COURT JURISDICTION LEGISLATION AMENDMENT BILL 2017

Second Reading

Resumed from 13 June.

HON MICHAEL MISCHIN (North Metropolitan — Deputy Leader of the Opposition) [2.59 pm]: I rise as the lead speaker for the Liberal opposition on the Court Jurisdiction Legislation Amendment Bill 2017 and indicate that, notwithstanding that there are a few questions about the bill, the opposition supports the legislation before the house. The bill was introduced and read a second time in the Assembly on 18 October last year and it was debated, to begin with, on 23 November last year. Debate was then adjourned because, as I understand it, the opposition lead speaker in the other place was on health leave. The opposition appreciated the indulgence of the government in deferring the debate on the bill for that reason. However, it took quite some time for it to re-emerge and be dealt with. It was not until 12 June this year, over six months later, that this rather important piece of legislation, if we are to believe the government, was brought back on for debate in the other place. It was introduced in this place on 13 June this year, which was the first time it seemed to have achieved any level of priority, which is a bit of a surprise given the amount of effort that the government took to deal with things like interest-charging provisions that were redundant and magistrates' retirement ages, because this bill is apparently intended to achieve something beyond a mere sectional interest and achieve what has been spruiked as efficiencies in the criminal justice system.

I know that the Director of Public Prosecutions has been anxiously awaiting the passage of this bill. Given the Attorney General's track record of blaming this place for everything involving his dilatoriness, I am sure that he will have found some excuse for why it has not been dealt with earlier and attributed the blame to us. The fact remains that this bill, which is meant to achieve some significant reforms in the ability of the courts at all three jurisdictional levels—I will touch on that in a moment—to achieve efficiencies and savings and to accelerate the administration of justice, has been sitting around with very little priority at all over the government's other more virtue-seeking pieces of legislation. Nevertheless, we are told that the bill works in conjunction with the increased resources that this government has supplied to the District Court. Of course, that is over a year old now. How it will achieve these efficiencies will be by adjusting the jurisdiction of the three courts in our criminal judicial hierarchy—going from top to bottom, the Supreme Court of Western Australia, the District Court of Western Australia and the Magistrates Court—in order to facilitate the expeditious disposal of the bulk of work that it is thought by the government ought to be properly dealt with by courts lower down the hierarchy.

The bill amends the District Court of Western Australia Act in particular by deleting section 42(2), which deals with its jurisdiction, and replaces it with a new section 42(2) that will preclude the District Court from dealing with certain classes of offences—not only homicides of one form or another, but also offences that may be prescribed in regulations. Going back to general principles, there are two classes of offences in Western Australia that are determined by the term that is applied to each of those offences. Section 67 of the Interpretation Act 1984 provides that any offence that is termed to be a crime or misdemeanour—as I recall, misdemeanour has disappeared from the Criminal Code under reforms made some years ago—is to be dealt with on indictment and all other offences are simple offences. When the code has an offence that is called a crime, that, by definition, needs to be dealt with on indictment. The Supreme and District Courts generally deal with all offences by way of indictment. However, a provision allows for some indictable offences to be dealt with summarily. The bill intends to adjust the jurisdiction to allow the Magistrates Court to deal with a greater range of offences than it is currently allowed to deal with; namely, by reclassifying certain offences as either-way offences—ones that can be dealt with on indictment or dealt with summarily, depending on the gravity of the circumstances of that offence. The bias, of course, is intended to try to deal with those offences summarily. The advantage of having an offence dealt with summarily is that, unlike on indictment, there is no need for the empanelment of a jury or the potential for a trial by jury. The processes are simpler and more expeditious. They are not as formal and, in many cases, cases can be prosecuted by a police prosecutor, rather than a legal practitioner or a prosecutor from the Office of the Director of Public Prosecutions. Nevertheless, the adjustment in jurisdiction will preserve the Supreme Court's exclusive jurisdiction in matters of murder, manslaughter, attempts to unlawfully kill, the procurement of or assisting in suicide, or preventing the birth of a live child.

It is also intended that certain classes of offences will remain reserved. Those will be dealt with by regulation. I will be interested to hear from the minister, so that it is on the record in this place for the information of members, what sorts of offences those are intended to be. Otherwise, the bill changes the status of the offence of threats to kill under section 338B(a) of the Criminal Code from an indictable offence to an either-way offence, making it capable of being dealt with by the Magistrates Court subject to the provisions that apply generally to such offences under section 5 of the Criminal Code. That is achieved by prescribing a summary conviction penalty for that offence of three years' imprisonment as a maximum or a fine of up to $36 000.

The bill further changes the status of certain property offences under the Criminal Code by increasing the monetary limit on the value of those property offences that determines whether they are to be dealt with summarily or on indictment. The current limit on the value of property that tends to be applied is $10 000. For example, a burglary in which the proceeds gained by the burglar are valued at under $10 000 can be dealt with summarily. If the proceeds are valued at over $10 000, it must be dealt with on indictment. It is thought that, with the change in the value of money and, presumably, the more general wealth of our citizens in the state, $50 000 is an appropriate threshold to make that determination. Setting these sorts of thresholds of monetary value and the like is not an exact science of course, but I would like to hear from the minister the rationale for setting the figure at $50 000 as opposed to, say, an inflationary-adjusted figure based on the $10 000 that would have been current in, I suspect, 1996 when those provisions were first introduced. Plainly, we have achieved rather more than an extension based on inflation. Inflation has been running at about 3.5 per cent over the years. This is more than a fivefold increase. Nevertheless, as I mentioned, it is not an exact science. In fact, there is no science to it at all. It is really an assessment of what appears to be appropriate. Likewise, the threshold for frauds and for certain other offences will be lifted to $50 000. There is no need for me to go into detail about those, but I do have a few questions regarding the legislation itself and how it is expected to function. We were told in the second reading speech that there had been a review of jurisdictional boundaries of courts that had been conducted by the Solicitor-General and that in conducting the review, consultation occurred with the Chief Justice of the Supreme Court, the Chief Judge of the District Court and the Director of Public Prosecutions. Something is not plain to me. Maybe I have overlooked it, but there does not appear to have been consultation with the Chief Magistrate. I would be interested to know whether that has been done as well.

