CRIMINAL CODE AMENDMENT (IDENTITY CRIME) BILL 2009

Second Reading

Resumed from 19 November 2009.

HON SUE ELLERY (South Metropolitan — Leader of the Opposition) [8.06 pm]: I rise to support the Criminal Code Amendment (Identity Crime) Bill 2009, the subject of which, as members will recall, was initiated in the other place by the former Labor government. I want to take a few minutes to talk about the nature of the crime this piece of legislation deals with, and then address the details of the legislation. Members would be very conscious that technology in Australia, indeed around the world, is moving very fast. The benefits and advantages that come with new ways of managing information and accessing information also, obviously, provide new opportunities for criminal activity. That is why this legislation is before us tonight. In preparing my remarks this evening I have referred a little to a briefing paper published in June 2008 by Dr Lynne Roberts from Curtin University entitled "Cyber-Victimisation in Australia: Extent, Impact on Individuals and Responses".

The bill that is before us deals with identity theft and is a form of a range of crimes that now come under the heading of "cybercrime"; that is, any crime that is facilitated or committed using a computer network or hardware device that allows information and communication technologies that are networked to provide cheap, fast, secure, and anonymous communication with multimedia capacity. Identity theft itself, which is the precise subject of the legislation before us, really involves misappropriating information online; that is, trying to access other people's email addresses or passwords, or, indeed, as we are dealing with tonight, other ways of using people's identities, typically for financial gain.

Information can be harvested online. There is a whole new range of language that is used to describe how this information is collected—words like "phishing" and "pharming", which are not spelt with an "f" but with a "ph", come to mind as ways that information can be garnered online for the purposes of creating false identities in order to commit further crimes. The prevalence of this form of identity theft is growing all the time. It is what might be described as an emerging form of criminal activity. The technology that we have today increases the ease and reduces the cost of getting information and collecting and storing data about ourselves. The flip side of that is that it provides easy access to undertake criminal activity.

The paper that I referred to at the outset of my comments was published in June 2008. To get some idea of the scope of the crime that we are talking, part of the information that it provides indicates that hacking was used to obtain account information for some 40 million credit card customers that was held by the United States company Custom Card Solutions, and a recent estimate suggests that approximately 40 per cent of all identity frauds are facilitated online. That paper was published in 2008 based on research conducted prior to that, so I would think that the numbers have in fact significantly increased since that date.

The problem with crime of this nature is that stolen identities have a range of flow-on effects for the victims. In the first instance, obviously there is stealing money from people's accounts or off their credit cards, which of itself has a significant impact. But perhaps there are more insidious impacts for people relating to people's credit card ratings; the denial of credit, which is described in this paper as a secondary form of victimisation; increased insurance and credit card interest rates; the cancellation of credit cards; the denial of services; and continued contact by collection agencies. People can also then be subject to further inquiry by police because someone has used their identity or parts of their identity for other sorts of crime. Those are all reasons that, unfortunately, we need legislation of this kind.

The most recent Western Australian example that brought this matter to our attention as legislators was the skimming that occurred through the automatic teller machines at some well-known fast-food outlets in Perth. I do not know whether this is a good reflection of my lifestyle—members might think otherwise—but I had no idea that people used ATMs to buy fast food. I certainly was aware that people drove through the drive-throughs, but it never occurred to me that they would not pay cash and would lean through the window and use their card.

Hon Liz Behjat: You can even get cash out.

Hon SUE ELLERY: Yes. I do not know why the notion never struck me. I certainly do those things at shops, but it never occurred to me that people would drive through and pay for their burger with a card. Clearly people do it and some people were the victims of skimming activities through the ATMs used at those fast-food businesses in Perth.

The purpose of access to financial gain is the immediate reason that people would use those facilities—that is, to get immediate access to other people's money. But, more importantly, information gained in the crime that this legislation deals with is then used for the purpose of creating false identities for further criminal activity. The bill before us defines the terms that constitute the new offences and creates some new offences. In the first instance, anyone who uses identification material that is gained via these means for another offence, as opposed to just

having the information, which could be for legitimate reasons, will be committing an offence. The possession of identifying material that has been gained illegally with intent is also one of the new offences, as is the possession of the equipment that is used to copy identifying material. I hasten to add that sometimes it is entirely reasonable for someone to have access to another person's identification—for example, family members. When I take my mum shopping, I carry her purse in my hand because of her disability and so I will walk around with all her identifying material.

The legislation will also give the court the power to issue a certificate to the victim after the end of the appeal period or, if an appeal has commenced, after that appeal is determined. The purpose of that certificate is to give the victim something that he or she can use to prove to others that he or she has been the victim of one of these crimes. Although I think that is commendable, I would not mind some comments from the parliamentary secretary. Given the length of time that such matters may take before the courts, I wonder whether a certificate that cannot be issued until the very end of that process would be of any immediate practical use to the victim, and whether there might be other things that could be done. I do not intend to hold up consideration of the bill, but if the parliamentary secretary could make some comments on that matter, I would appreciate it.

There are some amendments on the supplementary notice paper in the name of Hon Giz Watson relating to the length of the sentence attached to the new offences. I will listen carefully to the debate and make a decision accordingly. I note that the main difference between the legislation that was proposed in the other place by the Labor Party and that which appears before us now is the length of time of the sentences, but I will listen to the debate. The briefing indicated to me that there have been further movements in consideration of those matters as other jurisdictions have dealt with this issue since it first came before the Standing Committee of Attorneys-General.

With those comments, I indicate that the Labor Party will support the legislation. I am pleased to be part of the legislation being dealt with eventually. I am disappointed that this is a new form of crime that we have to legislate for, but I think it is important that we do so to give Western Australians some peace of mind that we are taking action to ensure that we do something about a crime that can continue to dog people's lives for a considerable period after the matter has been resolved because of the very nature of using people's identity and what that might mean for many years to come. With those comments we support the legislation.

HON GIZ WATSON (North Metropolitan) [8.17 pm]: We are dealing with the Criminal Code Amendment (Identity Crime) Bill 2009. Obviously, this is a government bill that was introduced in November 2009. Interestingly enough, at that point it was considered an urgent bill and passed through the other place the following day with the opposition's support. In our place, it was referred to the Standing Committee on Uniform Legislation and Statutes Review, and that committee tabled its report on 2 March 2010.

Proposed new section 489 inserts a definition section in relation to identity crime. It is worth noting that this includes an extensive definition of "identification information". It is an inclusive definition so it will cover new forms of identification information that emerge in the future. Although the proposed section refers to the identification information of a person, the term "person" under the Interpretation Act 1984 includes a public body, company, or association or body of persons corporate or unincorporate. It is probably worth noting that it is interesting that this bill seeks to insert some proposed new sections. It is kind of a technical interest, but the new numbering in the Criminal Code goes from section 488 to section 510. We can insert the proposed new sections because the intervening sections were deleted in 1990, so there is space in the act into which new bits can be inserted. I note that matter for those of us who pay close attention to bills. It is a fascinating phenomenon rather than numbering sections with "AA", "AB", "AC" and all the rest of it.

Hon Sue Ellery: I am not sure that "fascinating" is the right word.

