

GRAFFITI VANDALISM BILL 2015

Consideration in Detail

Clause 1: Short title —

Ms M.M. QUIRK: Clause 1 of this bill is, of course, the short title. The explanatory memorandum states that this bill is “stand-alone legislation relating to graffiti”. Is it not the case that there are still some provisions for graffiti in, for example, the Criminal Code, so in fact this is not stand-alone legislation?

Mrs L.M. HARVEY: There are still some references to graffiti in the racial vilification part of the Criminal Code, but every other graffiti vandalism clause has been pulled from the Criminal Code and put into this legislation.

Ms M.M. QUIRK: I also note from the explanatory memorandum that the Public Transport Authority Act will be amended to expand the powers of arrest of PTA security officers to include apprehending persons suspected of committing the Criminal Code offences of disorderly behaviour, trespass and criminal damage. Would it be true to say that this bill in fact deals with powers of arrest for disorderly behaviour and trespass that may not necessarily involve any graffiti component?

Mrs L.M. HARVEY: The areas of disorderly behaviour, trespass and criminal damage are covered under the Public Transport Authority Act. This bill will amend the Public Transport Authority Act 2003 to allow the power of apprehension to extend to graffiti vandalism offences as well, and will also allow the power of apprehension for those disorderly behaviour, trespass and criminal damage areas that are currently covered under the PTA act.

Ms M.M. QUIRK: I seek clarification. Do the Public Transport Authority security officers have power to arrest for disorderly behaviour and trespass—prior to the introduction of this bill?

Mrs L.M. HARVEY: Yes, but only if the offence is continuing or being repeated, not if the person desists from the behaviour. At present, PTA security officers can apprehend somebody if they catch them in the act of graffiti vandalism, for example, but if the person desists from that activity at that point and does not continue with the offence, there is no opportunity for the PTA officers to apprehend them. This bill will allow the PTA officers to apprehend them if they have a reasonable suspicion that the offence is likely to continue.

Ms M.M. QUIRK: Am I to understand that for non-graffiti-related offences, which are described in the explanatory memorandum, the powers of arrest of PTA security officers will be expanded?

Mrs L.M. HARVEY: That is correct.

Dr A.D. BUTI: In regard to the title “Graffiti Vandalism Act”, there is a definition of “graffiti” but not of “vandalism”. Is the bill to do with graffiti per se, or must there be also a vandalism part to that graffiti; and, if so, what is the definition of “vandalism”?

Mrs L.M. HARVEY: It is about graffiti damage, which is therefore vandalism.

Dr A.D. BUTI: Where is that defined in the bill?

Mrs L.M. HARVEY: The word “vandalism” is not referred to in the bill. It is always referred to as graffiti damage.

Dr A.D. BUTI: What is vandalism then?

Mrs L.M. HARVEY: It is damaging property.

Dr A.D. BUTI: Why did the minister not call it the “Graffiti Damaging Act”? The minister has “Vandalism” in the title but she has refused to define it and says that it is damage. Would she not have called it the “Graffiti Damage Act”?

Mrs L.M. HARVEY: It would be called a commonsense interpretation, because if we refer to “graffiti vandalism”, I think every Western Australian person, when asked what graffiti vandalism is, would be able to tell the member that it is damage to property by graffiti.

Dr A.D. BUTI: I am glad the minister has given me that explanation; therefore, I will ask the question again. We are referring to graffiti that is damaging then, not just graffiti per se; is that correct?

Mrs L.M. HARVEY: Generally in Australian language, when people damage property by way of graffiti, they are called graffiti vandals. So, graffiti vandalism is the appropriate title for the bill.

Dr A.D. BUTI: The question then is: it is not an offence for it to be just graffiti, it has to be also damaging; does it? Is graffiti per se an offence, or does it have to have the damage element as well to it?

Ms Margaret Quirk; Mrs Liza Harvey; Dr Tony Buti; Mr John Day; Mr Fran Logan; Acting Speaker; Mr John Quigley

Mrs L.M. HARVEY: When we move on from clause 1 to clause 3, the member will see that the term “graffiti” is defined, and then clause 5 defines “damaging property by graffiti”. As we progress through the bill, the logic in the legislation will become more apparent, if it is not already.

Dr A.D. BUTI: I would prefer the minister’s non-patronising response too. I will go again. Graffiti, as the minister knows, can also not be damaging; it can be public art. My question again to the minister, and I would like a non-patronising response otherwise this will not be civilised, is: are we referring to graffiti per se or does it have to have the additional element of being damaging?

Mrs L.M. HARVEY: The bill needs to be taken in context, member. If we look at clause 3, it states —

graffiti means any drawing, writing, painting, symbol or mark applied to or marked on property by —

- (a) spraying, writing, drawing, marking or otherwise applying paint or another marking substance;
or
- (b) scratching or etching;

We consider that in the context of clause 5, “Damaging property by graffiti”, which states —

- (1) A person must not destroy, damage or deface the property of another person by graffiti without that other person’s consent.

I will not read through the rest of it as we will get to that when we come to clause 5. In this legislation we define the acts of graffiti vandalism that we determine to be damaging and, therefore, an offence under this legislation.

Dr A.D. BUTI: Yes, the minister has just said that the graffiti therefore has to be damaging. I will repeat to the minister: graffiti per se is not an offence; is that correct? Graffiti per se is not an offence; it has to have the additional element of being damaging. That is the question.

Mrs L.M. HARVEY: No, there are two components to this. It has to be, first of all, either damaging or any application of graffiti by drawing, writing, etching et cetera that is done without the other person’s consent. If the graffiti is applied without the property owner’s consent, it is an offence under this legislation. In addition to that, if it is damaging, it is also an offence.

Dr A.D. BUTI: If the graffiti is done without the consent of the owner but it is not damaging, is that an offence?

Mrs L.M. Harvey: If the legislation is passed, yes.

Dr A.D. BUTI: Where are we told that in the bill?

Mrs L.M. HARVEY: If the member goes to clause 5, he will see that it states —

- (1) A person must not destroy, damage or deface the property of another person by graffiti without that other person’s consent.

Dr A.D. Buti: That is right.

Mrs L.M. HARVEY: It therefore covers the destruction of property, the damage of property or the defacing of property without the property owner’s consent.

Dr A.D. Buti: But it may not be damaging.

Mrs L.M. HARVEY: If the graffiti destroys the property, if it damages the property or if it defaces the property.

Dr A.D. BUTI: But it may not do that. The graffiti may not damage, it may not deface and it may not destroy the property. That is the point. Some graffiti does not do that. I will repeat: does the graffiti have to have the additional element of being damaging, not just graffiti? The minister referred to clause 3, which states that graffiti means drawing, writing, scratching, etching, spraying et cetera; it still may not be damaging. The question I will repeat to the minister is: for an offence under this bill, does the graffiti have to be damaging; and, if the graffiti is not damaging, is it still an offence?

