## CRIMINAL CODE AMENDMENT BILL (NO. 2) 2011

*Second Reading*

Resumed from 23 June.

**HON MICHAEL MISCHIN (North Metropolitan — Parliamentary Secretary)** [10.06 am]: The bill before the house seeks to amend the Criminal Code and is specifically focused on an amendment to the Criminal Code that was passed in September 2009; that is, the Criminal Code Amendment Act 2009. That act amended sections 297 and 318 of the Criminal Code to effectively ensure that a person found guilty by a court of causing bodily harm or grievous bodily harm to a police officer, and to certain other categories of public officer, will face, in the case of an adult, a term of imprisonment of at least six months and, in case of a juvenile aged 16 and over, a term of detention of at least three months.

Before charges can be laid under these sections, prosecutorial guidelines must be adhered to, requiring all charges to be approved by the police prosecuting division in Perth; and, of course, in the event that the charge is one of causing grievous bodily harm, that would require the Director of Public Prosecutions to consider his prosecutorial guidelines and the various public interest considerations that are contained in those, before a decision is made on whether to indict, or, indeed, on the form of the indictment to be presented in the court. So it may very well be in any case, as is not unusual in any criminal matter, that a charge against section 297 or 318 may not in fact be laid, or a different charge will be presented.

Of course it must be understood what we are talking about here in terms of offences under those sections. What triggers a sentence of a minimum term of imprisonment is the doing of bodily harm in the case of a serious assault under section 318. "Bodily harm" is defined in the Criminal Code as any bodily injury that interferes with health or comfort. That can range from the relatively trivial, through to a significant harm that does not endanger life or is likely to cause permanent injury to health. So there are a wide range of possibilities in that. Grievous bodily harm, on the other hand, is any bodily injury of such a nature as to endanger life or to be likely to endanger life or cause or to be likely to cause permanent injury to health. The injuries suffered, for example, by Constable Butcher in the notorious case that has been raised in this place on several occasions was an instance of grievous bodily harm.

As to mandatory terms of imprisonment generally, these are not the only ones in the Criminal Code. There is a third strike provision with respect to burglaries of homes and there is also the penalty for murder, which is a mandatory term of imprisonment, murder being, in one of its manifestations, a death resulting from actions that are intended to cause grievous bodily harm. Court records indicate that, since these laws were passed and up to June this year, charges under these provisions have been laid on 43 occasions. Of the 19 finalised cases, 13 have resulted in a term of imprisonment, four charges have been dismissed by the courts without conviction and two have been varied or withdrawn by prosecutors. Again, one must bear in mind that, before the minimum term of imprisonment is imposed, there must nevertheless be a conviction either by way of a plea of guilty or by a conviction after trial, whether before a magistrate or, in the case of a grievous bodily harm offence against a public officer, before a court convened of a judge and jury unless, of course, the option is taken for trial by judge alone.

Importantly, these laws were introduced with a view to increasing the level of protection for police officers and other public officers such as ambulance officers, fire and emergency service officers, volunteer fire brigade officers and the like. They are not simply for the protection of police officers; they are also for the protection of a wide range of public officers who, as a matter of course, come into contact with people who may be violent, who may be under the influence of alcohol or drugs and who wish to take out their aggressive tendencies on people whom we as members of the Western Australian public engage to be the contact between us and those people. In the case of police officers, we rely on them for our security. In the case of ambulance officers, we rely on them to attend to matters in which lives and safety and health are paramount and in which they can offer assistance—likewise with prison officers and with fire and emergency service officers. People who they deal with as a matter of course on our behalf are far too often under the influence of drugs or alcohol or are simply aggressive or may have, as seems to be the concern in this case, some kind of mental illness or mental impairment. I will come to that in due course.

Dealing with simply police officers alone, there was a drop of something like 30 per cent in reported assaults against police officers in the first year following the law's introduction. That was part of the objective of the legislation. As I pointed out at one stage during my reply in the second reading debate on the bill, I can recall that when I first started practising criminal law, any assault against a police officer, without necessarily even causing bodily harm, almost inevitably resulted in a term of imprisonment of some length, whether it was a relatively short one of perhaps weeks or months or something more substantial. Police officers are at the front line of our security and safety and they were cloaked in the authority and with the status of the government as

government officials and as people who were doing the community's work on the community's behalf. At one time the presence of a police officer or the entry of a police officer into a volatile situation resulted in a calming of that situation. What has developed over a period of time with far more flexible sentencing by the courts is a diminution of their protection and that cloak, that shield of authority, has been eroded. Until at least the passage of these laws, what was tending to happen was that police officers would enter into a volatile situation and the troublemakers would immediately focus their attention on the police officer, with results that we have far too often seen of police officers being injured or maimed for a significant period or, indeed, crippled for life. The message needed to be sent out to the troublemakers that if they wished to touch a police officer, they would bear the consequences of any injury that occurred from that. That has had the desired effect of a reduction in assaults against police officers.

**Hon Simon O'Brien**: It's quite a significant reduction too, isn't it?

**Hon MICHAEL MISCHIN**: Indeed, that is my understanding. I think in the first year there was a reduction of some 30 per cent but I understand that the figures are more like a 40 per cent reduction since the start of the —

**Hon Alison Xamon**: It's irrelevant to this debate though because we're talking about —

**Hon MICHAEL MISCHIN**: It is entirely relevant to this debate.

**Hon Alison Xamon**: No, it's not, because we're talking about people who are not criminally culpable for their actions.