Hon GIZ WATSON: It is amazing what fascinates me after being in this place for a little while, but that is one of the things that fascinated me.

Hon Michael Mischin: I think you need to get out more!

Hon GIZ WATSON: I know I need to get out more! It is a worry. I should give full credit to my research staff for their thoroughness in this regard.

Proposed new section 490 of the Criminal Code makes it an offence to make, use or supply identification material with the intent that it will be used by somebody to commit an indictable offence; it does not matter if the offence is technically impossible to commit, interestingly enough. Also, it does not matter if the owner of the identification consented, which is also interesting, and an alternative conviction under proposed section 491—possession—is also available. The penalty is seven years' imprisonment or the penalty for the indictable offence, whichever is the greater. Interestingly enough, there is no reference in the bill to a financial penalty, but I will talk to that in a minute.

Proposed new section 491 makes it an offence to possess identification material that will be used by somebody to commit or facilitate an indictable offence. Again, it does not matter if the offence is technically impossible to commit and it does not matter if the owner of the ID consented. The penalty is five years' imprisonment and a lesser summary conviction penalty is also included.

Proposed new section 492 makes it an offence to possess identification equipment—and this term is defined as "any thing capable of being used to make, use, supply or retain identification material"—with the intention that it be used by somebody to commit or facilitate the commission of an indictable offence. Again, it does not matter if the offence is technically impossible to commit, and the penalty is the same as for proposed new section 491.

The key point about all these proposed new sections is that they relate to actions in preparation for fraud, not fraud itself, which is covered under existing provisions.

Proposed new section 493 states —

> Section 552(1) does not apply to an offence against section 490, 491 or 492.

That section makes liable people who attempt to commit an indictable offence.

Proposed new section 494 enables a court, upon conviction and if the person did not plead guilty after the expiration date of any appeal or time to appeal, to issue the victim of an identity offence who did not consent to the offence—including not only the offences in the new sections but also the existing code offences of forgery, uttering and impersonation—with a certificate showing that the person was a victim of the offence and covering any further prescribed matters and also any other matters that the court considers relevant. The purpose of the certificate is to help victims sort out matters to do with banks or debt collectors et cetera that may have resulted from the identity crime.

As a bit of a background to this bill, Mr John Quigley, MLA, the member for Mindarie, introduced two private member's bills on ID crimes in 2009—the Criminal Code (Identity Theft) Amendment Bill 2009, which was defeated in September of that year, and the Criminal Code (Identity Theft) Amendment Bill (No. 2) 2009, which I assume will now not go anywhere. The government supported the concept of the member for Mindarie's bills, but felt that it could improve on the drafting. As noted, the opposition supported this bill in the other place. In March 2008, the "Final Report Identity Crime" was published by the Model Criminal Law Officers' Committee of the Standing Committee of Attorneys-General, which suggested model clauses. This bill was clearly drafted with reference to the contents of that report. For example, definitions of the coverage of the fictitious persons as well as real ones, coverage of technically impossible offences and the three offence types in the bill are very similar to those model clauses.

On 26 November 2009, the bill was referred to the Legislative Council Standing Committee on Uniform Legislation and Statutes Review. The committee produced its forty-fourth report and tabled it on 2 March 2010. The committee's report found that the bill gives effect to an intergovernmental agreement to implement the Standing Committee of Attorneys-General model criminal code. Further, given its focus on fraud, the bill also gives effect to the multi-jurisdictional crime and intergovernmental agreement. The bill is, therefore, uniform legislation. It is interesting that this view differs from that of the Attorney General. The Attorney General considered the bill to have a broadly cooperative approach to the issue, rather than being part of any legislative scheme per se. Nevertheless, the standing committee did its work and produced a report.

I will talk a little about the size of the problem of these kinds of offences. An Australian Institute of Criminology report of September 2009 made the following comments in its foreword —

> In 2008, the ABS found that approximately five percent of the Australian population reported being victimised by consumer scams, with personal losses reaching almost $1b. This paper compares the findings of the ABS survey with those gathered by the AIC during the annual fraud awareness-raising activities conducted by the Australasian Consumer Fraud Taskforce. In 2008, a self-selected sample of 919 respondents to the AIC's online survey reported being victimised by a wide variety of scams, including those relating to fictitious lotteries, phishing scams —

That is spelt with a "ph". I had never actually heard of it before; perhaps somebody can explain what that is. The foreword continues —

> financial advice and other attempts to elicit personal information from respondents. Individuals from all age groups were targeted in these scams, with older Australians being victimised to a similar extent to those in their middle years.

It is also worth looking at the Australian Bureau of Statistics' personal fraud survey, which was conducted during July to December 2007. This survey covered both scams and identity frauds. Regarding identity fraud, the summary states, under the heading "Snapshot of Identity Frauds" —

> In the twelve months prior to the survey, identity fraud accounted for 3% or nearly half a million (499,500) victims in Australia. Just over half (54%) of these victims were male, while 46% were female. Of the 499,500 victims of identity fraud, the majority (383,300 or 77%) were a victim of credit or bank card fraud. This equated to a victimisation rate of 2.4%. These victims experienced at least one unauthorised, fraudulent transaction using their cards or account details. Identity theft accounted for 124,000 victims of identity fraud. These victims included those who experienced unauthorised use of their personal details, such as a driver's licence, tax file number, or passport through fraudulent or forged identification documents, or unauthorised appropriation of their identity through any other means to conduct business, open accounts or take out loans illegally in their name. There were varying rates of victimisation for identity frauds across the states and territories of Australia in the 12 months prior to the survey. Western Australia had the highest victimisation rate for all combined identity frauds, at 3.5% of the population aged 15 years and over (56,100 people), followed by Victoria (3.4% or 141,300 people). South Australia had the lowest victimisation rate at 2.2% or 27,600 people.

A summary of the existing legislation is provided in section 5.4 of the March 2008 "Final Report Identity Crime", prepared by the Model Criminal Law Officers' Committee of the Standing Committee of Attorneys-General, and Western Australia is discussed on page 20 of that report. The report states that the options in our Criminal Code for more serious offences include section 409, which deals with fraud and has a maximum penalty of seven years or 10 years in specified aggravating circumstances. Sections 473 and 474 deal with forging and uttering, and the maximum penalty is two years. Section 488, "Procuring or claiming unauthorised status", carries a maximum penalty of three years. Section 510, impersonation of someone with the intention to defraud, carries a maximum penalty of three years or 14 years in specified aggravating circumstances. The impersonation of a shareholder or an interest in a company carries a maximum penalty of 20 years.

Western Australia's lesser offences are not mentioned in the report, such as those that apply to under-18s using false ID to try to get tobacco or alcohol or enter licensed premises, and situations whereby a person provides a false name to the police. They are the "other offences" when identity fraud is committed. There are also federal crimes, which are discussed on page 18 of the Model Criminal Law Officers' Committee report. Proposed section 490 does not refer to a fine as an alternative penalty to prison. I noted that when we debated the Arson Legislation Amendment Bill 2009, which was drafted in a similar way to this bill, that legislation did not provide specific reference to a fine as an alternative penalty to prison either. The reason in that case was that section 41(5) of the Sentencing Act 1995 allows the court to impose a fine penalty if the court considers it to be appropriate. I ask the parliamentary secretary to confirm whether upon conviction for this offence a court could impose a fine, where appropriate. I assume that, as is the case under the Arson Legislation Amendment Bill, the Sentencing Act covers that in a general sense. Perhaps the parliamentary secretary could indicate whether that is so.