Hon Sue Ellery: Yes, there was.

Hon MICHAEL MISCHIN: There was—all right. I would like to know the outcome of that consultation and just what was involved in it. "Consultation" is a pretty broad term. It can mean telling people: "This is what we are intending to do; what do you think about it? Thank you; I am not much interested in the outcome at all, but I have consulted with you and I have heard what you had to say and ignored it." On the other hand, "consultation" may involve a rather more elaborate process of a genuine exchange of views and some tweaking of the initial proposal to adjust it to the informed opinions of those who are being consulted. I would like to get some feedback about what was thought to be meritorious about this proposal, whether certain things that were being advanced were discounted in due course and not pursued, or whether there was some indication of improvements that could be made along the line. I also note that the Director of Public Prosecutions was consulted and that the second reading speech said that data on the performance of the superior courts was also provided by the Department of Justice. I presume it was really the imperatives associated with the workload of those superior courts; that is, the Supreme Court dealing with a range of cases that the government has concluded, and, presumably, the court has indicated it does not think it should, and would rather not, be dealing with, in order to relieve it of the burden that is being placed on it. Likewise, I suspect that was also the case with the District Court because the Supreme Court is losing some of its workload, which is being handed down to the District Court. The District Court no doubt has a view on whether its performance is going to suffer by having the additional workload provided to it, so I would like to hear more about that. Part of the key to that, of course, is the number of cases involved and how much of the court's workload is being readjusted. That leads me to some information that was helpfully provided when I first raised this subject at a briefing provided by the Attorney General last year about the operation of the bill. Some of the information has confused me and perhaps it is an opportunity now to indicate why, so I can get some confirmation. Part of the interest I have is in the readjustment of the workload of the courts, particularly the relief on the Supreme Court, but also the consequences for the District Court. There was a briefing last year on the legislation that the Attorney General was kind enough to provide through his offices, and we were provided with some information about that, in particular the workload, but I received some further information recently and I confess to being a little confused about which to rely on. There is a note under the hand of the then acting director general of the Department of Justice dated 16 November 2017, and another document. I seek leave to table a copy of these documents.

Leave granted. [See paper 2110.]

Hon MICHAEL MISCHIN: The first document is addressed to the Attorney General under the hand of Pauline Bagdonavicius, acting director general of the Department of Justice, and dated 16 November 2017. A second document addressed to me is unsigned and undated, but it was provided to me by email as an attachment towards the end of last week, so it is relatively contemporaneous—I think 24 October or something like that. I will identify the questions I have about those two documents. It is perhaps helpful for the Leader of the House to receive them. I will read them anyway so that other members can understand what I am driving it. The first letter states —

> **COURTS JURISDICTION AMENDMENT BILL 2017**
>
> **Key Issue**

During a briefing on the Courts Jurisdiction Legislation Amendment Bill 2017 the Liberal Party requested some data in relation to the proposed movement of offences between jurisdictions.

In responding to this data request, the response is based on figures originally prepared by the Department of Justice in June 2017, which were sent to the Solicitor General at the time the Bill was being drafted. These figures are based on the calendar year 2016 workload.

Response

The following response has been prepared:

1. Q—The number of criminal cases committed to the Supreme Court in 2016

   A—314

I refer the Leader of the House to the second document, which reads —

COURTS JURISDICTION LEGISLATION AMENDMENT BILL — ADDITIONAL DATA

Key Issue

Following your conversation with the Hon John Quigley MLA, Attorney General, you —

Meaning me —

requested additional data relating to the Courts Jurisdiction Legislation Amendment Bill 2017 (WA) (the Bill). The information below is provided to you to aid the efficient passage of the Bill.

Background Information

The Bill is before Parliament. You requested additional data including:

1. Criminal cases committed to the Supreme Court.
2. Criminal cases that would have been committed to the Supreme Court were the proposed amendments in effect.
3. Additional criminal cases that would have been committed to the District Court instead of the Supreme Court (with the proposed amendments in effect).
4. The effect of the changes to workload across the superior courts.

Current Status

The data provided below outlines the data sought …

Hon Sue Ellery: Honourable member, I have got the letter now.

Hon MICHAEL MISCHIN: I draw the Leader of the House's attention to the number of criminal cases committed to the Supreme Court in 2016. The figure in the first document is 314, but under the equivalent heading in the second document it says 313. It is only a case, but it casts doubt about whether any of the other figures are accurate. We go on to the second figure, which is for the number of cases that would have been committed to the Supreme Court in 2016 if the amendments in the bill were in effect. The first document says 49 and classifies them as the number of homicide offences, but the second document says 64. Does that include simply homicide offences or are there some other offences? It appears in the marginal note that it includes commonwealth offences, but what sorts of commonwealth offences? The first document goes on to state —

3. Q—The number of additional criminal cases that would have been committed to the District Court in 2016 instead of the Supreme Court

   A—265

If these amendments had been in place, in 2016, an additional 265 criminal cases would have been committed to the District Court instead of the Supreme Court. The second document states it would have been 249. To my mind, that raises a question of how the alleged savings in the table in the second document are calculated.

It may not matter much in the scheme of things—plainly a significant workload is being shifted around—but it is significant because one of the Attorney General's commitments was that he would set up a "justice pipeline" model of assessing the implications of any changes to the criminal justice system or to the justice system generally in terms of workload, court resources and the like, and we read in the 2017–18 budget that some $850 000 had been devoted to that exercise. My understanding, perhaps naively, was that the whole point of the $850 000 investment in the "justice pipeline" idea was to make rational, evidence-based decisions on how we tinker with things like the jurisdiction of courts so we can determine what sorts of resources may be necessary down the line. If we play with one section of the criminal justice system—I will devote myself to that, because that is what the bill is about rather than the civil sphere itself and the legal system generally—there are consequences to another part of the system. Inevitably it is not exact and a lot of assumptions need to be made along the way, but this was allegedly a means

of trying to improve that system. As I said, $850 000 was said to be devoted to that function. We have not seen anything of this "justice pipeline" mechanism advertised to us and we do not know how effective it will be. I accept that this legislation was crafted and introduced before that mechanism had been created, but it seems to me that now we are something like a year down the track, some more precise calculation of the effects of these changes ought to be available.

