REPORT 9
STANDING COMMITTEE ON LEGISLATION
CRIMINAL LAW AND EVIDENCE AMENDMENT BILL 2006

Presented by Hon Graham Giffard MLC (Chair)

August 2007
STANDING COMMITTEE ON LEGISLATION

Date first appointed:
17 August 2005

Terms of Reference:
The following is an extract from Schedule 1 of the Legislative Council Standing Orders:

“4. Legislation Committee
4.1 A Legislation Committee is established.
4.2 The Committee consists of 5 members.
4.3 The functions of the Committee are to consider and report on any Bill referred by the House or under SO 125A.
4.4 Unless otherwise ordered any amendment recommended by the Committee must be consistent with the policy of a Bill.”

Members as at the time of this inquiry:
Hon Graham Giffard MLC (Chair) Hon Peter Collier MLC
Hon Giz Watson MLC (Deputy Chair) Hon Sally Talbot MLC
Hon Donna Faragher MLC
(substitute Member for Hon Ken Baston MLC)

Staff as at the time of this inquiry:
Anne Turner, Advisory Officer (Legal) Denise Wong, Advisory Officer (Legal)
David Driscoll, Committee Clerk Kerry-Jayne Braat, Committee Clerk

Address:
Parliament House, Perth WA 6000, Telephone (08) 9222 7222
lcco@parliament.wa.gov.au
Website: http://www.parliament.wa.gov.au

ISBN 1 921243 27 9
<table>
<thead>
<tr>
<th>Abbreviation</th>
<th>Definition</th>
</tr>
</thead>
<tbody>
<tr>
<td>A Crim R</td>
<td>Australian Criminal Reports</td>
</tr>
<tr>
<td>ALJR</td>
<td>Australian Law Journal Reports</td>
</tr>
<tr>
<td>ALR</td>
<td>Australian Law Reports</td>
</tr>
<tr>
<td>ALRC</td>
<td>Australian Law Reform Commission</td>
</tr>
<tr>
<td>Bill</td>
<td>Criminal Law and Evidence Amendment Bill 2006</td>
</tr>
<tr>
<td>cf</td>
<td>compare</td>
</tr>
<tr>
<td>CLR</td>
<td>Commonwealth Law Reports</td>
</tr>
<tr>
<td>COAG</td>
<td>Council of Australian Governments</td>
</tr>
<tr>
<td>Code</td>
<td><em>The Criminal Code</em></td>
</tr>
<tr>
<td>Committee</td>
<td>Standing Committee on Legislation</td>
</tr>
<tr>
<td>CP Act</td>
<td><em>Criminal Procedure Act 2004</em></td>
</tr>
<tr>
<td>DPP</td>
<td>Director of Public Prosecutions for Western Australia</td>
</tr>
<tr>
<td>FLR</td>
<td>Federal Law Reports</td>
</tr>
<tr>
<td>HCA</td>
<td>High Court of Australia, unreported judgment</td>
</tr>
<tr>
<td>High Court</td>
<td>High Court of Australia</td>
</tr>
<tr>
<td>KBT</td>
<td><em>KBT v The Queen</em> (1997) 149 ALR 693; (1997) 191 CLR 417; 72 ALRJ 116</td>
</tr>
<tr>
<td>MCCOC</td>
<td>Model Criminal Code Officers’ Committee of the Standing Committee of Attorneys-General</td>
</tr>
<tr>
<td>NSWCCA</td>
<td>New South Wales Court of Criminal Appeal, unreported judgment</td>
</tr>
<tr>
<td>NSWR</td>
<td>New South Wales Reports 1960-1970</td>
</tr>
<tr>
<td>NZLC</td>
<td>New Zealand Law Commission</td>
</tr>
<tr>
<td>NZLR</td>
<td>New Zealand Law Reports</td>
</tr>
<tr>
<td>Abbreviation</td>
<td>Description</td>
</tr>
<tr>
<td>--------------</td>
<td>-------------</td>
</tr>
<tr>
<td>Qd R</td>
<td>Queensland Reports</td>
</tr>
<tr>
<td>SASR</td>
<td>Supreme Court of South Australia, unreported judgment</td>
</tr>
<tr>
<td>SR(WA)</td>
<td>State Reports, Western Australia</td>
</tr>
<tr>
<td>VR</td>
<td>Victorian Reports</td>
</tr>
<tr>
<td>WASCA</td>
<td>Supreme Court of Western Australia, Court of Criminal Appeal, unreported judgment</td>
</tr>
</tbody>
</table>
CONTENTS

LIST OF ABBREVIATIONS AND DEFINED TERMS

EXECUTIVE SUMMARY AND RECOMMENDATIONS............................................................... i

EXECUTIVE SUMMARY........................................................................................................ i
RECOMMENDATIONS........................................................................................................... iii

CHAPTER 1 INTRODUCTION................................................................................................. 1

REFERRAL ................................................................................................................................. 1
INQUIRY PROCEDURE ........................................................................................................... 1
BACKGROUND TO THE CRIMINAL LAW AND EVIDENCE AMENDMENT BILL 2006 ........ 1
SCOPE OF THIS REPORT ......................................................................................................... 2

CHAPTER 2 PART 2 - THE CRIMINAL CODE AMENDED............................................. 3

CLAUSE 5 - SECTION 297 AMENDED .............................................................................. 3
  Range of People Protected ................................................................................................. 3
    Committee Comment ....................................................................................................... 7
CLAUSE 9 - SECTION 318 AMENDED .............................................................................. 7
  Range of People Protected ................................................................................................. 7
    Committee Comment ....................................................................................................... 8
CLAUSE 10 - SECTION 321A REPLACED ......................................................................... 8
  Introduction ......................................................................................................................... 8
    General Committee Comment .......................................................................................... 10
    Proposed New Section 321A(3)(b) - Sexual Acts Need Not All Occur in the State .... 11
      Committee Comment ..................................................................................................... 14
    Proposed New Section 321A(5) - No Requirement to Particularise Dates or
      Circumstances on Charge ............................................................................................... 14
      Committee Comment ..................................................................................................... 21
    Proposed New Section 321A(6) - Duplicity Authorised ............................................... 21
      Committee Comment ..................................................................................................... 24
    Proposed New Section 321A(8) - No Court Power to Order Further Particulars of
      Sexual Acts ....................................................................................................................... 25
      Committee Comment ..................................................................................................... 30
    Proposed New Section 321A(11) - Change in Requirement for Jury Unanimity ......... 31
      Committee Comment ..................................................................................................... 35
    Proposed Section 321A(12) - Possible Conviction for Specific Sexual Act if Not
      Guilty of Persistent Sexual Conduct ............................................................................ 35
      Committee Comment ..................................................................................................... 38

CHAPTER 3 PART 3 - CRIMINAL PROCEDURE ACT 2004 AMENDED ...................... 41

CLAUSE 26 - SECTION 129 AMENDED............................................................................. 41
  Judicial Determination of Material Facts after Guilty Plea ................................................ 41
CHAPTER 4 PART 4 - CRIMINAL APPEALS ACT 2004 AMENDED