In terms of the severity of the penalty, the Leader of the Opposition has foreshadowed an amendment I have on the supplementary notice paper. The model clause contained in the March 2008 "Final Report Identity Crime" prepared by the Model Criminal Law Officers' Committee suggested lower penalties. The model proposed was five years for the first offence, not seven years, which we are looking at in this bill. It also proposed a penalty of three years' imprisonment rather than five years for the other two offences. In its report, the standing committee found that the penalties in the bill are not only more severe than in the model, but also more severe than the penalties that are currently in place in South Australia, Queensland and Victoria. Interestingly, that is not the case for New South Wales, which introduced legislation after this bill was introduced. Perhaps that was what the Leader of the Opposition meant when she said that there is a trend for some jurisdictions to impose a higher penalty. However, South Australia, Victoria and Queensland have lower penalties.

It is also worth noting that this is a heavier penalty than penalties for Western Australian crimes of similar criminality when comparing these offences with similar offences. The current penalties for attempting or commissioning a fraud offer a lesser penalty than what is proposed in the bill. It must be remembered that this bill relates to the preparatory activities and not the offence itself. It is questionable whether the preparation for an activity should incur a higher penalty than the penalty for carrying out the offence of fraud. The standing committee recommended that the Attorney General explain the reasons for this to the Legislative Council. Perhaps a response will be forthcoming by the parliamentary secretary. I certainly have not seen a formal response from the Attorney General to the standing committee's recommendation. That is one of the reasons, among others, that I have proposed amendments to reduce the penalty which would achieve better parity with existing Western Australian laws on this topic and which would be consistent with the national approach.

The standing committee also recommended that the Attorney General explain to the Legislative Council why sections 10D, 10E and 10F of the Criminal Code are not being amended to ensure that if charged with the principal offence, the person may instead be convicted of an offence in the bill. Section 10D currently permits people charged with the principal offence to instead be convicted of attempt, inciting someone else or being an

accessory after the fact. If charged with attempt, the person may instead be convicted of committing an offence in the bill, providing the penalty is no higher. Section 10E currently permits people charged with attempt to instead be convicted of committing the principal offence, provided that the penalty is no higher. If charged with conspiracy, the person may instead be convicted of committing an offence in the bill, provided that the penalty is no higher. Section 10F is similar to section 10E except it refers to conspiracy. I would be interested in the parliamentary secretary's response and would like to know whether the Attorney General has offered a formal response to that.

With regard to the exclusion of attempts law, which is proposed section 493 in this bill, the reason given by the Attorney General for excluding attempts law in respect of these offences is that since the bill, like attempts law, relates to preparatory activities that fall short of the actual offence, attempts would be or should be superfluous. I think that the Attorney General is correct. The Law Society did not raise this issue when we consulted with it on this bill. This approach is also consistent with the March 2008 "Final Report Identity Crime" prepared by the Model Criminal Law Officers' Committee, which suggested the model clauses for identity crimes. We are comfortable with that.

I refer now to proposed section 494. The purpose of the certificate is to help victims sort out matters with banks and debt creditors et cetera that usually result after an offence of identity crime has occurred. This is appropriate but, as the standing committee identified, it is tricky in practice for a number of reasons, including that the problems for victims of identity crime would be compounded if a certificate was issued to the wrong person. The standard of proof before issuing a certificate needs to be high. For example, it would need to be similar to that in a criminal conviction. However, the criminal law process can take years to finalise, which raises the question of whether interim certificates are merited. Also, in some cases there will be no conviction. Questions arise as to whether other jurisdictions will recognise the Western Australian certificate; whether institutions—for example, banks—are obliged to rely on those certificates; and who bears the financial loss of an institution—for example, a bank—that relies on a certificate that is either forged, expired or cancelled. The Unauthorised Documents Act makes false documents a crime but it does not address the issue of who bears the loss. Finally, there is the issue of the process of cancelling a certificate. There are a number of questions in that regard.

The March 2008 "Final Report Identity Crime" prepared by the Model Criminal Law Officers' Committee suggested a model clause about a certificate that has not been adopted in the bill. The standing committee recommended that the Attorney General advise—I am sorry if I am stealing all Hon Adele Farina's comments from the committee; we do like to be thorough—whether there is a legal requirement on recipients of such a certificate to act on it and what the consequences are if a false or wrongly issued certificate is relied on, and what steps have been taken to ensure inter-jurisdictional recognition of such certificates issued in Western Australia. The Attorney General has already advised that the interstate courts can admit such certificates into evidence, which would likely influence decisions of interstate financial institutions about whether or not to rely on a certificate, and that the other states and territories have the option of enacting provisions to recognise certificates that are issued in Western Australia.

As I understand it, the Attorney General agreed to draft changes to ensure that regulations can be made about cancelling certificates as well as issuing them. Also, his department will consider the issue of interim certificates when no convictions have resulted. As noted, there is merit in having a high standard of proof. The Attorney General has advised that all the interstate jurisdictions, except New South Wales, require a court conviction. The Australian Finance Conference is happy with the certificate being issued on the balance of probabilities before conviction or if there is no conviction.

The government has subsequently proposed an amendment so that a court will be able to cancel a certificate if there is good reason to do so. The court has discretion over what constitutes good reason. This means that a cancellation may be available for more than false or incorrect certificates. There are in place some Western Australian laws drafted in the same way with a wide discretion over circumstances in which a document can be cancelled—for example, fines and infringement notices and Magistrates Court summonses. However, some other WA laws specify particular grounds for cancellation to occur—for example, business names and recognition certificate of gender reassignment.

The amendment also does not specify whether cancellation of a certificate will have a retrospective effect, which is as though the certificate had never been issued, or solely a prospective effect, which is only from when the cancellation was pronounced, with all things previously done pursuant to the certificate remaining valid. Looking at other Western Australian legislation, this seems to be something that is generally made clear. The effect can be quite different depending on how courts interpret the provision. I assumed that the intent is that cancellation be of prospective effect only, as a retrospective effect could become very complicated.

There has been no amendment proposed regarding the interim certificates or certificates when no conviction results, so under this bill no certificate could be granted in those situations. I have a number of questions with regard to that, which I might ask now. I do not know whether the committee stage or the second reading response would be the appropriate point at which to respond to these, but I will put them on the record now.

What further circumstances beyond a false or incorrect certificate could constitute a good reason for cancellation of a certificate? Is it the intention that the cancellation will have a prospective effect only? If yes, has it been confirmed that principles of statutory interpretation indicate that courts will need to interpret it this way? Will the government be continuing to consider the level of need, if any, for interim certificates and/or certificates where no conviction has resulted?