Mrs L.M. HARVEY: I will repeat this one more time. It states “destroy, damage or deface”. The definition is if the graffiti damages, destroys or defaces someone’s property without their consent, it is an offence under this bill.

Dr A.D. Buti: What I asked was: if it’s just graffiti and it doesn’t damage, is it an offence?

Mrs L.M. HARVEY: If it defaces another person’s property without their consent, yes.

Dr A.D. Buti: If it does not deface and it’s done without consent, is it still an offence?

Ms Margaret Quirk; Mrs Liza Harvey; Dr Tony Buti; Mr John Day; Mr Fran Logan; Acting Speaker; Mr John Quigley

Mrs L.M. HARVEY: If somebody is complaining about graffiti damage, I would infer that they are upset that the graffiti has defaced their property. I have nothing more to add.

Dr A.D. BUTI: Well, I do. Who determines if it has been defaced, damaged or destroyed? Is it the owner of the property, or is it an objective matter by the reasonable person?

Mrs L.M. HARVEY: It is the owner of the property. The definition of “deface” is spoiling the surface or appearance of an object by changing the appearance of it; for example, by writing on it. Defacing someone’s property without their consent is an offence under this legislation.

Dr A.D. BUTI: I repeat the question: it may be without the person’s consent, but who determines whether it has defaced the property? Is it the property owner? The minister does not actually say that; she just says that they have destroyed, damaged or defaced the property. Who determines that? Is it the subjective owner or the person’s consent, or is it the community standard? I am not trying to criticise the legislation; I am just trying to get some clarification. Is it a reasonable test, is it an objective test or is it a subjective test?

Mrs L.M. HARVEY: The way that these sorts of things generally work is that —

Dr A.D. Buti: I don’t want to know about “generally”; I want to know about this bill.

Mrs L.M. HARVEY: Can I answer the member’s question my way, please? People generally make a complaint about graffiti vandalism to the police, and a police officer will inspect it and make a decision as to whether it is a graffiti vandalism offence. If an offender is charged with that offence, there is an opportunity for it to be heard in a court and ultimately a court will make a decision as to whether it fits, for the purposes of this legislation, as being an offence, with respect to the offender.

Dr A.D. Buti: But who makes that test? Is it the police, or the court, and on what standard? Is it an objective or a subjective standard?

Mrs L.M. HARVEY: We need to put this in context. If a person’s property has been damaged, destroyed or defaced by graffiti and they make a complaint to police, the property owner has a surface that has been damaged and defaced without their consent. They complain to the police, the police uphold their claim and charge an offender, and the offender goes to court. The court makes those decisions based upon how we legislatively frame what constitutes an offence. An offence under this legislation would need to fit, first of all, the definition of “graffiti” and also that the property has been damaged with respect to the components of clause 5.

Dr A.D. BUTI: When it goes to the court, the magistrate or judge or whoever has to have a standard. Is it the standard of the owner of the property, is it an objective standard of what the community would say, or is it, as the minister would say, the police? Who is it? Who determines that it has been —

Point of Order

Mr J.H.D. DAY: I point out that the clause we are considering is simply the short title of the bill. I think the member for Armadale is asking valid questions, but they relate to a lot of detail within the bill that comes at later clauses, dealing with offences and how the bill will operate. I suggest that it might be appropriate to consider those matters at a later stage of consideration in detail.

Mr F.M. LOGAN: What the member for Armadale is pointing out, and questioning the minister at length about, is the word “vandalism” in the title. The reason he is raising that is that there is no definition of “vandalism” in the title. It is about the relationship of that word in the title with the other parts of the bill. It is not that the member for Armadale is being pedantic or opposing the legislation. As we know, he has great standing as a jurist, and he is pointing out to the minister that she needs to have a clear understanding of how this bill is defined because it will be interpreted and applied in court.

Mr J.H.D. Day: It is defined in clause 4.

Mr F.M. LOGAN: That is the Leader of the House’s opinion, but it is not his opinion that will be used in a court of law; it will be the words in this bill. That is why the member for Armadale is going through it very carefully.

The ACTING SPEAKER (Mr I.M. Britza): Members, I am allowing a little bit of leeway, but the standing orders say that, especially for the short title of the bill, it must not degenerate into a debate. For the clause that has been presented, whether agreed to or not agreed to, that is what has to be accepted. I do not want to get into a debate because this is just the short title of the bill and we have to remain on that.

Ms M.M. QUIRK: Which standing order you are referring to in terms of the short title, Mr Acting Speaker?

The ACTING SPEAKER: Standing order 179, “Relevancy of debate”, which states —

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

Mr F.M. LOGAN: On the point of relevance, I come back to the point I made to you earlier, Mr Acting Speaker, that the bill has included in its short title the word “vandalism”. Vandalism is not defined anywhere else in this legislation. There is no definition of vandalism and there is no relationship of the term “vandalism” to any other part of the bill. That is why the member for Armadale is testing this, as he should. That is the role of the opposition. The minister might not like that, and the Leader of the House might not like that, but that is our job. That is our job—to test the legislation that comes before this house, and that is exactly what the member for Armadale is doing. He is testing the legislation to see whether it will be functional as an act of Parliament.

The ACTING SPEAKER: Any further points of order on this? I am allowing leeway, but I remind members that if it gets into a general debate, that is where I will have to step in, because it is a debate that can be taken in further clauses. For the short title of the bill, that is what we need to aim at.

Debate Resumed

Ms M.M. QUIRK: In the context of the short title and the word “vandalism” in the short title, and in response to questions raised by my colleagues, the minister has referred to clause 5, which prohibits people from destroying, damaging or defacing a property. Can the minister clarify whether that is conjunctive or not? In other words, is it necessary to destroy, damage and deface a property, which is what the minister seems to imply, or does just one of those three elements constitute vandalism?

Mrs L.M. HARVEY: With respect to clause 5, a person must not destroy, damage or deface the property of another person.

Mr J.H.D. Day: The member for Armadale was asking the question.

The ACTING SPEAKER: He declined it.

Ms M.M. QUIRK: With respect to the Leader of the House, in the definition given of “vandalism”, the minister referred to clause 5.

The other issue I want to raise about vandalism is whether there is a connotation that it must be permanent damage. To give a hypothetical situation, say someone wrote or drew on premises with chalk, for example, that could be removed by mere water or rain. Does that constitute either graffiti or vandalism?

Mrs L.M. HARVEY: It comes down to whether something has been applied without the other person’s consent and, as I said, clause 5 states —

A person must not destroy, damage or deface the property of another person by graffiti ...

The definition of “graffiti” in clause 3 states —

graffiti means any drawing, writing, painting, symbol or mark applied to or marked on property by —

(a) spraying, writing, drawing ...