PROSECUTION RIGHT OF APPEAL

Introduction

The Double Jeopardy Rule

History of Double Jeopardy

Arguments for Reform of the Rule

Arguments against Reform of the Rule

The Council of Australian Governments on Double Jeopardy Law Reform

Double Jeopardy Law Reform

Response of Other Jurisdictions

The Tasmanian Model - 1924

The United Kingdom Model - 2005

The New South Wales Model - 2006

The Proposed New Zealand Model - 2007

The Proposed Queensland Model - 2007

PART 4 - CRIMINAL APPEALS ACT 2004 AMENDED

Clause 34 - Section 24 amended

Error of Fact Cases

Error of Law Cases

Impact of Clause 34 on a Fundamental Common Law Principle

Director of Public Prosecution Guidelines

Committee Comment

Clauses 37 (Section 31 amended) and 41 (Section 41 amended)

Committee Comment

Review of Part 4 of the Bill

Committee Comment

CHAPTER 5 PART 5 - EVIDENCE ACT 1906 AMENDED

ClAUSE 43 - SECTION 36BE INSERTED AND CONSEQUENTIAL AMENDMENTS

The Law on Expert Evidence

Australian Law Reform Commission Recommendation

Concerns of the Chief Justice

Defining the Expert

ClAUSE 47 - SECTION 106C REPLACED

The Appropriateness of Associating Mentally Impaired Witnesses with Child Witnesses
EXECUTIVE SUMMARY AND RECOMMENDATIONS

EXECUTIVE SUMMARY

1 On 21 March 2007, the Legislative Council referred the Criminal Law and Evidence Amendment Bill 2006 (Bill) and the Bill’s policy to the Standing Committee on Legislation (Committee) for inquiry with a reporting deadline of 28 June 2007. Pursuant to the Committee’s requests, the Legislative Council extended the reporting deadline to 30 August 2007.

2 The Bill proposes:

- to make amendments to the prosecution of sexual assault cases;
- to introduce a limited prosecution right to appeal against acquittal verdicts in trials heard by Judge and jury; and
- to make other amendments which have been identified in various reviews of crime legislation as well as minor consequential amendments.

3 While the Committee has analysed all of the provisions of the Bill, it has only provided comments on specific clauses and the issues raised in respect of them. These issues are summarised as follows:

- Clauses 5 and 9 are discussed in terms of the range of people who should be further ‘protected’ against the commission of grievous bodily harm and serious assault. The Committee has recommended that both clauses be amended so as to increase this range of people (refer to Recommendations 1 and 2).

- Clause 10 is discussed in light of the various significant changes it proposes to make in relation to the prosecution of multiple and persistent sexual conduct with a child who is under 16 years of age. The Committee has recommended that the responsible Minister explain why proposed section 321A(12) of The Criminal Code is required (Recommendation 3). The Committee also draws the attention of the Legislative Council to the ‘Committee Comments’ which have been made in relation to clause 10 of the Bill.

- In the discussion about clause 26, the Committee explores the potential for injustice to occur if the court is or is not authorised to determine a set of material facts which differs from the statement of material facts upon which a guilty plea is based. The Committee supports clause 26.
• Clause 28 of the Bill proposes to restrict the defence opening address in a criminal trial. The Committee is not convinced of the need for the restriction and has recommended that clause 28 be opposed (refer to Recommendation 4).

• Clause 34 is discussed in the context of double jeopardy reform. Clause 34, in introducing a limited prosecution right of appeal against acquittal verdicts, extends the principle of finality in criminal proceedings. A minority of the Committee (comprising Hon Giz Watson MLC) has recommended that the number of times a person be retried following an appeal by the Director of Public Prosecutions be limited to one.

• Clauses 37 and 41 raised concerns about precluding the application of the principle that allows a court to take account of the circumstances that might flow to an offender from being twice exposed to the judicial determination of whether the offender should be imprisoned and if so, for how long. The Committee has recommended that the Bill be amended to take this principle into account (refer to Recommendation 5).

• The Committee has recommended that the proposed amendments to the Criminal Appeals Act 2004 in Part 4 of the Bill be reviewed within five years (refer to Recommendation 6).

• Clause 43 makes admissible, expert opinion evidence of typical patterns of behaviour and responses of child victims of abuse. The Committee supports this clause but has recommended the Bill be amended to clarify, what warnings the judge should make to a jury about this type of evidence (refer to Recommendation 7).

• Clause 47 raised formatting issues in the Bill. The clause links the evidence of mentally impaired people with children in proposed amendments to the Evidence Act 1906. The Committee is of the view that this is inappropriate and has recommended that the Bill be reformatted so as to distinguish their evidence (refer to Recommendation 8).

• Clause 72 seeks to provide an accused person who faces a retrial (resulting from the successful appeal by the prosecution against their acquittal by a jury) with the opportunity to apply for their costs of the retrial to be reimbursed out of the Suitors’ Fund. Having considered whether this proposal is likely to provide adequate reimbursement for the accused person, the Committee supports clause 72.
RECOMMENDATIONS

4  Recommendations are grouped as they appear in the text at the page number indicated:

Page 7

Recommendation 1: The Committee recommends that clause 5 of the Criminal Law and Evidence Amendment Bill 2006 be amended so that proposed section 297(4) of The Criminal Code includes private sector health workers (such as nurses and doctors), court security officers, prison officers and volunteer State emergency service workers.

Page 8

Recommendation 2: The Committee recommends that clause 9 of the Criminal Law and Evidence Amendment Bill 2006 be amended so that section 318(1) of The Criminal Code will be amended to include private sector health workers (such as nurses and doctors), court security officers, prison officers and volunteer State emergency service workers.

Page 39

Recommendation 3: The Committee recommends that during debate on the Criminal Law and Evidence Amendment Bill 2006, the responsible Minister explain why proposed section 321A(12) of The Criminal Code is required given the effect of proposed new section 321A(6) of The Criminal Code.

Page 49

Recommendation 4: The Committee recommends that clause 28 of the Criminal Law and Evidence Amendment Bill 2006 be opposed.

Page 82

Recommendation 5: The Committee recommends that the Government amend clause 41 of the Criminal Law and Evidence Amendment Bill 2006 to expressly enable the Court of Appeal to take into account any materially changed circumstances of an offender.

Page 83

Recommendation 6: The Committee recommends that the proposed amendments to the Criminal Appeals Act 2004 in Part 4 of the Criminal Law and Evidence Amendment Bill 2006 be reviewed within five years.
Recommendation 7: The Committee recommends that the Government amend clause 43 of the Criminal Law and Evidence Amendment Bill 2006 so as to ensure that trial Judges give a warning to the jury in relation to admissible expert evidence.

Recommendation 8: The Committee recommends that the Government amend the Criminal Law and Evidence Amendment Bill 2006 so that the Evidence Act 1906 distinguishes the evidence of mentally impaired people from that of children.
CHAPTER 1
INTRODUCTION

REFERRAL

1.1 On 21 March 2007, the Legislative Council referred the Criminal Law and Evidence Amendment Bill 2006 (Bill) to the Standing Committee on Legislation (Committee) for inquiry with a reporting deadline of 28 June 2007.\(^1\) The policy of the Bill was also referred to the Committee for inquiry. Pursuant to the Committee’s requests, the Legislative Council extended the reporting deadline to 30 August 2007.\(^2\)

INQUIRY PROCEDURE

1.2 The Committee sought written submissions on the Bill by:

- writing to several individuals who, and organisations which, may have had views on the subject matter of the inquiry (a list of these individuals and organisations is attached as Appendix 1);
- advertising the inquiry in The West Australian newspaper on 31 March 2007; and

1.3 Appendix 2 contains the details of the 13 written submissions which were received by the Committee. Two public hearings were held in relation to this inquiry, the details of which appear at Appendix 3. Valuable information was also obtained by the Committee through written correspondence.