**Hon MICHAEL MISCHIN**: So the member says. We will get to that. The member needs to understand what she has been saying because what she said in her second reading speech was incorrect. I will get to that if I am allowed.

Also, significantly, the Criminal Code Amendment Act 2009 introduced section 740A of the code, which requires a review of the provisions. That will occur in September 2012. The bill was passed in September 2009, and it is now September 2011. In the two years that have elapsed—we have another year to go before a mandatory statutory review of the provisions—we have seen a significant prima facie reduction in assaults against police officers. I cannot tell members what the reduction has been in respect of other public officers who are also protected by these provisions, but I would suggest that if any substantial information can be brought forward of any evidence that these laws are not working in the manner that they should be working or of any evidence that they are creating significant injustices, there has been ample time for that to be brought forward and there remains time for that to be advanced before September 2012 and the mandatory statutory review of the operation of this legislation. By evidence I mean not material that expresses fear as to how they may operate but evidence of how they operate. I will get to that shortly also.

Turning back to the law, there are two circumstances in which an accused can avoid being convicted of an offence due to some kind of mental impairment. They apply to any person charged with any offence in Western Australia, whether the penalty carries a mandatory minimum term of imprisonment or otherwise. If a person is charged with a criminal offence and is so mentally impaired that they did not understand what they were doing, were unable to control their actions or did not know what they were doing was wrong, a court is required to find them not guilty on account of unsoundness of mind, or what is commonly known as the insanity defence under section 27 of the Criminal Code. That remains unchanged and that applies to these provisions as well. When a person charged with a criminal offence faces trial and they are sufficiently mentally impaired that they are either unable to understand the nature of the charges against them or cannot decide whether to plead guilty to the charges or properly defend the charges against them, the court will find them unfit to plead and the charges will not proceed. That is under sections 16 and 17 of the Criminal Law (Mentally Impaired Accused) Act 1996. Arguments may certainly be raised as to the consequences of taking those courses of action and whether they are sufficiently nuanced to achieve justice in every case. However, any proposed laws that members wish to put forward for this house's consideration in that regard is a debate for another day. It is not a case of trying to tinker with provisions in the Criminal Code on a particular basis as opposed to a more general basis. If, for example, the consequences of being unfit to plead are a problem, some consideration is needed about what to do with the Criminal Law (Mentally Impaired Accused) Act rather than tinkering with the principle of specific offences under the Criminal Code. What we have here is an attempt to qualify the penalties that are available for two offences under the Criminal Code but not others. What does one do, for example, with section 294 of the Criminal Code for which no minimum term of imprisonment is required but which generally involves a substantial term of imprisonment—to my recollection, 20 years—for doing grievous bodily harm with intent? There is no attempt to apply this sort of qualification for either that or the penalty for murder and the like.

Turning back to the Criminal Law (Mentally Impaired Accused) Act, when a court finds a person not guilty by reason of insanity or unfit to plead, the court faces a decision about whether to release the person or make a custody order. For alleged serious offences in higher courts, custody orders are required to be made. For alleged offences in the Magistrates Court, where all but two of the mandatory sentencing charges that we are dealing

with have been finalised, a person will be released unless the court considers it would not be in the public interest to do so. Therefore, people who have a diminished sense of responsibility by and large would be the subject of a custody order, particularly if we use the example of someone who has psychotic episodes from time to time and is a menace to not only him or herself, but also other members of the community whether they happen to be police officers or other public officers. The rarity of this procedure, however, is illustrated by the fact that more than 100 000 cases of any kind are dealt with in the Magistrates Court each year and a total of two custody orders were made by the Magistrates Court in the last five years.

The effect of a custody order is that an accused is detained in an authorised hospital, prison, juvenile detention centre or declared place. We accept entirely that a declared place does not exist in Western Australia and has not since the introduction of the Criminal Law (Mentally Impaired Accused) Act in 1996, but I am proud to say that this government is dealing with that issue and addressing that failure. That is a work in progress. Under section 24 of the Criminal Law (Mentally Impaired Accused) Act 1996, an authorised hospital will be considered appropriate only if the accused has a mental illness that is capable of being treated. In that respect, the Mentally Impaired Accused Review Board is required to report once a year on persons subject to a custody order and recommend whether that person be released conditionally or unconditionally. Under section 33 of the act, the reports are required to have regard to the mentally impaired accused person's circumstances, the care available to them, the nature of the alleged offences and the level of risk that they pose.

Turning from the general to the specifics of the Criminal Code Amendment Bill (No. 2) 2011, the bill proposes to amend the Criminal Code so that sections that require the court to impose a mandatory term of imprisonment do not apply to cases in which the person convicted was impaired to a significant extent by a mental impairment. Clause 5 of the bill seeks to insert a new subsection into section 318 regarding serious assaults, for example. Proposed section 318(6) states —

> Subsections (2) and (4) —

Which are the relevant provisions that impose a term of minimum mandatory imprisonment for adults or minimum detention for juveniles —

> do not apply to a person whose judgment or behaviour at the time of the offence was impaired to a significant extent by mental impairment.