There is no reference as to whether it is easily removed or not easily removed. There is a reference further in clause 5 with respect to destroying property, but it is the application of graffiti onto property without the owner’s consent.

Ms M.M. QUIRK: Again referring to the short title, there is no requirement in defining the word “vandalism” that it be permanent damage; it can be the mere altering of the status of a particular piece of property even on a temporary basis.

Mrs L.M. HARVEY: Generally, when it comes to the point of police making a decision with the Director of Public Prosecutions as to whether they would prosecute somebody for the offence, they would then need to look at whether it is in the public interest to prosecute somebody with respect to the claim. When it comes down to graffiti, there is a necessity to define the word “graffiti” in this legislation, because as we heard in the second reading debate from members, there are members in this place who view graffiti as art and there are members who view graffiti as vandalism. For the purpose of this legislation, it was very important to define what graffiti is. Everybody understands what vandalism is—it is damaging someone else’s property—but graffiti for some people means an artistic form and for others it means vandalism. With respect to this legislation, we have defined that graffiti is a certain act that in conjunction with the definition in clause 5—that is, to destroy, damage or deface the property of another person without their consent—becomes an offence under the legislation.

Ms Margaret Quirk; Mrs Liza Harvey; Dr Tony Buti; Mr John Day; Mr Fran Logan; Acting Speaker; Mr John Quigley

Ms M.M. QUIRK: This is my final point on this short title. Is the minister telling us the word “vandalism” that is included in the title is there to give some colour and context to the term “graffiti” because the term “graffiti” as defined does not have any reference to whether the markings are permanent or otherwise?

Mrs L.M. HARVEY: Clause 5 states that graffiti must destroy, damage or deface the property of another person without that person’s consent.

Ms M.M. QUIRK: I was going to conclude there, but the answer is not satisfactory. The definition of “graffiti” itself says nothing in relation to the need for any permanent damage; it just refers to writing or etching, which is the classical meaning of the word “graffiti” in Latin. I am asking the minister whether that term “vandalism” was put in the title to limit the definition of “graffiti” to those cases in which there is permanent damage.

Mrs L.M. HARVEY: The word “vandalism” refers to an act committed by people who destroy, deface or damage property by way of graffiti, but regardless of whether —

Ms M.M. Quirk: But it’s not defined as that.

Mrs L.M. HARVEY: I would like finish what I was saying. With respect to this legislation, regardless of whether something has been permanently damaged by an act of graffiti vandalism, there is still a cost to the removal—there is still a time cost and there is often a substance cost to the removal of graffiti. For example, when graffiti on somebody’s premises is spray-painted or marked by a marking pen, there is not permanent damage, because it can be removed, but there is still a cost to the removal. The graffiti is there without the owner’s consent and under this legislation that would be an offence.

Ms M.M. QUIRK: Sorry, I lied, Mr Acting Speaker. The minister referred to spray-painting there and I think that is a reasonably clear example of what we are talking about. But what about chalk? In Hay and Murray Street malls there are quite often chalk artists doing quite nice paintings or depictions. Under this legislation, I think that is probably graffiti.

Mrs L.M. HARVEY: First of all, if something was marked with chalk—chalk is not always 100 per cent removable—for example, on the pavement in the City of Perth, there would have to be a complaint from the property owner about those chalk markings in order for the interrogation to occur about whether it would constitute an offence under this legislation.

Ms M.M. QUIRK: I am not asking about the process, I am asking about the definition of the word “graffiti”, which is in the short title. I am trying to find out whether using a medium like chalk, which does not have the tendency of destroying, damaging or defacing property, would be graffiti.

Mrs L.M. HARVEY: It does not matter what substance is used in the drawing, writing, painting or markings applied to property. If it fits the elements of this legislation, the elements of the offence, it would be an offence.

Clause put and passed.

Clause 2: Commencement —

Ms M.M. QUIRK: Following this bill being passed in this house and the other house, what measures need to be taken that might influence the date of assent?

Mrs L.M. HARVEY: There will need to be some sentencing regulations drafted, the new graffiti offence will need to go into the schedule and the operating procedures for WA Police and the Department of Corrective Services will also need to be formalised.

Ms M.M. QUIRK: What sort of time frame will there be to do all those things?

Mrs L.M. HARVEY: I am advised that the regulations will take about two to three months.

Clause put and passed.

Clause 3: Terms used —

Mr F.M. LOGAN: Referring to the definition of “graffiti”, can I just take the minister back to the issue I raised in the second reading debate. In this clause “graffiti” is defined as follows —

graffiti means any drawing, writing, painting, symbol or mark applied to or marked on property by —

- (a) spraying, writing, drawing, marking or otherwise applying paint or another marking substance; or

(b) scratching or etching;

Does the minister agree that that does not include some of the things I raised in the second reading debate; that is, sticking up pieces of art such as mosaic tiles, sculpture, posters, pictures et cetera?

Mrs L.M. HARVEY: Mosaics are generally applied with glue and that would be considered to be a marking substance under the legislation.

Mr F.M. LOGAN: The putting on of glue is clearly not graffiti, is it? In fact, it would not be glue, it would be grout. Putting grout on a tile is not a symbol of graffiti. The application of grout to a mosaic tile and its application to a wall is not a symbol of graffiti and I put it to the minister that there is no way a court would agree with that interpretation under this definition. I ask again: mosaic tiles are one example, but I put to the minister the question of sculpture, posters and pictures.

Mrs L.M. HARVEY: Several elements of the offence would need to be proved. First of all, for example, a mosaic tile would need to be glued onto a surface and then grouted. If that destroyed, damaged or defaced the property of another person without their consent—if those elements were satisfied—yes, applying mosaic tiles to someone’s property without their consent would fit the elements of the offence.

Mr F.M. LOGAN: I take the minister back to the definition. The only thing I think the minister can apply to her argument about the term “graffiti” is “another marking substance”, because the clause states “spraying, writing, drawing, marking or otherwise applying paint or another marking substance”. We are talking about spraying, but that is not what I put to the minister. I have not raised writing and I am not suggesting marking or otherwise applying paint. For the purposes of graffiti, glue is not a marking substance; it is for the applying of a mosaic tile. It is certainly not scratching or etching. I again ask the minister whether it includes posters, pictures et cetera. There are a number of posters and pictures around Perth about forthcoming bands or events that are happening, so the minister’s interpretation today could have an impact on the posters that could be put up around the city.

Mrs L.M. HARVEY: At the moment, one offender prints their tags onto stickers and sticks them onto buildings, and they would be covered under this legislation.

Mr F.M. LOGAN: Can the minister point out exactly how they would be caught under the definition of the term “graffiti” in this legislation?