As I have mentioned, the bias in the Criminal Code, unless the provisions in the code provide for certain offences to be dealt with either exclusively summarily or as either-way offences, is to have them dealt with on indictment. I recall reading in *Hansard*—I cannot remember which particular bill; it could have been this one—the Attorney General being critical that under the previous government, changes had been made but that insufficient resources had been devoted to other elements of the criminal justice system. The Attorney General has a habit of saying that sort of stuff, but I would like to know what planning has been done to deal with the consequences of this readjustment of jurisdictions because, plainly, if the work is being reduced, there ought to have been a relief of some sort on the demands on the Supreme Court. We had another instance of reduction on the demands of the Supreme Court through the reforms introduced at the end of 2016 with the dangerous sexual offenders legislation, which allows for a greater period to elapse between reviews. Now that a substantial proportion of cases, by any estimation, will be handed from the Supreme Court to the District Court—according to one figure it will be 49 cases and to another it will be 64, which is a significant proportion of cases—some estimation should be available on the savings that will be made there, the impositions on the District Court and the consequences for the authorities that need to manage that workload. By those I mean not just judicial officers—one would think that the demand for judicial officers in the Supreme Court would decrease, but perhaps the minister can help us with that—but otherwise prosecutors, court staff, and additional judicial officers in the District Court, and the commissioning, if necessary, of additional courtrooms. It must be borne in mind, for example, that for every judicial officer who is appointed, we are looking at potentially an extra 20 court days a month, and that means we have to have people to fill that court—and I do not mean by way of offenders! We have to have people who are able and competent to deal with the cases as prosecutors and associated support staff and, of course, defence lawyers, whether they are engaged from the bar or they are Legal Aid staff. Anyway, I would like some further information about that issue.

Of course, it is quite appropriate that jurisdictions be adjusted from time to time. Before the District Court of Western Australia came into being there were two essentially criminal courts—that is, the Supreme Court of Western Australia and what was then the Court of Petty Sessions and is now the Magistrates Court. Life was a lot simpler back then; burglaries were dealt with by the Supreme Court of Western Australia. After I joined the crown law department, I was told by a very senior prosecutor, who was my mentor at the time, that at one stage—I do not know whether it is apocryphal—in the 1960s there was a month when there were no criminal cases at all on a particular circuit in Bunbury. Back in those days they had a quaint tradition, the judges would travel to Bunbury on trains—they would have the Governor's carriage—and if there was no crime at the end of that circuit, there was a custom in which the prosecutor would formally hand over to the judge a pair of white gloves. Those were the days! If that was in fact the custom—I have no reason to doubt it other than it just sounds too quaint even for Western Australia in the 1960s—it is certainly not something that has happened very often since. In fact, the increase in burglaries and the like was one of the reasons for the establishment of the District Court of Western Australia in order to take that sort of intermediate work away from the Supreme Court.

Of course, certain offences were always considered to be the most serious types and carried a potential penalty of life imprisonment. Apart from homicides, they included armed robberies, on the basis that armed robberies, whether the perpetrator was actually armed or pretending to be armed, were an enormous assault on people's safety. The adrenaline involved in a robbery when someone is armed with a weapon could lead to disastrous consequences, and it was always considered that an offence that carried a penalty of life imprisonment ought to remain with the Supreme Court. Over time, particularly with the increase in the abuse of and craving for drugs, and addicts seeking funds to support their habit, we ended up with more and more of what might be termed, without diminishing the trauma to the victim, low-level robberies—threats to people behind the counter at delicatessens and the like; not a typical bank robbery with bandits entering with firearms, but stick-ups with knives, broken bottles, sticks and all sorts of things. They tended to impose a greater workload on the Supreme Court. I suppose it is one of the sad things about our society that over time those sorts of offences and circumstances have become so common, not, fortunately, as bad as some places, but sufficiently common to be considered low level and run of the mill. There has been a tension toward relieving the Supreme Court of jurisdiction for those sorts of offences. One way to do that would be to prescribe a finite penalty of not life; the other way would be to adjust the jurisdiction of the District Court to allow the District Court to deal with certain offences, notwithstanding that they carry a penalty of potentially life imprisonment, not that anyone, to my memory, has ever received life imprisonment for an armed robbery. If they have, it has been very, very rare. Last year, this government created a precedent in that regard by increasing the penalty to life imprisonment—we have yet to see anything like that penalty, but we will give it time—for those who traffic methamphetamine. That is said to be part of the tough new

approach to drug dealing. We will see whether that makes any material difference to the sentencing patterns in the court and the trafficking of that particular drug.

That was the first occasion on which an offence that carries a penalty of life imprisonment was allowed to be dealt with by the District Court. Now a certain number of offences will also be transferred to that court, one of which is arson-type offences. Our government increased the penalty for arson-type offences to life as a potential deterrent and punishment for those who are inclined to set fires. I note from the debate in the other place that the Attorney General seemed to trivialise arson and said that certain types of circumstances—for example, a family violence situation in which the male partner breaks in, steals various things and also sets fire to a pair of underpants or a brassiere—would be arson and would therefore go to the Supreme Court and that that would be absurd. I would have thought that it would be. Perhaps the minister can assist with the number of those sorts of cases there have been in reality in which something as trivial as that has ended up in the Supreme Court. It may be that it was one of the Attorney General's rhetorical flourishes but I would be surprised if people had been indicted in the Supreme Court for something as low level as that, particularly as there may be other offences, such as criminal damage without the necessity of charging arson, that could just as easily serve the same purpose. No doubt, some work is being done on a broad set of statistics on how many arson cases have been indicted in the Supreme Court over the relevant few years and what sort of burden they have been either in terms of time taken for sentencing or trials.

Hon Sue Ellery: I read the *Hansard* from the other place as well. I did not read the Attorney's comments as diminishing or seeking to trivialise the crime of arson. I understand that the Attorney General was provided advice from the previous Solicitor-General, with the example of a fire in a wheelie bin. I think that is where that reference came from. The Attorney is prone to moments of flourish, but I think that one was based on advice he received from the former Solicitor-General.