Clause 4 of the bill inserts into the Criminal Code new section 297(9), which has an identical purpose. I remind the house that section 297 of the Criminal Code deals with the offence of causing grievous bodily harm; that is, bodily injury of such a nature as to endanger, or be likely to endanger life, or to cause permanent injury to health—in other words, to maim or cripple someone—or to be likely to cause permanent injury to health. The word "likely" in those cases is not an academic abstract concept; it is simply that if the injury is left untreated, it is more probable than not that it will result in death or permanent injury to health and wellbeing. I remind the house that we are talking about very, very serious injuries in this particular case to public officers doing our work on our behalf. The concept of "impaired to a significant extent by mental impairment" is not elaborated on in the bill. The definition in section 1 of the Criminal Code, states —

> The term ***mental impairment*** means intellectual disability, mental illness, brain damage or senility;

It also states —

> The term ***mental illness*** —

Which is part of the definition of a mental impairment —

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

In other words, if a person is otherwise of sound mind, for want of a better term, but has drunk themselves into a stupor or has decided to take drugs and their reason is deranged by that and they are unable to know what they are doing is wrong, control their actions or appreciate what they are up to, they are not protected by the insanity defence and they do not fall within the concept of a mental illness.

**Hon Helen Morton** interjected.

**Hon MICHAEL MISCHIN**: That is correct. Hon Helen Morton has raised the issue that, of course, that applies at that particular time, which is quite so.

**Hon Helen Morton**: There's Korsakoff's syndrome, which is a disorder caused by long-term alcohol abuse.

**Hon MICHAEL MISCHIN**: However, it is arguable that the definition that will apply in this bill also embraces what is in the Mental Health Act 1966, which provides that a person has a mental illness if they suffer from a

disturbance of thought, mood, volition, perception, orientation or memory that impairs judgement or behaviour to a significant extent. That definition is quite broad and quite uncertain. Whether something amounts to a mental illness in those circumstances depends on the diagnosis of whether their judgement or behaviour is significantly impaired. That broader definition could include clinical depression, manias and anxiety disorders, although the consumption of alcohol or drugs alone is expressly stated not to be sufficient to amount to a mental illness. Disorders compounded by substance misuse, whether by alcohol or drugs, will fit that definition if they are sufficient to impair judgement.

The point, even within the strict bounds of what is proposed in the criminal court, assuming it picks up those definitions in the Criminal Code, is that there is the potential that the sorts of people who generally assault police officers when their judgement or behaviour is significantly impaired—whatever that might be, on a sliding scale—will escape the consequences of their actions. For example, those who have a substance abuse problem that impairs their self-control because they have suffered some minor brain damage as a result of their alcohol ingestion that results in them having a short temper, violent overreaction to circumstances or some animus towards authority, whether or not they are affected by drink at the time would, arguably, have their behaviour or judgement impaired within the meaning of the exception that is being proposed. Notwithstanding having done significant bodily harm to a public officer, whether a police officer or otherwise, or grievous bodily harm to a police officer or public officer, they will not be subject to the provisions in the act. Likewise, someone suffering from clinical depression that significantly impairs their judgement or level of anger, but does not otherwise affect their ability to function in the community and to have a responsible position within the community, who chooses on a particular occasion to lash out at a police officer and cause that police officer harm, would not be subject to the mandatory sentencing provisions. Even if a person suffering from a mild intellectual disability—who has acquired brain damage brought on by, say, petrol sniffing, cannabis use or other drug use—completely understood the nature of what they were doing and intended to assault a police officer, ambulance officer, fire officer or prison officer, they would still fall within this exception. The very people whom we engage police officers to deal with and to protect us from on a daily basis would be the people who are not subject to the mandatory sentencing provisions. The very people that ambulance officers are far too often called upon to help and are put at risk by are the very people who would not be restrained by these laws.

There seems to be an email campaign against this legislation; I have received quite a number of emails. Interestingly, apart from some introductory paragraphs, they are all of a standard form. None of them bears up under any examination, because they are all based on the same misconceptions of the law, for a start. A number of them purport to say that somehow the 2009 act is unconstitutional, or something; I really do not understand where they get that stuff from. But one of the examples that tends to be used and, indeed, I think was alluded to by Hon Alison Xamon, is that mandatory sentencing might result in a person suffering a psychotic episode, and that the mandatory sentencing provisions should not apply to people who do not know that what they are doing is wrong. Well, that is the basis for insanity under section 27, if it can be shown that that inability to know what they are doing is wrong is as a result of mental illness. We do not get to the stage of mandatory or any other sentencing, or to the stage of a conviction, if that is the case. There seems to be a desire to pick an extreme example to attack the fundamentals of this legislation, but it is an example that simply does not bear up under any legal analysis, and ought not to arise. If a person does not understand the nature of their actions, does not know that what they are doing is wrong or is not capable of controlling his or her actions due to mental illness, they are not guilty of that offence by reason of unsoundness of mind, full stop.

What will no doubt be raised is that there are consequences to that. If a person is found not guilty on the basis of unsoundness of mind, they might actually go into an institution for some length of time.

**Hon Alison Xamon**: Indefinitely.

**Hon MICHAEL MISCHIN**: It may be indefinitely if they are, in fact, a danger to the community. The argument seems to be, "We don't actually want to be held responsible for our actions. Sure, we may have maimed or injured someone, but we don't want to be held responsible for that because we aren't able to control our actions. But we don't actually want to go into an institution to be treated; what we want is something else where we are not being held responsible for our actions and don't suffer any consequences for that". That is the logical conclusion from that argument. Hon Alison Xamon can frown and shake her head, as she often does, but what she said in her second reading speech is legally wrong. I accept that she has vast experience as a legal practitioner in this area —

**Hon Alison Xamon**: You might want to think about all the legal practitioners who are coming out in support of this bill before you go down that path, including the Chief Justice of the Supreme Court. Are you suggesting that he doesn't know anything about the law either?