I wanted to touch on the impact on those under 18 years of age and the exclusion of certain offences. The member for Mindarie's bill, which I alluded to earlier, specifically excluded under 18s claiming to be over 18 for the purpose of obtaining restricted goods, such as tobacco and alcohol. The standing committee report refers to a South Australian provision to this effect. The South Australian provision also excludes use of false documentation to enter restricted premises. This was apparently drawn to the committee's attention by the Law Society of Western Australia. There is also the offence of giving false particulars to police under section 16(8) of the Criminal Investigation (Identifying People) Act 2002, which states —

> A person who, in response to a request made under subsection (2), gives any false personal details commits an offence.
>
> Penalty: Imprisonment for 12 months.

This bill relates only to indictable offences—that is, the more serious matters dealt with in the District Court or Supreme Court. Section 67 of the Interpretation Act 1984 defines what an indictable offence is, and under that definition, I understand that these offences should be excluded from the bill. However, I note that the Law Society has identified a small chance that under 18s could be caught by certain provisions of the bill in certain situations—for example, if the juvenile entered a nightclub with false proof of age to commit grievous bodily harm, GBH obviously being an indictable offence. The Law Society therefore seeks an amendment to the bill as per the South Australian provision. I have not actually drafted amendments to that effect, but I raise that and perhaps the parliamentary secretary might respond with what the government's attitude is in assessing the risk of that possible unintended consequence of the bill and whether it thinks that the South Australian provision, or indeed the provision that was originally drafted in the member for Mindarie's bill, carries some weight. As I say, I have not actually drafted any amendments to that effect, but perhaps I may seek a response from the government on this one.

With regard to the issue of multiple jurisdictions, this is a Western Australian bill, but offences may involve various jurisdictions—for example, a card can be skimmed in Western Australia and the information transferred and used elsewhere or vice versa. This raises the issue of whether the Western Australian courts will have jurisdiction in such cases. The issue was raised in the other place during debate and the Attorney General pointed out section 12 of the Criminal Code, which deals with the territorial application of the criminal law, would come into effect. It reads —

> **Territorial application of the criminal law**
>
> (1) An offence under this Code or any other law of Western Australia is committed if —
>
> (a) all elements necessary to constitute the offence exist; and
>
> (b) at least one of the acts, omissions, events, circumstances or states of affairs that make up those elements occurs in Western Australia.
>
> (2) Without limiting the general operation of subsection (1), that subsection applies even if the only thing that occurs in Western Australia is an event, circumstance or state of affairs caused by an act or omission that occurs outside Western Australia.

It is also worth noting sections 13 and 14 of the Criminal Code that might apply in some circumstances. Section 13 deals with offences aided, counselled or procured by persons out of Western Australia. Section 13 reads —

> When an offence under this Code or any other law of Western Australia is committed, section 7 of this Code —

That is the section that makes people to aid the offender inquiry liable —

> applies to a person even if all the acts or omissions of the person in —
>
> (a) enabling or aiding another person to commit the offence;
>
> (b) aiding another person in committing the offence; or

(c) counselling or procuring another person to commit the offence,

occurred outside Western Australia.

Section 14 of the Criminal Code deals with offences procured in Western Australia to be committed outside Western Australia. It reads —

> Any person who, while in Western Australia, procures another to do an act or make an omission at a place not in Western Australia of such a nature that, if he had himself done the act or made the omission in Western Australia, he would have been guilty of an offence, and that, if he had himself done the act or made the omission, he would have been guilty of an offence under the laws in force in the place where the act or omission is done or made, is guilty of an offence of the same kind, and is liable to the same punishment, as if the act had been done or the omission had been made in Western Australia, but so that the punishment does not exceed that which he would have incurred under the laws in force in the place where the act was done or the omission was made, if he had himself done the act or made the omission.

It is very complicated. The standing committee raised the issue again. The Attorney General replied, confirming that provided there is a territorial nexus between Western Australia and the facts that constitute the elements of the offence, yes, Western Australian courts will have jurisdiction over the offence. It is important that we use our standing committees to get to the bottom of these very important issues.

As for other strategies, legislation is one of a raft of strategies for dealing with matters such as identity theft, preventative strategies obviously being best by preventing the offending occurring in the first place rather than dealing with it after it has occurred. Preventative actions can be taken by consumers, legislators, police, and public and private sector organisations—for example, information about what consumers can do is on the National Identity Fraud Awareness Week website, interestingly enough. It suggests there are strategies, including paying attention to billing cycles, checking one's credit report regularly, shredding personal documents, securing one's letterbox, and being diligent particularly when online. That is all good advice. I suggest that the government might also look at a bit of an awareness campaign around this issue to reduce the risk of people being victims of this sort of crime, by dealing with a legislative response is such as this. My question is: does the government have any strategies in place, either now or that it intends to implement, regarding community education in this area, and is there anything for the protection of identification information held by government agencies? Interestingly enough, in the other place the Attorney General said that he would look into this, but it was not clear to me from looking at that debate exactly how that was to be done.

With those comments, the Greens will support the bill. I would urge members to consider the amendments on the notice paper, which we will clearly get to when we get to the detail of the bill. Those amendments seek to reduce the penalties to bring Western Australia back in line with the model national approach. The Greens (WA) support the government's proposed amendments regarding the cancellation of certificates, subject to the questions I have put, which I might put again during the committee stage.

HON ADELE FARINA (South West) [8.49 pm]: I rise as the Chair of the Standing Committee on Uniform Legislation and Statutes Review to speak to the forty-fourth report of the committee on the Criminal Code Amendment (Identity Crime) Bill 2009. In doing so I would like to acknowledge my colleagues on the committee for their hard work. This bill came before the committee at a time when there were a number of other bills before the committee, so the committee has been working overtime to try to progress all these bills and to provide reports to the house. I can assure Hon Giz Watson that I do not have any objection to her stealing my thunder! It is good to know that there are members who read the report and feel that it is of some benefit to the house in its deliberations. I would also like to acknowledge the work of the committee staff, who have also put in an enormous amount of time and effort to progress the enormous workload that the uniform legislation committee has had since it was established. Susan O'Brien always delivers work of very high quality, as does Mark Warner, so on behalf of the committee, I would like to acknowledge them for their efforts.

As members have already been made aware by previous speakers, this bill stood referred to the committee as a 230A bill. The committee went through its usual processes of advertising, seeking submissions and holding hearings with the relevant departmental officers as part of its inquiry into the bill. Clause 5 is the substantive clause of the bill; it amends the Criminal Code to introduce the offences of making, using or supplying identification material, under proposed section 490; possession of identification material, under proposed section 491; and possession of anything capable of being used to make, use, supply or retain identification material, under proposed section 492, when that is accompanied with the intent that the identification material be used, whether by the person making, supplying, using or possessing the identification material, or some other person, to commit or facilitate the committal of an indictable offence. Clause 5 of the bill also proposes a section—section 494—which provides that a court may, on conviction of a person for identity crime, issue a certificate to the victim of that crime, confirming the occurrence of the crime.