1.4 The Committee extends its appreciation to the individuals who, and organisations which, provided evidence and information as part of the inquiry.

BACKGROUND TO THE CRIMINAL LAW AND EVIDENCE AMENDMENT BILL 2006

1.5 According to the Explanatory Memorandum, the Bill seeks to put into effect two proposed reform packages involving:

- amendments in the prosecution of sexual assault cases; and

---

\(^1\) Parliament of Western Australia, Legislative Council, Parliamentary Debates (Hansard), 21 March 2007, pp448-452.

\(^2\) Parliament of Western Australia, Legislative Council, Parliamentary Debates (Hansard), 9 May 2007, p1862; 26 June 2007, p3593; and 30 August 2007, p3790.
1.6 The Bill also proposes other amendments which have been identified in various reviews of crime legislation as well as minor consequential amendments.

SCOPE OF THIS REPORT

1.7 While the Committee has analysed all of the provisions of the Bill, it has only provided comments on specific clauses and the issues raised in respect of them. These clauses are 5, 9, 10, 26, 28, 34, 37, 41, 43, 47 and 72.

---

CHAPTER 2

PART 2 - THE CRIMINAL CODE AMENDED

CLAUSE 5 - SECTION 297 AMENDED

Range of People Protected

2.1 This clause proposes to insert a subsection (4) into section 297 of The Criminal Code (Code). Section 297 of the Code establishes that a person who unlawfully does ‘grievous bodily harm’ to another person commits a crime and imposes a maximum period of imprisonment of 10 years. The effect of the proposed subsection (4) is that a person who commits ‘grievous bodily harm’ against:

- a public officer who is performing the functions of their office or employment (‘public officer’ is defined in section 1 of the Code and does not include privately employed people who perform public services);

- a public officer “on account of his being such an officer or his performance of a function of his office or employment”;

- a person who is operating or is in charge of certain forms of public transport, such as a vehicle travelling on a railway, a ferry or a taxi (while these people perform public services, they do not fall within the definition of ‘public officers’ because they are employed in the private sector); or

- an ambulance officer performing his or her duties as an ambulance officer (while these people perform public services, they do not fall within the definition of ‘public officers’ because they are employed in the private sector),

will be liable to a higher maximum period of imprisonment of 14 years.

2.2 The Western Australian Director of Public Prosecutions (DPP) advised the Committee that this proposed amendment is the product of his consultation with the Western Australian Police in response to “increasing concern about the incidence of violence against police and other public officers”. The rationale for introducing the increased penalty for committing grievous bodily harm against these officers is that attacks on these officers (given their role as protectors of law and order within the community) are generally regarded as more serious than attacks on other civilians. The DPP contended that attacks on all public officers should attract higher penalties “in order to

---

4 Submission No 6 from Mr Robert Cock QC, Director of Public Prosecutions, Office of the Director of Public Prosecutions, 23 April 2007, p3.
promote respect for the law and to recognise that public officers have an important function”.  

2.3 This proposed amendment will implement recommendation 1 and the tenet of recommendation 5 of a 2006 report by the DPP, where he identified that:

- the penalty for committing grievous bodily harm against public officers is inadequate; and

- it is “archaic and inadequate” that currently, assaults on public officers (covered in section 318 of the Code) can only be prosecuted in circumstances where the offence is committed while the public officers are performing their official duties or where the assault is motivated by their performance of their official duties. There is no provision for an offence where a public officer is assaulted simply because he or she is a public officer.

2.4 While clause 5 of the Bill also proposes to increase the maximum penalty for committing ‘grievous bodily harm’ against certain categories of people who do not fall within the definition of ‘public officers’ (such as ambulance officers performing their duties, train operators, ferry operators and taxi drivers), it does not also propose to increase the penalty for committing ‘grievous bodily harm’ against other privately employed people who perform public or community services. Examples of these people are private sector health workers (such as nurses and doctors), court security officers, prison officers and volunteer State emergency service workers, although the DPP, in a 2006 report, provided reasons why court security officers, prison officers and volunteer State emergency service workers may fall within the definition of ‘public officer’.

2.5 In his 2006 report, the DPP considered that there is an identifiable group of privately employed people “who exercise essentially the same function as their public service counterparts and may be equally deserving of the protections available under s 318” of the Code (Serious Assaults). The DPP identified this as an option for an amendment, although his final recommendations related to public officers and ambulance officers only. While these considerations were made in the context of serious assaults, it is clear that this rationale also influenced the drafting of the proposed amendment to section 297 (Grievous Bodily Harm) in clause 5 of the Bill.

5 Ibid.
7 Ibid, pp4-5, 11 and 19.
9 Ibid.
10 Ibid, p22.
2.6 In briefing the Committee on the Bill, the DPP advised that the decision to increase the penalties associated with attacks on ambulance officers was largely influenced by a desire to maintain national consistency in this area of the law:

It was not my recommendation to include anyone other than ambulance officers because my inquiry was principally concerned with police officers, people in a quasi-law enforcement circumstance, whose primary function really brought them in contact with persons who are likely to be charged with other offences. They are somewhat of a special category. The amendments, of course, picked up the definition of “public officer”; so, despite the narrow scope of my inquiry, my recommendations were to provide these additional penalties not simply for police officers but for all public officers. I paid some regard to the extent to which that was appropriate. I felt it was appropriate because persons performing public duties are, by and large, on some constraints with respect to their employment remuneration; whereas persons in the private sector, by and large, have greater flexibility to seek remuneration, and may pursue work in that area for less than the motivations that operate in relation to public officers. I acknowledge, however, that dichotomy is breaking down as society develops. About the time of my inquiry, there was a very savage assault on an ambulance officer in Rockingham. There was considerable public concern and disquiet about the absence of proper and adequate punishment available for those effecting that particular assault. My inquiries around Australia revealed that all ambulance officers, except those in Western Australia, are in fact public officers. All other states of Australia employ ambulance officers in the public service.

We are unique. I felt a very strong case therefore existed to extend the protections of these assault provisions to the ambulance officers, because they were, in a sense, front line in their duties and responsibilities, and, as I say, because of the national perspective, it was really perhaps for historical reasons more than for any substantive reason that they were denied the protection of the benefits of the provisions designed to protect public officers. I then paid some regard to the extent to which other persons in a public-type industry, although employed in the public sector, should also receive protection. A couple of categories immediately came to mind. First, there were the officers working in the private prisons, who are obviously working somewhat in the front line, as in my police and ambulance analogy, and also there were the mental health nurses, in particular, in the nursing area, where there is some real exposure to potentially violent individuals. I discussed these with colleagues and
the Attorney, and it was felt that there was not a sufficiently strong case to extend the protection to these private sector employees, other than the ambulance officers, for the reasons I have expressed.

