout.

The ACTING SPEAKER: Member for Butler, you have the floor.

Mr J.R. QUIGLEY: I will take the interjection from the Premier.

The ACTING SPEAKER: Members, this is consideration in detail. We are considering clause 3—"This Part amends The Criminal Code". Questions in consideration in detail are to the minister. Thank you, member.

Mr J.R. QUIGLEY: The minister talks about the mandate requiring the amendment and why she sought the mandate. In seeking the mandate, as I said earlier, now that the Premier is back in the chamber, the Premier said that everybody knows that some judges are not doing the right thing.

Mr C.J. Barnett: I didn't say that.

Mr J.R. QUIGLEY: He said that on TV. Has the minister discussed with the Premier which cases the Premier had in mind when he said that the judges were not doing the right thing in meeting the community's expectation? Has she discussed that with the Premier?

Mrs L.M. HARVEY: As a cabinet and as a government we have discussed and debated this legislation and settled on the legislation that we have presented to Parliament. We stand by the legislation. The government is in agreement that this legislation is the right way to go in response to the election commitment that we made to the community.

The ACTING SPEAKER: Member for Butler, I draw your attention to the fact that clause 3, which is what we are dealing with, reads, "This Part amends The Criminal Code". I bring you back to consideration in detail of "This Part amends The Criminal Code".

Mr J.R. QUIGLEY: May I address the Chair?

The ACTING SPEAKER: No, you cannot address the Chair.

Mr J.R. QUIGLEY: Okay. You have not called me out of order, so that is all right.

I have received a copy of documents from the databases that the minister printed out, which I had previously read. Does the minister agree that these databases do not set out sentences in respect of any particular offence?

Mrs L.M. HARVEY: The member has confused me by saying that he read them. Previously he said that he did not know where to get them from the website. I request that he clarify that comment. I do not think it is appropriate for him to mislead Parliament and say that he has been presented with a document that he previously acknowledged he did not know how to access through the website but he has read it and considered it when we know we just handed it to him.

Mr W.J. JOHNSTON: Madam Acting Speaker —

The ACTING SPEAKER: Members, the minister has the floor. We are considering clause 3, "Act amended—This Part amends The Criminal Code". I am not going to deal with debate across the chamber about how we debate it. Members need to concentrate on clause 3, "Act amended—This Part amends The Criminal Code".

Mr W.J. JOHNSTON: Indeed, Madam Acting Speaker. I just wanted to seek the call.

The ACTING SPEAKER: You have the call, member for Cannington.

Mr W.J. JOHNSTON: I think the minister might have misunderstood the question being asked by the member. The member asked whether there was a database of decisions of the court that underpinned the comments made by the minister. The minister has referred him to a statistical summary report which the member had already printed out. It was not a database of decisions. This is why there is confusion here; perhaps the minister did not understand the question from the member for Butler. She was asked whether there was a database of sentences that are examples of the statements the minister has used in urging us to support this provision. Clearly, it is not the statistical report that the minister has provided to us; it must be some other document, and therefore it would

be helpful to the debate if the minister could direct us to the database of decisions, rather than the statistical report that the member for Butler already had.

Mrs L.M. HARVEY: I think the member for Cannington will find that I said we did not have a listing of every single decision of every single magistrate; we had a database that showed offences in groupings and sentencing outcomes. That is what I said we had used as part of our consideration in doing the research work for this legislation. When the member checks *Hansard* tomorrow, he will find that I said that that was what we had, and that is indeed what this report is.

Mr J.R. QUIGLEY: In relation to the "Report on Criminal Cases of the District Court of Western Australia", I look at what I have been handed and I have read it before. I will go through it before I put the question and in framing my question. The first particularisation is of case lodgements by offence; the second is case lodgements by offence type; and the third is charge lodgements by offence type. The fourth table is charge lodgements by offence type; the fifth table is criminal cases finalised by method of finalisation; and the final one is sentences imposed. If I go to the last of those, the sentences imposed, it gives the number of people imprisoned; for example, the number of people imprisoned for 2014–15 is given as 1 005. Does the minister agree that nowhere in the "Report on Criminal Cases of the District Court of Western Australia" is any duration of sentence mentioned at all? Does the minister agree with that?

Mrs L.M. HARVEY: If the member refers to page 7 of the report, he will find that it articulates exactly what I said it would. It articulates groupings of offences and sentencing outcomes—serious offences of cases receiving a custodial sentence.

Mr J.R. QUIGLEY: I will refer to one of the items, aggravated sexual assault. I am trying to find one that fits within the current context.

Mrs L.M. Harvey: If you go halfway down the page, you will find one that is relevant to the legislation we are debating—unlawful entry with intent, burglary, and break and enter.

Mr J.R. QUIGLEY: For unlawful entry with intent, burglary, and break and enter in 2013–14, 166 sentences were struck. Is that correct?

Mrs L.M. Harvey: That is what the report says, yes.

Mr J.R. QUIGLEY: The report, however, does not give any indication of the duration of any one of those sentences, does it?

Mrs L.M. Harvey: No, not this report.

Mr J.R. QUIGLEY: In relation to any of the offences listed there, the report does not give any indication as to any length of any term of imprisonment imposed. Is that correct?

The ACTING SPEAKER (**Ms J.M. Freeman)**: Member, you need to sit down, and then the minister will respond. It is not done by interjection.

Mrs L.M. HARVEY: As previously stated, I have articulated what this report comprises and I have also clearly articulated on a number of occasions that a range of reports from WA Police and the Department of the Attorney General's website were considered as part of the preparation for this legislation. If the member recalls, several hours ago I discussed the fact that we had to manually go into individual cases to look at their sentencing. It was a very complex procedure and the result of this interrogation helped us form the view that we need a new offence of aggravated dwelling burglary because it was difficult to retrieve all the data relevant to the offences we are targeting with this legislation without the creation of a new offence. We will come to that should we ever get past clause 3.

The ACTING SPEAKER: I draw the member for Butler's attention to standing order 179, which states —

> Debate will be confined to the clause or amendment before the Assembly and no general debate will take place on any clause.

The member may want to know that there are quite a few clauses to go.

Mr J.R. QUIGLEY: I put to the minister —

Several members interjected.

The ACTING SPEAKER: Members, the member for Butler has the floor.

Mr J.R. QUIGLEY: I put to the minister that the three reports she has referred the chamber to, having been printed from the Department of the Attorney General's website, do not help us determine whether the sentences struck were too long, too short or good sentences. Does the minister agree that those reports do not help us?

The ACTING SPEAKER: Member, you need to sit down.

Mrs L.M. HARVEY: I feel I am being somewhat repetitive but, as I said, these reports informed us to a degree, along with a range of other reports and research work, in forming this policy, taking this policy to the electorate as an election commitment and bringing this legislation forward. It is a decision of government. We can debate the ins and outs of different reports. We are a government that produces a lot of reports. We could go through a range of individual reports or we could accept that it is a policy decision of government to proceed down this path.

The ACTING SPEAKER: Minister, you need to focus on the clause.

Mrs L.M. HARVEY: The policy is based on the confidence that we have that this legislation is consistent with the commitment we gave to the community.

Mr J.R. QUIGLEY: I absolutely concur with the minister's last point that this legislation reflects what the community wanted when it voted at the election, which is why we are not opposing it. However, it still begs the question whether there is any evidence that the judiciary was not passing sentences in accordance with community expectation. We put these reports aside because they are not helpful as they do not mention any particular sentence. The minister said she went to other reports about the length of sentences. We have agreed that the Director of Public Prosecutions has a database of appeal decisions. I have printed them and I will go through them as we get to individual clauses, but we are right back where we started. Apart from the appeal case database, which represents only a small portion of sentencing law in Western Australia, are there any other databases on the length of sentences for offences that were referred to in formulating this policy?

Mrs L.M. Harvey: I've previously answered this question a number of times and I don't have a different answer to give you.

Mr J.R. QUIGLEY: I have discussed this with the senior judiciary and they are at a loss because they say that they cannot get the funding for any database. The judiciary is saying they cannot find the database —

The ACTING SPEAKER: Member, you have to —

Mr J.R. QUIGLEY: I am. I do not mind doing this clause by clause, and as I submitted to the Chair earlier, we can do this whole exercise for each individual clause, which will take us an until next week sometime, or —

The ACTING SPEAKER: Good-oh.

Mr J.R. QUIGLEY: Good-oh? That is what the Acting Speaker (Ms J.M. Freeman) wants?

The ACTING SPEAKER: It is nothing to do with me, member. You have to say, "standing order 179, relevancy of debate". The question is that clause 3 stand as printed.

Mr J.R. QUIGLEY: The relevancy of debate is the formulation of the policy necessity to amend this part of the Criminal Code, and I am exploring the factual basis behind the statements that advance the policy; that is, that some of the judiciary are not doing the right thing by meeting community expectations on individual sentences. So far, apart from the three cases referred to in the second reading speech, we have not heard any reference to any case, so I am asking the government, given that I know of no database, whether it has a secret database that it is keeping from the community and this Parliament. I am asking the minister: does she agree that, apart from the Director of Public Prosecutions' database on appellate cases, there is no database of first-instance sentences across the jurisdiction? Does she agree with that?

Mrs L.M. Harvey: I've answered that question a number of times.

Mr W.J. JOHNSTON: What we are attempting to do here is to amend the Criminal Code. I wonder whether the minister is satisfied that this legislation complies with recommendation 99 of the Royal Commission into Aboriginal Deaths in Custody?

Mrs L.M. HARVEY: We are amending the Criminal Code as a policy decision and a decision of government.

Mr W.J. JOHNSTON: I understand that, because the minister has already given that answer to a different question. That is not what I was asking. What I specifically asked was: does the minister believe that this arrangement that the government is asking us to vote on complies with recommendation 99 of the Royal Commission into Aboriginal Deaths in Custody?

Mrs L.M. Harvey: I've answered the question.

Clause put and passed.

Clause 4: Section 1 amended —

Mr J.R. QUIGLEY: There is an amendment to clause 4 on the notice paper standing in my name.

The ACTING SPEAKER: You have to move your amendment after clause 4.

Mr J.R. QUIGLEY: I thank the Acting Speaker; that is the clarification I was seeking. If I go here, and then clause 4 is put —

The ACTING SPEAKER: I am assured by the Clerk that you can put the amendment after clause 4.

Mr J.R. QUIGLEY: Clause 4 inserts proposed definitions. I want to understand the policy behind this. Does the minister agree that, under clause 4, for a person to be convicted of home burglary, it is necessary for the person to actually, with some part of his or her body, enter the dwelling, as opposed to entering the property? That is, someone who goes down the garden path and attacks a woman who is sunbaking by the pool is not captured by this legislation, but someone who goes down the garden path and opens the flywire door and enters beyond the flywire door, even with their hand, and attacks a woman who is sunbaking in the sunroom of the house, is captured by the legislation. Are we at idiom on that?