**Hon MICHAEL MISCHIN**: I have not read what the Chief Justice has had to say, but —

**Hon Alison Xamon**: Well, maybe you should before you start saying that!

**Hon MICHAEL MISCHIN**: As I understand it, some of it seemed to be based on a complaint —

**Hon Helen Morton** interjected.

**The PRESIDENT**: Order!

**Hon MICHAEL MISCHIN**: He was talking about mental impairment, as I understand it, but he was also talking about how the court processes relate to injustices. I remind Hon Alison Xamon that the Chief Justice of Western Australia and his fellow judges determine the court processes. They publish procedural rules and they have a vast array of discretions for dealing with anyone, whether affected by mental impairment or otherwise, and determining whether they understand the processes in their courts and the like.

**Hon Alison Xamon**: He's opposed to this bill. He's opposed to the mandatory sentencing provisions.

**Hon MICHAEL MISCHIN**: If the Chief Justice has a problem, he ought to be putting forward a submission to amend the law, if there is a legal problem.

**Hon Giz Watson**: Are you going to take any notice of that?

**Hon Alison Xamon**: Yes, you'd ignore it anyway.

**Hon MICHAEL MISCHIN**: Hon Alison Xamon is simply wrong in her legal analysis to say that someone who cannot control their actions on the basis of a legitimate mental illness may end up being sentenced to a term of mandatory imprisonment. If that happens, it is because they have not revealed all the circumstances to the court, because the court is obliged under the law to consider defences such as insanity. If a tactical or strategic decision is made by the accused and the accused's legal advisers to avoid the consequences of a not guilty finding on the grounds of unsoundness of mind, that is something that is out of the control of the government and out of the control of the courts, and nothing in the legislation will change that.

The government is aware that some advocacy groups are claiming that people are now afraid to call the police when a family member is facing a psychotic episode because they may face a custody order if they are acquitted by reason of that unsoundness of mind. It may very well be right that they may face a custody order. Perhaps other avenues for dealing with people ought to be included in legislation, but this legislation is not the context in which to deal with them because this legislation provides no option. If the member wants to address other options and formulate some proposals for dealing with people who come into contact with the criminal justice system, she should put them up in legislation and not simply qualify a penalty provision, because that does nothing. Again, Hon Alison Xamon rolls her eyes!

**Hon Alison Xamon**: I've done more on that than anyone!

**Hon MICHAEL MISCHIN**: No, she has complained a lot about it.

**The PRESIDENT**: Order!

**Hon Alison Xamon**: I keep putting forward suggestions and I'm here, and the Minister for Mental Health keeps telling me that these suggestions are being picked up.

**The PRESIDENT**: Order! Can we keep the comments to the substance of the matter before the house, rather than who did, you did, what you did not do and who did not do what? Let us keep the debate to the issues.

**Hon MICHAEL MISCHIN**: The bill before the house does not alter that prospect. Those consequences exist for any alleged criminal offence when a person is unfit to plead or is found not guilty due to unsoundness of mind. Nothing in the bill alters that, although an inappropriate example is used to advance the cause in the bill.

As to people being afraid to call the police, the government has no control over potential fear campaigns that may be run to promote a particular cause. I will make an observation again on the matter of logic. Let us assume that a person has psychotic episodes of the nature on which Hon Alison Xamon relies, and that those episodes have been going on for quite some time, even before the passage of the Criminal Code Amendment Act 2009. We are led to believe that every time this uncontrollable person has one of these episodes and puts his or her family in fear for their safety, the police would be called and there would be the prospect—hopefully not regular or inevitable—that the person would turn on the police, an ambulance officer or any other public officer who is called out and cause them injury or some grievous bodily harm, and that those people in fear for their safety would be quite prepared to call out public officers to protect them. Now, however, because of the prospect of something happening, the person who is the threat or the danger—with no greater probability of it happening, presumably—might do some harm to the public officer and be sentenced to a term of imprisonment, and that is deterring them from putting public officers in the line of danger. Previously the logic seems to be that they did not mind that a public officer could be harmed, because the argument could be raised that the accused was not in control of his or her actions and ought not to be held responsible for them. But now that will change.

I have some difficulty with understanding the logic behind that. The consequences do not change. If a person having one of these so-called psychotic episodes were to maim a police officer, one would expect that unless they came within the ambit of unsoundness of mind, they would almost inevitably go to jail anyway. The consequence of maiming someone and permanently injuring their health is almost inevitably a term of imprisonment. But now it seems, because this is being reinforced by the legislation, people are taking a different course of action. I find that remarkable. I do not understand the thinking behind it. All I can attribute it to is a fear campaign that is being generated for ideological reasons by people who are opposed to minimum terms of punishment.

The bill before the house and the public advocacy for it seems to have unintentionally equated all mental illnesses with psychotic episodes. The passage of these laws would oversimplify mental illness and would stereotype and stigmatise many people with a diagnosed mental illness. For example, it would stigmatise people diagnosed with depression, a bipolar illness or an anxiety disorder as inherently dangerous, violent and not responsible for their actions. That is quite a change in emphasis. In the past 20-odd years the emphasis has been—rather than on isolating people with a mental illness generally as some kind of second-class citizens and putting them in institutions—on putting them into the mainstream of society and regarding them as people with a problem that needs to be addressed from time to time, but otherwise functioning, responsible members of the community. Now someone with a mental illness whose judgement or behaviour may be impaired will be treated differently from the point of view of any form of criminal responsibility in that they will not suffer the same consequences as others because they will be regarded as not capable of controlling their behaviour or actions. I stress again that if someone has a mental illness or a mental impairment within the definition of the Criminal Code and they really cannot control themselves when they commit what would otherwise be regarded as an act, or a failure to do an act by omission, that would bring them within the ambit of an offence, then unsoundness of mind would be the appropriate verdict and they would not get a conviction. Once again, if some treatment options ought to be involved, that is a matter to be addressed by the Mental Health Act and other like provisions, rather than playing with the penalties under the Criminal Code.