The new offences are directed at the misappropriation and misuse of other persons' identity, which was described by Hon Michael Mischin during his contribution to the second reading debate as the most invidious and sophisticated criminal activity. Hon Michael Mischin noted that automatic teller machine skimming—the act of electronically capturing information that can be used to confirm another's identity for the purposes of stealing money from the victim's bank account—is merely the most high-profile example of identity crime. In fact, the ambit of identity crime is really far-reaching. For members who are interested in understanding exactly what is captured within the ambit of identity crime, I recommend they read pages 5 to 11 of the committee report, which detail those matters and identify the distinction between identity crime, identity fraud and identity theft, and also the range of behaviours constituting identity crime, the technology involved, and, of course, most importantly, the impact of identity crime on victims and society more generally. The impact is, in fact, very far-reaching, justifying the need for specific legislation to deal with this matter.

All of the offences proposed by clause 5 are indictable, but offences of possession of identification material and identification equipment may be tried summarily. The proposed offences are preparatory offences; no act or omission giving effect to the intention to commit or to facilitate the committal of the indictable offence is required to trigger the application of the offence provisions. It is also not relevant to the proposed offences that it is not possible to commit the intended indictable offence.

As detailed in the second reading speech, in creating these offences the government's intention is to target preparatory behaviour to the offence of fraud. As stated, the bill will protect against identity crime. However, it is important for members to note that the bill does not create an offence of identity crime per se, in that it does not create an offence of assuming another's identity. During the second reading debate in the Legislative Assembly, the Attorney General actually explained why that is the case. The problem sought to be cured by this bill is the fact that it would be very difficult to prove an attempt to an offence in a circumstance in which the person was in possession of material that would otherwise be innocuous.

Where it is clear that an offence such as fraud has occurred but the method and the perpetrator cannot be identified to the standard of certainty required for a conviction for that offence, the person may nonetheless be charged with a related preparatory offence as a result of provisions in this bill. The committee received a number of submissions on this bill, and all the submissions made to the committee expressed general support for the legislation, in particular for addressing the problem of identity crime. However, the submissions also raised some technical issues in the drafting and the effect of certain provisions, which I will detail in a short while.

I want to make some comments about the nature of the bill. The bill was not identified as uniform legislation during the second reading speech. In response to the committee's standard letter requesting supporting documents in respect of the bill, the Attorney General advised that, in his opinion, the bill was not uniform legislation. As a result of that, the committee was required to undertake a review of the very question of whether there is a Standing Committee of Attorneys-General intergovernmental agreement in respect of implementing a criminal code or uniform scheme to which the bill is giving effect by reason of its stated matter. The outcome of that review—which is detailed in the report, but I do not intend reading through it—clearly shows that the bill is a 230A bill. For members who are interested, this is detailed on pages 15 to 31 of the committee's report. As I indicated, I do not intend detailing that. Those members who are interested in understanding why it is a 230A bill can do so. As a result of that, the committee made four findings that identify the fact that this bill is a 230A bill and was quite rightly referred to the committee.

As members will know, one of the principal things the uniform legislation committee examines when looking at uniform legislation is whether, in practical terms, an intergovernmental agreement or uniform scheme to which a bill relates, or the provision of a uniform bill itself, derogates from the sovereignty of the state. As members will also have heard me say a number of times in addressing uniform legislation, all uniform legislation has this effect to some degree, and it is a question of the degree to which it is acceptable and where it goes over the limit. The committee, in having a close look at this bill, concluded that the bill raises no particular constitutional issues. The committee then looked at and reviewed a number of the issues that were raised in the submissions. These are detailed on pages 32 to 35 of the report. We received a submission from the Department of Commerce, which raised the fact that, from time to time, it is presented with forged or falsified identification documents to obtain an occupational licence, such as an electrician's licence. It was also aware of false documents, including licences being used to obtain employment. The Department of Commerce suggested to the committee that there should be an amendment of the definition of identification information in proposed section 489 to include information about a person's trade or professional status. The Attorney General advised the committee that his present view was that the issue of forged or falsified documents to obtain or renew an occupational licence was dealt under existing provisions of the Criminal Code, including sections 473 and 488. The Attorney General is also of the view that using forged or falsified documents to obtain an occupational licence is not an example of

using or assuming another's identity, but rather illegitimately claiming a certain status in relation to oneself. The committee was satisfied with the explanation by the Attorney General and has taken the matter no further.

Another issue that was raised in submissions was whether the bill would have an interstate and international application. As members would be aware, identity crime is often a multi-jurisdictional and international operation. Clearly, this issue was an issue of concern to the committee. As previously stated by Hon Giz Watson, the committee was referred to section 12 of the Criminal Code. At the hearing, representatives from the Department of the Attorney General advised that section 12 of the Criminal Code addresses this issue. The committee accepted that section 12 deals with multijurisdictional offences when they occur within Australia. However, the committee was not clear that section 12 of the Criminal Code applies when part of the crime occurs overseas. For example, what happens in a situation in which a person makes, supplies or possesses identification information in Western Australia with the intent of committing an offence in another country or who makes, supplies or possesses identification information in another country with the intent of committing an offence in Western Australia? In the committee's view the application of section 12 of the Criminal Code to those sorts of offences in which one aspect has occurred overseas is unclear. As a result, the committee recommended that the responsible minister—in this case the parliamentary secretary—advise the Legislative Council whether the offences proposed by the bill will apply in the event a person makes, supplies or possesses identification information in Western Australia with the intent of committing or facilitating the committal of an offence in another country or makes, supplies or possesses identification information in another country with the intent of committing or facilitating the committal of an offence in Western Australia. I look forward to the parliamentary secretary commenting on that particular recommendation.

The other issue that the committee considered, which has also been touched on by Hon Giz Watson, is the impact on persons under the age of 18 years. The committee received a submission from the Law Society of Western Australia in which it referred to a special provision in the South Australian Criminal Law Consolidation Act 1935 exempting persons under the age of 18 who use false documents to buy cigarettes or alcohol or enter restricted premises. The Law Society noted that as the offences proposed by the bill related to the intended committal of indictable offences, they would apply only in the event that a juvenile was buying cigarettes or alcohol or entering the restricted premises in order to commit the related indictable offence. The Law Society provided an example of such a scenario, being a juvenile entering a nightclub with false proof of age to commit grievous bodily harm. While acknowledging that such situations were possible rather than probable, the Law Society suggested an amendment to the bill in terms similar to the South Australian provision. It is detailed, for those who are interested, at footnote 94 on page 34 of the report. The committee simply informs the house of the representation it received and makes no further comment on it. It is up to the Legislative Council to determine whether it wants to proceed any further. I hope that the parliamentary secretary will address this issue when he replies to the second reading debate.

It is important to note that as drafted, the proposed offences will not apply to situations in which an identity is assumed or stolen otherwise than with the intent to commit or facilitate the committal of a crime.

In relation to the act of credit card skimming, proposed sections 490 to 492, which have "rolled up" the SCAG model criminal code provisions in respect of credit card skimming with its provisions in respect of identity crime, do not criminalise the act of credit card skimming. However, the proposed section 492 offence of possessing identification equipment for the purpose of committing an indictable offence is broad enough to capture a person being in possession of that equipment during the act of credit card skimming. It is also important to note that acts of possessing, making, or supplying identification material will not be offences under the new sections proposed by the bill. The offences created are the doing of these things in preparation for or to facilitate the intended commission of an indictable offence.