Other states of Australia do have private sector health workers and private sector prison officers who are not under their regimes covered by the protection of the public officer provisions of the Criminal Codes in those other states, and I think our philosophy has always been to try to maintain some consistency nationally in relation to our criminal laws. I know that there is a model criminal code project that has been going for some years, which is trying to in fact create uniformity of criminal law across Australia. Whether that happens in due course is for others to assess, but, from my perspective, I was desirous of achieving, insofar as was possible, some similar provisions, and to try to cover a larger group of private sector workers and ambulance officers was to go beyond what the other states are presently doing, and I felt was really not sufficiently justified.\textsuperscript{11}

2.7 Despite the above reasoning, the DPP could see no difficulty in expressly extending the protection afforded in sections 297 and 318 of the Code to privately employed people who perform essential public or community services. However, he also stressed that he has never been approached by any representatives of this group to make these changes, and that any changes to the Code should first be carefully considered:

Whilst I do not want to have the law reactive, I do think you have to have a pretty good case, though, to amend provisions that have been in our law for a hundred years, which is our Criminal Code. I am not troubled about developing the law and extending the protections to other groups of workers, if there is a perceived or demonstrated vacuum or inadequacy, but, as I say, nothing has been brought to my attention. Whilst I have been the Director of Public Prosecutions, there has been no occasion on which any sector other than the police officers have made public a concern about inadequate sentences to protect them for assaults.\textsuperscript{12}

2.8 It appears that the inclusion of the offence of committing grievous bodily harm against other non-public officers such as train operators, ferry operators and taxi drivers as crimes which attract a maximum penalty of 14 (rather than 10) years’ imprisonment

\textsuperscript{11} Mr Robert Cock QC, Director of Public Prosecutions, Office of the Director of Public Prosecutions, \textit{Transcript of Evidence}, 18 April 2007, p3.

\textsuperscript{12} \textit{Ibid}, p4.
was proposed to bring section 297 in line with section 318 of the Code, which already provides that assaults against these people are serious assaults which attract a maximum penalty of 10 years’ imprisonment (as opposed to other forms of assault which attract lesser maximum penalties).

2.9 The Committee noted that, in the consultation process for the DPP’s 2006 report, the Commissioner of Police supported, in principle, extending the application of section 318 of the Code to private sector workers who perform public or community services. However, the Commissioner of Police also made the following observations:

\[
\text{it is considered that there is a risk that once this definition is broadened, the reason for having a distinct offence relating to this particular group [public officers] may lose effect. Accordingly, it is believed that while private sector employees such as Ambulance/Paramedic Officers should be included in this group, it should be clearly defined to ensure it does not extend to encompass for example, persons performing a paid security/crowd control function.}^{13}
\]

Committee Comment

2.10 The Committee considers that attacks on people who are employed in the private sector and perform essential public or community services should be treated as seriously, and should attract the same criminal penalties, as attacks on public officers. Accordingly, the Committee recommends that the commission of grievous bodily harm against such private sector workers should also attract a maximum penalty of imprisonment for 14 years.

Recommendation 1: The Committee recommends that clause 5 of the Criminal Law and Evidence Amendment Bill 2006 be amended so that proposed section 297(4) of The Criminal Code includes private sector health workers (such as nurses and doctors), court security officers, prison officers and volunteer State emergency service workers.

CLAUSE 9 - SECTION 318 AMENDED

Range of People Protected

2.11 Clause 9 of the Bill amends section 318 of the Code, which provides that assaulting public officers and other people performing public functions (for example, train operators, ferry operators and taxi drivers) are serious assaults which attract a

---

maximum penalty of 10 years’ imprisonment (as opposed to other forms of assault which attract lesser maximum penalties). Among other things, clause 9 proposes to make an assault on an ambulance officer performing his or her official duties a serious assault.

2.12 The discussion of the rationale for clause 5 of the Bill at paragraphs 2.2 to 2.9 of this Report is also relevant to the underlying principle for clause 9.

Committee Comment

2.13 The Committee considers that attacks on people who are employed in the private sector and perform essential public or community services should be treated as seriously, and should attract the same criminal penalties, as attacks on public officers. Accordingly, the Committee recommends that the commission of an assault against such private sector workers should also attract a maximum penalty of imprisonment for 10 years.

Recommendation 2: The Committee recommends that clause 9 of the Criminal Law and Evidence Amendment Bill 2006 be amended so that section 318(1) of The Criminal Code will be amended to include private sector health workers (such as nurses and doctors), court security officers, prison officers and volunteer State emergency service workers.

CLAUSE 10 - SECTION 321A REPLACED

Introduction

2.14 This clause seeks to repeal and replace section 321A of the Code (which deals with the offence of having a sexual relationship with a child under the age of 16 years) with a proposed new section 321A. The offence is an indictable offence, which means that it is triable by a Judge and jury.\(^{14}\)

2.15 One effect of clause 10 is that the offence will be known as ‘persistent sexual conduct with a child who is under 16 years old’. This amendment was proposed because the inclusion of the words ‘relationship with’ in the description of the offence implies an element of mutuality or consent on the part of the child, and is therefore, considered to be inappropriate.\(^{15}\) The Child Protection Unit, Princess Margaret Hospital for Children, agreed with the amended description:


\(^{15}\) Submission No 6 from Mr Robert Cock QC, Director of Public Prosecutions, Office of the Director of Public Prosecutions, 23 April 2007, p.7; and *Explanatory Memorandum* for the Criminal Law and Evidence Amendment Bill 2006, p.3.
This amendment far better reflects the fact that these contacts are often undesired and are not part of a mutually consenting relationship.\textsuperscript{16}

2.16 The Criminal Lawyers’ Association of Western Australia and The Law Society of Western Australia did not object to the replacement of the word ‘relationship’ with a “suitable alternative” in the description of the offence.\textsuperscript{17} In this Report, the Committee has used the term ‘persistent sexual conduct with a child aged under 16 years’ or variations of that term when referring to the offence.

2.17 A person persistently engages in sexual conduct with a child under 16 years of age if they commit a sexual act against the child on three or more occasions, each of which is on a different day. A ‘sexual act’ means an act that would constitute:

- sexual penetration of a child who is under 13 years of age (section 320(2) of the Code);
- indecently dealing with a child who is under 13 years of age (section 320(4) of the Code);
- procuring, inciting or encouraging a child who is under 13 years of age to engage in sexual behaviour where the child in fact engages in sexual behaviour (section 320(3) of the Code);
- sexual penetration of a child who is of, or over, the age of 13 years and under the age of 16 years (section 321(2) of the Code);
- indecently dealing with a child who is of, or over, the age of 13 years and under the age of 16 years (section 321(4) of the Code); and
- procuring, inciting or encouraging a child who is of, or over, the age of 13 years and under the age of 16 years to engage in sexual behaviour where the child in fact engages in sexual behaviour (section 321(3) of the Code).

2.18 The DPP advised the Committee that, generally, sexual offences against children are the most difficult to prosecute successfully, citing a general conviction rate of 81.6 per cent for all criminal cases and a conviction rate of 51 per cent for sexual offences

\textsuperscript{16} Submission No 11 from Clinical Associate Professor Peter Winterton, Medical Director, Child Protection Unit, Princess Margaret Hospital for Children, 17 April 2007, p1.