Furthermore, the bill introduces a much lesser standard than the standard of not guilty by reason of insanity. Any person facing a mandatory penalty of imprisonment will be able to raise the issue of mental illness. In the sentencing process the court would need to be satisfied beyond reasonable doubt that the person was not suffering from a mental illness or that it did not significantly impair their judgement or behaviour, which may be well nigh impossible to do. I think the almost inevitable consequence is that anyone coming before the courts would turn to that option and would require the prosecution to establish that they were not suffering a mental impairment and that their behaviour and judgement at the time of committing the assault or doing the harm to the public officer was not as a result of a significant impairment of their judgement or behaviour, which may be well nigh impossible. Essentially, we would be going back to the level of protection available to public officers that was the case two years ago before this government took this step that has had a marked reduction on assaults against police officers. If, in fact, the 2009 act has influenced public behaviour, it is because of the strong deterrent message that it has sent. Passing this amendment would fundamentally compromise that deterrent message.

The government has closely monitored the use of the 2009 amendment. As mentioned, court records indicate that between September 2009 and June 2011, police sought a mandatory penalty on 43 occasions, and of the 19 matters finalised, 13 have resulted in a conviction and mandatory jail term, and there was a drop of nearly 30 per cent in the first year following the introduction of the laws. At no time in the past three years has a mentally impaired accused been subject to a custody order as a result of charges under these laws. If Hon Alison Xamon is aware of any instances—any evidence—I am sure the Attorney General will be pleased to hear it. However, none to my knowledge has been presented. Therefore, this proposed legislation is not based on any evidential approach, but simply, one would suggest, on an ideological approach—having failed to oppose successfully these laws back in 2009 when they were coming through the house.

One of the unfortunate features of the public debate about this bill is that it has created a perception of risk for families that is not based entirely on fact. In the Magistrates Court, where the majority of assaults against public officer charges are heard, a court will make a custody order from mentally impaired accused only if it considers it warranted given the nature of the offence and the level of risk the offender poses. At other times, they will simply be released.

The concerns that have led to this private member's bill are not really about any injustices being done to the mentally impaired. As I say, no evidence has been presented other than speculation and possibilities. It really ought to be about how mentally impaired people are dealt with in the criminal justice system. As I say, there may very well be room for improvement in that area, either by way of attention to the options under the Mental Health Act or the Criminal Law (Mentally Impaired Accused) Act or, indeed, of a public administration nature; however, those are not being attended to by this bill, which in essence results in a watering down of provisions

shown to address the causes of crime; that is, deterring people who would otherwise be prepared to vent their anger—by assaulting police officers, ambulance officers, fire officers or prison officers—from taking that course of action and assuming responsibility for their behaviour and suffering the consequences if they choose to proceed as they wish. Nevertheless, the government is looking to address some of the more unsatisfactory features of the manner in which the criminal justice system and our mental health system operate. We are working towards creating and funding a declared place for mentally impaired accused who are subject to custody orders. I expect that the Minister for Mental Health will have more to say on that subject should she choose to speak. We are further consulting on proposed changes to the Criminal Law (Mentally Impaired Accused) Act in light of the Holman review and developments since that time. We are developing a proposal for a mental health diversion court along the lines of the drug diversion court that is currently in place and operating successfully.

**Hon Robyn McSweeney**: For the first time in history.

**Hon MICHAEL MISCHIN**: For the first in WA, as the Minister for Child Protection has pointed out.

We are creating some better guidelines and procedures to ensure that specially trained people will attend incidents involving mentally impaired accused with or instead of the police. I should just say that one of the solutions being advanced by advocates in favour of this bill and against the mandatory imprisonment provisions is that somehow the training of police officers will solve all problems. There is a limit to what a police officer can do. It is all very well to say, when one is not involved in volatile situations and having to make decisions on the spur of the moment, what a police officer, ambulance officer, prison officer or fire officer ought to do when facing often violent or irrational people. When they fail to deal with the situation as one might if one had the opportunity of hindsight and reflection, it is easy enough to complain that they are not properly trained, which is really, to my mind, a cop-out. Of course people can be trained, but one must always bear in mind that the decision-making process in dangerous situations or what may appear to be dangerous situations cannot be expected to be perfect in every case. People will get it wrong. We get things wrong in this house. We get things wrong in debates. Accidents and mistakes happen. We throw an awful lot of responsibility onto our public officers and expect them to get it right all the time. Sadly, the media, and even members of this Parliament when there is some advantage in doing so, are all too ready to blame our public officers when things do not go as desirably as one might hope or that with the wisdom of hindsight could have been addressed. They do a terrific job under difficult circumstances.

I am not here simply defending the actions of police officers; we are talking about public officers generally. Ambulance officers do not have the ability to use force in the way that a police officer is licensed to do. Fire officers often attend emergency situations, including the scene of car accidents in which liquor or all sorts of aberrant behaviour may have been involved and at which emotions may be running high. I take this opportunity to pay tribute to their dedication to duty. Surely, from time to time, things will go wrong and people will make the wrong judgement call. However, I suggest that by and large they do a terrific job and that they warrant the protection, imperfect as it may be, that the 2008 amendments provide. The reduction in assaults on police is, I think, a tribute to the success of that act.