Mrs L.M. HARVEY: I refer the member to the need to cross reference this with section 401(1)(b) of the Criminal Code, which states —

> (b) if the place is ordinarily used for human habitation but the offence is not committed in circumstances of aggravation, to imprisonment for 18 years; or

The words "place is ordinarily used for human habitation" means that the threshold of the dwelling needs to be crossed. Section 400(1)(b) of the Criminal Code defines "place" as follows —

> ***place*** means a building, structure, tent, or conveyance, or a part of a building, structure, tent, or conveyance, and includes —
>
> (a) a conveyance that at the time of an offence is immovable; or
>
> (b) a place that is from time to time uninhabited or empty of property.

We are not changing that definition of "place" with this amendment.

Dr A.D. BUTI: I refer to the term "aggravated home burglary". Basically, what the minister is seeking to capture in this bill is people who in the course of committing a home burglary commit an assault on a person, so it is aggravated home burglary. That is defined in section 400(1) of the Criminal Code as follows —

> (1) In this Chapter —
>
> ***circumstances of aggravation*** means circumstances in which —
>
> (a) immediately before or during or immediately after the commission of the offence the offender —

There is then a list of things that the offender may have done. My question relates to time. What time period is required in order to have a connection between the burglary and the circumstances of aggravation? Can the offender commit the burglary and commit the assault five hours later? There must be some time period. I am wondering what that time period is.

Mrs L.M. HARVEY: Section 400 of the Criminal Code, headed "Terms used", states in subsection (1) —

> ***circumstances of aggravation*** means circumstances in which —
>
> (a) immediately before or during or immediately after the commission of the offence the offender —

It then goes on to list a range of activities.

Dr A.D. BUTI: That is what I said in my question to the minister. I want to know what "immediately" means. Immediately might mean two minutes, or it might mean 10 minutes. It might mean five hours. It is a serious question. The whole issue here is a concurrence between the home burglary and the aggravation. That is why the minister is seeking to impose mandatory sentencing. I want the Parliament to know and to send a signal to the people of Western Australia about what is that time connection. What does "immediately" mean?

Mrs L.M. HARVEY: It states "immediately before or during or immediately after the commission of the offence". There is no specified time period in the Criminal Code. It is up to the court to determine whether that circumstance of aggravation is consistent, and that is based on many years of history of case law.

Dr A.D. BUTI: The judges will not get any guidance from the minister about that. Let us turn to the definitions of "adult offender" and "juvenile offender". Of course, there is quite a difference between the penalty incurred by an adult offender vis-a-vis a juvenile offender. The bill states —

The term ***adult offender*** means, with respect to a person convicted of an offence, a person who had reached 18 years of age when the offence was committed;

This is a serious question. I am not trying to be tricky here. If a burglary is committed at, say, 11 o'clock, by a person who is still only 17 years of age and that person then commits an assault after midnight, and if there is sufficient time for the offence to be determined as "immediately after", whatever that is, has that person committed the offence as a juvenile or as an adult, because that will have a major impost on what sentence that person will receive?

Mrs L.M. HARVEY: The onus is obviously on the state to present to the court the circumstances of the offence and the circumstances of the birthday of that person, presumably assumed to be midnight. The brief of evidence would be put together and the court would determine whether that offender would be considered an adult offender or a juvenile offender for the purposes of this legislation.

Dr A.D. BUTI: The problem when we start imposing mandatory sentencing legislation is that all these conundrums come up. Now the minister is leaving it to the discretion of the court to determine whether someone is an adult offender or a juvenile offender. The legislation before us says that an adult offender will have a certain mandatory sentence imposed and a juvenile offender will have a certain mandatory sentence imposed, but the minister cannot tell us whether they are an adult offender or a juvenile offender. The minister's answer does not provide any indication of whether the person in the scenario I gave is a juvenile or an adult. The minister says that the prosecution has to present the case, which is obvious, but the minister has gone down the mandatory sentencing route by introducing this legislation so the onus is on the minister to determine, in the scenario that I relayed, whether that person would be a juvenile offender or an adult offender, and whether 18 years of age is 18 years of age at midnight on the day they were born or the actual hour that they were born.

Mrs L.M. HARVEY: Ultimately, when the prosecution case is put together and the information is presented to the court, if at that point in time we are asserting that this person should be treated as an adult offender or a juvenile offender, regardless of what date or the circumstances that it occurs in, we need to articulate that case to the court and have the court determine whether this person in the particular circumstance the member referred to is correctly charged as an adult offender or a juvenile offender.

Dr A.D. BUTI: Is the minister telling us that judges will have no guidance from Parliament in determining whether that offender is a juvenile or an adult?

Mrs L.M. HARVEY: In that instance, the judge would be guided by their years of experience, precedent and the quality of the brief that has been put to them in the context of the charges that have been laid against the offender.

Ms M.M. QUIRK: Minister, if I could just go back to the point the member for Armadale raised, which was the meaning of the word "immediately" in the context of that clause. The minister's response was basically that the court would decide, but of course decisions have to be made prior to it going to court. There has to be a decision of the police whether to charge with a particular offence, and, again, whether the Director of Public Prosecutions thinks that those charges are important. Ultimately, the court may regard that term as ambiguous and refer back to *Hansard* to see what the minister said. Is the minister saying that "immediately" has its ordinary meaning, or what is the nexus between the home burglary and the other offending? The minister will appreciate that because this is a case of a mandatory sentence being imposed, the court is likely to interpret that provision quite restrictively.

Mrs L.M. HARVEY: In the event that the hypothetical offender we are discussing was charged as a juvenile offender, they would then come before the Children's Court, and the Children's Court would make the determination as to whether that offender's case should appropriately be heard in that court or in another jurisdiction. Courts make these decisions all the time based on the merits of cases put before them.

Clause put and passed.

New clause 4A —

Mr J.R. QUIGLEY: I move —

Page 3, after line 25 — To insert —

4A. Section 27 amended

After section 27(2) insert:

(3) A person suffering from a mental impairment as defined in section 8 of the *Criminal Law (Mentally Impaired Accused) Act 1996* who is not relieved of criminal responsibility under subsection (1) or (2) for an offence under a provision listed in column 1 of the Table

is nevertheless not subject to a minimum sentence requirement under the provisions listed in column 3 of the Table opposite that offence if, by reason of the mental impairment, it would be manifestly unjust to apply the minimum sentence requirement to the person.

Table

Offence provision	**Description of Offence**	**Minimum sentence requirement provision**
s. 279	Murder	s. 279(5A) and (6A)
s. 280	Manslaughter	s. 280(2) and (3)
s. 281	Unlawful assault causing death	s. 281(3) and (4)
s. 283	Attempt to unlawfully kill	s. 383(2) and (3)
s. 294	Act intended to cause grievous bodily harm or prevent arrest	s. 294(2) and (3)
s. 297	Grievous bodily harm	s. 297(5) and (6)
s. 320	Child under 13, sexual offences against	s. 320(7) and (8)
s. 321	Child of or over 13 and under 16, sexual offences against	s. 321(14) and (15)
s. 324	Aggravated indecent assault	s. 324(3) and (4)
s. 325	Sexual penetration without consent	s. 325(2) and (3)
s. 326	Aggravated sexual penetration without consent	s. 326(2) and (3)
s. 327	Sexual coercion	s. 327(2) and (3)
s. 328	Aggravated sexual coercion	s. 328(2) and (3)
s. 330	Incapable person, sexual offences against	s. 330(10) and (11)
s. 401	Burglary	s. 401(4) and (5)

A couple of things have happened in this debate so far, and the one that preceded it. Firstly, the minister, before dinner, agreed with the Attorney General that the risk of injustice is increased by rigidity, and that there have been high-profile campaigns based on particular cases that did not enable the measured consideration of sentencing. We have already read the rest of the remarks so that they are all in context. When I asked the minister what injustices or risks of injustice the Attorney General and the government were referring to, the minister did not demur from what the Attorney General said; that is, there is a risk of injustice with increased rigidity—that is, mandatory sentencing—but the government had made a call that there was also, in its view, injustice to victims and it was proceeding regardless of the government's view that rigidity increased the risk of injustice. The honourable Premier of Western Australia, of course, publicly identified one of those areas that are potent with the risk of injustice. They, of course, deal with those people burdened with mental illness. In that list of mental illness we would include—section 27, minister —

Mrs L.M. Harvey: I have it, thank you.

Mr J.R. QUIGLEY: That list of mental illness, of course, includes that condition that is rampant amongst the Indigenous community, especially the Fitzroy Valley; that is, foetal alcohol spectrum disorder. Of course, when

sentencing someone with mental disability in a very rigid mandatory regime, the risk of injustice is obvious, as identified by the Attorney General of Western Australia, with whose remarks the minister concurs.

On 24 July 2014, News Limited published in its online publication PerthNow an article under the headline "Coffee with Colin", referring to the honourable Premier. The headline was "'Humble' Colin Barnett denies he's arrogant, but admits disappointment at poor opinion polls in Coffee with Colin". The by-line is attributed to Yasmine Phillips, a well-known and respected reporter in this city. That cup of coffee with the Premier was at Gino's in Fremantle, by the look of the photograph.

Mr W.J. JOHNSTON: I am impressed by the member for Butler and would like to hear further from him.

Mr J.R. QUIGLEY: Yasmine Phillips, the reporter, took the Premier to comments by senior Perth magistrate Catherine Crawford. I might read into *Hansard* that part of the transcript on PerthNow —

> Perth Magistrate Catherine Crawford recently said that she believes Foetal Alcohol Syndrome should be considered a disability and a mitigating factor when you're sentencing young offenders in the Children's Court. What do you think of that?

Point of Order

Mrs L.M. HARVEY: Is the member moving an amendment?

The ACTING SPEAKER (Ms J.M. Freeman): Yes.

Debate Resumed

Mr J.R. QUIGLEY: So that this reads in context in *Hansard*, Madam Acting Speaker, I must go back to it; I am sorry. The question put by PerthNow to the honourable Premier was —

> Perth Magistrate Catherine Crawford recently said that she believes Foetal Alcohol Syndrome should be considered a disability and a mitigating factor when you're sentencing young offenders in the Children's Court. What do you think of that?

The Premier replied —

> Well I think it is. Foetal Alcohol Syndrome, which can result in a severe mental impairment, and therefore that mental impairment is considered by judges and magistrates in sentencing. It is treated no differently—it is basically a disability, probably one of the saddest disabilities you can imagine that a child is damaged before even being born.

I was impressed by the Premier's response to the comment. That comment is really the air beneath the wings of this amendment. When this amendment appeared on the notice paper and this matter first came before Parliament, a dorothy dixer was put to the minister about Labor's proposed amendment in relation to people burdened with mental illness. The minister replied that this would be a get-out-of-jail-free card for every methamphetamine addict who could simply say that they were on methamphetamine and were therefore mentally impaired, so the mandatory provisions of the bill would not apply. The Attorney General was asked about this and he gently demurred. The minister then came back into the chamber and made a clarification because, of course, that cannot be the case. The criminal law specifically deals with intoxication in the next section. Of course, being high on alcohol or methamphetamine is intoxication, and the criminal law specifically provides that intoxication does not provide a defence to any charge. The minister returned to the chamber, and in her explanation backtracked from that untenable proposition that intoxication or methamphetamine could give a get-out-of-jail card to anyone.