It is a general law in criminal law that criminal law should not apply to persons who are suspected of being about to commit an offence unless there has been an incitement or an attempt. However, there are some precedents in the Criminal Code for preparatory offences of the type proposed by the bill. In particular, there are various sections identified in the committee's report; for example, sections 557E and 574 of the Criminal Code. The committee noted that in the provisions proposed by the bill the onus remains on the prosecution to prove intent to commit an indictable crime, which must be established beyond reasonable doubt. The committee is of the view that proposed sections 490 to 492 are akin to the existing exceptions to the general principle that the criminal law should not apply to persons who are suspected of being about to commit an offence unless there has been an incitement or an attempt. The committee was satisfied on that basis.

The committee also examined whether the penalty for these offences reflects the degree of criminality. This matter was also touched on by Hon Giz Watson. The penalty for an offence under proposed section 490 is the greater of seven years' imprisonment or the penalty that would apply if the person were convicted of attempting

the indictable offence. The penalty under proposed sections 491 and 492 is five years' imprisonment or 24 months on summary conviction. The penalty for many indictable offences is less than seven years or even five years' imprisonment under the Criminal Code. The report lists a number of those offences. It is a general principle that the penalty imposed for an offence should reflect the degree of criminality of the offence as well as the potential harm. The committee report explores this in some detail. It is important to note that the committee believes there is a lack of parity between the maximum penalty applying to an offence under the bill's proposed sections 490, 491 and 492 and the penalties for existing offences involving a greater degree of criminality under the Criminal Code. That is an issue that should interest members. I hope the parliamentary secretary will address that issue in his response to the second reading debate and explain why the government does not appear to be too concerned about the lack of parity with other criminal provisions in Western Australian laws.

The committee also considered the lack of parity within other jurisdictions. Again, Hon Giz Watson touched on that matter. In summary, most of the other jurisdictions have lower penalty provisions, with the exception of New South Wales. Again, I am sure members would like to hear the parliamentary secretary explain why the government has not been too concerned about the lack of parity with other jurisdictions, particularly given undertakings that were given in terms of trying to put forward a national law that applies with some consistency across the nation.

The Attorney General claimed that the purpose of the bill is to fill a gap in the law that frustrates prosecutions for attempt offences by requiring a preparatory act. In effect, the bill removes the need to establish the taking of a preparatory act, or existence of a conspiracy, where a person makes, uses, supplies or possesses identification material or possesses identification equipment. It is lowering the threshold of criminality and, therefore, conviction.

Parity and consistency in penalties is important. It is undesirable that proposed sections 490, 491 and 492 will, in many circumstances, carry a greater penalty than the attempt and conspiracy offences or even commission of the intended indictable offence. The committee made a finding on that basis. I think it is important that the parliamentary secretary address this issue in some detail so that members of the house can understand the object of the government in ignoring the issue of parity. In the circumstance that a series of behaviours by different people in different jurisdictions may cumulatively lead to the committal of the intended indictable offence, the committee draws the attention of the Legislative Council to the fact that the penalty to which a person may be exposed will depend on location, not criminality, of the particular offence with which the person is charged. This arises because there is no commonality amongst the different state jurisdictions as to penalty. The fact that we have applied a particular penalty, if the nexus is with another state then obviously the provisions of that state will apply. Although the Standing Committee of Attorneys-General's model Criminal Code intergovernmental agreement does not require uniformity, the interstate nature of many of these offences requires, in the committee's view, a better explanation of the reason for Western Australia not adopting a more consistent approach to penalty. That led the committee to its two recommendations in the report; the first being —

> **The Committee recommends that the responsible Minister provide the Legislative Council with an explanation as to why the maximum penalties imposed by proposed sections 490 to 492 are not limited so as not to exceed the penalty that might be imposed for attempting the intended indictable offence to which the relevant offences relate.**

The second recommendation states —

> **The Committee recommends that the responsible Minister provide the Legislative Council with an explanation as to why the maximum penalties imposed by proposed sections 490 to 492 are higher than those recommended by the SCAG Model Criminal Code and, with the exception of New South Wales, higher than those imposed by the other Australian jurisdictions.**

As I have indicated, I await with interest the parliamentary secretary's comments on these matters.

The committee also considered the issue of the possibility of multiple charges and convictions, because the new offences proposed by the bill overlap with existing attempt and conspiracy offences in the Criminal Code. The committee's consideration of this matter is detailed in the report, and has been outlined in some detail by Hon Giz Watson. I do not intend to repeat it all. I draw to members' attention recommendation 4 —

> **The Committee recommends that the responsible Minister provide an explanation to the Legislative Council as to why:**
>
> - **section 10D of The Criminal Code has not been amended to include a reference to the preparatory offences proposed by clause 5 of the Bill; and**

- **it is not proposed to insert provisions equivalent to sections 10E and 10F of The Criminal Code in respect of the preparatory offences proposed by clause 5 of the Bill.**

I note for the parliamentary secretary's attention that I hope he will address that issue in his address on the second reading speech.

The last issue that the committee looked at was the issue of certificates. Point 10.1 reads —

> Proposed section 494(2) provides that on conviction of a person of an identity offence, the court may issue a certificate to a victim of an identity offence setting out:
>
> *(a) the identity offence to which the certificate relates; and*
>
> *(b) the name of the victim; and*
>
> *(c) any matter prescribed by regulations made under subsection (6); and*
>
> *(d) any other matter the court considers relevant.*

The committee received a number of submissions on the aspect of certificates. The submissions generally supported the principle of legislative power to issue certificates to victims of identity crime. However, there were some questions about the proposed provisions of the bill. Those questions are detailed in the report at pages 50 to 53. In particular, point 10.7 of the report reads —

> … the Australian Bankers' Association Inc.'s questions related to the reliance that its members would place on the certificates; a critical matter, as no legal obligation has been identified by the government that requires an institution to act on production of a certificate that a person has been a victim of an identity offence.
>
> The Committee also had a question as to whether financial institutions or other entities located interstate or internationally were required to recognise certificates issued in Western Australia.

That was an issue that the committee did not get a response to. Point 10.9 reads —

> The Office of the Deputy Commissioner noted that:
>
> > *In some instances it can take many months, if not years, to convince financial institutions and investigating authorities that an offence has been committed and that it should be investigated. Then any subsequent investigation and court case, if the offender is apprehended, can also take years.*
>
> The Office of the Deputy Commissioner also pointed out that a Western Australian might be the victim of an identity crime where the perpetrator was overseas and, therefore, beyond the jurisdiction of Western Australia Police.

Also of concern to the committee, at point 10.11, was —

> The Office of the Deputy Commissioner's view that conviction-based issue of certificates did not provide timely assistance to victims, or address all circumstances in which a person might be a victim of identity crime …
>
> Both the Office of the Deputy Commissioner and the Australian Financial Conference noted that the … 2008 Identity Crime Report recommended issue of a certificate where no conviction had occurred, or prior to a court hearing, where a court was satisfied on the balance of probabilities that the person was the victim of an identity offence.
>
> The Office of the Deputy Commissioner also submitted that provision should be made for issue of a certificate to persons who were the victims of an identity crime in respect of which a conviction occurred prior to the enactment of the Bill.