Hon MICHAEL MISCHIN: Thanks for that. I accept that, yes, theoretically, that charge is open to setting fire to a wheelie bin. But, of course, setting fire to a wheelie bin that results in the bin being damaged or destroyed is one extreme while setting fire to a wheelie bin that is in a location in which it is prone to set fire to buildings and endanger life is quite another, even though the damage that caused may have been only to the wheelie bin. Of course, many of the bushfires that have caused threats to lives and homes started off as small fires. It may be that the offender had no interest or inclination to cause a general conflagration but did so in circumstances in which lives were endangered, property could be destroyed and the like and it was more through good luck rather than good management that that did not occur. I would like to get a ballpark figure. I am not talking necessarily about precise figures but a flavour of what sort of cases are being moved to establish the rationale for these sorts of provisions.

I was about to get to the other element of that, which is the importance of the public's perception of the gravity of conduct being diluted or reduced by moving an offence from a superior court to a lower court. It is not a reflection of the competence of the lower court or the seriousness with which the lower court may deal with the subject matter before it. Nowadays, we tend to treat burglaries as merely property offences. The majority of burglaries are dealt with by magistrates, which is quite a different proposition from the gravity of burglary being dealt with by the Supreme Court of Western Australia, giving the imprimatur that it is one of the more serious offences not only against property but, indeed, as an invasion of people's security. It is an interesting argument whether an armed robbery in company is materially different from a burglary in company while armed. In fact, I would have thought it is worse, even though one carries only 21 years' imprisonment if it is in a home and the other carries life. In the public's mind—and, I think, in the mind of offenders—the fact that aggravated burglary has been dealt with by the District Court for a long time and armed robbery has been dealt with by the Supreme Court tends to add a gravitas to the proceedings and demonstrates that armed robbery is a very serious matter with serious consequences. The more that offences we regard as serious are dropped to the lower-level courts, the more there is an inclination—perhaps a mental, a psychological and a wrong one—that it is no different from any other simple offence, such as speeding, driving recklessly and things of that nature, and that they are not crimes that one would treat with the level of respect that they should be given. There is that element. I presume the government is able to assure us that there is no risk that people will regard an armed robbery as being less serious because it is dealt with in the District Court rather than in the Supreme Court and, likewise, that some of these offences, such as threatening to kill people, will be regarded as a trivial matter.

One of the features of the Supreme Court, of course, is that it deals with, and will continue to deal with after these amendments are passed, the most serious offences in the criminal calendar. I suppose one can argue the relative seriousness of things, but the taking of lives has always been regarded as the most serious offence in the criminal calendar. Other offences can be equally horrific—sexual assaults particularly on children, maiming, torture, and the like—but certainly the taking of life is the most serious offence. We are told that those cases are taking longer to try and are more complicated than other cases. I should say, of course, that homicide offences, even murders, are not necessarily the most complicated cases to try. Rather more complicated are drug offences, particularly those involving conspiracies, when a great deal of technical evidence needs to be led, not only of a chemical nature but also through interception processes of significant sophistication. This evidence needs to be assembled and

arranged in a way that it will be comprehensible to a jury and establish a case beyond reasonable doubt. Homicides are serious cases.

Given that part of the expertise that a judicial officer picks up in being able to try those sorts of cases may involve accumulating experience in other areas, I am concerned that there may be a limiting of the ability to acquire the necessary skill to adjudicate, to explain a case to a jury in a case in which the concepts can be quite difficult, and to allow a Supreme Court judge to pick up the necessary experience to expand their professional development and competence. I will not name the particular judge, but I recall many years ago when I was a prosecutor, one particular judge had a couple of murder trials and managed to get them wrong on both occasions and then did not do any more crime and, instead, went to the Court of Appeal to tell other people how it ought to be done. Unfortunately, a lot rides on the fact that these are homicides. Secondary victims, as we are well aware, live with the pain of the loss of a loved one for the rest of their lives. They become quite agitated at the very idea that the killer may at one stage be released on parole; yet, what we are looking at is the potential for Supreme Court judges to deal only with homicide-type cases, as they are not only their bread and butter, but also their exclusive jurisdiction. Therefore, I am concerned that not only the variety of the sort of work that they may deal with, but also their ability to extend their professional development and competence may suffer with the limitation on the jurisdiction in that court. Of course, it is an intangible, and it may very well be that that is not the case; I would hope that it is not. But it is quite remarkable that some judges who have had no criminal experience in their careers, having devoted themselves solely to civil cases or even simply been solicitors with some forensic experience, have become remarkable criminal judges—better than some who have practised in that sphere of the criminal law. Nevertheless, variety is the spice of life, and to have judges dealing with one type of case may not be the best proving ground for their abilities, particularly when they may end up having to serve on the Court of Appeal and make the final decisions as to whether a case has been conducted not only according to law, but also in a just fashion so that there has been no miscarriage of justice, and yet not have the breadth of experience of the judges whose performance they are judging.

I have mentioned the question of regulations to bring other offences within the Supreme Court's exclusive jurisdiction. A question arises as to whether there has been any consultation with the commonwealth in that regard. I would like to hear more about that. I have mentioned the question of the justice pipeline and the merits of the information that it is meant to be able to provide government in being able to effect the sort of exercise that we are currently experiencing. As I mentioned, I would like to know more about the number of court days and the like that will allegedly be saved.

Hon Sue Ellery: We have a technical issue over here.

Hon MICHAEL MISCHIN: Someone is having a good time!

Hon Sue Ellery: No, he's not; the rest of us are not either.

Hon MICHAEL MISCHIN: Time weighs heavily over there in the backbench!

Hon Sue Ellery: Yes, indeed it does.