Mr D.A. TEMPLEMAN: I am extremely interested in this line of thought and I would like to hear more.

Mr J.R. QUIGLEY: The minister returned to the chamber and then gave an explanation that is also unsatisfactory in the sense that it does not reflect the true nature of the law. The minister then took the chamber's attention to section 27 of the Criminal Code, which provides that when a person is insane and does not understand the nature of his or her actions by reason of insanity or by reason of that mental illness, and cannot control his or her actions or does not understand that what they are doing is wrong, the person is to be found not guilty. Therefore, the Premier could not be referring to insanity in his comments because we are talking about sentencing, and sentencing can follow only upon conviction. This, of course, has been acknowledged by the Court of Appeal in myriad cases. One of those cases I will refer to is the case the minister took us to, although she wrongly encapsulated it in her response to the second reading debate. I am referring to the case of Thorn, which the minister said was a case involving foetal alcohol syndrome. I am now referring to that part of the judgement in Thorn v The State of Western Australia [2008] WASCA 36, delivered on 28 February 2008, under the heading "The medical reports before the learned sentencing judge". I will paraphrase this. In Thorn's case, Thorn was diagnosed as suffering from schizophrenia and organic psychosis. At paragraph 16, the court notes —

> Dr Goria said, in his report dated 25 November 2004, that the appellant suffers from organic psychosis and a moderate cognitive deficit as a result of his sustaining a severe head injury in … a trail bike accident.

At paragraph 18(d), the court notes —

> Despite appropriate treatment and abstinence from illicit substances, the appellant has ongoing symptoms. He has significant psychiatric issues, which need to be addressed.

This was a person who had significant psychiatric issues but not to the level that would have him declared insane under the definition of "insanity" in section 27 of the Criminal Code. This was put before the Court of Appeal against the sentence that was struck by the sentencing court at first instance.

Mr W.J. JOHNSTON: I am very interested in the member for Butler and would love to hear from him further.

The ACTING SPEAKER: Absolutely.

Mr J.R. QUIGLEY: The sentencing judge at first instance was Judge John Wisbey. The minister will recall that the sentence in this 1995 offence was struck in 2004. The Court of Appeal examined the impact that mental impairment, short of insanity, would have on the sentence; that is, a person has been convicted because they are not insane but nonetheless burdened with a significant mental illness. The point I am making is that the court recognises that a category of offenders fits between mentally healthy people and people who would be found not guilty on the grounds of insanity. What does the court make of that? The court refers to a long line of appeal cases, and at paragraph 38 states —

> In ***Orchard v The Queen*** [2004] WASCA 23 … there was evidence from a psychiatrist that an offender, because of his ingestion of the drug, Interferon, —

Mrs L.M. Harvey: It is used for the treatment of hepatitis C and a range of other illnesses.

Mr J.R. QUIGLEY: Yes. What I am saying is it is not an illicit drug.

Mrs L.M. Harvey: No.

Mr J.R. QUIGLEY: It continues —

> … was less able to exercise logical reasoning processes and to make rational judgments and choices. The Court of Criminal Appeal said:
>
> > That necessarily reduced the applicant's moral culpability, albeit not … his legal responsibility. The law accepts that, where a mental disorder has contributed to the commission of an offence, the moral culpability of the offender will be lessened (and it may be appropriate to attach less significance to either or both … general and personal deterrence) and that that should, ordinarily at least, be reflected in … penalty imposed: ***R v Tsiaras*** [1996] 1 VR 398 at 400; ***Lauritsen v The Queen*** (2000) 22 WAR 442 at 456–459; and ***R v Payne*** (2002) 131 A Crim R 432 at [40], [43]–[48] and [67] [18].

A long line of cases recognise that when an offender before the court is burdened with a mental disability, short of insanity, his moral culpability will be lessened and that should be reflected in a lesser sentence. But it does not end there, because the court's lead judgement, written by much esteemed senior Court of Appeal judge, Justice Michael Buss, stated at paragraph 39 —

Mr W.J. JOHNSTON: I am very interested in the member for Butler's comments and would love to hear from him further.

Mr J.R. QUIGLEY: I have gone to those cases that show that the court recognised that short of insanity, mental illness can reduce moral culpability when that mental illness plays a critical part in the offence. There is a huge important caveat at paragraph 39. The Court of Appeal of Western Australia stated —

> 39 The critical feature which must be established before a psychiatric condition can mitigate punishment is a causal connection between the condition, on the one hand, and the commission of the offence, on the other, which reduces the offender's moral culpability in respect of the offence. See ***Paparone*** [2000] WASCA 127; (2000) 112 A Crim R 190 [49] - [53], per Murray J —

Mr Justice Murray is the former Senior Puisne Judge. Paragraph 39 continues —

> ***T v The State of Western Australia*** [2005] WASCA 237 [87] - [89] …

In T v The State of Western Australia Justice Roberts-Smith, with whom the present President of the Court of Appeal, her Honour Justice Carmel McLure, and Justices Steytler and Pullin agreed, said the sentence

would not be reduced on the basis of mental illness short of insanity unless a close causal connection between the mental illness and the commission of the offence is demonstrated. The court is quite strict about that. They turn to Thorn's case. Thorn had obtained a weapon and a balaclava, or other some disguise, and had gone about this offence. The court said that there was a degree of premeditation and planning, which would negate causal connection between his psychiatric condition and the commission of the offence. In other words, he was not being driven to it by his mental condition; he had demonstrated a rational ability, albeit sadly for the victim a criminal rational ability, to plan the offence, his disguise and his getaway. So they just disregarded that and, quite rightly, the court swept aside all consideration of his mental illness as irrelevant to the sentence. The amendment that stands in my name addresses this very point. The purpose of this amendment is not to have a get-out-of-jail-free card for those suffering mental illness, but where a connection between the mental illness and the commission of the offence can be demonstrated, the mandatory provision should not apply and the court should be able to exercise discretion in relation to the sentencing process, just as the Premier of Western Australia said should happen when he said in that article that I referred to earlier —

> … therefore … mental impairment is considered by judges and magistrates in sentencing. It is treated no differently …

The Premier himself was recognising that where there is mental illness the court should take that into account. I would like to further address the terms of the amendment standing in my name.

Mr D.A. TEMPLEMAN: I now understand the theme, so I would like to hear more.

Mr J.R. QUIGLEY: It is not that a defence counsel on behalf of an accused could establish that a person was burdened with a mental illness and that there was that connection between the mental illness and the commission of the offence, because without that connection the mental illness is irrelevant. I would like to explain why the amendment standing in my name is a table. After consulting with the parliamentary draftsmen, instead of repeating this amendment in each and every clause of the bill, it was easier to set out the clauses of the bill in a table and then just have the one paragraph amendment so that it would apply to all of the clauses in the bill before the chamber.

To avoid the mandatory term it is not sufficient to establish that the prisoner in the dock was burdened with mental illness at the time of the offence and that there was this causal connection between the mental illness and the commission of the offence, as pointed out as necessary in Thorn's case, but the extra step, that by reason of the mental impairment it would be manifestly unjust to apply the minimum sentence requirement to the person, so the court would have to be convinced that the person was mentally impaired, that there was a close causal connection between the mental impairment and the commission of the offence, and, further than that, the court would have to be satisfied that it is manifestly unjust to imprison on a mandatory basis that mentally ill person. We agree with the Premier of Western Australia's reported comments to Yasmine Phillips that it should be considered by judges and magistrates.

I will give members an example of what can happen. Foetal alcohol syndrome is generally a spectrum disorder. A person can have a severe or mild case. The features of the disorder are not only physical—the moonface, the eyes and the things that we can see—but also cognitive, with repressed cognitive development. An 18-year-old person could have the cognitive abilities of a 12-year-old person. A further feature of foetal alcohol spectrum disorder is that the person, although not insane, is not socially adept and is very susceptible to suggestion and to being led. As the Commissioner of Police has said on radio, often the aggravating circumstance in an aggravated home burglary is that the burglary is done in company. That is the circumstance of aggravation.

We have an 18 or 19-year-old chap burdened with foetal alcohol spectrum disorder to whom it is suggested that there is a stock of booze at Quigley's house. He would be right in that regard because there is Campari and some Heineken.

Mr P. PAPALIA: I would like very much to hear more from the member for Butler.

Mr J.R. QUIGLEY: I am very grateful to the member for Warnbro because he gave me the bottle of Campari that is at my house that is the subject of this example. A 22-year-old offender says to an 18-year-old offender, who is suffering from foetal alcohol spectrum disorder, "Let's go into the house and steal his booze", and they do. In the process of this, Max—that is my champion miniature schnauzer, Madam Deputy Speaker—goes off his nut like he does when visitors come, and I intercept one of these offenders as they are leaving the property. The older offender punches me and breaks my jaw. That is grievous bodily harm. The young lad, the 18-year-old who is burdened with foetal alcohol spectrum disorder, who has the cognitive ability of a 12-year-old and, by reason of his mental disorder, is unable to resist suggestion—that is one of the sad features of this—under section 7 of the Criminal Code, he is a primary offender and is charged with aggravated home burglary causing grievous bodily harm, although did not touch me. He just got scared when he heard Max and fled. My son flees from Max but that is another story. The older offender punched me in the jaw and we know from the case of

Newman, the Eagles footballer, and the case of Marley Williams, the Collingwood footballer, that punching and breaking a person's jaw is grievous bodily harm. Under this legislation, the mandatory term is 10 years. The 18-year-old, who has the cognitive ability of a 12-year-old and is unable to resist suggestion or being led, is subject to a mandatory term of 10 years' imprisonment without the court being able to take into account his moral culpability in any way. That is not allowed to be considered.

Another case that I defended unsuccessfully many years ago—they say that lawyers only talk about their successes but in this case I was unsuccessful—was a tragic murder. The Leader of the House might remember this man. His name was Alec Brown. He ran a liquor store in Railway Parade, Subiaco, opposite the Subiaco football oval, now known as Domain Stadium, or something like that. He was a strong man, and he lived on the premises, so it was not only a liquor store but ordinarily used for dwelling. My client, George Vincent Meaney—I will never forget that name—and two others went into the liquor store high on amphetamines. Even back in those days, it was a problem. I forget the name of the amphetamine, but it was not ice. High on amphetamine, they went in to rob the liquor store. Alec Brown, who was in his kitchen, because it was a dwelling, heard this, got up and immediately charged at Vincent Meaney, who, in his drugged-out haze, discharged his weapon. Alec Brown was the centre halfback for West Perth, and played for Western Australia against Victoria. He was a strong man, and Meaney dropped him with one shot. The three were charged with murder, and the driver of the vehicle that took them to the liquor store, who did not enter the premises, was also charged with murder under section 7 of the Criminal Code, and rightly so.