Mrs L.M. HARVEY: “Graffiti” means any drawing, writing, painting, symbol or mark applied, so by applying a mosaic tile to a surface, they have applied a drawing, writing, painting, symbol or mark. If that is applied to someone else’s property without their consent, it would be defacing their property, so it would fit the elements of the offence.

Mr F.M. LOGAN: Clearly, that is the minister’s interpretation on the run in this house. The words “symbol or mark applied” are clearly in the clause, and the minister knows that that is to catch people who tag. That is what that is there for—taggers. I agree with the minister. Nobody likes taggers. That is what that reference is in the bill for; it is not to catch people who put up pieces of art. There is no way that that can be applied to people who put up pieces of art, whether by glue or any other method, and the minister knows that.

Mrs L.M. HARVEY: The member has done a very good job of highlighting why we have defined “graffiti”, because, as I have said previously, one person’s graffiti is another person’s art. It needs to fit the other elements of the offence. Whatever it is, the member might find it artistic but somebody else might find it defacing. However, if it has been applied to somebody else’s property without their consent and a complaint is made, for the purposes of this legislation it becomes graffiti.

Ms M.M. QUIRK: Given what the minister said about the short title, would it be true to say that the definition of “graffiti” in clause 3 should be restricted to those markings that destroy, damage or deface property?

Mrs L.M. HARVEY: That is covered by the offences further on in the bill. The offence is damaging property by graffiti.

Ms M.M. QUIRK: I know that is the offence, but is the minister telling us that, if there is no owner consent, all markings defined in clause 3 are effectively graffiti within the terms of the sanctions in this bill?

Mrs L.M. HARVEY: Only if they fit the elements of the offences, such as those described in clause 5.

Ms M.M. QUIRK: Why is that not in the definition, minister? That would be the obvious place for it to be. However, the definition of “graffiti” for the purposes of this legislation means those markings that destroy, damage or deface.

Dr A.D. BUTI: What is the definition of “property” for the purposes of the bill?

Ms Margaret Quirk; Mrs Liza Harvey; Dr Tony Buti; Mr John Day; Mr Fran Logan; Acting Speaker; Mr John Quigley

Mrs L.M. HARVEY: The definition of “property” is the normal dictionary definition, but we have defined “public property”.

Dr A.D. Buti: I’m asking about “property”.

The DEPUTY SPEAKER: Order, member! Allow the minister to finish her answer, please.

Dr A.D. BUTI: “Public property” is referred to throughout the bill, but what is the definition of “property”? When the minister says that it is the normal definition of “property”, does that include personal and real property? Does it include chattels? Does it include fixtures? What does it include? What does it mean? The minister has not defined “property”.

Mrs L.M. HARVEY: It is the usual definition of the word “property”. I put to the member that intellectual property might be somewhat difficult to graffiti vandalise.

Dr A.D. Buti: I did not ask that.

Mrs L.M. HARVEY: “Property” has the normal definition of a person’s property. It could be any property owned by a person.

Dr A.D. BUTI: Does that include personal property?

Mrs L.M. HARVEY: It could include the brick wall of a house, a fence, a motor vehicle, business premises, a sign that is owned, or glass at the front of business premises. “Public property” is defined further in the bill as property owned by local government, the Crown et cetera.

Dr A.D. BUTI: It can refer to all property. If I deface a soccer ball, that is property. Could that be vandalism?

Mrs L.M. HARVEY: If the property, which happened to be a soccer ball, was destroyed, damaged or defaced by graffiti without the owner’s consent and they made a complaint and the public interest test was satisfied, yes, there would be a conviction under the legislation.

Dr A.D. BUTI: Where is the public interest test in the legislation? When the Graffiti Vandalism Bill was being drafted, did the minister believe that people who defaced property such as soccer balls et cetera should come under the jurisdiction of the bill?

Mrs L.M. HARVEY: The public interest test is part of the police discretion in deciding whether it is in the public interest to charge someone with an offence.

Dr A.D. Buti: But it’s not in the bill, though.

Mrs L.M. HARVEY: No, we have not defined soccer balls.

Mr J.R. QUIGLEY: I would like to ask a question flowing on from the minister’s last answer about it being applied without consent. The bill states —

In this Act —

graffiti means any drawing, writing, painting, symbol or mark applied to or marked on property by —

- (a) spraying, ...
- (b) scratching or etching;

Where does the element of consent or non-consent come in, because of course later in the bill—I know we are not dealing with later provisions in the bill, but I want to put this question in context—there is provision for local governments to remove graffiti and then impose the cost on the person whose property has been the subject of graffiti? I wonder whether the minister can take me to where in the definition the consent or lack thereof forms the element of the offence, as she referred to in her earlier answer.

Mrs L.M. HARVEY: The member is referring to clause 18, under which a local government can order a property owner to remove graffiti that has been applied with the consent of the owner, is visible from a public place and is deemed to be unsightly or offensive. Clause 18 needs to be read in conjunction with clauses 20 to 25 of division 3, which also provide an opportunity for a property owner who might be ordered to remove graffiti applied with their consent to appeal to the SAT if they determine that that is unfair.

Mr J.R. QUIGLEY: That is the context within which I was asking my question. The question relates to clause 3, the clause before the chamber at the moment, which states —

Ms Margaret Quirk; Mrs Liza Harvey; Dr Tony Buti; Mr John Day; Mr Fran Logan; Acting Speaker; Mr John Quigley

graffiti means any drawing, writing, painting, symbol or mark applied to or marked on property by —

- (a) spraying, writing, drawing, marking or otherwise applying paint or another marking substance; or
- (b) scratching or etching;

I will not go to the question relating to the soccer ball. The minister's answer was that it depends on whether there was consent. Where does the lack of consent of the property owner fit in as an element of the offence?

Mrs L.M. HARVEY: Graffiti is defined generally by the definition but the elements of the offence are damaging property by graffiti. Graffiti is not an offence; damaging property by graffiti is the offence, and the elements of that offence are explained in clause 5.

Ms M.M. QUIRK: In response to the member for Butler, the minister has said that property needs to be damaged.

Mrs L.M. Harvey: Defaced, damaged or destroyed.

Ms M.M. QUIRK: All right. All those things imply a level of damage to property. Previously the minister said there needs to be none. I will continue from what the member for Armadale asked.

Mrs L.M. Harvey: Member, just to correct the record, I said it doesn't need to be permanent damage; it just needs to fit the elements of clause 5, which states —

A person must not destroy, damage or deface the property of another person by graffiti without that other person's consent.

I did not say that it had to be permanent, if you recall that conversation.

Ms M.M. QUIRK: Accepting the minister's proposition, I give the scenario of a property owner who parks a car in Hay Street, West Perth. A traffic inspector comes along and marks the car's tyre with chalk. What is in this legislation that would prevent that traffic inspector from being guilty of committing an offence?