We will continue to monitor the situation until these laws come up for review in September 2012. During that review, the government will scrutinise all the outcomes and consequences of these laws and the cases to which they have been applied. However, at this time, there is simply no evidence that these laws are not operating as they were intended to operate. There is no evidence of any unjust outcomes being produced. There have been unfounded and anecdotal concerns, but that is not a reason to amend legislation ahead of that review. It is unfortunate that those who are ideologically opposed to government legislation that sets minimum terms are fuelling the fears of those with mental illnesses and the fears of their families and loved ones and doing them a disservice to promote their own cause. The government will not be supporting this bill.

**HON HELEN MORTON (East Metropolitan — Minister for Mental Health)** [11.00 am]: At the outset I would like to seek some clarification, by way of interjection if possible, on the reference in the Criminal Code Amendment Bill (No. 2) 2011 to "mental impairment". Clauses 4 and 5 of the bill refer to "impaired to a significant extent by mental impairment". The bill proposes to use the definition of "mental illness" in the Mental Health Act, and although Hon Alison Xamon is asking us to look at the definition of "mental impairment" in the Mental Health Act, there is no such definition in that act. I am making the assumption that throughout this bill Hon Alison Xamon is not talking about mental impairment covering the four aspects of mental impairment—intellectual disability, dementia, senility and acquired brain injury. Can I assume that Hon Alison Xamon is not covering those aspects in the bill, because the Mental Health Act does not cover those parts of the definition?

**Hon Alison Xamon**: No; that is actually incorrect. By interjection, if I can respond, Mr President, when I refer to "mental impairment" I am making very specific reference to "mental impairment" as defined in the Criminal Code. As the minister is aware, the Criminal Code also defines mental illness as one of those four categories. It

was always intended that all four would be covered because, as I am sure you would agree, we need to look at these protections for people who do have brain damage, intellectual impairment and also those who are experiencing senility. The advice that came from the drafters—I would like to clarify that this was, of course, drafted by the parliamentary drafters—was that they thought that in order to further clarify mental illness it would also be useful to cross-reference that category within the mental impairment category with the definition within the Mental Health Act. As has already been picked up rightly, it is important also to clarify that the use of alcohol and drugs is not part of that defence and both the definitions of mental illness within the Mental Health Act as well as within the Criminal Code are not inconsistent, but it was to provide full clarification of what was intended to be covered.

**Hon HELEN MORTON**: So the issue is that in wanting to make use of the definition within the Mental Health Act that broadened the definition of mental illness within the Criminal Code to cover all of the elements of mental illness that are in the Mental Health Act.

**Hon Alison Xamon**: And, as the minister is also aware, within the Mental Health Act, the definition of mental illness, importantly, defines what is not a mental illness as well. By further extending that out, it is ensuring that those identified areas within the mental illness are not able to be used as defences within this provision.

**Hon HELEN MORTON**: I wanted to get that clarified because it goes to the fundamental position that I have taken on the bill. I will start by saying that I have the greatest respect for Hon Alison Xamon's attempt to progress the mental health reforms that we are seeking in Western Australia. I have no concern about the member being quite genuine on that, but unfortunately, in this instance, I believe the member is misguided and I will go on to explain why I believe that to be so.

It is my belief that if this bill were passed it would set back the cause of reform; in particular, it would perversely impact on the objective of according greater dignity and respect for people with a mental illness, and I believe that it would add to the stereotypical stigma of criminality that many people have towards people with serious mental illness. I will go on to explain why I believe that to be so. I again mention that the majority of people with a serious mental illness are very responsible, very capable people who have responsible jobs, great relationships and terrific connections with family and friends, and who live in the community and make a significant contribution to the community. People should always remember that that is the majority of people with a serious mental illness. Often that mental illness is managed quite well and is stabilised through the use of medication and other forms of ongoing support that people might have. It is no different from someone who might have high blood pressure getting ongoing medication to stabilise and manage that condition or somebody with a diabetes condition who has a range of medication and other treatments to stabilise that condition. The majority of people with a serious mental illness as described in the Mental Health Act are able to live very well and very successfully in the community. I do not want to see anything at all that will start to reduce the move that we are creating, and that everyone is actively involved in, not just the government but the whole community of people—those with a mental illness, their carers, their families and people who provide services. There is a significant move at the moment against stigmatising people with a mental illness. As I said, I do not want to see anything happen that will turn that back in any way.

Why do I say that this bill could do that? I am not talking about this from a legalistic point of view like the parliamentary secretary but from the point of view of a person who is interested in people with a mental illness and how they live successfully in the community. Basically, section 27 of the Criminal Code provides the defence that a person is not criminally responsible for an act or omission on account of unsoundness of mind. I might add at the beginning that if I could change anything in the Criminal Code, it would be to take out the word "insanity" and to put in another word, because I do not use that word and I am not going to use it. Section 27(1) reads —

> A person is not criminally responsible for an act or omission on account of unsoundness of mind if at the time of doing the act or making the omission he is in such a state of mental impairment as to deprive him of capacity to understand what he is doing, or of capacity to control his actions, or of capacity to know that he ought not to do the act or make the omission.

In layman's terms—my terms—that basically provides the defence that if the illness causes a person not to know what they are doing and that they are out of control through the phase of an acute psychotic episode of an illness, for example, and if it results in a continued use of alcohol and drugs, which has produced a deteriorating state of mind—I use the example of Korsakoff's syndrome which alters a person's state of mind as a result of continual use of alcohol and drugs—that is covered in the Criminal Code. The bill suggests that we use the definition of "mental illness" in the Mental Health Act to describe mental illness.