Mr P. PAPALIA: I would very much like to hear more from the member for Butler.

Mr J.R. QUIGLEY: Convictions ensued, and I can remember that life terms were imposed. That was my first involvement as a defence counsel in a murder case. The point is that in such cases, a person with a mental disorder can be involved. I am using foetal alcohol spectrum disorder at the moment because it is so prevalent in the Fitzroy Valley. The perpetrator says to that person "I'm going into the house to steal the booze. Would you just keep a lookout for the coppers?" The 18-year-old with the foetal alcohol spectrum disorder agrees. As the minister will confirm to the house, under section 7 of the Criminal Code, he is liable as a principal offender. He is a party to anything reasonably foreseeable that happens during the commission of that offence. Once again, if the offender goes into the house and assaults the occupant of the house causing grievous bodily harm, the mentally impaired 18-year-old outside the house is liable as a principal offender, and the court cannot take into account, not the fact that he was outside; that is irrelevant, he was a principal offender, but the fact that he is suffering from a severe mental disorder that left him susceptible to suggestion and persuasion to stand outside the premises. I am not criticising the government because I know what an election campaign is like—I have been to three or four of them. We start to get a bit punch-drunk after a few of them!

Ms M.M. Quirk: Four.

Mr J.R. QUIGLEY: Four, was it? Innaloo, Mindarie, Butler and Butler—I think that is right, yes.

In the hot crucible of an election campaign there is no room to explain these sorts of things; there is no room to examine these sorts of things. They cannot be examined as we are examining them here in the chamber tonight. Indeed, that is why beyond this amendment, it is Labor Party policy to have a sentencing council where the community, judges and the prosecutors can all consider these things and make recommendations to the Parliament. That has never been considered hitherto for people with a severe mental disorder, which I repeat does not amount to insanity. I take the point the minister made when she corrected and clarified her misstep about methamphetamine intoxication—intoxication on a drug—providing a get-out-of-jail-free card under this amendment. I am not being critical. The law is complex and needs cool and thoughtful consideration. When the minister, after consultation, doubtless with the Attorney General, came in here to correct her misstep, she took us to section 27 of the Criminal Code, which provides a defence for insanity. We are not talking about insanity, we are talking about the sorts of conditions referred to in the case brought before this chamber by the honourable minister—that is, Thorn's case—in which the court said that mental illness can necessarily reduce the moral culpability of the offender —

Mr D.A. TEMPLEMAN: I wish to hear more from the member for Butler.

Mr J.R. QUIGLEY: In that case, the court said that mental illness can reduce the moral culpability of an offender, albeit not the legal responsibility, and that is the very point. The court is saying that there are cases that fall short of what the honourable Minister for Police is saying—that is, not guilty on the basis of insanity under section 27. The Court of Appeal is saying that there are cases that fall short of insanity in which the person is sane, is fit to plead guilty and pleads guilty, and the court accepts the plea, but is nonetheless burdened with a mental illness or impairment that reduces his moral culpability and that should be reflected in the sentence when a close causal link can be demonstrated between that mental illness and the commission of the events. Under the amendment I have moved the extra step is added that the court has to say it would be manifestly unjust

to impose the mandatory term. That is not to say that we do not agree, and nor does the Court of Appeal say this, that the person therefore should not go to jail for a substantial period of time—not at all—but the court can take into account that mental illness when striking the offence. This is not Russia. This is not a totalitarian regime where mental illness itself is used to incarcerate.

Having said that, one can look at some of the outcomes under the Criminal Law (Mentally Impaired Accused) Act, such as the case of Marlon Noble. He spent a decade in prison, not for home burglary but for an allegation of indecent assault for which, had he ever been convicted, he would not have been sentenced to more than six months; but, because of his mental impairment, he spent a decade in prison.

As I say, this is not Russia, it is not China, it is Australia, and this legislation should reflect the principles we as a community uphold—indeed, the principles that we commit our young armed personnel to fight to preserve in this democracy. When a person is mentally ill, the court should have regard to that, rather than just thoughtlessly inflicting a mandatory term. How could it ever be that a mandatory term could deter a person who is mentally ill? How could that be?

It is for these reasons that I commend my proposed new section. It is not for reasons of political pointscoring, not to try to undo the legislation and not to try to create a get-out-of-jail-free card on the Monopoly board: what is it? "Get out of jail; do not pass 'Go' and collect a million at Park Lane"? It is not that sort of game; it is to ensure that a court is able to take mental illness into account when sending someone to prison and graduating the term of imprisonment, having regard to the person's mental illness. For these reasons, I commend my proposed new section to this chamber.

Mrs L.M. HARVEY: I would firstly like to correct some of the comments that the member for Butler asserts I made. If the member for Butler goes back to what I said, I did not link the case of Thorn with foetal alcohol spectrum disorder. I referred to the case of Thorn separately in response to some other comments that the member for Butler made. The FASD case raised by the member for Butler concerned an 18-year-old with FASD; the member for Butler asserts that that is an actual case, and I addressed that separately, so I just want to clarify that I did not link Thorn with foetal alcohol spectrum disorder.

Some of the arguments mounted by the member for Butler were interesting, but with regard to section 7 of the Criminal Code, the member for Butler referred to principal offenders in company for the purposes of aggravated home burglary, and the fact that for the purposes of this amendment, people can be charged as principal offenders if they are in company, even if one of them may have committed a more serious offence than the other. A principal offender can be charged by way of association, but whether someone is a principal offender by way of violent action or by way of association, they are still subject to the same tests as any other offender who comes before the court. The Director of Public Prosecutions' prosecution policies would still apply and those offenders would still need to go through exactly the same tests as every other offender, whether they have been charged as a principal offender by way of association or not. As an example, with regard to the test of whether the accused is mentally unfit to stand trial, the court would have its considerations at that point. In determining whether the person was mentally unfit at the time of the commission of the offence, that test would also be afforded to the principal offender by way of association and the test of section 27 would still stand.

A couple of things are unclear with respect to the member's amendment. It is unclear whether the court, when determining whether it would be manifestly unjust, is to have regard to the offender's mental impairment at the time of the offence, or to the offender's mental impairment at the time of sentencing. If the person was decreed to have a mental impairment at the time of the offence, the usual test in section 27(1) of the Criminal Code would apply. Therefore, conceivably, the condition of an offender whose mental impairment was either not serious or not being effectively managed at the time the offence was committed might have worsened by the time the offender was sentenced. The amendment also uses the words "manifestly unjust", and it is not clear what the definition of those words would be, given that, as I understand it, there is no statute law in Australia that uses this term, and the term has not been judicially considered in Australian statute. Therefore, for a range of reasons, we will not be supporting this amendment.

Mr J.R. QUIGLEY: With respect, it has been considered in cases in which people are appealing against conviction. They have to show not only that there was an error in law—for example, that the judge's charge to the jury was wrong—but also that the conviction was manifestly unjust. I know that the law is complex, and I am not putting the minister down for not being a lawyer, but I want, for the benefit of the chamber, to go to the fact that the term "manifestly unjust" is in the Criminal Code. If someone wants to appeal against a conviction, they have to demonstrate not only that there has been an error of law, but also that if the conviction were to stand, it would be manifestly unjust. It is a twin test. Someone cannot just go to the Court of Appeal in Western Australia, minister, and say to the court, "In His Honour's charge to the jury, His Honour made this error; therefore, the verdict should be set aside." The Criminal Code requires that the person who is appealing identify the error in the trial and

demonstrate to the appeal court that if the conviction were to stand, it would be manifestly unjust. That term has been considered at length by both the Court of Appeal in Western Australia and the High Court of Australia. Indeed, that was one of the tests that we had to pass in the Mallard case. We had to show not only that there had been an error in the trial—that is, that the prosecution had failed to discharge its obligations of disclosure—but also that by reason of that failure, it would be manifestly unjust to allow the verdict to stand. I am not nitpicking on the minister for saying that "manifestly unjust" is not defined and is an airy-fairy term. That is a term in the Criminal Code, and it has been, as I say, considered by both the Court of Appeal and the High Court.

As to the other proposition, namely, that the amendment does not make it clear whether the person is under mental impairment at the time of sentencing or at the time of the commission of the offence, I could be derisory in my response, but I shall refrain, because the minister would seek to argue the same, presumably, in relation to section 27 of the criminal code. What is section 27 of the Criminal Code about? Is it talking about sanity at the time of the commission of an offence or sanity at the time of sentencing? We know that section 27 of the Criminal Code in relation to insanity is not guilty—at the time of the offence they did not know. If the person is insane at the time he is presented to the court, that brings into play the Criminal Law (Mentally Impaired Accused) Act's "unfitness to plead".

I return to the point made by the Court of Appeal in Thorn's case and in a string of other cases to which I have already referred. There are offenders who come before the court who, at the time of offending, were not insane, and at the time of pleading were not so mentally impaired as to be unfit to plead and therefore the subject of a term of detention, but nonetheless the court says their mental illness should be taken into account when striking the offence because their moral culpability is that reduced by reason of illness.

Mr P. PAPALIA: I think the member for Butler is pursuing an interesting line. I would like to hear him complete that line.

Mr J.R. QUIGLEY: If the minister says, "I want to preserve this legislation; I reject all you say; I don't care", that is fine. The community will know that in relation to mentally ill people, the court should not have any regard to that when imposing mandatory sentencing. That goes to the character of this government. The Labor Party is not saying that the mentally ill should escape imprisonment. It says if there is a causal connection between the mental illness and the offending, in the circumstances it would be manifestly unjust to impose a term of mandatory imprisonment and the court should be able to take that into account. If the minister says that should not happen in relation to sick people, I will accept that. The government has the numbers. That reflects upon the character of the government and the character of the members who comprise the government. They say, "We don't care if a person is mentally ill at the time. Once again, not to evade punishment, but we don't care about that and the court should not have any regard to it." That reflects upon the character of not only the government, but also every member who makes up the government. It does not cast the Labor Party as soft on crime to say that a person's mental illness should be taken into consideration.

I can recall being upbraided in this chamber by the honourable Premier for criticising the conduct of Mr Troy Buswell, the former member for Vasse, who, at that time, was the Treasurer of Western Australia and the Minister for Transport. After hitting six vehicles, he then evaded police and refused to cooperate with the police investigation. I was upbraided by the Premier for not having regard to the then Treasurer's mental illness. Several of us on this side of the chamber were taken to task by the honourable Premier when we sought to scrutinise the conduct of Mr Buswell in avoiding the police and avoiding interview by police. The reason we were criticised: "The man is mentally ill; give him a break!" But if someone is an 18-year-old person, burdened with foetal alcohol spectrum disorder at the time of the offence—not that they would get out of jail; not that they would avoid conviction—the court is not even allowed to consider it. The character of this government is that, as a princeling of the government, it is absolutely morally wrong to examine the conduct of the former member for Vasse, transport minister and Treasurer. It is absolutely morally wrong and despicable to ask any question about it because of his mental illness! But it is different when it comes to an 18-year-old young man who is mentally ill through no fault of his own. As the Premier said —

> … that mental impairment is considered by judges and magistrates in sentencing.