Mrs L.M. HARVEY: First of all, there would need to be a complaint from the motor vehicle owner about their tyre being marked with chalk. That would need to pass that reasonableness test of whether that could constitute destroying, damaging or defacing the property of another person without their consent. I suspect that might be a somewhat complex argument given that if the person's car is parked in a public car park, there might be an implied consent, if you like, to being policed while in that place.

Ms M.M. QUIRK: The minister referred to "reasonableness". I wonder where that term is contained. We can go through the individual elements. The fact that chalk is easily removable does not seem to be an impediment to it being used for graffiti. The car is private property. The owner is absent from the area so no consent is given. Why is that not an offence?

Mrs L.M. HARVEY: The scenario that the member has described was not one that I envisaged when we were drafting this legislation. Although technically, yes, somebody could make a complaint about having a small chalk mark put on their tyre under this legislation, I would wish them all the luck in the world trying to have that successfully prosecuted through a court.

The DEPUTY SPEAKER: Member for Girrawheen, we are talking about clause 3, "Terms used". Can you direct your questions to those terms, thank you.

Ms M.M. QUIRK: Madam Deputy Speaker, if you had been listening intently, you would be —

The DEPUTY SPEAKER: Thank you. I do not appreciate that. I have been listening.

Ms M.M. QUIRK: — aware that we are all perplexed at what the definition of graffiti is. We are trying to work out how the courts will enforce this.

Just coming back to the minister's response, it seems to be that whether or not someone is prosecuted under this offence will be dependent on the property owner making a complaint. Can we infer from that that the police or other authorities will not be actively pursuing it if there is no complaint?

Mrs L.M. HARVEY: In order for the police to charge someone with an offence, they obviously have to be informed of the offence. Somebody would need to make some sort of complaint to the police or the police would need to make an observation themselves in order for a person to be prosecuted.

Ms M.M. QUIRK: For example, I go back to my favourite parking inspector. Police are walking along the street. They see the parking inspector putting chalk, rather enthusiastically, on someone's tyre. Even if the owner is not there, would the police consider not prosecuting because the owner is not around to pursue the matter?

Ms Margaret Quirk; Mrs Liza Harvey; Dr Tony Buti; Mr John Day; Mr Fran Logan; Acting Speaker; Mr John Quigley

Mrs L.M. HARVEY: A parking inspector going about their duty, marking the tyres of a car that is parked in a timed parking bay on the property of a local government or other premises, is highly unlikely to be interrupted by police and accused of graffiti vandalism while performing their duties.

Ms M.M. QUIRK: I will use another example of police patrolling an area. They see someone spray-painting an area. It is 11 o'clock on a Friday night and it is not easy to ascertain the owner. The police will still be pursuing that offence, irrespective that no complaint has come in, I presume. It will just be down the track when they are taking the statements that they have to establish that there is no consent. At the time they will hopefully be enforcing the law and doing something with that offender. That is what I am trying to say. The minister is implying that there will be no prosecution action or nothing will be activated until there is a complaint from the owner. There will clearly be situations in which that is not the case.

Mrs L.M. HARVEY: I was not implying that for every scenario. Specific scenarios have been put to me. I have been saying that in that hypothetical scenario, the property owner would need to make a complaint. The police and Public Transport Authority security officers will be able to apprehend offenders in the act of graffitiing. Of course they are going to do their job.

Mr J.R. QUIGLEY: Under the definition of “graffiti”, it states —

... marking or otherwise applying paint or another marking substance;

Does this include the application of posters and other paper advertisements that we see around our city?

Mrs L.M. HARVEY: A range of posters are covered under the Litter Act 1979. They will not be covered by this legislation. Under section 24A of the Litter Act, bill posting is an offence. That covers off any person who leaves or posts a bill on any building, fence, furniture, pillar et cetera. Then there is the penalty regime described for the posting of bills, which is what the member has described. That is not covered under this bill.

Mr J.R. QUIGLEY: Just to be clear, what is a bill? If someone puts some offensive words on paper and then glues that paper to a wall, would that not be considered as graffiti under this bill?

Mrs L.M. HARVEY: Under the Litter Act —

bill means any poster, placard, handbill, sticker, or other material or object manufactured, printed, drawn or produced for the purpose of advertising or promoting any thing, cause, function, event or occasion of any kind;

Ms M.M. QUIRK: I am just a little perplexed, because earlier, in response to the member for Cockburn, the minister seemed to imply that they would be covered as graffiti. Which is it?

Mrs L.M. HARVEY: I did not say that, member for Girrawheen. I said that graffiti on a sticker applied to someone’s property without their consent would be covered under this legislation as graffiti vandalism, but a bill is defined under the Litter Act.

Ms M.M. QUIRK: There seems to be some duplication, because stickers and handbills come under the Litter Act as bills, and they are things that the minister also told us were in this bill. I remember that the member for Cockburn had a discussion about glue. The minister said that the mere fact of putting glue on paper—a bit of artwork or something—and then pasting it onto the wall was graffiti.

The DEPUTY SPEAKER: The question is that clause 3 do stand as printed. All those in favour say “aye”; to the contrary, “no”. Member for Girrawheen —

Ms M.M. QUIRK: I am just waiting for an answer from the minister.

The DEPUTY SPEAKER: The minister has decided not to answer, by the look of things, so I put the question. Member for Girrawheen, do you have further questions?

Ms M.M. QUIRK: In relation to clause 3, the definition of graffiti, I asked the question: when there is conduct involving a piece of paper or a sticker affixed to a wall, does that come under the Litter Act or under the Graffiti Vandalism Bill 2015?

Mrs L.M. HARVEY: I am glad I have a copy of the Litter Act 1979 here, because it has proven to be very useful. The definition of a bill in the Litter Act is a poster, placard, handbill or sticker—which is the relevant point the member is talking about—but it is also defined as being manufactured, printed, drawn or produced for the purpose of advertising or promoting any thing, cause, function, event or occasion of any kind. If it was a sticker containing promotional material for a cause, function or event it would fall under the Litter Act, but if it was a sticker with a graffiti tag on it, for the purposes of this legislation it would be an offence under clause 5.

Clause put and passed.

Clause 4 put and passed.

Clause 5: Damaging property by graffiti —

Dr A.D. BUTI: Clause 5(1) reads, in part —

A person must not destroy, damage or deface the property of another person by graffiti without that other person's consent.

Is this other person the legal owner of the property?

Mrs L.M. HARVEY: It is damage to the property of another person, without that person's consent, so, yes, it refers to the need to obtain the consent of the person who owns the property.

Dr A.D. BUTI: The legal owner?

Mrs L.M. Harvey: Yes.

Dr A.D. BUTI: What about if I am renting a property?

Mrs L.M. Harvey: That is covered as well.