Another issue that was unclear to the committee is the situation of an institution, such as a financial institution or government agency, that relies on a certificate that later proves to be false. This is a matter that was also raised by Hon Giz Watson. It seems there are a lot of questions that still surround the issue of certificates and their application. On that basis, recommendation 5 states —

> **The Committee recommends that the responsible Minister —**

In this case, the parliamentary secretary —

> **clarify for the Legislative Council:**

- **the legal requirements, if any, for institutions and government agencies to act on receipt of a certificate that a person is a victim of identity crime; and**
- **the consequences of an institution or government agency relying on a false or wrongly issued certificate.**

I look forward to the parliamentary secretary's comments on those matters. Point 10.24 of the committee's report states —

> In answer to the Committee's question as to whether a certificate issued in Western Australia would be recognised by other jurisdictions, the Attorney General noted that the 2008 Identity Crime Report does not deal with the issue of inter-jurisdictional recognition of certificates.
>
> The Attorney General advised that, as proposed section 494 was not part of a crossjurisdictional mutual recognition arrangement, it would operate only in Western Australia. However, the Attorney General advised, courts in other jurisdictions might recognise that such certificates were relevant and admissible in evidence in other court proceedings.

However, there is no certainty that that will happen. That remains a question on which we would appreciate some further clarification or enlightenment. Point 10.26 states —

> The Attorney General further advised that interstate recognition of certificates issued in Western Australia might be achieved by the jurisdictions that enacted similar laws and granting power for courts to issue certificates based on similar criteria … also enacting a provision indicating that certificates issued by other courts would be recognised and that such a certificate is evidence of its contents.

I think that is a good way to proceed. However, we are not there yet. I am not too sure whether the Attorney General is taking any steps to try to achieve that outcome. I will be interested to hear from the parliamentary secretary whether the Attorney General has taken any active steps to advance that. That led to the committee's recommendation 6 —

> **The Committee recommends that the responsible Minister —**

In this case the parliamentary secretary —

> **advise the Legislative Council whether any steps are being taken to ensure the interjurisdictional recognition of certificates issued in Western Australia.**

It seems to the committee that the certificates are of limited value without inter-jurisdictional recognition. This is an important issue on which I look forward to hearing from the parliamentary secretary.

At the hearing, the committee suggested that the regulation-making power required amendment if the intent were to enable the cancellation of a certificate. The committee notes in its report that it is pleased to report to the Legislative Council that the Attorney General has advised —

> *I agree that this is a useful addition as the power to cancel a certificate must lie outside of the certificate itself. Appropriate drafting will be undertaken in this regard.*

I can state, however, that the committee being pleased with the Attorney General's comments has been short lived because there are no amendments to that effect on the supplementary notice paper. I welcome the parliamentary secretary making some comment about the current status of that undertaking and how advanced it might be.

The other issue is the provision for certificates to be issued on the conviction of an offence. It was explained at the hearings as a cautious approach designed to address the need for certainty as to the occurrence of the offence in light of the reliance that was to be placed on the certificates. Issuing a certificate to persons who are victims of identity theft in the process of the commission of an offence for which a conviction had already occurred was seen as raising problems with the retrospective application of legislation. In his response, the Attorney General noted that, other than New South Wales, the legislation of other jurisdictions operate victim certificate systems that are dependent on court convictions. However, the report notes that the Attorney General advised the committee that he had —

> *… asked the Department to assess the feasibility of an interim certificate for victims of identity crime, one that could be issued without the resolution of a court decision or any other related processes, such as an appeal. As mentioned by my officers, this is a complex issue that involves possible elements of retrospectivity and the need for the proposed certificates to have a degree of explanatory power that would satisfy relevant organisations, such as financial institutions and banks.*

I would be interested in the parliamentary secretary commenting on the status of that matter, whether the Attorney General and the department have advanced that case at all and the likely outcome of those investigations to date, and whether the Attorney General will be progressing down the path that he indicated to the committee at the time of the hearing. On that basis, I will conclude my comments and perhaps make some comments during the committee stage of the bill.

HON MICHAEL MISCHIN (North Metropolitan — Parliamentary Secretary) [9.22 pm] — in reply: I acknowledge the contributions of members to this debate and also acknowledge with thanks the support that has been indicated by the opposition and the Greens (WA) for the bill, subject to certain qualifications and the amendments that have been proposed by Hon Giz Watson. I also acknowledge the work that has been done by the Standing Committee on Uniform Legislation and Statutes Review in analysing the bill and the several issues that have been raised regarding it. They are fruitful matters for consideration, and I will address some of those at this point. I do not have the answers to some of them at my fingertips and I will address those during the committee stage, and we can delve further into the detail at that point.

I should say at the beginning of my comments that I have the responses from the Attorney General that have been provided to the committee. The first response is a letter of 25 February this year to Hon Adele Farina as the chairperson of the committee, which addresses the issue of the jurisdictional scope, the territorial limitations, of the proposed provisions. The second response—unfortunately, I do not have a signed or dated copy of this, but I understand that it will have been sent out in the past few days—is addressed to the Clerk Assistant (Committees) and addresses the several recommendations made by the committee. It would be of assistance for future reference if I were to table copies of each of those letters. I happen to have a copy of the letter of 25 February 2010. The best I can do at the moment on the subsequent response is to table a word processor file copy, as it were, but it is not initialled or dated. I hope to locate by tomorrow Mr Allison's copy of that letter, which can be tendered in its place. However, for the purpose of this exercise, perhaps these documents will do, and I will make some reference to those. I seek leave to table those documents.

Leave granted. [See paper 2072.]

Hon MICHAEL MISCHIN: Once the original of the subsequent letter comes into the possession of Mr Allison, I propose to table a copy of that so that we have a signed copy under the hand of the Attorney General.

As has been recognised, the legislation fills a gap in the current law and tries to at least keep pace with that most ingenious of human beings, the criminal, who seems to be able to be very inventive in ways of committing crimes either as an end in themselves or in preparation for committing other sorts of mischief. The bill is fairly straightforward and I will not descend into detail on it, but I will address each of the recommendations that have been made by the committee on which it has sought some response from the Attorney General. As I mentioned, if there are certain variations of those that I do not address specifically at this point, I will certainly do so to the best of my ability during the committee stage.

I will deal with the first recommendation of the committee and the questions of territoriality and whether these offences will apply to acts or omissions that are committed outside Western Australia, either in other states or territories of Australia or overseas, and, likewise, whether certain acts or omissions that are committed overseas or in other states and territories can give rise to criminal liability here. The governing provision is section 12 of the Criminal Code. It is not limited to the commission of acts or omissions simply within Australia; it applies to anything that is done overseas. The key to it is that if an act or omission that constitutes an element of the offence is committed within Western Australia, that will give rise to criminal liability in Western Australia for the offence. It may be that, in the case of a conspiracy, the agreement is reached with one party being in Western Australia and the other being overseas. In the case of the possession of an article, it does not matter whether it happened to have been manufactured overseas, as long as a person in possession of it comes into this state, or, if a group of people perform offences, one of those people is in Western Australia when he does an act or omission that constitutes an element of the offence. Provided there is a territorial nexus between Western Australia and the facts constituting an essential element of the offence, Western Australia will have the jurisdiction to prosecute that person. It may be that, as a matter of practicality, if the person involved leaves Western Australia, or one of the parties to the offence never comes into the state, there will be a problem in actually prosecuting them, but the liability is there. It matters not whether the remaining elements of the offence—or the acts and omissions constituting the remaining elements of the offence—are committed outside Western Australian territory or outside, indeed, Australian territory.