\textsuperscript{17} Submission No 12 from Associate Professor Judith Fordham, President, Criminal Lawyers’ Association of Western Australia, 1 May 2007, p2. An earlier version of this view was adopted by The Law Society of Western Australia: Submission No 1 from Ms Maria Saraceni, President, The Law Society of Western Australia, 12 April 2007, p1 and Attachment 2, p2.
against children. The amendments proposed by clause 10 of the Bill are aimed at “removing obstacles to the proper functioning of s 321A” of the Code, and thereby, improving the rate of success of prosecuting sexual offences against children.

2.19 It was also noted by the Committee that the current ‘sexual relationship’ charge appears to be relied upon as a charge of last resort, where the evidence available to the prosecution would not support a more specific sexual offence charge. The DPP commented that:

It is a most unfortunate situation where we have to proceed with the sexual relationship charge. That is all we can do.

2.20 Similarly, a representative of The Law Society of Western Australia, who is also a prosecutor for the DPP, provided the following observation of current section 321A of the Code:

the use of section 321A in my experience as a charge or an offence is limited. Generally the DPP, if it has evidence of specific acts of sexual abuse, will charge with the specific act; that is, indecent assault, sexual penetration of a child and so on.

2.21 As is the case currently, an indictment containing a charge of persistent sexual conduct with a child aged under 16 years must be signed by the DPP or the Deputy DPP.

General Committee Comment

2.22 The Committee recognises that the sexual abuse of children is a particularly emotive subject and noted that the Parliament has a difficult role in legislating for the prosecution of this type of criminal activity. There is a need to ensure that the accused person receives a fair trial and the Parliament must ensure that the law meets the expectations of the wider community. The balancing of these considerations will necessarily mean that legislative changes may result in the perception that some interests will be sacrificed for the benefit of others. It is in light of this general

---

18 Submission No 6 from Mr Robert Cock QC, Director of Public Prosecutions, Office of the Director of Public Prosecutions, 23 April 2007, p5.
19 Ibid.
20 Mr Robert Cock QC, Director of Public Prosecutions, Office of the Director of Public Prosecutions, Transcript of Evidence, 18 April 2007, p16.
21 Mr John Prior, Councillor, The Law Society of Western Australia, Transcript of Evidence, 2 May 2007, p2.
22 Refer to section 321A(6) of The Criminal Code.
23 Refer to proposed new section 321A(7): clause 10 of the Criminal Law and Evidence Amendment Bill 2006.
Proposed New Section 321A(3)(b) - Sexual Acts Need Not All Occur in the State

2.23 Proposed new section 321A(3)(b) will provide that not all of the three or more sexual acts alleged to constitute the persistent sexual conduct need to have occurred in Western Australia, as long as at least one of them did occur in this State. The DPP advised the Committee that, currently, the law requires that the three or more sexual acts have occurred in Western Australia.\(^{24}\) He provided the following examples of how this aspect of the current section 321A of the Code has previously prevented the mounting of prosecutions under that section:

\[
A \text{ number of the cases within my office in the past eight years that I have been there relate to sexual offending against children in circumstances of itinerant families in which incidents have been said to have occurred in South Australia, Queensland and Perth. On a number of those occasions victims have given statements to say that they can remember it happening in Carnarvon, Port Augusta and Cairns. We have not been able to prosecute such offences at the moment because the law requires three separate acts on separate days happening in Western Australia.}^{25}\]

2.24 The Child Protection Unit, Princess Margaret Hospital for Children, agreed that sexual acts which are committed in other jurisdictions need to be included in the overall indictment of persistent sexual conduct.\(^{26}\) However, the Criminal Lawyers’ Association of Western Australia and The Law Society of Western Australia were uncertain whether the proposed new subsection would be “constitutionally valid given that the Parliament has limited power to deal with offences occurring outside Western Australia.”\(^{27}\)

2.25 The DPP advised the Committee that proposed new section 321A(3)(b) is consistent with a national response to this type of offence, citing section 66EA(3) of the Crimes

---

\(^{24}\) Mr Robert Cock QC, Director of Public Prosecutions, Office of the Director of Public Prosecutions, \textit{Transcript of Evidence}, 18 April 2007, p14.

\(^{25}\) \textit{Ibid.}

\(^{26}\) Submission No 11 from Clinical Associate Professor Peter Winterton, Medical Director, Child Protection Unit, Princess Margaret Hospital for Children, 17 April 2007, p1.

\(^{27}\) Submission No 12 from Associate Professor Judith Fordham, President, Criminal Lawyers’ Association of Western Australia, 1 May 2007, p2. An earlier version of this view was adopted by The Law Society of Western Australia: Submission No 1 from Ms Maria Saraceni, President, The Law Society of Western Australia, 12 April 2007, p1 and Attachment 2, p3.
Act 1900 (NSW) as a similar provision. An excerpt of section 66EA of the Crimes Act 1900 (NSW) is provided here for the information of the Legislative Council:

66EA Persistent sexual abuse of a child

(1) A person who, on 3 or more separate occasions occurring on separate days during any period, engages in conduct in relation to a particular child that constitutes a sexual offence is liable to imprisonment for 25 years.

…

(3) It is immaterial that the conduct on any of those occasions occurred outside New South Wales, so long as the conduct on at least one of those occasions occurred in New South Wales.

2.26 The DPP also advised the Committee that proposed section 321A(3)(b) is consistent with section 12 of the Code, which essentially provides that a criminal offence can be prosecuted in Western Australia if at least one of the acts that constitute the elements of the offence occurs in Western Australia:

12. 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.

(3) This section does not apply to an offence if —

---

28 Submission No 6 from Mr Robert Cock QC, Director of Public Prosecutions, Office of the Director of Public Prosecutions, 23 April 2007, p7.

29 Ibid; and Mr Robert Cock QC, Director of Public Prosecutions, Office of the Director of Public Prosecutions, Transcript of Evidence, 18 April 2007, p14.
(a) the law under which the offence is created explicitly or by necessary implication makes the place of commission an element of the offence; or

(b) the law under which the offence is created is a law of extraterritorial operation and explicitly or by necessary implication excludes the need for a territorial nexus between Western Australia and an element of the offence.

2.27 The Committee noted that section 12 of the Code is similar to section 10C of the Crimes Act 1900 (NSW), which provides as follows:

**10C Extension of offences if there is a geographical nexus**

(1) If:

(a) all elements necessary to constitute an offence against a law of the State exist (disregarding geographical considerations), and

(b) a geographical nexus exists between the State and the offence,

the person alleged to have committed the offence is guilty of an offence against that law.

(2) A geographical nexus exists between the State and an offence if:

(a) the offence is committed wholly or partly in the State (whether or not the offence has any effect in the State), or

(b) the offence is committed wholly outside the State, but the offence has an effect in the State.

2.28 It was also noted by the Committee that section 2(1) of the Australia Act 1986 (Cth) provides that State parliaments have the power to make laws which have extraterritorial effect:

*It is hereby declared and enacted that the legislative powers of the Parliament of each State include full power to make laws for the peace, order and good government of that State that have extraterritorial operation.*
The DPP indicated that he is prepared to accept the principle espoused in section 12 of the Code in constitutional law, confirming that there has never been a constitutional challenge to that principle.\(^{30}\) He further confirmed that his office has been successful in prosecuting drug charges where one element of the offence may have occurred in a Melbourne or Sydney airport and another had occurred in a Perth airport.\(^{31}\)

**Committee Comment**

The Committee is satisfied that proposed section 321A(3)(b) is within the State’s legislative powers.