But the minister does not want what the Premier said to happen. The Premier does not and did not want us to examine the conduct of Mr Buswell because of his mental illness! We were not even allowed to ask a question about it because of his mental illness! I was not saying I was going to imprison him—I do not have that power anyway—and I do not think he deserved imprisonment anyway. He clearly did not deserve imprisonment.

Mr P. PAPALIA: Madam Deputy Speaker, I would like to hear more from the member for Butler.

Mr J.R. QUIGLEY: But somehow I lacked integrity, somehow I lacked moral judgement and somehow I lacked character because I questioned his conduct and did so in circumstances when the Premier said, "Give him a break; he's mentally ill!" That is not something that this government will allow to be taken into

consideration in relation to a mentally ill 18-year-old person. It will say, "No; give him the mandatory term of 10 years." That speaks to the character of this government. When the division is called on this, it goes to the character of all those people who vote against this amendment. It has to, because the Premier says we have to take into account mental illness. Even if I say Mr Buswell went here, there, ping-ponged all over town like a pinball machine, and then evaded the police —

Mr M.J. Cowper: He still had to appear before the judiciary. He still went to court like anyone else. He still appeared in court, didn't he?

Mr J.R. QUIGLEY: No, he didn't appear in court, member.

Mr M.J. Cowper: He was penalised.

Mr J.R. QUIGLEY: He was penalised? That is interesting; we will get to that later.

Mr M.J. Cowper: He was penalised.

Mr J.R. QUIGLEY: Hang on; we will get to that later. He was penalised, but the member will recall that he declined to be interviewed by the police.

Mr M.J. Cowper: As is his right, of course.

Mr J.R. QUIGLEY: As is his right. The member for Murray–Wellington is a former policeman, and I know what the police say: "If you haven't done anything wrong, you don't refuse to speak to the police." That is what the police say all the time, and I am sure the member has said it in his career.

Mr M.J. Cowper: What do you say to your defendants when you represent them?

Mr J.R. QUIGLEY: Well, they were mainly police, as the member knows, and I would say, "If you don't want to get sacked, shut up, because I know what you've done."

But we digress a little, member. I am saying that in this chamber when I raised the matter I was upbraided on account of the man's mental illness. We were not allowed to question or scrutinise his conduct because of his mental illness. Here we have 18-year-old young offenders who are mentally ill because of foetal alcohol spectrum disorder, and the court is not allowed to consider that. The court has to inflict a 10-year mandatory term, even though the Premier, on another occasion, said —

> … that mental impairment is considered by judges and magistrates in sentencing. It is treated no differently …

And the courts are. If a person is a princeling of the Liberal Party, their mental illness has to be taken into account. If they are a homeless, mentally ill young person—when I say "young", I mean 18 years of age with the cognitive ability of a 13, 14 or 15-year-old, as many of these people have, as the member for Murray–Wellington knows because he served up there—that cannot be taken into account: "Ten years; take him down." That is not the Western Australia I know. It is not the Western Australia I love. It is not the character of previous governments, but it goes right to the heart of the character of this government. When the division is called, it will go right to the character of those who vote no.

Mr W.J. JOHNSTON: I heard the minister say that she will reject the terms of the proposed new clause. I just wondered whether the minister will provide an amendment to take account of the Premier's comments when he said that a judge or magistrate could take these matters into account when sentencing. What provision will the minister move to take account of the Premier's comments, or is the government going to walk away from the Premier's comments about options for people with mental disability during sentencing? We are not talking about convictions, and neither did the Premier; we are talking about sentencing. Given that the minister will reject the member for Butler's words, and she has said that she will reject them not because of the policy issue, but because of the terms used, I wonder what she will propose to ensure that there is no injustice for people with mental disability, as outlined by the Premier in his interview with the reporter from PerthNow, or is she saying that she will walk away from the Premier's commitment? If she is going to take that second course and walk away from the Premier's commitment, I wonder whether she could let us know whether she will walk away because she believes that she has some additional mandate from the election. I wonder whether she could let us know when the question of mental impairment was discussed with the community during the election campaign to give her that mandate. Of course, we all understand that the concept of a mandate is that a political party lays out its agenda to the community before an election and then it has the privilege to act on that mandate after the election. I was unaware of any occasion during the election campaign when the Liberal Party said that people with mental disability would not be included in a special category. As the member for Butler has pointed out, subsequent to the election campaign, the Premier had indicated that people with mental disability would be given special privileges, as is appropriate, during the sentencing phase of a court's decision-making process.

Mrs L.M. HARVEY: I will go back again to the new clause that the member has proposed. Just to be clear, pursuant to section 26 of the Criminal Code—I will cross-reference with the Criminal Law (Mentally Impaired Accused) Act 1996 because it is referred to in the proposed new clause—and section 10 of the Criminal Law (Mentally Impaired Accused) Act 1996, everyone is presumed to be of sound mind and mentally fit to stand trial unless proven to the contrary. The question of whether a person is mentally fit to stand trial is dealt with under part 3 of the Criminal Law (Mentally Impaired Accused) Act 1996, and the definition in section 8 of that act, which is referred to in the new clause proposed by the member, is consistent with section 27 of the Criminal Code.

Under those two sections, it is determined whether an accused is mentally unfit to stand trial and the court considers a range of factors: the ability of the offender to understand the charge, whether they are unable to understand the requirement to plead to a charge, whether they are unable to understand the purpose of a trial, whether they are unable to understand their right to exercise a challenge to the courts, whether they are unable to follow the course of a trial, whether they are unable to understand the substantial effect of evidence presented in the trial or whether they are unable to properly defend the charge. Whether an accused is mentally fit to stand trial can be raised prior to the commencement of the trial. In addition, at any stage during the trial, the defence prosecutor or the presiding judicial officer can again raise the issue of fitness to stand trial. The court can determine whether the accused is unfit to stand trial. The court has options, including imposing a period of custody to be served at a treatment facility, adjournment of the proceeding for a period of not more than six months to allow the accused to have treatment so they are potentially fit to stand trial at a later date. The court can determine when the accused is fit to stand trial and when the trial will commence and continue. There are a range of tests. Those tests of section 27 of the Criminal Code are made in the context of the definitions of "mental illness", which means —

> … an underlying pathological infirmity of the mind, whether of short or long duration and whether permanent or temporary, but does not include a condition that results from the reaction of a healthy mind to extraordinary stimuli;

There is also the term "mental impairment", which means —

> … intellectual disability, mental illness, brain damage or senility;

We have covered those in some of the scenarios the member for Butler covered in his hypotheticals. Once a person's ability to stand trial has been tested by the court, there is also a test of their soundness of mind at the time of the commissioning of the offence. That test is also made in the context of the establishment of a prima facie case—the tests the Director of Public Prosecutions can apply under prosecutorial guidelines about whether it is in the public interest to prosecute that offender and, indeed, bring that case to trial. There is a range of tests in place for the protection of offenders who fit the criteria of mental impairment or mental illness well before they get to trial or before they reach a point at which a conviction can be handed down.

I put it to the member that if those tests exist and the court has determined the person is fit to stand trial, they understood what they were doing and their mental impairment and mental illness at the commissioning of the trial was not such that it rendered them unfit to go to trial, imposing a secondary test at the time of sentencing is somewhat irrelevant because the person should not even be before the court if the test of section 27 has been met and the court has determined that the person is unfit to stand trial due to their mental illness or their mental impairment.

Mr W.J. JOHNSTON: I think it would help the minister if I read out the provision. Although the contribution she made is very interesting, of course, it is not relevant to the amendment. The amendment relates to the Premier's comments, referred to previously by the member for Butler, where he says "therefore that mental impairment is considered by judges and magistrates in sentencing". We are not talking about the question of capacity to stand trial, which we understand, but that is not what we are discussing; we are discussing sentencing. We are also not considering the question of guilt or innocence because that is a separate arrangement, as the minister just outlined. We are going to the words of the Premier about the sentencing. We are proposing a set of words that takes that into account. The member for Butler has constructed his amendment to say that for a person with a mental illness, who is not deemed unfit to stand trial and is not deemed unfit to be found guilty, there remains only the question of sentencing. So the person has been found fit to stand trial and to be found guilty but, as the Premier says, there needs to be this arrangement to allow the question of mental illness to be considered in sentencing. All we are doing with this amendment is exactly what the Premier of Western Australia said would be done. The minister can see that. Although her contribution was very interesting, and I am sure learned people such as the members for Butler, Armadale and Girrawheen knew that all before she started, it was very helpful to me.

However, it has nothing to do with the amendment before the house, because the amendment already acknowledges that some people are excluded from trial or from being found guilty because of mental impairment. We are only going to the question of sentencing, and that is exactly what the Premier discussed with PerthNow. That is what I have said. The minister referred to some technical issues with the wording. She talked about the term "manifestly unjust" et cetera. Given that the minister thinks this amendment is technically inadequate, what is her amendment so that she can make sure that she does not make the Premier out to be a liar? I do not think he was lying on PerthNow, yet if the minister does not come up with her own amendment, that is what she will be doing to the Premier: she will be creating him as having not told the truth. She will make his words a lie. I do not think the minister wants to do that, so if not this, what? If the minister is not going to support this amendment, what is her amendment that will be moved to allow judges and magistrates to deal with the question of mental impairment during sentencing? That is, not fitness to stand trial or guilt or innocence, which we have already dealt with. They are included in the Criminal Law (Mentally Impaired Accused) Act 1996, so we do not have to worry about that as it is in a different provision. We need to deal with the question raised by the Premier in his interview with PerthNow about sentencing. So, if not this, the minister should tell me what provision she will insert to take account of what the Premier of Western Australia said—he may be the most unpopular Premier in the state but he is still our Premier—to ensure that the Premier's words do not become a lie?

Mrs L.M. HARVEY: The member for Cannington's argument lacks logic. Should the accused offender be tested by the court under section 27 of the Criminal Code and all the other sections of the Criminal Law (Mentally Impaired Accused) Act and be deemed to be fit to stand trial and to have understood the consequences et cetera of their actions at the time of the commissioning of the offence, the court then, by virtue of that decision and by virtue of allowing that person to go to trial, logically assumes that that person is deemed fit and that it is fit and proper for that person to be subject to the consequences and the sentencing regimes that the court will impose. The tests for the court, in my view, are thorough and rigorous, and are there to protect those people suffering from mental illness and mental impairment. Should the court deem that the accused offender is fit and the trial should proceed, the court will also deem it appropriate to have the ability to impose the relevant sentence. To be talking about a secondary test at the time of sentencing lacks logic because the tests need to occur prior to the trial commencing. Why would the court determine that they should put a person suffering from a mental illness or a mental impairment and who is unfit to stand trial through the rigours of a court process and then have a secondary test at the time of trial? It lacks logic. The member for Butler implied that there is a definition of "manifestly unjust" in the Criminal Code. It is not there. The term "manifestly unjust" is not in the Criminal Code. If we look through some of the case law, we see that there have been references to the "manifest inadequacy" of a sentence and a loose reference to the term "manifestly unjust", but there is an absence of authority to the clear meaning of that definition. In addition, it is generally in the principles of the manifest inadequacy of a sentence and those sorts of criteria where the reference of those words may be grouped together. There is no definition in the Criminal Code and if the member would refer me to it, I would appreciate the benefit of his learned experience.