Dr A.D. BUTI: The minister did say "legal owner", so if I am renting the property and I give consent to someone to deface that property, but the legal owner of the property did not give consent to do that, is that an offence?

Mrs L.M. HARVEY: Yes, because as a rental property the occupier does not own the property. The legal owner of the property is the person whose consent needs to be obtained.

Dr A.D. BUTI: Is this therefore a strict liability offence?

Mrs L.M. HARVEY: In what respect, member for Armadale?

Dr A.D. BUTI: I am sure the minister would know, because she represents the Attorney General in this house, that strict liability means that there is no need to show any intent to commit the crime. As the minister would know, strict liability and absolute liability are usually reserved for some pretty serious crimes, such as drug importation et cetera. It is quite interesting that under this graffiti bill someone could be prosecuted when they thought they had consent. For example, I go to someone's house. I think they are the legal owner because they are occupying the house but they are actually renting the house. They give me consent to paint on that brick wall or whatever, but they can still be prosecuted and found guilty under this act because the legal owner did not give that consent. However, the person who did the marking thought they had consent. Is the minister saying that that is not a defence?

Mrs L.M. HARVEY: In the circumstance that the member has described, the facts of the case would have to be put together. Whether the person who owns the property gave consent would need to be determined. The owner of the property is the person who needs to give consent to any graffiti being applied to it. If the tenant of the property has commissioned somebody to come in and apply graffiti to a wall without the property owner's consent, that would come down, I expect, to the leasing arrangement that the tenant has with the property owner. The elements of the case would need to be proved, and who was responsible and should be charged with the damage would need to be determined. It would come down to who has illegally authorised the graffiti to be applied without the consent of the property owner.

Dr A.D. BUTI: In answer to my original question, the minister said it was the legal owner. She was quite clear that that was the case, but now she is hinging that. This is very important; this is the actual offence here. The minister said that the legal owner had to give the consent. However, what about the scenario in which I paint a wall because I thought the person who occupied that property was the legal owner, but they are not the legal owner? In answer to my question the minister said that consent had to be obtained from the legal owner. If it has to be the legal owner, what about the scenario in which I get the consent of the occupier of that property who I think is the legal owner, and I paint the wall without the consent of the legal owner? The minister said to me initially that that is an offence. Is she now trying to tell me that it may not be an offence? The judges and magistrates will need to know the intent of the Parliament. Is it an absolute strict liability test, or is it not? Therefore, would we need to look at what is meant by the person giving consent? Is it the legal owner only; and, if it is, what about the scenario in which I thought it was the legal owner, but it was the person renting the property?

Mrs L.M. HARVEY: What the member is describing there, when a tenant of a property has contracted someone to come in and apply illegal markings to a wall, is more of a civil matter. This clause is about a perpetrator applying graffiti and damaging, destroying or defacing someone's property without their consent. The scenario

Ms Margaret Quirk; Mrs Liza Harvey; Dr Tony Buti; Mr John Day; Mr Fran Logan; Acting Speaker; Mr John Quigley

that the member described is more of a civil matter rather than a criminal matter. I put it to the member that the question of who could legally give consent to apply the paint is likely to be resolved in a criminal court.

Dr A.D. BUTI: That is a very strange answer to my question. This bill is before us. Is the minister saying that a civil court will have to determine who gave consent? This will come before the court under the Graffiti Vandalism Bill 2015. I may not contract anyone—this person may be a friend who has said they wanted to paint on my wall. I tell them they may do that, but I am not the legal owner. It is nothing to do with a civil matter under this bill. I ask the minister: under this bill, if only the legal owner can give consent, will we not potentially catch people who had no intention of committing graffiti? They may have thought they had the owner’s consent from the person who occupied the flat, apartment, house, or whatever it may be. If that is the case, there is no necessity for them to have an intention to commit an offence under this bill. Purely the action will be sufficient to find someone guilty under this bill. That is surely not what the minister intends because strict liability—absolute liability—is usually quarantined to very serious criminal offences, not acts of graffiti.

Mrs L.M. HARVEY: Going back to the scenario that the member described, it is a very similar scenario to a tenant of a property performing unauthorised works on a property, which is a civil matter between the tenant and the owner. The contractor who performed the unauthorised works is generally not involved in those sorts of litigation issues. It comes down to what the arrangement was between the tenant and the legal owner of the property. That is the scenario that the member described. This bill is about damaging property by graffiti—that is, destroying, damaging or defacing the property of another person without that other person’s consent. If somebody wants to paint a wall with their graffiti, the onus is on them to determine who can authorise and consent to that graffiti being applied if they do not want to be prosecuted under this legislation.

Dr A.D. BUTI: Under this provision, the fact that I have allowed someone to deface a wall does not mean that I have committed an offence because it is quite clear that the person who did the action of graffiti will be found guilty. The minister is saying that it is up to me to ensure that I have the consent of the legal owner, but surely there is an issue of what is reasonable. If a person occupies a property and I have obtained their consent, believing that they are the legal owner, the minister is telling me that that is not an excuse. Therefore, I ask again whether this is an absolute strict liability offence. If it is, it is quite interesting that the minister is going down that line.

Mrs L.M. HARVEY: Section 24 of the Criminal Code, “Mistake of fact” states —

A person who does or omits to do an act under an honest and reasonable, but mistaken, belief in the existence of any state of things is not criminally responsible for the act or omission to any greater extent than if the real state of things had been such as he believed to exist.

The operation of this rule may be excluded by the express or implied provisions of the law relating to the subject.

In the circumstances that the member described, if somebody thought, in good faith, that they had the legal owner of a property’s consent when they applied graffiti, there would be an opportunity under the Criminal Code to object to that charge being preferred.

Dr A.D. BUTI: Has the minister incorporated section 24 of the Criminal Code into this bill? I do not think she has, so where is the authority to incorporate section 24 of the Criminal Code into this bill? The minister may have incorporated it, which I have not read. The bill incorporates other sections of the Criminal Code, such as section 731, but it does not refer to section 24. This bill has come in after the enactment of the Criminal Code; therefore, the Criminal Code itself, without the express authority or intention of this Parliament, is not automatically incorporated into this bill unless the minister states that it is incorporated into this bill. I see nowhere that section 24 of the Criminal Code is incorporated into this bill.

Mrs L.M. HARVEY: When police prosecute someone for an offence, they need to establish all the facts of the case. Before the police bring forward a charge against any person for damaging property by graffiti under this legislation, they need to prove the elements of the offence. I think the offence is pretty clear. I still put to the member that the scenario he described to me is more of a civil matter. In that case, a complaint would need to be made or police would need to catch somebody in the act of damaging property by graffiti in order for the offender to be charged with the offence.