**Proposed New Section 321A(5) - No Requirement to Particularise Dates or Circumstances on Charge**

Proposed new section 321A(5) provides that a charge of persistent sexual conduct with a child who is under 16 years old:

\[(a)\] must specify the period during which it is alleged that the sexual conduct occurred; and

\[(b)\] need not specify the dates, or in any other way particularise the circumstances, of the sexual acts alleged to constitute the sexual conduct.

It was noted by the Committee that the current section 321A(5) already provides that in proceedings for such an offence, it is not necessary to specify the dates, or in any other way particularise the circumstances, of the alleged sexual acts. Current section 321A was inserted into the Code on 1 August 1992.\(^{32}\) Proposed new section 321A(5)(b) appears to continue the principle that the prosecution is not required to provide the dates and other circumstances of the alleged sexual assaults by clarifying that the indictment containing the charge need not provide these details. The operation of that principle is extended in proposed new section 321A(8) (refer to paragraphs 2.64 to 2.80 in this Report).

‘Particulars’ has been defined as meaning the:

---


\(^{32}\) Section 321A of *The Criminal Code* was inserted by section 6(1) of the *Acts Amendment (Sexual Offences) Act 1992*. The debate on the bill for that Act in the Legislative Council indicates that section 321A was inserted to overcome the difficulty in prosecuting persistent sexual misconduct against a child after the High Court of Australia decision in *S v R* (1989) 168 CLR 266: Parliament of Western Australia, Legislative Council, *Parliamentary Debates (Hansard)*, 6 May 1992, pp1803-1804.
Details of the material facts alleged in the pleadings\[^{33}\], including details of any claim ... or other matter pleaded ... While pleadings define the issues in general terms, particulars control the generality of the pleadings, restrict the evidence to be led by the parties, and give the other party information to enable them to know the case they will be met with ... \[^{34}\]

2.34 When the Committee queried what details would be required to appear on an indictment for a charge of persistent sexual conduct with a child under 16 years of age under proposed new section 321A(5), the DPP provided the following advice:

*The indictment will often say that between a certain date and another date, at one or other places, the accused person engaged in persistent sexual conduct with a child being under 13 years of age. I should say that that is almost the same as now; it uses that most inappropriate formulation of “had a sexual relationship with”.\[^{35}\]*

2.35 The Child Protection Unit, Princess Margaret Hospital for Children submitted that a need to particularise dates is very disadvantageous to children as it may not be possible for them to provide such detail if repeated assaults have occurred. Its view was that it is useful for the protection of the child victim to not require the specification of dates and other particulars.\[^{36}\]

2.36 The Criminal Lawyers’ Association of Western Australia and The Law Society of Western Australia acknowledged that the proposed subsection would continue the effect of current section 321A(5) of the Code and confirmed that, where the exact dates of the alleged sexual acts are not known, the prosecution is at liberty to word the charge in the following way:

*the offence ... occurred “on a date unknown between (for example) 1996 and 2001”.* \[^{37}\]

\[^{33}\] *‘Pleadings’ are “Written or printed statements which alternate between the parties to a dispute and define the issues to be decided ... Criminal pleadings may consist of an indictment, presentment, information, or complaint, followed by a plea on the part of the accused.”*: The Honourable Dr Nygh, PE and Butt, P, General Editors, *Butterworths Australian Legal Dictionary*, Butterworths, Perth, 1997, p884.


\[^{36}\] Submission No 11 from Clinical Associate Professor Peter Winterton, Medical Director, Child Protection Unit, Princess Margaret Hospital for Children, 17 April 2007, p1.

\[^{37}\] Submission No 12 from Associate Professor Judith Fordham, President, Criminal Lawyers’ Association of Western Australia, 1 May 2007, p2. An earlier version of this view was adopted by The Law Society of Western Australia: Submission No 1 from Ms Maria Saraceni, President, The Law Society of Western Australia, 12 April 2007, p1 and Attachment 2, p2.
2.37 The Criminal Lawyers’ Association of Western Australia submitted that the effect of current section 321A(5), particularly where there has been a substantial delay in making a complaint, is to deny an accused person the opportunity to provide alibi or other exculpatory evidence.

2.38 A similar view was held by The Law Society of Western Australia, which submitted that the current section 321A(5), again especially where there has been a significant delay in making the complaint, allows for vague allegations to be made and denies the accused person the opportunity to call alibi evidence or to test the credibility of the complainant by reference to surrounding circumstances. At a Committee hearing, The Law Society of Western Australia made the following comments about the practical effect of the current section 321A(5) of the Code:

The problem from an accused’s perspective, in simple terms of a lack of particularisation, is that unfortunately with child sexual abuse or child sexual relationship charges, many of them are of historical origin. That is, the child will go and complain to mum, teacher, dad, whatever and it may be many years after the offence. Normally with an accused person, a complaint is made against them of a criminal offence within a reasonable time after the alleged offence was committed. In those sorts of circumstances, an accused person can be told it happened years and years ago. In terms of whether they have, for example, an alibi defence - I was not there, I did not do it, I was in another country or another place - the longer the time span, the more difficult it is. If there is a child sexual relationship offence that does not specify and says that in these general years a person engaged in an unlawful relationship of a sexual nature with a child under 16, it becomes very vague for the accused and it is difficult for the accused to defend.

2.39 Mr Michael Crowley was of the view that proposed new section 321A(5)(b) should be amended to read:

---

38 An ‘alibi’ is a “claim by a person charged with an offence to the effect that the person was somewhere other than the place where the crime was committed at the time of the commission of the offence, and therefore, could not be guilty of the offence.”: The Honourable Dr Nygh, PE and Butt, P, General Editors, Butterworths Australian Legal Dictionary, Butterworths, Perth, 1997, p45.

39 Submission No 12 from Associate Professor Judith Fordham, President, Criminal Lawyers’ Association of Western Australia, 1 May 2007, p2. An earlier version of this view was adopted by The Law Society of Western Australia: Submission No 1 from Ms Maria Saraceni, President, The Law Society of Western Australia, 12 April 2007, p1 and Attachment 2, p2.

40 Submission No 1 from Ms Maria Saraceni, President, The Law Society of Western Australia, 12 April 2007, Attachment 1, p2.

41 Mr John Prior, Councillor, The Law Society of Western Australia, Transcript of Evidence, 2 May 2007, p2.
‘...should when available specify the dates and the circumstances of the sexual acts alleged to constitute the sexual conduct’.  

2.40 He argued that an indictment should contain sufficient particulars of time, the manner and the place of the commission of the alleged offence in order to provide the accused person with sufficient information with which to prepare a defence. Any reduction of the requirement for particulars may lead to an injustice. Mr Crowley’s submission went on to say that:

While prosecutors may favour wide indictments and defence narrow indictments the role of legislators is to achieve a balance in the interests of justice to all parties. This proposed amendment not only shifts the balance in favour of the prosecution but opens the door to abuse by any prosecutor who may seek an unfair advantage by intentionally drafting a wide indictment lacking particularisation when such particularisation exists.