Mr W.J. JOHNSTON: Firstly, I want to go back to the point I made before. This will be the last time I make this point because it seems to be troubling the minister. I do not know why it is troubling the minister because the Premier has understood it. He made the point that judges and magistrates in sentencing take account of mental impairment. That is the whole point of giving judge's discretion; they are the ones who know the details of the matter. A person might be found guilty but because of the particular circumstances of the case, such as foetal alcohol spectrum disorder, as the Premier discussed, the penalty will be different from the penalty for a person who is found guilty but has no mental impairment. That is what the Premier explained with PerthNow.

I agree with the Premier's comment that that needs to be taken into account. I cannot understand why the minister is rejecting the Premier's position on this matter and walking away from his plain words to the people of Western Australia. I do not understand why the minister is doing that and why she has this problem with the term "manifestly unjust". Let us assume that these words are not defined. That does not matter, because they then have their plain meaning. I appreciate that we are all getting to this point in our career based on the experience that we all have, and I understand that the minister may not have dealt with courts and tribunals et cetera and, therefore, the minister may not be aware of the way the courts deal with words such as "manifestly unjust". If words are not specifically defined, the courts will say—what is it?

Ms M.M. Quirk: Clapham omnibus.

Mr W.J. JOHNSTON: "The man on the Clapham omnibus"—that is the way it is determined. If the minister does not want to narrow the meaning, she does not need to because the ordinary meaning of the words will be used by the courts. Everybody who has had any interaction with the court system knows that that is the way things work. I appreciate that that may not be the way that the minister's career has developed and the minister

may not have understood that before she became a minister but now that she is a minister, I am sure she has been advised of that. Therefore, that is not a proper criticism of the words here.

The question is whether the minister is saying she wants to walk away from the Premier's explanation to PerthNow that judges and magistrates should be given discretion in sentencing people who have a mental impairment? The logical consequence of the minister's argument in this chamber is that more people will be found not guilty of crimes, because the minister is saying that there should be a lower test to exclude them from standing trial. The minister is saying that a person who has the mental capacity to understand right from wrong, but might have that issue dealt with in mitigation of their sentence, will now be found not guilty. That is what the minister has just said.

Mr P. Papalia: There are mentally ill people in prison.

Mr W.J. JOHNSTON: There are hundreds and hundreds of mentally ill people in prison, because the courts have determined that that is an appropriate sentence for the person in the circumstances. Yet the minister is saying that they will not even get to be found guilty, that there will be actually fewer convictions; there will be murderers who will be found not guilty because there is going to be a lower test than the one that currently exists in the court system. I do not understand that. That is not the Labor way. The Labor way is to say that we do not want injustice. It can be just to find somebody guilty despite their having a mental impairment. It is then a question of what is the penalty. Just as the Premier said—we agree with the Premier on this matter—judges and magistrates should be given that discretion in sentencing for people with a mental impairment. It is exactly what the Premier said and I do not understand why the minister is rejecting the Premier of Western Australia in this matter.

Dr A.D. BUTI: Part of the minister's response to the member for Butler stated that there was no definition of "manifestly unjust" and, therefore, that should be the end of the matter. But in answer to my question about what was meant by "immediate", the minister said that the courts know what that is so we will just go by that. It seems to be okay that we do not have a definition in the Criminal Code for "immediate", but if we do not have a definition for "manifestly unjust" that is the end of the argument. Can the minister see the inconsistency there? She does not worry about a definition for "immediate", but she needs a definition for "manifest unjust". I do not understand why one term needs a definition and one does not.

I turn now to section 279(4) of the Criminal Code, which states —

> A person, other than a child, who is guilty of murder must be sentenced to life imprisonment unless —
>
> (a) that sentence would be clearly unjust …

I imagine that "clearly unjust" would equate to "manifestly unjust" so, therefore, it is in the Criminal Code and one would therefore take judicial notice of what clearly "unjust" means. I do not think that what the member for Butler is proposing is out of step with the general wording of the Criminal Code. Clearly "unjust" is there. Surely one could argue that would equate to "manifestly unjust".

Mrs L.M. HARVEY: I will go back to the stance that I have reiterated previously. We will not support the member for Butler's amendment for various reasons. However, the key reason we will not support the member for Butler's amendment is that the government believes that there is adequate definition in the Criminal Code and the Criminal Law (Mentally Impaired Accused) Act to that test of section 27 of the Criminal Code, the definitions that are in here for "mental illness" and "mental impairment", plus that other test and safeguard for people suffering mental impairment or mental illness, the Criminal Law (Mentally Impaired Accused) Act 1996 that operate as sufficient tests and safeguards for people with mental illness, that the court can determine whether they should stand trial and therefore be subject to, should they be found guilty, the sentencing regime that legislation prescribes. That is the government's stance. That is the government's position on this matter. We can argue the nuances of language for hours, but our position will not change.

Ms M.M. QUIRK: Mr Acting Speaker (Mr P. Abetz), at the risk of sounding impertinent in your august position as Acting Speaker, can I say that I thought Alston captured your likeness well.

I go to section 8 of the Criminal Law (Mentally Impaired Accused) Act because I envisage two situations in which a person who would be fit to stand trial but it would be manifestly unjust to impose a mandatory sentence. Under section 8 of the Criminal Law (Mentally Accused) Act, "mental impairment" means intellectual disability, mental illness, brain damage or senility. I looked up the definition of "senility". It means a severe form of mental deterioration in old age. My immediate thought was that a person who has young onset dementia could not be accused of being subject to senility so it would not come under the definition of impairment.

I turn to the second area that I want to address. I have a spare copy of an article from a journal that I can show the minister, if someone could hand it to her.

The ACTING SPEAKER: Member for Girrawheen, only if the minister wants to receive it. If the minister does not want to receive it, she is under no obligation to take it.

Ms M.M. QUIRK: Thank you, Mr Acting Speaker. I intend to read a passage from the *Journal of American Academy of Psychiatry and the Law* of 2010, volume 38(3), pages 318 to 323. I thought it would be easier for the minister to follow if she had a copy of it. It relates to frontotemporal dementia. I do not believe that it is covered under the definition of "mental impairment". The paragraph under the heading "Abstract" states —

> Brain disorders can lead to criminal violations. Patients with frontotemporal dementia (FTD) are particularly prone to sociopathic behavior while retaining knowledge of their acts and of moral and conventional rules. This report describes four FTD patients who committed criminal violations in the presence of clear consciousness and sufficiently intact cognition. They understood the nature of their acts and the potential consequences, but did not feel sufficiently concerned to be deterred. FTD involves a unique pathologic combination affecting the ventromedial prefrontal cortex, with altered moral feelings, right anterior temporal loss of emotional empathy, and orbitofrontal changes with disinhibited, compulsive behavior. These case histories and the literature indicate that those with right temporal FTD retain the capacity to tell right from wrong but have the slow and insidious loss of the capacity for moral rationality. Patients with early FTD present a challenge to the criminal justice system to consider alterations in moral cognition before ascribing criminal responsibility.

Those people, by definition, were fit to stand trial. They suffer from an organic disease over which they do not have control. I do not believe that the neuroscientist would believe these to be cases of brain damage. Therefore, it can be acquired prior to the onset of old age. I think it is arguable that they may not come within the definition of mental impairment. Surely it is manifestly unjust to apply a sentence to people such as that when their primordial condition—the circumstances of the disease—clearly indicate that the level of culpability should be reduced.

Mrs L.M. HARVEY: The member presents an interesting conundrum. If by definition a person suffering from early FTD would not fit the definition of mental impairment, they would also not be relieved by the member for Butler's amendment on the notice paper at the point of sentencing. I would suggest to the member for Girrawheen that if they have developed a brain disorder of this kind, there is a possibility that they would be considered under the definition of mental impairment that means intellectual disability, mental illness, brain damage or senility.

Ms M.M. QUIRK: It is late in the evening; I was probably not as precise as I might have been. There are two cases—young onset dementia and FTD, where there is a level of impairment that may or may not come within the definition of section 8. There is clearly a lack of culpability for their actions but it would not be sufficient for the courts to say that they should not stand trial; in fact, they would say that they would probably. As the article says, these sorts of cases challenge the legal system but I do not think the minister can put her hand on her heart and guarantee that we will not be presented with such challenges. The member for Butler's amendment is about having the means to deal with them effectively.

Mr J.R. QUIGLEY: I just want to make a clarification and a correction. I said that it was the term "manifestly unjust", whereas the appellant legislation uses the term "substantially unjust". I am referring to the actual legislation that provides that an appeal would be dismissed if there is no substantial miscarriage of justice. The point is, however, that those terms are not defined. In other words, that is judicially interpreted. It is the legislation of this Parliament in relation to the question of justice. I said earlier "manifestly unjust", whereas the actual legislation says "substantial miscarriage of justice" or "miscarriage of justice", but those terms are not defined. It is the same. When I say "manifestly unjust" in my amendment, that means plainly or obviously unjust. The legislation says "miscarriage of justice" and "no substantial miscarriage of justice", but those terms are not defined. The system has not fallen over in the last 11 years because the legislation uses the words "miscarriage of justice" or "substantial miscarriage of justice", which are undefined. There is no difference here, in the words "manifestly unjust to apply the minimum term". The government is opposing this amendment because those words are not defined, but what problem has it had in the past six years with the undefined words—to quote the legislation—"substantial miscarriage of justice" or "miscarriage of justice"? There has been no problem at all because that is the subject of judicial interpretation. We use the words "manifestly unjust", or plainly unjust. Their Honours know what that means.

Mr P. PAPALIA: Like the minister, I am not a lawyer. I am listening to the discussion of this amendment, which I felt was quite reasonable, and trying to understand the minister's rejection of the proposed amendment. As I understand it, the minister is suggesting that there is no case in which someone deemed cognitively capable of pleading, and capable of knowing right from wrong, having gone on to being sentenced by a judge, would then be still deemed to have some degree of mental illness that should be taken into account as part of the sentencing. Is that what the minister is saying? The minister is effectively saying that all the tests that exist

currently, prior to the person being charged and the court case taking place, are sufficient to completely eradicate any requirement at all for this amendment. Am I right in that understanding?

Mrs L.M. HARVEY: I have said it before, and I will say it again. We are not supporting the member for Butler's amendment based on all the previous reasons that I have articulated earlier in the evening.