Dr A.D. BUTI: I do not think the police would need to catch the person performing the graffiti. For instance, say I performed the graffiti and then the legal owner or real estate agent came to do an inspection and found that the wall was defaced. They ask the tenant who did it, and the tenant replies that Joe Blow did it. The police do not need to see Joe Blow actually do it. Joe Blow did it, and the offence under clause 5 means that the person can be found guilty even though they thought they had the owner’s consent. The minister did not answer my question: where is section 24 of the Criminal Code incorporated into this bill?

Mrs L.M. HARVEY: Section 24 of the Criminal Code is not referred to in this bill. I put it to the member that in the scenario he described, it is possible that the person who applied the graffiti could be charged with the offence. They would then need to go to court and the court would need to be satisfied that the person had destroyed, damaged or defaced the property of another person by graffiti without that other person's consent. The court would need to determine—if, indeed, it got to court—what the facts of the matter were, and who, if anyone, was responsible, firstly, for the offence and should be convicted of the offence, and, secondly, who would be responsible for the removal of the graffiti.

Dr A.D. BUTI: I will break up these questions now. Can the minister please give us a clear answer? Is section 24 of the Criminal Code incorporated into this bill?

Mrs L.M. Harvey: No.

Dr A.D. BUTI: I am therefore not sure why the minister quoted section 24 of the Criminal Code. The offence is —

A person must not destroy, damage or deface the property of another person by graffiti without that other person's consent.

I present the scenario to the minister that a person has defaced property having obtained the consent of the occupier or tenant of the property, not the legal owner. Therefore, where is the court's discretion to find that person not guilty? The minister just said that section 24 of the Criminal Code is not incorporated into this bill; therefore, that defence cannot be utilised. On the plain reading of this offence, no intent is necessary; it is just the action that is necessary, which is to destroy, damage or deface the property of another person. However, a person may have done that believing they had the legal owner's consent. That is surely not what the government wants to do under this bill. Surely, this legislation is not to catch people who honestly thought they had the legal owner's consent, but that person was not the legal owner. Those people will be caught under this provision in this bill. It is not a civil matter; under this bill it is a criminal matter.

Mrs L.M. HARVEY: As is always the case, police would examine all the elements and facts of the case. If police were going to charge an offender in the circumstances the member described, that offender would need to put their case to the court, and the court would need to determine whether it was reasonable for that person to assume that they really had obtained the consent of the true property owner to apply graffiti.

Dr A.D. BUTI: Where does this clause state anything that provides any comfort to what the minister just said? Where does this clause state that the court has the discretion to determine whether the person who has done the graffiti has ensured that they have done what is necessary to obtain the property owner's consent if they thought the occupier of the property was the owner? What if a person had gone to the occupier of the property to ask if they legally owned the property, and the occupier replied that they were the legal owner of the property? Under the provision in this clause, that person does not have a defence. As the minister stated, section 24 of the Criminal Code is not incorporated into this bill; even though at one stage the minister tried to imply that it was.

When we look at the legislation before the house, it is not answering a question to say, "The police will do X, Y, and Z." That is not the issue. The issue is: what is the law that the minister is trying to pass in this house? To understand that, we have to go by the words of the bill before us, not what police may or may not do. That is not an answer to the question I asked. The minister gave us the answer that section 24 of the Criminal Code is not incorporated into this bill—even though the minister implied that it was. This has to be clear: as the instigator of this bill in this house, is the minister saying that this is an absolute liability test or is it a strict liability test? If the latter is the case, I wonder whether we are the first Parliament in Australia—maybe we are not—to have a strict liability test for graffiti. A strict liability test for graffiti! Is it that serious? Is it a matter of life or death that we need a strict liability test for graffiti? It is an easy enough question: is this a strict liability test?

Mrs L.M. HARVEY: I go back to what I said previously: graffiti is a means of drawing, writing, painting, or a symbol or mark applied to or marked on property by spraying, writing, drawing, marking, scratching et cetera. The offence in clause 5 is "Damaging property by graffiti", which states —

A person must not destroy, damage or deface the property of another person by graffiti without that other person's consent.

For somebody to be charged with damaging property by graffiti, the facts of the case would need to be determined and police would need to be confident that they had charged the appropriate person with the offence. The courts determine these things all the time. The scenario that the member put to me, I still put to him is more a civil matter. To me, the offence is very, very clear. No, there is no defence and there is no reference to section 24 of the Criminal Code.

Dr A.D. Buti: Why did you mention it?

Ms Margaret Quirk; Mrs Liza Harvey; Dr Tony Buti; Mr John Day; Mr Fran Logan; Acting Speaker; Mr John Quigley

Mrs L.M. HARVEY: That was just by way of my advisers providing me with information about how police would put together some of the public interest test and whether they could prove the facts of the case and whether it would be in the public interest to charge and prosecute somebody for an offence, which is their normal business.

Dr A.D. BUTI: Is the minister telling me that the police will be the judges here, and that it is a determination made by police whether this is an offence or not?

Mrs L.M. Harvey: No.

Dr A.D. BUTI: Therefore, if it is not, and it goes before the court, the court has to determine on the legislation before it. It is an easy enough question: is this a strict liability offence?

Mrs L.M. HARVEY: I have answered that question. I stated how somebody can be charged with the offence of damaging property by graffiti under this legislation. Member, I am not a lawyer and I cannot argue the nuances of the various different —

Dr A.D. Buti: It is a very important point!

Mrs L.M. HARVEY: I understand that it is an important point, but I have nothing further to add or to respond to the member.

Dr A.D. BUTI: This is extraordinary. The minister before us is not prepared to tell the Parliament, and therefore to provide guidance to the judiciary, whether this is a strict liability test. Her defence is that she is not a lawyer. That is no defence. The minister brought the bill before the house; it is up to her to have the ability to answer questions put to her. This is an incredibly important issue: is this offence a strict liability test? The minister said that she has answered that question but she will not provide me with a yes or a no response. Minister, is this a strict liability test? The minister has to answer that question because the judiciary needs some guidance on whether this is a strict liability test or not.

Mrs L.M. HARVEY: I am advised that it is a strict liability offence.

Dr A.D. Buti: It is a strict liability test.

Mrs L.M. HARVEY: Yes.

Dr A.D. BUTI: This is a strict liability test. The Parliament should be aware—even though the minister took about 20 minutes to come to that final admission—that in Western Australia graffiti can be committed without the intention to commit the offence. Minister, that is unbelievably extraordinary. The minister should read textbooks on criminal responsibility. I do not think she will find that offences such as graffiti should have a strict liability test. Strict liability tests are usually quarantined for offences such as drug importation. The minister has now determined that graffiti is a strict liability test; that is quite amazing.

Clause put and passed.

Clause 6 put and passed.

Clause 7: Selling graffiti implement to child —

Dr A.D. BUTI: Members will be relieved that my question is not about the wording of this clause. Why is selling a graffiti implement to an adult not an offence?