Hon MICHAEL MISCHIN: I am curious about the desire and insistence that there needs to be a relief on the workload of the courts. I recall that towards the end of the previous Parliament, the then opposition introduced the Criminal Laws (Domestic Violence) Amendment Bill 2016. One of its features was to highlight the importance of family violence, or domestic violence as it was termed. It prescribed an increase in penalties for breaches of violence retraining orders, which are offences that can be dealt with summarily, yet what was sought and what was advocated quite vehemently on the part of not only the now Premier, but also one of the proponents of the bill, the member for Armadale, was that the bill should pass with the reclassification of breaches of violence restraining orders as crimes to show how serious they are. Of course, as a matter of definition, a crime would be an indictable offence. What was being sought was that cases of perhaps potentially thousands of restraining order breaches over the course of a year would go to the District Court. The view of the then government at the time was that that was a misconceived idea; nevertheless, the then opposition, the now government, was quite adamant about how important it was and how the government's attitude in opposing the bill was trivialising the importance of domestic violence. There has plainly been a change of philosophy there. Perhaps that bill was misconceived, although the opposition at the time refused to admit that. I am surprised that this reform, which was so important, has not been reintroduced, because what the District Court is losing in terms of workload is not being restored by something as important as breaches of violence restraining orders being dealt with as crimes. I say that particularly because the second reading speech stresses —

> a charge of threat to kill sometimes accompanies sexual offence charges, most frequently it is charged with associated domestic violence charges.

The second reading speech goes on to say —

> Often, the associated charges can be dealt with only in the Magistrates Court, such as common assault or breach of a violence restraining order, or they are either-way offences that could be dealt with in either the District Court or the Magistrates Court. Frequently, the count of threat to kill is the only charge that must be dealt with in the District Court.

The then opposition was proposing that breaches of a violence restraining order, which could involve simply getting too close to someone they are prohibited from approaching, through to making a phone call and all sorts of technical breaches, be dealt with in the District Court. Yet, it appears that threats to kill will now, as a preference, be dealt with by the Magistrates Court rather than the District Court, even though they may involve the breach of a violence restraining order. There seems to have been a reversal of attitude. Maybe the original bill back in the day was simply showmanship and virtue signalling rather than being realistic, and the then government was being invited to dispose of that silly proposition in order that the then opposition could gain some publicity. Nevertheless, I have mentioned my particular interest in the evidence to support what is being proposed and the benefits of it.

It is always going to be a matter of judgement whether a jurisdiction should be adjusted in some fashion or another. I have a fear that, over time, we are going to end up with more and more work of the courts being sent downstream to the lower-level courts. That, in itself, is a concern. It suggests that the system is not able to bear the load that is being placed on it. The corollary of every offence being treated as serious is that none are serious, and the corollary of sending everything down to the lowest level of courts simply for the sake of efficiency means that all offences in those lower courts are treated as low-level and regulatory offences rather than the crimes that they are. Perhaps some more general rethink of our criminal justice system and the manner in which it deals with things is necessary. That is an argument for another day. However, we do not stand in the way of what is being proposed in this legislation.

I hope the minister can assist us in putting on the public record some of the information I have sought—in fact, hopefully all the information I have sought—and that the bill can take effect, albeit that it has taken some considerable time for this bill to be brought on for debate and disposal, so that the benefits that will allegedly flow from its enactment will take effect very shortly. On that note, I indicate once again the Liberal opposition's support for the legislation. I look forward to hearing what the minister has to say either in reply or perhaps in some brief session in Committee of the Whole.

HON ALISON XAMON (North Metropolitan) [3.52 pm]: I rise on behalf of the Greens as the lead speaker on the Court Jurisdiction Legislation Amendment Bill 2017, and indicate that the Greens will be supporting this legislation. I note that the bill follows a review by the Solicitor-General. The review was not tabled, but I was advised post the briefing that it was in fact a memo between the Solicitor-General and the Chief Justice and, as such, it is privileged. I want to confirm whether that is indeed the case.

What the bill is doing is quite sensible and will assist the courts to manage their workloads far more effectively. It will give the District Court jurisdiction over offences that carry a penalty of life imprisonment, except for homicide or unlawful killing–type offences. The District Court is largely a criminal trial court, so it already has the necessary expertise, especially in relation to drug offences. Importantly, its trials are ordinarily shorter than Supreme Court trials, because it does not deal with homicide cases. I am pleased to note that the District Court now has two new judges to help meet the increased workload. I also note that the Attorney General said in June this year that this is still not enough, and it is likely to need another one or two. I note that it has been suggested that, ideally, we would have 10 judges to reduce the District Court waiting time to two months. In any event, the second reading speech states that the proposed division is also consistent with the approach already taken in other states.

The second thing the bill will do is to increase the monetary limit that can be dealt with in the Magistrates Court from $10 000, which was the amount set back in 1996, to $50 000 for some property offences, so that the Magistrates Court can deal with some cases that would otherwise have to go to the District Court. I note that the number of magistrates has also been increased by two.

Thirdly, the bill permits, but importantly does not require, unlawful threats to kill to be dealt with in the Magistrates Court, where the penalty will be up to three years' imprisonment and a $36 000 fine. I note that the second reading speech indicated that this charge is most often associated with other domestic violence–related charges that are being dealt with in the Magistrates Court, resulting in proceedings both in the Magistrates Court for those charges and in the slower District Court for the unlawful threat charge. We know that this is very often not ideal, particularly for victims of domestic violence. This is an important reform that has been specifically requested by domestic violence advocates. I note that the Chief Justice, the Chief Judge, the Chief Magistrate and the Director of Public Prosecutions have all been consulted on the bill. Again, the second reading speech stated that the first three are happy with it, and I understand from the briefing that the DPP is also happy with the bill and in fact suggested the changes regarding unlawful threats.

Clause 2 provides that different parts of the act may come into operation at different times. That is obviously to allow for regulations to be drafted regarding the matters to be prescribed.

I refer to the offences that are now going to be able to be dealt with in the District Court instead of the Supreme Court. Currently under the District Court of Western Australia Act, the District Court has no jurisdiction over indictable offences with a maximum penalty of life imprisonment, with the exception being serious meth crime. Clauses 4 and 5 of the bill propose that now only certain life-imprisonment offences will not fall within the jurisdiction of the District Court and will remain exclusively within the jurisdiction of the Supreme Court. As has been said, these are the most serious offences against the person—murder; manslaughter; attempt to unlawfully kill; to procure suicide; to prevent the birth of a live child as a woman is about to deliver; and a number of other prescribed offences, most notably homicide-related commonwealth offences. The District Court will be able to deal with non-homicide-related commonwealth offences, such as trafficking or cultivating commercial quantities of drugs. I note that regulations will define the commonwealth offences by subject matter rather than by reference to specific offences. This is because WA does not always know exactly how the commonwealth is going to enact or prescribe the offence. The change means that these life-imprisonment offences will now fall within the jurisdiction of the District Court unless otherwise prescribed. We are talking about perjury if done to procure another person's conviction of a life-imprisonment offence; armed robbery; armed assault with intent to rob; arson; and committing, preparing, planning for or financing a terrorist act. I understand from the briefing that the Supreme Court is also not going to lose its jurisdiction over those offences. It is going to be up to the prosecution to choose whether to file in the District Court or the Supreme Court, and an application for transfer to the other court will be possible. Terrorism cases that do not involve the death of a person and can be brought in either court will, in practice, probably be brought to the Supreme Court, which is appropriate. Thankfully, WA has to date had very few terrorism cases, and I hope this remains the case. It is important to note that the Supreme Court will continue to deal with cases that are on foot within its jurisdiction.