I turn now to deal with the second recommendation. The issue there was that of parity of penalties in respect of their relationship to other offences in the code. Each of the offences that the Criminal Code Amendment (Identity Crime) Bill 2009 creates is some act or omission with the intent to commit an indictable offence. They are not preparatory offences in the same manner that an attempt to commit an indictable offence is a preparatory

offence; they are substantive offences in their own right. The Criminal Code has a number of other examples of a similar character, whereby the substantive offence may be something that is also classed as preparatory or an attempt but is nevertheless an offence in its own right and not simply something preparatory to an indictable offence.

By way of explanation, or perhaps clarification or example, the offence of attempting to pervert the course of justice falls under section 143 of the Criminal Code. There is no offence of perverting the course of justice that has a preparatory offence that is lesser than that of attempting to do so. The fact of attempting to do so is the offence itself and it carries a penalty of seven years' imprisonment. Attempted murder is another one. Certainly in the case of doing grievous bodily harm, for example, there can be a lesser preparatory offence of attempting to do grievous bodily harm, which carries half the usual penalty. But attempted murder is an offence in its own right under section 283 of the code, and it carries a maximum sentence of life imprisonment. More akin to these ones, for example, is stupefying a person with intent to commit an indictable offence. Again, in a sense, it is preparatory to the commission of an indictable offence, but the fact of the stupefaction—just like the fact of possession or manufacture or obtaining of equipment to commit an indictable offence by way of identity theft—is, again, a substantive offence. A conviction for stupefying with intent to commit an offence, under section 293 of the code, carries 20 years' imprisonment because it is considered grave enough in its own right to carry a penalty of that nature, notwithstanding if the intended offence is never committed.

Another example is that of attempting to cause an explosion likely to do serious injury to property, which carries 14 years' imprisonment. Again, that is an attempt, and yet it is regarded as a substantive offence and carries a substantial penalty. Preparation for forgery—under section 474—is a substantive offence not unlike these and it carries a maximum of three years' imprisonment. Each of the offences proposed by the bill is, in itself, a substantive offence with penalties calculated to deter the work preparatory to the commission of a crime that the offender may be intending to commit with the stolen identities, or whatever the case may be. They are not, in themselves, offences of attempting to do anything and they are not preparatory in that sense.

A further feature of the way that these offences are formulated is that it may not always be possible to clearly determine the indictable offence that a person has in mind, although it is plain that he is planning some nefarious and criminal activity because the instruments he is in possession of or is manufacturing are intended to commit some sort of more serious offence, although we may not be able to identify exactly what it is. Again, by example, the idea of burglary whereby there is an intent to commit an indictable offence while being present in someone's home—of which there are a range of possibilities such as a sexual assault or theft, to damage of property, to whatever—means that it may not always be possible to identify what the indictable offence was. It is the view of the government that the penalties, therefore, that have been formulated are sufficient, or hopefully will be sufficient, to deter this sort of conduct.

I turn to the third recommendation, which deals with the question of parity with penalties contained in the legislation of other states and territories and why the proposed maximum penalties are higher than what was proposed in the Standing Committee of Attorneys-General model code. With the exception of New South Wales, the penalties in Western Australia are higher than in other jurisdictions. The first point is that there is no parity, anyway, in the strictest sense. Queensland does not have a possession offence, for example, and the New South Wales penalties are substantially higher. In any event, no agreement has been reached between the states and territories that the penalties will reflect a uniform scheme. Since the model Criminal Code officers resolved, in 2007-08, to formulate certain offences and penalties, Western Australia has formed the view that identity crime and its prevalence is more serious than they originally had in mind. Not being bound by an intergovernmental agreement to reflect model provisions across the country, the government has determined to reflect the seriousness of the offences by striking on the penalties in this bill. The agreement between the states and territories was to address the mischief by enacting some form of model legislation, but that has not been done pursuant to an intergovernmental agreement and there has been no prescription as to the means by which each state or territory attends to this issue. Western Australia has formulated its own view as to how it should be done and has struck on the penalties accordingly.

I deal with the fourth recommendation, which relates to sections 10D, 10E and 10F of the Criminal Code. Section 10D of the code provides that certain offences, which may not be proved, can nevertheless result in conviction for variations or preparatory offences to that principal offence. For example, in the case of a charge of fraud, if the prosecution fails to prove beyond reasonable doubt that a fraud was committed by the accused, the accused can nevertheless be convicted of attempting to commit fraud or inciting another person to commit fraud or becoming an accessory to fraud after the fact. To include these sorts of offences as other alternatives to a principal offence would neither be logical nor make sense because the possession, for example, of identity theft material may not logically or sensibly, on the facts, necessarily be an alternative to a principal offence. We may not know what that principal offence will be or what the indictable offence was that the offender had in mind. It

might have been identity theft or possession of material to commit a murder, a fraud, an assault, a burglary or a bribe. It does not necessarily follow that if a person is charged with burglary and the burglary conviction fails, there ought to be available to the prosecution a conviction of identity theft material. That does not make sense, which is why it is not included as a variation to section 10D. Likewise, there is no offence of attempting to possess identity theft material. Therefore, it would not make sense to amend section 10E to include a variety of alternative verdicts that would not be open either logically, or on the facts necessarily, for that offence. Likewise, similar reasoning applies to section 10F. That is why the government has not taken that course.

The fifth recommendation is the question of the certificates. In short, there is no specific provision in the proposed bill for the consequences of relying on false or wrongly issued certificates. If a person were to forge a certificate that purports to evidence that that person was a victim of identity crime, the person would be able to be punished under the other provisions of the Criminal Code relating to the falsification of documents, or forgery and uttering, as the case may be, or other provisions. There is no need for a specific provision for these certificates. As for the consequences, if a financial institution or others were to rely on a false certificate, again, the usual consequences would flow from that in the same way that anyone who presented any alleged document which purported to be issued under the authority of a court and which proved to be false would be charged with offences, and civil liability consequences could flow from that. There is no need, in the government's view, to provide for specific provisions relating to these sorts of certificates.

As for the interjurisdictional recognition of certificates, once again, these certificates will be evidence of what is stated in them. Regulations are capable of being drafted to provide what goes into them, but they will be evidence of what is stated in the certificate and they will have the same level of authority as any other certificate, judgement or order that is issued by a court. Courts from other jurisdictions may or may not take notice of them. It would be surprising in Australia if other jurisdictions did not take notice of something that was issued by our courts. However, there is no mechanism or need to provide for interjurisdictional recognition. I am not aware of whether the Attorney General is looking into that aspect. I will seek some advice on that subject and may be in a better position to answer that when we are in committee.

I have dealt with each of the recommendations of the committee and I would be quite content to deal with the other issues when we go into committee on the bill. I commend the bill to the house.

Question put and passed.

Bill read a second time.