Mrs L.M. HARVEY: The reason is that adults can have many purposes for a range of implements that could be used for the purpose of graffiti. Trying to ban the sale of these products to 19, 20 and 21-year-olds, or 45-year-olds, can be difficult, but it is not difficult for juveniles. It is an offence as prescribed under section 216 of the Criminal Code. We plucked that provision from the Criminal Code and put it into this clause.

Dr A.D. BUTI: The minister said the answer is because someone could be selling things to an adult that they could use for other purposes. Children who are 15, 16 or 17 years old could have a very legitimate purpose for buying implements that might be used for graffiti. I am not quite sure why 18 years of age is the arbitrary limitation. A lot of 15, 16 and 17-year-olds are apprentice painters. They could be sold implements, and it would be an offence, but for someone who is 18 or 19, it would not be an offence. If someone is 17 years and 364 days old, it would be an offence. I do not quite understand the rationale behind that. It seems to be quite arbitrary. The minister is saying that an adult may have a legitimate use for an implement but a 17-year-old may not.

Mrs L.M. HARVEY: When this was first introduced into the Criminal Code in 2009 and was being debated in this house, the intention of this clause was to make it an offence to sell a graffiti implement to a child. That was to prevent children from having access to graffiti implements that would make it easier for them to participate in graffiti vandalism offences and property damage offences. The purpose of this is around protecting children from

Ms Margaret Quirk; Mrs Liza Harvey; Dr Tony Buti; Mr John Day; Mr Fran Logan; Acting Speaker; Mr John Quigley

having access to implements with which they could then go on to offend. That is why the provision was included. We have put the onus on the retailers et cetera to take some responsibility, and made it an offence for them to sell a graffiti implement to a child. It has been quite effective. When the bill was proclaimed in 2010, WA Police spent a lot of time engaging with retailers who sell spray cans, for example. Out of this legislative change to the Criminal Code, a lot of the major hardware stores ended up putting their spray cans inside locked doors, and that has significantly limited the supply of graffiti implements to children. In turn, that is limiting the opportunities for children to access these implements and therefore to go on to commit offences. It is around protecting children by making it illegal to sell them graffiti implements.

Dr A.D. BUTI: Of course, as the minister very well knows, 18-year-olds and even people over 18 may be heavily involved in graffiti but they will not be caught under this provision. Does the minister not think something is missing here? I am sure many 18, 19 and 20-year-olds committed graffiti vandalism as 16 and 17-year-olds, but will not be caught under this provision. Does the minister not think this is a weakness of this provision?

Mrs L.M. HARVEY: I do not think it is a weakness at all. The age of 18 is when we take legal responsibility for ourselves as adults. Someone might be an immature legally responsible person at the age of 18, but the acceptance in this country is that when we reach the age of 18 we are legally responsible for ourselves. This has been brought in for children under the age of 18. By definition, we are trying to severely limit their opportunities to obtain graffiti-marking implements and thereby limit their opportunities to commit offences.

Dr A.D. BUTI: I do not quite understand that answer. With this Graffiti Vandalism Bill, the minister is trying to reduce the frequency of graffiti. With this offence not covering people who are over 18, it will limit the ability to reduce graffiti. The minister spoke about having a legal obligation at age 18 but they have criminal responsibility at 10, I think. Member for Butler, does a 10-year-old have criminal responsibility? Whatever it is; I am not quite sure. It has nothing to do with legal responsibility at 18. We are talking about trying to reduce the frequency of graffiti, yet this provision will not catch 18 or 19-year-old people who are committing graffiti offences.

Mrs L.M. HARVEY: That is correct.

Dr A.D. BUTI: That is a bit of an oversight.

Mrs L.M. HARVEY: If I can clarify: we are not making it an offence to sell graffiti implements to people 18 years and over. We have made it an offence for people to sell graffiti implements to children under the age of 18. Obviously, with this legislation being quite prescriptive, it gives us the ability to charge people of all ages with graffiti-damaging offences.

Dr A.D. BUTI: The clause provides that a person must not sell a graffiti implement to a child—someone under 18 years. Is there any defence for that if the retailer honestly believes the person is over 18 or is this once again an absolute liability issue?

Mrs L.M. HARVEY: It states very clearly, under clause 7(2) —

It is a defence to a charge of an offence under subsection (1) ...

Dr A.D. BUTI: Fine; thank you. It would have been good if perhaps the minister had included something like that in clause 5.

Ms M.M. QUIRK: Can the minister confirm something she said yesterday—that is, that no charges have been laid under this offence as it stands in the Criminal Code?

Mrs L.M. HARVEY: That is correct.

Ms M.M. QUIRK: What is the reason for that? The Attorney General brought in this legislation and insisted that it is an important element in the fight against the scourge of graffiti. Has there been an analysis of why this section in the Criminal Code has not been successful?

Mrs L.M. HARVEY: When this legislation first came through in 2010 in the Criminal Code, the police ran an operation in which they informed retailers of their responsibilities under this legislation—that is, it would be an offence to sell a graffiti implement to a child. As a result of that, we got outstanding cooperation from retailers, who put their spray cans and other implements that could be used for graffiti inside locked cupboards. I think the member will find, if she goes into her local hardware store that sells spray cans, they will be in locked cupboards. The high level of compliance from retailers has resulted in no-one being charged to date with selling a graffiti implement to a child.

Ms M.M. QUIRK: It is not necessary.

Mrs L.M. HARVEY: No; legislation can be often used to achieve a policy outcome without necessarily taking someone to court to answer a charge.

Extract from *Hansard*

[ASSEMBLY — Wednesday, 14 October 2015]

p7315b-7328a

Ms Margaret Quirk; Mrs Liza Harvey; Dr Tony Buti; Mr John Day; Mr Fran Logan; Acting Speaker; Mr John Quigley

Ms M.M. QUIRK: As part of the police analysis of why there have not been any charges under the equivalent provision in the Criminal Code, has police intelligence, as the opposition warned at the time, become aware that much of the graffiti implements and material are in fact ordered over the internet?

Mrs L.M. HARVEY: Police are aware of that, member, but charges still have not been laid under this offence.

Ms M.M. QUIRK: I am saying that instead of buying implements from local retailers, offenders are now buying them online and are, therefore, quite assiduously avoiding exposure to criminal offences.

Mrs L.M. HARVEY: If the member has evidence of that I request that she bring that to the police.

Ms M.M. Quirk: I am asking whether the police have evidence of it.

Mrs L.M. HARVEY: Not to my knowledge, but if the member has evidence of that I suggest she take it to police. A child accessing an online sale is a different scenario from an adult selling a graffiti implement to a child, which is what this offence will be.

Clause put and passed.

Debate adjourned, pursuant to standing orders.