We will also ensure that offences can now be dealt with in the Magistrates Court instead of the District Court. Notably, the Criminal Code provides at the moment that threats to kill a person cannot be dealt with summarily, and clause 7 of the bill changes this to provide a summary conviction penalty of imprisonment for three years and a fine of $36 000, as I mentioned. Section 5 of the Criminal Code deals with charges that can be brought in either court, and also sets out the circumstances in which a court can decide that the murder must be tried on indictment, rather than summarily. To quote section 5(3)(a), these include —

> that the circumstances in which the offence was allegedly committed are so serious that, if the accused were convicted of the offence, the court would not be able to adequately punish the accused;

This effectively means that threats to kill can still be tried in the District Court if the circumstances are such that if the defendant were convicted, the summary conviction penalty that has been prescribed would be woefully inadequate.

I also note that there is a higher ceiling for property matters. Currently, burglary and fraud cannot be dealt with summarily if the property is worth more than $10 000. This will increase to $50 000, which is a more appropriate figure. The property value ceiling for summary proceedings for certain stealing offences and fraudulent dealing by a judgement debtor will also be increased from $10 000 to $50 000. I think this will have a positive impact. I agree that it will be a positive reform through the impact of the changes on the number of cases appearing before the courts.

I note that in 2016, the Supreme Court had 314 cases and 49 of those were homicide cases; this is not considered a particularly unusual figure. Defendants usually plead not guilty to homicide offences and homicide trials can take 7.7 days on average. The Supreme Court also had 265 non-homicide cases that could have been dealt with in the District Court had this bill then applied. That includes 179 robbery cases and other non-homicide trials, which usually take 2.9 days on average. As it is, the District Court tends to double-list its cases, because about half its cases that are listed for trial either adjourn or the defendant ends up changing their plea to guilty. In 2016, the District Court had 2 515 cases. Had the bill applied, it would have been dealing with 2 780. It is not known how many of these could have been dealt with in the Magistrates Court if this bill had been applied because, as I understand it, the data warehouse does not capture the information to this level. But, in any event, the number of cases lodged in the Magistrates Court will not change, but more of them may be completed in that court, rather than being committed to the District Court.

To deal with the bill's changes, as I mentioned, the number of judiciary has already been increased by two in the District Court and by two in the Magistrates Court. I have been given undertakings that the government will be monitoring the number of judiciary, and it anticipates, as has been mentioned, a further increase in the number of District Court judges. I am interested to receive a bit more information on how that is likely to be undertaken. Separately from the bill, the government is also considering extending the infringement process to public order offences. If implemented, this would increase the number of cases going to the Magistrates Court.

I refer to the issue of ramifications around legal fees. I understand from the briefing that much criminal work is subject to legal aid and that legal fees for matters in the Supreme Court and the District Court are approximately

the same. Little change in legal fees is likely to result from the proposed increase in jurisdiction of the District Court, other than the fact that the length of the court cases will be reduced more generally; therefore, hopefully, that will have a positive impact. Successful defendants in the Magistrates Court can get cost orders; hence, the increase in the proposed jurisdiction of the Magistrates Court may result in more cost orders. Really importantly, shorter remand periods because of shorter waiting times for trial in the Magistrates Court will be a saving for the community. I remind members that the Department of Corrective Services' last annual report indicated that it costs approximately $297 a day to keep an adult in prison. Anything that expedites that process is very welcome, as far as I am concerned. If, in the future, the infringements process is extended to public disorder offences so that fewer of them proceed to court, that will be a further saving.

I am hoping that, overall, this legislation will result in matters being expedited in a far more time-sensitive way; people being kept out of our prisons for longer periods; and some flexibility and commonsense starting to apply in the way that particular matters can be heard and in which appropriate court. The second reading speech says that the government is committed to ensuring that it will continue to maintain the resourcing issues. As such, I really hope that we are keeping a close eye on this. Ultimately, I think this is a sensible reform. I am hoping that it will enable swifter justice for everyone who is concerned with these processes and it will be more cost-effective, so the Greens will most certainly be supporting this legislation.

HON SUE ELLERY (South Metropolitan — Minister for Education and Training) [4.07 pm] — in reply: I thank members for their contribution to the debate and for their support of the Court Jurisdiction Legislation Amendment Bill 2017. The two contributions ranged over the breadth of the bill and I will do my very best to respond to each issue raised.