Mr P. PAPALIA: I understand and admire the minister's persistence and certainty. She is clearly absolutely convinced that she will not be responsible for any erosion of the justice system through passing this law. Would it not be the case that there would not be any mentally ill people in prison, because all the current protections and safety measures that the minister is relying on are already in place? And yet, mentally ill people are deemed capable of pleading and capable of being sentenced, but where there is not a mandatory sentence the judge or whoever is sentencing the person is capable of applying some degree of discretion to the length and nature of their sentence. The minister knows as well as I do that there are many people in prison who have been sentenced who are mentally ill. The system is incapable of dealing with them and identifying them on many occasions.

Nevertheless, I think the number that was given to me as recently as a couple of years ago was that around 14 per cent or 15 per cent of the metropolitan adult prison population were receiving medication for a diagnosed mental illness. In early 2013, when I asked, there were 19 juvenile detainees in the system being medicated as part of treatment for mental illness. I know mentally ill people end up in the prison system under the current safety measures that the minister has identified render the amendment unnecessary. I wonder where the minister's certainty comes from. I wonder how the minister can be so certain that no mentally ill person, who, really, in a just system deserves some degree of discretion by the sentencing judge, will be subject to a mandatory sentence just because the discretion has been removed from the judiciary. What is the source of the minister's certainty?

Mrs L.M. HARVEY: There is a wide range of definitions of mental illness and a wide variance in the ability of people to be responsible or not responsible for their actions under the realm of mental illness. That is why there are tests in the Criminal Code for whether people with mental illness or mental impairment are able to stand trial and be held accountable for their actions. That accountability also extends to being responsible and having the court mete out the consequences as defined by legislation. From what the member is saying, his assertion is that people with mental illness, which could include a range of matters, by definition should be exempt from the consequences of their actions.

Mr P. Papalia: No, I am just saying that the judge should be able to apply some discretion when sentencing, taking into account their impairment, whatever degree of impairment it is.

Mrs L.M. HARVEY: As I said, we will not accept the amendment of the member for Butler. We believe the tests are already there in the Criminal Law (Mentally Impaired Accused) Act—I think it is; I am losing the names of all my bits of legislation—so we will not accept the amendment. I find it quite offensive that just by virtue of the fact that someone has a mental illness they are somehow linked to criminal offending that would have them be subject to these mandatory penalties. A range of people are in prison for a range of offences and if the court deems that someone is mentally fit and their mental impairment is not such that they can go to trial, that test also deems that they are fit to have the appropriate sentence meted out, and that appropriate sentence under this legislation we are proposing is in clauses 5 and onwards.

Mr P. PAPALIA: I will finish the line of questioning because clearly the minister is just rejecting the suggestion that there should be some degree of discretion in the cases of people who suffer from some degree of mental illness who will be capable of pleading and therefore capable of standing trial. In the event that they have committed an offence, but their mental illness has played some part in them having committed that offence, the minister is saying that that should not be considered with regard to the sentence, and I find that quite offensive myself. However, the minister and her advisers are clearly confident that there will not be any injustice involved. That is disappointing, but I will not pursue the matter any further because I think that probably sums it up.

Ms M.M. QUIRK: To go back to the purpose of this legislation, as I understand it the government's rationale is to provide a powerful deterrent so that particular offences for which there is great community opprobrium will be minimised or reduced because people will be deterred from committing them. Is that correct?

Mrs L.M. HARVEY: If we go back to the second reading speech, we talked about hoping for this legislation to achieve several things: that offenders who commit numerous home invasions involving seriously violent offences will be incarcerated for longer periods; to deter such offenders and to ensure that such offenders are kept out of circulation for longer; and to reflect community abhorrence of such offending.

Ms M.M. QUIRK: That was a long way of saying yes. Can the minister see that in the examples that I gave her, such as the condition of frontal temporal dementia, the offender knows that what they are doing is wrong, but they have no impulse control and that by virtue of their condition they effectively become sociopaths, lacking in empathy? In those circumstances, deterrence is not going to work at all; the minister accepts that. They are acting in such a way that they have no mental capacity to control their actions; does the minister agree, hypothetically?

Mrs L.M. Harvey: Member, you're basing your request of me on the flawed assertion that our only objective is deterrence, and it's not. I've already explained to you that there are a number of objectives of this legislation, including ensuring punishment for people who commit these crimes.

Ms M.M. QUIRK: All right, so it is incapacitation—that is, locking them up so they cannot do it again; deterrence; and an expression of the community's abhorrence of these crimes. There are three purposes.

Mrs L.M. Harvey: Also keeping violent offenders out of circulation for longer.

Ms M.M. QUIRK: Well, that is incapacitation; I said that. I am trying to work this out: if someone with this condition commits such an offence, they will be culpable under the Criminal Law (Mentally Impaired Accused) Act, and stand trial, and they will be sentenced. However, there will be no deterrent factor because that person acts in such a way that deterrence has no impact because although conscious, the person acts irrespective of their conscience or their instinctive sense of knowing that something is wrong. In that context, deterrence is not a possibility. In the second context, the offender will be incapacitated, but not necessarily for the period that the minister is suggesting. Thirdly, does the minister not accept that the community in such cases might think that there are some mitigating factors and that it is not necessary to have a mandatory sentence imposed as long as the offender is incapacitated, is in prison, and hopefully has access to some treatment?

Mrs L.M. HARVEY: I will respond to the abstract of the article that the member provided us. It says that brain disorders can lead to criminal violations and that people with early FTD present a challenge to the criminal justice system. That does not automatically lead to an assumption that they are going to fail the test of mental impairment or mental illness.

Ms M.M. Quirk: No, I said they wouldn't. I said they would end up going to prison because they were fit to stand trial. That's exactly what I'm saying. They can't help it.

Mrs L.M. HARVEY: The sad reality is that with legislation we cannot prescribe every conceivable permutation and combination of every rare mental health disorder; we need to rely on those tests that are in the Criminal Code. Once again, we can argue this point around and around, but our position on this amendment will not change.

Division

New clause put and a division taken, the Acting Speaker (Mr P. Abetz) casting his vote with the noes, with the following result —

Ayes (15)

Ms L.L. Baker	Ms J.M. Freeman	Ms M.M. Quirk	Mr P.B. Watson
Dr A.D. Buti	Mr D.J. Kelly	Ms R. Saffioti	Mr B.S. Wyatt
Mr R.H. Cook	Mr P. Papalia	Mr C.J. Tallentire	Mr D.A. Templeman *(Teller)*
Ms J. Farrer	Mr J.R. Quigley	Mr P.C. Tinley	

Noes (29)

Mr P. Abetz	Ms W.M. Duncan	Mr S.K. L'Estrange	Mr J. Norberger
Mr F.A. Alban	Ms E. Evangel	Mr R.S. Love	Mr A.J. Simpson
Mr I.C. Blayney	Mr J.M. Francis	Mr J.E. McGrath	Mr M.H. Taylor
Mr I.M. Britza	Mrs G.J. Godfrey	Ms L. Mettam	Mr T.K. Waldron
Mr G.M. Castrilli	Mrs L.M. Harvey	Mr P.T. Miles	Mr A. Krsticevic *(Teller)*
Mr M.J. Cowper	Mr C.D. Hatton	Ms A.R. Mitchell	
Ms M.J. Davies	Mr A.P. Jacob	Mr N.W. Morton	
Mr J.H.D. Day	Dr G.G. Jacobs	Dr M.D. Nahan	

Pairs

Mr F.M. Logan	Dr K.D. Hames
Ms S.F. McGurk	Mr W.R. Marmion
Mr M. McGowan	Mr D.T. Redman
Mrs M.H. Roberts	Mr B.J. Grylls
Mr W.J. Johnston	Mr V.A. Catania
Mr M.P. Murray	Mr R.F. Johnson

New clause thus negatived.

Clause 5: Section 279 amended —

Mr J.R. QUIGLEY: This clause relates to section 279 of the Criminal Code, "Murder". When we dealt with clause 3 we talked about the philosophy behind the legislation and the perception that judges were not expressing community expectation in their sentences. I want to make sure I understand the government's position, minister. The purpose of the legislation is at least twofold: firstly, to send a deterrent message to offenders that they face certain terms of imprisonment; and, secondly, to send a strong message to judges about what is expected in terms of sentencing. Is that a fair summary?

Mrs L.M. Harvey: I will refer the member back to my second reading speech. I think I have articulated that previously. Rather than be repetitive, I refer the member to the second reading speech where I have articulated the purpose of this legislation.

The ACTING SPEAKER (Mr P. Abetz): Minister, you should actually stand if you are speaking, unless it is an interjection.

Mrs L.M. Harvey: I thought he was asking for an interjection.

Mr J.R. QUIGLEY: We will go back to the second reading speech and do it the long way.

Mrs G.J. Godfrey: Longer!

Mr J.R. QUIGLEY: I will go through the second reading speech page by page to ascertain the purpose. I was trying to do it the short way. I was trying to distil the minister's judgement down to a proposition that part of this is to send a message to the judiciary to meet community expectations about sentencing. That is a fair distillation of part of the minister's second reading speech, is it not?

Mrs L.M. HARVEY: In the interest of expediency, I will read from my second reading speech to clarify. In part, it states —

> In making these amendments, the government is determined to ensure that burglars who commit numerous home invasions, which can involve serious violent offences, are incarcerated for longer periods; to deter such offenders; to ensure that such offenders are kept out of circulation longer; and to reflect community abhorrence of such offending.

Mr J.R. QUIGLEY: This clause provides a mandatory sentence of 15 years when a murder has occurred during a home burglary.

Mrs L.M. Harvey: An aggravated home burglary.

Mr J.R. QUIGLEY: A mandatory sentence of 15 years.

Mrs L.M. Harvey: Minimum.

Mr J.R. QUIGLEY: Minimum, yes. Is there not a danger that the minister is pressing down the sentences? What would the minister say is the sentencing range for aggravated home burglary involving murder? What would the minister say is the average sentence or the range of sentences? What are the minimum terms for aggravated home burglary involving murder?

Mrs L.M. HARVEY: We do not have specific examples for every section of the Criminal Code. Consistent with all the cases we have highlighted and the examples we have presented of sentencing that we say were not in

keeping with community expectations and what the community has said to us, we have applied the mandatory penalty regime across those sections of the Criminal Code that cover off on those offences such as murder, manslaughter and unlawful assault causing death. We will go through a range of offences , no doubt clause by clause, in clauses 5 and 6 et cetera.

Mr J.R. QUIGLEY: But I was dealing with aggravated home burglary involving murder, and so far the minister has not referred us to one case involving aggravated home burglary involving murder. I wanted to know how the minister arrived at a mandatory minimum term of 15 years. The minister has not referred us to one case yet.

Mrs L.M. HARVEY: For the sake of consistency, we are not actually prescribing or changing the maximums for these penalties. The maximum for murder is life. We are saying we want a mandatory minimum of 15 years for murder that is committed in the circumstances of an aggravated home burglary. We are setting a minimum level of 15 years, but the maximum can still be life.