**Hon Sue Ellery**: Do you appreciate that relying on the defence of insanity —

**Hon HELEN MORTON**: No, I do not like using that word; use another word.

**Hon Sue Ellery**: That's the term —

**Hon HELEN MORTON**: That is section 27, yes.

**Hon Sue Ellery**: I understand what you're saying about the nature of the old-fashioned word, but that's the term in the code.

**Hon HELEN MORTON**: Yes.

**Hon Sue Ellery**: Do you understand that if you rely on that as a defence, there are a whole range of other consequences —

**Hon HELEN MORTON**: Hon Sue Ellery just has to wait; I am coming to all of that.

I am still talking about my very first point, which is around the stereotyping and stigmatising of this particular issue. The Mental Health Act, quite rightly, defines "mental illness" as —

> … a person has a mental illness if the person suffers from a disturbance of thought —

Most people can think about what thought disturbances are like; people might be having hallucinations or delusions, or having other less significant levels of disturbances of thought. According to the act, mental illness can be disturbance of mood; that is, when people have depressive illnesses and the bipolar-affected disorders, when moods are swinging and are not that easily controlled. All of these things, I might add, have the ability to be quite successfully managed through a variety of means, including medication. "Volition" is also in the definition, which means that people are not interested in doing anything—they do not want to get up or do not want to make anything happen. The definition also includes disturbances around perception, orientation or memory that impair judgement or behaviour to a significant extent.

**Hon Alison Xamon**: It can be significant.

**Hon HELEN MORTON**: Yes, to a significant extent.

**Hon Alison Xamon**: Exactly.

**Hon HELEN MORTON**: That is stated in the Mental Health Act.

**Hon Alison Xamon**: So it is not enough to simply say, "I am suffering from depression."

**Hon HELEN MORTON**: I agree. Hon Alison Xamon is saying that anybody who has, by cause of their mental illness, been determined to be out of control and unsure of what they are doing and making poor judgements on the basis of their unsoundness of mind is covered currently under the Criminal Code. We are also saying that it is already in the Criminal Code. But Hon Alison Xamon is wanting to put something in that is almost identical, except for one thing—they do not have to be out of control. They do not have to be not knowing what they are doing. They just have to have an altered mood that impairs their judgement or behaviour, or they just have to have a disturbance of thought, for example.

I prefer the definition in the Criminal Code that basically says that a person has to be unable to control what they are doing, unable to control their thoughts at the time, and that they have to be considered to be out of control. I think that what that says is that a person can have a serious mental illness—I do know people with serious mental illnesses who, for example, hear voices—but not be out of control; they know how to control that. They know how to continue to live successfully in the community, despite that. Why on earth does Hon Alison Xamon want to make it so that these people are considered not responsible for their behaviour?

**Hon Alison Xamon**: Because if they are not doing criminal acts, it is not an issue.

**Hon HELEN MORTON**: I know. So, the opposite of that is, if they are committing criminal acts, should it be an issue?

**Hon Alison Xamon**: And if it is as a result of their significant mental impairment, that should be taken into account!

**Hon HELEN MORTON**: That is already covered under the Criminal Code.

**Hon Sue Ellery**: Only if they use the defence of insanity.

**Hon Alison Xamon**: Of insanity! Yes, and if you want to stigmatise someone, make them go for the plea of insanity.

**Hon HELEN MORTON**: It is not an issue. I believe—I am telling Hon Alison Xamon my belief on this—that if Hon Alison Xamon says that all people who have a serious mental illness can now be excluded from the consequences of behaviour, I think that the member is stigmatising —

**Hon Alison Xamon**: It just means that they get charged under other offences and judicial discretion applies! That's all that it means.

**Hon HELEN MORTON**: Allow me to get to that point.

As I have said, my experience is that there are many, many very responsible, capable people with a serious mental illness—with mood disturbances; who hear voices—but they hold responsible jobs, they have great family connections and relationships, and they go on to make great community contributions. They want to be treated like any other member of the community. They do not want the stigma of being excused for bad behaviour.

**Hon Sue Ellery**: Minister, will you take an interjection? You said that you were going to talk about the consequences of relying on the defence of insanity.

**Hon HELEN MORTON**: If the member will wait, I will get there. The member just has to wait. I have 45 minutes, and I am using up too much of it with members' interjections.

**Hon Giz Watson**: You can apply for an extension.

**Hon HELEN MORTON**: Yes.

I do not think they want the stigma of being excused for their bad behaviour, unless they were going through a bad patch; unless they had a psychotic illness with delusions or are going through something that made it so that they were honestly out of control at the time. So, anything that suggests otherwise—that is what Hon Alison Xamon's bill would do—is not necessarily in the best interests of people with mental illness. It is my belief that any suggestion that people with a serious mental illness, with thought or mood disturbance—they are mostly able to be controlled, as I mentioned, through medication—should be excused —

**Hon Alison Xamon**: Subject to judicial discretion.

**Hon HELEN MORTON**: — from taking responsibility for their behaviour when it is not out of control is the reverse form of stigma.

**Hon Alison Xamon**: Oh God!

**Hon HELEN MORTON**: I am saying that the better approach is that that is already contained in the Criminal Code. If the bill were to pass, people would be clamouring for a defence of mental illness, even those who do not have one. Those who have one would be clamouring for the suggestion that they were out of control at the time, even when they were not. In my mind, this bill would further criminalise mental illness, which is a significant attempt that we are trying to get away from.