Hon Michael Mischin began by asking a question about the nature of the offences, so I will start there. The main criminal offences presently tried in the Supreme Court are state offences and commonwealth illicit drug offences. Apart from illicit drug offences, commonwealth offences do not usually occupy any major time in the Supreme Court's criminal workload. Presently, nine state offences are within the exclusive jurisdiction of the Supreme Court. Five of those are contained in chapter XXVIII of the Criminal Code and are described as homicide-type offences. These are the offences of murder, manslaughter, attempting to unlawfully kill a person, procuring or assisting suicide, and preventing the birth of a live child. There is no plan for those offences to be removed from the exclusive jurisdiction of the Supreme Court. The remaining four state offences within the exclusive jurisdiction of the Supreme Court—because they may carry a term of life imprisonment—are the offences of perjury in respect of a crime that carries a punishment of life imprisonment, armed robbery, assault with intent to rob, and arson. Three major categories of events, apart from the homicide-type offences, make up the Supreme Court's criminal workload. Over the past five years, the statistics show that there have been between approximately 147 and 192 offences a year in relation to robbery, extortion and related matters in the Supreme Court, which is a category involving the offences of armed robbery and assault with intent to rob; between 36 and 57 offences a year in relation to property damage and environmental pollution, which is a category involving the offence of arson; and between five and 24 illicit drug offences against commonwealth laws a year. Together, those three categories have accounted for between 70 and 80 per cent of criminal cases in the Supreme Court and have occupied a number of sitting days approximately equivalent to the number of sitting days for two full-time judges. The predicted effect of altering the exclusive jurisdiction of the Supreme Court next year will be to reduce the number of criminal cases commenced in the Supreme Court from in the order of approximately 300 cases a year in 2019 to approximately 60 cases a year, and to send approximately 240 cases to the District Court. This will substantially reduce the number of Supreme Court sitting days for crime a year. That is a significant benefit for the Supreme Court, because unless the legislation is passed, it will be necessary for either two additional Supreme Court judges to be appointed or there to be an unacceptable backlog in processing criminal cases in the Supreme Court. For a number of years, the former Chief Justice publicly commented that the resources of the Supreme Court were overstretched, and the present Chief Justice has confirmed that this is the position. Arrangements have already been made for the appointment of two additional District Court judges to address the increasing case load that will come about because of the change in the Supreme Court's exclusive jurisdiction.

It is also appropriate that the Supreme Court judiciary should be occupied with only the most complicated cases. Not all cases in the categories that are to be sent to the Supreme Court have warranted the use of the Supreme Court—for example, a case of arson by setting a wheelie bin on fire, which was the subject of the interchange that I had with Hon Michael Mischin by way of interjection.

Hon Michael Mischin: There was a lot of play on setting a wheelie bin on fire. How many cases of setting wheelie bins on fire has the Supreme Court dealt with and how much time did they occupy? How long did the trial take?

Hon SUE ELLERY: I do have some correspondence that I will refer to in a moment, but I probably cannot tell the member the number of cases.

Hon Michael Mischin: It doesn't sound common.

Hon SUE ELLERY: In any event, I have a piece of correspondence that I will refer to in a moment. For example, a case of arson by setting a wheelie bin on fire would have to be tried in the Supreme Court, even though the criminality involved in such an offence is comparatively minor.

Hon Michael Mischin: Sorry; again, I will test that. It depends on what they are charged with. If the charge is criminal damage as opposed to arson, it does not have to go to the Supreme Court. So it is a question of just commonsense being applied to the indictment process in the same way as whether the charge is aggravated burglary or a property offence claiming that it is more than $10 000 or under $10 000 worth of property involved. It is not inevitable at all.

The ACTING PRESIDENT (Hon Martin Aldridge): Order, members! I think this discussion is probably better had in committee with the assistance of advisers to help facilitate the minister's reply.

Hon SUE ELLERY: I was about to make the point that I am not the Attorney General; I am representing him and I am providing the advice that I have been provided with and, if it needs to be examined in greater detail, we can do that in committee.

The proposal to alter the exclusive jurisdiction of the Supreme Court so that it is limited to only homicide-style cases is consistent with the approach that has been adopted in New South Wales and Victoria. The commonwealth offences that will remain within the exclusive jurisdiction of the Supreme Court will be prescribed by regulation imposing a limit upon the jurisdiction of the District Court in relation to a list of identified offences. I can table that list of offences. I table a document titled "Schedule 2: Commonwealth offences punishable by life imprisonment".

[See paper 2111.]

Hon SUE ELLERY: That limit will then be operative by reason that section 39(2) of the commonwealth Judiciary Act invests state courts with federal jurisdiction only within the limits of their several jurisdictions, whether such limits are as to locality, subject matter or otherwise. Broadly, there will be three categories of commonwealth offences that remain in the exclusive jurisdiction of the Supreme Court. They are all categories punishable by life imprisonment. There are treason offences, war crime offences and terrorism offences. It is appropriate that they should remain in the exclusive jurisdiction of the Supreme Court, but so far they have not had a significant effect upon the workload of the Supreme Court in its criminal jurisdiction. The proposed change to the exclusive jurisdiction of the Supreme Court is warranted having regard to the nature of the type of offences that may now be tried in the District Court. It is also urgently necessary in order to ensure the efficient disposition of criminal cases. It is something that has been sought by all heads of jurisdiction involved. As I said earlier, it is a measure that brings the standing of the Supreme Court into alignment with the interstate counterparts of New South Wales and Victoria.

An issue was raised about lifting the threshold for property offences from $10 000 to $50 000 and the question asked was how the $50 000 was reached. The amendments to the jurisdictional value of offences relating to property matters that can be tried summarily before magistrates is appropriate because these values have not been reviewed since 1995. As well, the civil jurisdiction of magistrates has increased so that they deal with civil claims involving property with a value of up to $75 000. It is consistent with that jurisdiction that magistrates should be able to deal summarily with criminal matters involving property with a value of up to $50 000. The effect of moving certain cases into the summary jurisdiction of magistrates is that it will increase the case load of magistrates. The effect of that has not been quantified, but the Attorney General is certainly live and open to the heads of jurisdiction drawing any issues to his attention based on the good working relationship that he has with the Chief Magistrate.

In respect of the summary disposition of certain offences under section 338B of the Criminal Code, the present situation is that all cases involving a threat to kill must be tried on indictment by the Supreme Court or the District Court. However, consultation with the Director of Public Prosecutions has disclosed that the most frequent situation in which threats to kill are made are in the context of domestic violence. Very often domestic violence cases are dealt with summarily before magistrates. However, if there has been a threat to kill, this aspect of the case must be dealt with separately before the District Court. That has the effect that cases that may otherwise be dealt with summarily need to have part of them dealt with within the District Court. That may not reflect the proper criminality of the overall situation. As a result, the amendment to ensure that in appropriate cases questions about a threat to kill can be dealt with summarily ensures that all relevant matters can be dealt with in one hearing. That is important, as Hon Alison Xamon made the point, particularly for victims of family and domestic violence and their families. That does not mean that it will be appropriate in every case to deal with a threat to kill offence summarily; however, it provides that option when it is appropriate.