Mr J.R. QUIGLEY: But the minister has not referred us to one case yet. The minister has referred us to the database, to which we will now go, but she has not yet referred us to, in the course of discussion of the Criminal Law Amendment (Home Burglary and Other Offences) Bill 2014, even one case involving aggravated home burglary involving murder. I was wondering how the minister arrived at a mandatory minimum of 15 years. Is that just an arbitrary decision that the minister pulled off the roof?

Mrs L.M. HARVEY: When we were putting the legislation together we went back to our election commitment and pulled out the offences consistent with the commitment we made to the community around seriously violent offences committed in the course of an aggravated home burglary. Clearly, murder is one of those offences that should be subject to this regime in that context.

Mr J.R. QUIGLEY: But my question was: the mandatory term of 15 years, was that just an arbitrary figure the minister pulled off the roof, or did she arrive at that after a review of the case law?

Mrs L.M. HARVEY: Member, our commitment to the community was for a mandatory minimum jail term of 75 per cent of the maximum for an adult offender who committed serious physical or sexual assaults in the course of a home burglary. That was our commitment, so we have set that mandatory minimum jail term for section 279 at 15 years. We have set that at 15 years because life imprisonment can clearly mean longer, but we have prescribed a mandatory minimum.

Mr J.R. QUIGLEY: That is what I was getting at. That is what I was asking. For murder it is life imprisonment: how does the minister arrive at 15 years? Was this an arbitrary decision as the appropriate minimum sentence, or is this arrived at after analysis of what Their Honours are doing in court?

Mrs L.M. HARVEY: Member, as I said previously, my understanding is that for murder it used to be a mandatory life term. Now it is an option, so we have set a mandatory minimum of 15 years, consistent with our election commitment.

Mr J.R. QUIGLEY: Has the minister read the Director of Public Prosecutions' database of sentences? Has the minister studied the DPP's database for appeal cases on home burglary involving murder?

Mrs L.M. HARVEY: As I said previously, we did research on a range of areas. We are fulfilling a commitment. It is what it is. The member for Butler can either support it or not.

Mr J.R. QUIGLEY: I understand what it is. It is a popular election commitment. I am asking whether in the fulfilment of this populist election commitment, the minister arrived at the 15 years after studying the DPP's database on appellant sentences.

Mrs L.M. HARVEY: We considered the sentences that had been handed down but as I said, for the sake of consistency and in keeping with our commitment to the electorate, we determined that we would prescribe a mandated minimum term of 75 per cent of the maximum. Obviously, when the maximum term that can be imposed is life imprisonment, that can have a variable meaning, so we have said the mandated minimum for that offence should be 15 years, up to a maximum at the discretion of the court.

Mr J.R. QUIGLEY: The minister said she studied a series of matters. When I have asked before, with respect, the minister appeared to be evasive. She referred me to the Attorney General's website, but we agreed that that does not have individual sentences on it. It has just the number of sentences; it does not mention any sentence. We have also agreed that there is the DPP's data base of appellant sentences. I am asking whether the minister studied the DPP's database of appellant sentences for aggravated burglary involving murder. It is a simple question. Did the minister look at it?

The ACTING SPEAKER: The question is that clause 5 stand as printed.

Mr J.R. QUIGLEY: I have a question.

The ACTING SPEAKER: The minister has no obligation to answer the question.

Mr J.R. QUIGLEY: I have a further question.

The ACTING SPEAKER: You have a further question?

Mr J.R. QUIGLEY: Yes. I understand she sits there mute.

The ACTING SPEAKER: Please proceed. With the long pause, I thought you had finished.

Mr J.R. QUIGLEY: In framing my questions one after the other, I was anticipating an answer. When there was no answer I had to frame the next question.

The ACTING SPEAKER: Please proceed.

Mr J.R. QUIGLEY: Thank you.

Does the minister believe that in relation to home burglary involving murder, Their Honours are not living up to community expectations? Is that the reason this proposed new section is included?

Mrs L.M. HARVEY: I have already answered that question numerous times and explained the rationale for setting the mandatory minimum term for murder in the course of an aggravated home burglary at 15 years.

Mr J.R. QUIGLEY: When I look at the database of aggravated burglary involving murder, let us go firstly to Johnson v the State of Western Australia. He was 25 years at the time of offending and he pleaded not guilty. It is case 28. He was convicted after trial of murder, two counts of deprivation of liberty and aggravated burglary, and he was sentenced to a minimum non-parole period of 18 years. Does the minister think that sentence, a minimum non-parole period of 18 years, adequately reflects the community expectation?

Mrs L.M. HARVEY: Yes, member. It is above the mandated minimum that we are prescribing of 15 years and consistent with the maximum that could be imposed.

Mr J.R. QUIGLEY: Does the minister consider that it adequately reflects the community expectation for aggravated home burglary involving deprivation of liberty and murder? Does the minister think that adequately reflects the community expectation?

Mrs L.M. HARVEY: I will go back to the policy objective that sits behind this amendment to the Criminal Code. We could go through every case, case by case.

Mr J.R. Quigley: And we shall.

Mrs L.M. HARVEY: I will not be giving the member an opinion on the outcome of every single trial case that he presents. I am going to stand by what we believe, which is that the mandated minimum that we are prescribing for section 279, murder, committed in the course of an aggravated home burglary should be 15 years up to a maximum of life imprisonment—at the court's discretion, obviously, for the maximum.

Mr J.R. QUIGLEY: The minister said in her second reading speech that the court, bound as it is by case law and precedent, was striking sentences that did not adequately reflect the community's expectation, and so I ask: does a term of 18 years' imprisonment before parole adequately reflect the community's expectation in that case?

The ACTING SPEAKER (Mr P. Abetz): The question is that clause 5 stand as printed.

Mr J.R. QUIGLEY: Let the record note that the minister sits mute, again.

Mr P. PAPALIA: I was actually standing because I was certain that the member for Butler had some other question to ask, but I fear that he was waiting for the minister to respond to his question, which is a quite legitimate question about this specific case. It is not the entire list of cases; it was that specific case of an individual who was sentenced to 18 years. The member's question was pretty specific and pretty simple, I would have thought. He asked: does that 18-year sentence for that particular crime reflect community expectation?

Mrs L.M. HARVEY: I will clarify my comments. Without fully acquainting myself with all the material facts of every single one of the trials, which I am sure the member for Butler will ask me to express an opinion on, to say whether the sentences imposed meet community expectations, I stand by the fact that we believe we need to mandate minimum terms for seriously violent offences that are committed in the course of a home burglary. That is what we are prosecuting here. I will not be giving an opinion, members for Butler and Warnbro, on individual cases. I will not be going through every individual aspect to understand every single case, which I am sure we have here in a booklet of a couple of hundred pages. I will not be giving an opinion on every single outcome of every single judgement. I do not think that would further the debate or bring the debate forward, and I do not

think it would change our position as a government, which is that we took this election commitment to the community and now we intend to carry out that commitment by way of this amendment to the Criminal Code.

Mr J.R. QUIGLEY: In the minister's book of cases, can she take me to any case of aggravated home burglary involving murder in which the accused got less than 18 years' imprisonment? Can she give me an example of a case in which the judge failed to meet the community's expectation when sentencing for aggravated home burglary involving murder? Can the minister take us to one case in which the sentence was less than 18 years' imprisonment? From the ones I have read, I have it between 18 and 32 years for aggravated burglary involving murder. The minister's book is 100 pages. My book is not quite that big. Can the minister take us to any case in which the judge in a case involving aggravated home burglary and murder failed to meet the community's expectations?

Mr P. PAPALIA: I am pretty disturbed that the minister failed to respond to that very specific and reasonable question. The minister has actively sought to undermine the credibility of the judiciary in Western Australia by suggesting that it does not reflect the expectations of the Western Australian public in sentencing for this type of offence. The government uses this type of offence when selling this legislation. It uses the top-end, worst-case offence in which someone has burgled a house and killed somebody. That is the type of offence the government uses to sell this legislation to the public. If the minister is incapable of identifying one case in which the judiciary has failed to reflect community expectations in sentencing, that goes to her credibility and the credibility of this government and, obviously, this legislation. It is not good enough to sit there, minister, and fail to respond to this question that is at the heart of the whole debate. The minister will be held to account and her credibility is on the line. If the minister sits there now and fails to answer because she does not have an answer because there is no evidence to back this legislation and the unfounded attack that she has made on the judiciary in WA, the minister's credibility is, in fact, not at stake anymore; it is just condemned. The minister has no credibility.

Dr A.D. BUTI: I refer the minister to the "Statutory Review: Operation and Effectiveness of the 2008 Amendments to the Criminal Code and the Sentencing Act 1995" that the Attorney General tabled in the other place on 18 February 2015. An amendment to that deleted "wilful murder" and replaced it with "murder". The statutory review states —

> Prior to the amendments, the median life imprisonment prison sentence for murder charges finalised in the Supreme Court was 15 years. After the amendments, it was 18 years.

The median sentence is 18 years. Where does this concern come from that we have to impose this mandatory sentencing because the judiciary is not doing what it should do? The government's amendments impose a sentence that is lower than the median sentence. The minister has been misleading the public of Western Australia. The government's own Attorney General tabled a report in the other place that tells us that the median sentence for murder is 18 years. The minister says that the government is on the side of the victims. That is disgraceful behaviour. When 18 years is the median sentence imposed by the Supreme Court in a document tabled by the government's own Attorney General, whom the minister is representing in this chamber, how can the minister stand and say that we need to impose mandatory sentencing for 15 years? Do not sit there mute and not respond to that, because the minister is misleading this chamber and the people of Western Australia and undermining the judiciary.

When we were here last time, the member for Victoria Park talked about whether the members on the other side of the house are part of a conservative government. A conservative government does not go out and trash the institution. The judiciary is one of the arms of government, and the government is trashing the judiciary. The government is not conservative. The member for Victoria Park is right; government members are radicals. What is worse is that the minister is misleading the public of Western Australia. If they listened to the minister and the Premier, they would believe that they are not protected by the courts. That is rubbish! The Attorney General, whom the minister represents in this chamber, tabled a document that states that the median term of imprisonment for murder is 18 years. Where is the minister saying that we have to stand on the side of the victims? The judiciary is doing its job. This is pure grandstanding and base politics. The Leader of the House said to the member for Warnbro earlier this year that the government will not engage in an auction on law and order at the next election, but that is what the government did at the last election. The Leader of the House is a decent person—although I must admit that last Thursday was a bit of an aberration. The Leader of the House knows what the minister did at the last election. The government played base politics and it was disgraceful. It is particularly disgraceful that the government is attacking the judiciary, which is unable to fight back. The judiciary should not have to fight back. The minister should be in here upholding one of the pillars of the Westminster system—that is, an independent judiciary that is doing its job. How does this bill improve what the courts are doing at the moment when the median sentence for murder is 18 years? It is disgraceful, minister!

Debate adjourned on motion by **Mr J.H.D. Day (Leader of the House)**.

House adjourned at 11.01 pm

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