2.41 The Committee noted that, despite current section 321A(5) and proposed new section 321A(5)(b), if the prosecution is to be successful, the prosecutor must still particularise the charge sufficiently so as to identify the relevant elements of the offence. For example, Schedule 1, Division 2, Item 5 of the Criminal Procedure Act 2004 (CP Act) must still be complied with, apart from any direct inconsistency with current section 321A(5) and proposed new section 321A(5)(b). Schedule 1, Division 2, Item 5 of the CP Act provides as follows:

5. Alleged offence to be described

(1) A charge in a prosecution notice or indictment must inform the accused of the alleged offence in enough detail to enable the accused to understand and defend the charge, and in particular must —

(a) describe the offence with reasonable clarity;

(b) identify the written law and the provision of it that creates the offence;

(c) identify with reasonable clarity —

---

42 Submission No 5 from Mr Michael Crowley, Lecturer in Law and Barrister, School of Law and Justice, Edith Cowan University, 20 April 2007, p2.
44 Ibid, p2.
45 Letter from Mr Robert Cock QC, Director of Public Prosecutions, Office of the Director of Public Prosecutions, 9 May 2007, p2.
(i) the date when the offence was committed or, if the date is not known, the period in which the offence was committed; and

(ii) where the offence was committed;

(d) if the offence is one against a person, identify the person concerned in accordance with clause 6(2); and

(e) if the offence relates to property, comply with clause 6(4) and (5).

(2) For the purposes of subclause (1) —

(a) it is sufficient to describe an offence in the words of the written law that creates it;

(b) if that written law states that alternative acts, omissions, capacities, or intentions, constitute the offence, the alternatives may be set out;

(c) a charge is not defective only because an element of the offence is not stated; and

(d) it is not necessary to allege —

(i) any matter, or any particulars as to a person or thing, that need not be proved; or

(ii) the means or thing used to do an act constituting an offence unless the means or thing is an element of the offence. (emphasis added)

2.42 The DPP also advised the Committee that proposed new section 321A(5) would not affect the prosecution’s statutory duty of disclosure of evidence to the accused person and to the court during a prosecution.\(^n\) With respect to indictable offences, such as this offence, the prosecution is obliged to give the accused person:

- ‘initial disclosure’ of certain documents when, or as soon as practicable after, the indictment is served on the accused and before, or at the time of, the

\(^n\) Letter from Mr Robert Cock QC, Director of Public Prosecutions, Office of the Director of Public Prosecutions, 1 June 2007, p1.
The accused’s first appearance in the court in relation to the indictment. These documents are a written statement of the material facts for each charge, an approved notice of the existence or non-existence of relevant confessional material of the accused person, an approved notice that the accused does or does not have a criminal record, and any prescribed document. If an accused person is served with a notice of the existence of relevant confessional material of the accused person and/or notice that the accused person has a criminal record, the prosecutor must, as soon as practicable after the notice(s) is served, make a copy of the material and/or the record available to the accused person or their lawyer;

- ‘full disclosure’ of certain documents as soon as practicable after an indictable charge is adjourned to a ‘disclosure/committal hearing’ and continuing until the charge is finally dealt with. These documents are any relevant confessional material of the accused person that has not already been served on that person, any evidentiary material that is relevant to the charge, and any other prescribed document; and

- ‘pre-trial or pre-sentencing disclosure’ of certain documents within a prescribed period where those documents have not already been served on the accused person. These documents are a statement of the material facts of the charge, any relevant confessional material of the accused person, a copy of the accused person’s criminal record, (unless the accused person has been committed for sentence) any relevant evidentiary material, (where the accused person is committed for sentence or for trial) a copy of the certificate made under section 45 of the CP Act, and any other prescribed document.

---

47 Section 35 of the Criminal Procedure Act 2004.
48 ‘Confessional material’ is defined in section 35(1) of the Criminal Procedure Act 2004.
49 Section 35(4) of the Criminal Procedure Act 2004. Currently, no other documents have been prescribed for this section.
50 Section 35(11) of the Criminal Procedure Act 2004.
51 Ibid, section 42.
52 ‘Confessional material’ is defined in section 42(1) of the Criminal Procedure Act 2004.
53 ‘Evidentiary material’ is defined in sections 42(1) and (2) of the Criminal Procedure Act 2004.
54 Section 42(5) of the Criminal Procedure Act 2004. Currently, no other documents have been prescribed for this section.
55 This period is either 42 days or 28 days depending on the situation: rule 20 of the Criminal Procedure Rules 2005.
56 Section 95 of the Criminal Procedure Act 2004.
57 ‘Confessional material’ is defined in section 42(1) of the Criminal Procedure Act 2004.
58 ‘Evidentiary material’ is defined in sections 42(1) and (2) of the Criminal Procedure Act 2004.
59 For example, the person signing the certificate must certify that the disclosure requirements in sections 35 and 42 of the Criminal Procedure Act 2004 have been complied with.
2.43 If any of the above disclosure requirements are not met by the prosecution, various options are open to the court. For example, the court may:

- order disclosure or make other relevant orders;\(^{61}\)

- where the section 35 disclosure requirements are not met - adjourn the charge to a new court date that allows a reasonable time for the prosecution to serve the documents and order the prosecution to serve the documents before the new court date. If the order is not obeyed, the court may adjourn the charge again or dismiss it for want of prosecution;\(^{62}\)

- where the section 42 disclosure requirements are not met - adjourn the charge to another disclosure/committal hearing on a new court date that allows a reasonable time for the prosecution to comply with section 42 and order the prosecution to comply with section 42 before the new court date. If the order is not obeyed, the court may adjourn the charge again or dismiss it for want of prosecution;\(^{63}\) or

- where the section 95 disclosure requirements are not met or an order made under section 138 has not been obeyed - adjourn the trial for a period that allows enough time for the prosecution to comply with the requirement or order, for the party affected by the breach to investigate properly any evidence or other matter disclosed in accordance with the requirement or order, and for the party affected by the breach to obtain any evidence as a result of the disclosure. If the trial is a trial by jury, the court could also discontinue the trial, discharge the jury and adjourn the prosecution. The prosecution may also be the subject of adverse comment to the jury by the Judge or the accused person.\(^{64}\)

2.44 It was also noted by the DPP that the non-disclosure of critical evidence or material particulars can lead to the quashing of any conviction secured at a trial in which important information was not disclosed.\(^{65}\)

2.45 The DPP maintained that the effect of the above disclosure requirements is that the prosecution is obliged to disclose, to the accused person, all of the evidence in

---

\(^{60}\) Sections 95(5) to 95(8) of the *Criminal Procedure Act 2004*. Currently, no other documents have been prescribed for this section.

\(^{61}\) Section 138 of the *Criminal Procedure Act 2004*.

\(^{62}\) *Ibid*, section 35(10).

\(^{63}\) *Ibid*, section 44(1)(b).

\(^{64}\) *Ibid*, section 97(2).