There was a question about consultation. I advised Hon Michael Mischin by way of interjection that, indeed, the Chief Magistrate had been consulted and believed that the measures were sensible. Hon Michael Mischin raised an issue about a discrepancy between the number of cases provided to the opposition in 2016 and the number

provided more recently in the last week or so. The best advice that I am able to provide the house is that the information provided in the most recent information in 2018 is correct. The only explanation that I have been provided with is that clearly there were three errors in the document that was provided in 2017, but the information that has been provided and tabled today by Hon Michael Mischin, which is headed "Courts Jurisdiction Legislation Amendment Bill — Additional Data", is the most current and is the best interrogation of the data available.

The question was raised about arson. I refer to a letter from the then Chief Justice in October 2012 to Mr Joseph McGrath, Director of Public Prosecutions. I will table this letter, but essentially it is about prosecutions for arson. It reads —

> The purpose of this letter is to inquire whether there are guidelines within your office with respect to the exercise of the discretion to prosecute the offence of arson.
>
> My query is prompted by the case of State of WA v Chester, in which sentence was passed by Justice McKechnie last Friday. The material facts presented to the court by the prosecutor were to the effect that following the breakdown of a domestic relationship of 10 years duration, the offender burnt five items of underwear in the rear yard of the house which he had occupied with the owner of the underwear. The estimated value of the underwear was $200. The offender was fined $500.
>
> … bringing a charge which brought the offender within the exclusive jurisdiction of the Supreme Court, facing a potential maximum penalty of life imprisonment, was plainly inappropriate.

Hon Michael Mischin: I would agree with that, but it is a question of what charge was laid, and the indictment presented in respect of that charge. You can overcharge.

Hon SUE ELLERY: Correct. I will table that document.

[See paper 2112.]

Hon SUE ELLERY: An issue was raised about the potential deskilling of Supreme Court judges. I can advise that it is this government's intention to ensure that the judges will be appointed from amongst experienced crime practitioners. The question was asked about negotiations with the commonwealth about the capture of commonwealth offences in this legislation. I am advised that no negotiations occurred with the commonwealth on this issue. The former Solicitor-General advised that the commonwealth vests jurisdiction in the states to try offences in accordance with the way their courts are structured. The commonwealth confers that jurisdiction to the state by virtue of section 39(2) of the Judiciary Act 1903.

I think I have dealt with the proposition that somehow making unlawful threats to kill an either-way offence lessens the seriousness with which family and domestic violence charges are dealt with by the justice system. The answer to that is that this government is doing a range of things in the area of family and domestic violence, but victims and their advocates have drawn to the attention of the government, probably for some time I would expect, that the current split in the jurisdiction for dealing with those matters when they are linked with family and domestic violence in fact holds up, makes more complicated and therefore drags out, if you like, the potential trauma of victims. This is a more efficient way to deal with that. It remains, of course, a discretionary matter, depending on the particulars of the case.

The other issue that was raised was whether the shift in moving cases from the Supreme Court to the District Court, and then from the District Court to the Magistrates Court would result in lesser penalties being handed down on serious offences. I make the point that no penalties are diminished by the bill; only the jurisdiction is changed for a number of offences. I think Hon Alison Xamon wanted confirmation that the status of the review, if you like, in documentation form, was indeed by a memorandum from the previous Solicitor-General. I am not able to table that document, but I can confirm that that is correct.

With those comments, I again thank members for their contributions to the debate and commend the bill to the house.

Question put and passed.

Bill read a second time.

Committee

The Deputy Chair of Committees (Hon Martin Aldridge) in the chair; Hon Sue Ellery (Leader of the House) in charge of the bill.

Clause 1: Short title —

Hon MICHAEL MISCHIN: How did the review arise that resulted in, or at least informed, this legislation? Was it at the request of the Attorney General that there be a review with a view to reducing the workload for the Supreme Court and/or the District Court, or was it as a result of an instruction to commence a review to see whether anomalies in jurisdiction needed to be addressed?

Hon SUE ELLERY: The current Attorney General asked the former Solicitor-General to review the current jurisdictional boundaries so as to improve the delivery and efficiency of the criminal justice system in WA.

Hon MICHAEL MISCHIN: That review came to the conclusion that a significant saving would be realised in the Supreme Court by reducing, as I understand it, the number of committals from something in the order of 300 per annum down to 60 per annum. Is that right?

Hon SUE ELLERY: I am advised the answer is yes.

Hon MICHAEL MISCHIN: How many judges of the Supreme Court will be necessary to deal with a reduction to one-fifth of the criminal workload that is currently theirs?

Hon SUE ELLERY: It would not be accurate to assume that there would, of necessity, be a complete total reduction in the work of that jurisdiction. I will table a letter from the Chief Justice of Western Australia to the Attorney General dated yesterday, 29 October 2018. It reads —

> I write in relation to the *Courts Jurisdiction Legislation Amendment Bill 2017*, which I am advised is again before Parliament this week. In that context, it is important that I apprise you of the following …
>
> Even with that significant commitment of judicial resources to the criminal list, the work of the court is such that the time taken to bring matters to trial has been steadily worsening. At the time of the introduction of the *Courts Jurisdiction Legislation Amendment Bill 2017* (October 2017), the median time to trial was 30 weeks. The median time has not dropped below that level since and, indeed, has steadily increased. It is now 36 weeks, and has remained that way for the past 3 months.
>
> Particularly given the high number of accused awaiting trial on remand, this trend is of considerable concern.
>
> The *Courts Jurisdiction Legislation Amendment Bill* 2017 was, of course, intended to address the resourcing needs of the Courts … and to ensure that offences are dealt with in a timely manner.
>
> The criminal workload of the Supreme Court will only increase in 2019, with a number of trials of significant duration due to commence, including the trial of Bradley Edwards which (with pre-trial matters and the hearing) is likely to occupy one judge full time for the better part of a year. At the same time, as you are aware, Justice McGrath, who previously sat full time in crime, has recently been appointed to head a Commonwealth Royal Commission. While arrangements have been made for some aspects of his criminal case load to be covered, those arrangements are not a substitute for a full time judge.

He goes on to make some other comments. I table the document.

[See paper 2113.]

Debate interrupted, pursuant to standing orders.

[Continued on page 7385.]