This form of stigmatisation is very subtle, and I will just give members another example of how subtle it is. The Mental Health Law Centre recently sought my support for an idea that involuntary detention and treatment of people with a mental illness in an authorised mental health facility would wipe out fines in the same way that a person going to prison would wipe out their fines. I thought to myself, "Well, that sounds like a good outcome for the person with the mental illness; why wouldn't you want to get your fines wiped out for being an involuntary patient?" Then I thought, "This is just equating mental illness and treatment in an involuntary facility with criminality and prison again." This is saying that going and having involuntary treatment in an authorised facility is the equivalent of going to prison and being a prisoner. I thought, "There is no way that we're going to go down that track." This bill would do the same sort of thing. There is no way we are going down that track, because people with a mental illness want to be treated, when they can be, the same as everybody else. When they are out of control, they are already covered under the act. I know the member wants some more information on that, and we will get there. Just because someone has a serious mental illness, it does not necessarily mean that they do not know what they are doing or that their actions are out of control, or that they are unable to realise that what they are doing is wrong.

Of all the things that have come out of this debate, and of all the things that have come out of the tabling of this bill, the thing that has been of most concern to me has been something that I consider to be deliberate—it could be consequential—but if it not deliberate, then there has not been an attempt to fix the situation. It is of concern to me that there has been some deliberate—or consequential—misleading of people about the current act. If this is so, we may have to provide some funds to the Association of Relatives and Friends of the Mentally Ill, to the Western Australian Association for Mental Health, to the Mental Illness Fellowship of Western Australia, to Carers WA, and to the other organisations that are specifically charged with providing support and education and accurate information to the families of a person with a mental illness, to try to fix that misinformation.

**Hon Sue Ellery**: Do you share your colleague's point of view that those organisations have been involved in an ideological scare campaign?

**Hon HELEN MORTON**: I do not think he was referring to those organisations. I think he was referring to members of Parliament.

**Hon Sue Ellery**: Check *Hansard*, because he was referring to emails.

**Hon HELEN MORTON**: The main area of concern that I have heard about is carers not wanting to contact police; they would rather have their house and their belongings damaged in some way, or sustain personal injury, than call the police in the case of a family member who has a mental illness and is out of control. I would like to know what people have done, when that misinformation has come to their attention, to correct that misinformation—or have they made use of that concern, and in fact built on it, so that this would provide additional ammunition for this kind of bill to come through? I think that of all the issues that could be raised in this area, the greatest disservice that anybody could do is enable people to go along with that misinformation and misapprehension, and sustain that injury, or sustain that damage in their own home.

**Hon Sue Ellery**: It is the advocacy groups that are saying that.

**Hon HELEN MORTON**: If the advocacy groups need some assistance to get it right, we will help them with that, too.

**Hon Sue Ellery**: So the advocacy groups do not know what their members and the people they represent are saying to them?

**Hon HELEN MORTON**: I want members to look at the actual process that is gone through. This is my understanding of the process, and this is my understanding of the briefings that I have had. My view is a bit the same as that of Hon Michael Mischin, in that, before mandatory sentencing came in, people were calling the police for assistance. I do not think anybody is disputing that. I think everybody is comfortable with that. I am assuming that, at that stage, if a person was out of control and someone needed police assistance, they would call the police. What happens now? The person who needs assistance can still call the police. That police officer may sustain bodily harm. I have the guidelines in front of me that the police use when they determine whether to take the matter any further, but there is obviously some discretion that the police use at that stage; it probably depends on how serious the damage is, or whatever.

But that is not where the decision is made. The suggestion that somehow or other it is left up to the police to decide whether to take this any further is absolute rot. That is another piece of misleading information that needs to be corrected. It is not the individual police officer who makes that decision. The police officer can decide whether to take it any further, or leave it alone. But if he takes it further, there are another two stages.

**Hon Sue Ellery**: It is still the police service.

**Hon HELEN MORTON**: The next stage is that it goes to a lawyer at the Office of the Director of Public Prosecutions. Once again, I think Hon Michael Mischin has demonstrated to us that the number of cases that have gone to that stage in the last two years is 43; and, at that stage, the DPP has said that, no, only 19 of those are really worthy to take any further. I do not know the reasons that those cases have been dismissed at that stage, but it is certainly within the discretionary powers of the DPP to go a bit further and look at those cases.

But that is not where the decision is made. There are two options for screening people out at that stage. The police officer might decide not to take it any further. The DPP might decide not to take it any further. But it then goes to a magistrate, and the magistrate decides whether to take it any further. The magistrate still has the option of determining, under the Criminal Code, whether the person has a defence under mental illness.

**Hon Alison Xamon**: Under insanity.

**Hon HELEN MORTON**: Okay. Hon Alison Xamon can say that if she wants to keep saying it. Say it really loudly so that everybody can hear! Get it out of your system!

Several members interjected.

**The DEPUTY PRESIDENT (Hon Col Holt)**: Order, members!

**Hon HELEN MORTON**: Under section 27 of the Criminal Code, the magistrate still has another process for screening. So, at this stage, there have been three processes of screening—and, as Hon Michael Mischin has said, of the 19 cases that went to a magistrate, 13 have gone on to conviction. So there is obviously a process that is working there as well.

A lot of discussion has taken place here around whether, at that point in time, rather than going on to conviction, a custody order should be made. A person with a mental illness may have been severely incapacitated at the time the alleged event took place—it could have been, for example, a psychotic episode—and the person may now, over a period of a couple of weeks, have been stabilised with medication et cetera. Therefore, just because the person has a mental illness, that does not mean the person cannot plead. The person can plead. That person knows and understands the consequences. Members need only read the book *The Centre Cannot Hold*.

Debate adjourned, pursuant to temporary orders.