\(^{65}\) Letter from Mr Robert Cock QC, Director of Public Prosecutions, Office of the Director of Public Prosecutions, 1 June 2007, p2.
Committee Comment

2.46 The Committee acknowledges the concerns of the Criminal Lawyers’ Association of Western Australia, The Law Society of Western Australia and Mr Crowley. In particular, the Committee is of the view that Mr Crowley’s suggested re-wording of proposed new section 321A(5)(b) has merit. However, the Committee observed that proposed new section 321A(5)(b) would continue the effect of current section 321A(5) of the Code, a provision which has been in operation since 1992.

Proposed New Section 321A(6) - Duplicity Authorised

2.47 Proposed new section 321A(6) provides that a person charged with persistently engaging in sexual conduct with a child under 16 years of age (the ‘general charge’) may also be charged (either in the same indictment or a separate indictment) with committing a sexual act which is alleged to have been committed during the same period as the persistent sexual conduct is alleged to have occurred (the ‘specific charge’).

2.48 This amendment differs from the effect of current section 321A(4) of the Code, which provides, among other things, that a person:

\[\text{shall not be charged in the same indictment with any other offence under this Chapter [Chapter XXXI - Sexual Offences] alleged to have been committed against the child during that period.}\]

2.49 The Criminal Lawyers’ Association of Western Australia and The Law Society of Western Australia submitted that, if an indictment charges a person with both a specific charge and the general charge under proposed new section 321A, there would be some danger that both charges may be declared by the court as bad for duplicity, given that it will not be necessary to particularise the acts alleged to constitute the general charge\(^{67}\) nor nominate the charge on which the prosecution intends to proceed.\(^{68}\)

2.50 The common law rule against duplicity provides that a statement of an offence (in Western Australia these statements are known as either indictments or prosecution

\(^{66}\) Ibid, p1.

\(^{67}\) Refer to proposed new sections 321A(5) and (8): clause 10 of the Criminal Law and Evidence Amendment Bill 2006.

\(^{68}\) Submission No 12 from Associate Professor Judith Fordham, President, Criminal Lawyers’ Association of Western Australia, 1 May 2007, p3. An earlier version of this view was adopted by The Law Society of Western Australia: Submission No 1 from Ms Maria Saraceni, President, The Law Society of Western Australia, 12 April 2007, p1 and Attachment 2, p3.
notices) or a count in such a statement must allege only one offence.\(^{69}\) One aspect of this rule is reflected in Schedule 1, Division 2, Item 2 of the CP Act, which provides that:

\[
\text{A prosecution notice or indictment must contain one charge only, unless clause 7\(^{70}\)}\text{ or another written law permits otherwise.}
\]

2.51 That aspect of the rule is also reflected in current section 321A(4) of the Code.

2.52 The purpose of the rule against duplicity is to avoid confusion and unfairness by ensuring that the accused person knows the charges that they have to answer.\(^{71}\) Once duplicity is disclosed, the court should require the prosecution to nominate on which charge it wishes to proceed. While the prosecution cannot be compelled to nominate, the indictment or prosecution notice should not be dismissed unless the prosecution has been put to a nomination and has refused to nominate.\(^{72}\)

2.53 In answer to the concerns of the Criminal Lawyers’ Association of Western Australia and The Law Society of Western Australia, the DPP’s view of proposed new section 321A(6) was that it implicitly authorises the charging of both the specific charge and the general charge in the same indictment.\(^{73}\) That is, the rule of duplicity is being overridden:

\[
\text{It is my view that the court would not declare a charge of that kind for duplicity because it would be implicitly authorised by the subsection. If I am wrong in this, then the prosecution would be required to elect upon which charge it decides to proceed, and that would have to happen. We would not initiate the indictment; it would simply mean that we would elect whether we proceed on the sexual relationship charge or the specific charge. If I am right, we can proceed on both.}^{74}\]


\(^{70}\) Schedule 1, Division 2, Item 7 of the *Criminal Procedure Act 2004* provides that a prosecution notice or indictment may charge two or more offences if those offences are alternatives to one another or the offences are effectively part of the same transaction.


\(^{72}\) *Ibid*, and the cases cited there.

\(^{73}\) Mr Robert Cock QC, Director of Public Prosecutions, Office of the Director of Public Prosecutions, *Transcript of Evidence*, 18 April 2007, p16; and Submission No 6 from Mr Robert Cock QC, Director of Public Prosecutions, Office of the Director of Public Prosecutions, 23 April 2007, p6.

\(^{74}\) Mr Robert Cock QC, Director of Public Prosecutions, Office of the Director of Public Prosecutions, *Transcript of Evidence*, 18 April 2007, p16.
2.54 The DPP confirmed that with respect to the specific charge, the prosecution would still be required to comply with the normal rules of particularisation, which are to identify the date and the nature of the alleged act.\textsuperscript{75} He advised that the proposed new section 321A(6) will avoid the prosecution difficulties associated with a situation where a complainant may be clear about one sexual act but confused about the remaining sexual acts alleged to constitute the general charge:

\textit{In this case the accused may be acquitted simply because the jury might be completely satisfied about one or even two of the acts, but not the third act. If the accused is acquitted on the persistent sexual conduct charge I cannot retry the accused person for any sexual offence between the dates of the acquitted offence. The result is that any act which the jury concluded unanimously was committed by the accused remains unconvicted.}\textsuperscript{76}

2.55 The DPP also indicated that, under proposed new section 321A(6), he would be able to prosecute both the specific charge and the general charge.\textsuperscript{77} The two charges could be prosecuted under either one indictment or separate indictments.

2.56 In support of the DPP’s contentions, the Committee noted that:

- there is a general principle that there may be only one indictment for each trial;\textsuperscript{78} and

- current section 321A(10) of the Code provides that if a person who has been tried and convicted or acquitted on an indictment alleging a general charge, the fact of the trial and conviction or acquittal is a defence to any specific charge. The Committee observed that current section 321A(10) will be deleted by clause 10 of the Bill.

2.57 However, there appears to be no legal impediment to the DPP prosecuting a specific charge first and then prosecuting a general charge on a separate indictment.

2.58 It was also argued by the DPP that any potential injustice caused by the duplicitous charging of an accused person would be avoided by the operation of proposed section 321A(13).\textsuperscript{79} The effect of the proposed subsection is that if a person who is convicted

\begin{itemize}
\item \textsuperscript{75} Ibid.
\item \textsuperscript{76} Submission No 6 from Mr Robert Cock QC, Director of Public Prosecutions, Office of the Director of Public Prosecutions, 23 April 2007, p6.
\item \textsuperscript{77} Mr Robert Cock QC, Director of Public Prosecutions, Office of the Director of Public Prosecutions, \textit{Transcript of Evidence}, 18 April 2007, p16.
\item \textsuperscript{78} Halsbury’s Laws of Australia, paragraph 130-13620 and the cases cited in footnote 4.
\item \textsuperscript{79} Submission No 6 from Mr Robert Cock QC, Director of Public Prosecutions, Office of the Director of Public Prosecutions, 23 April 2007, p6.
\end{itemize}
on both the specific charge and the general charge, and is sentenced to a term of
imprisonment for each of those charges, the court must order the terms of
imprisonment to be served concurrently.\footnote{Mr Robert Cock QC, Director of Public Prosecutions, Office of the Director of Public Prosecutions, \textit{Transcript of Evidence}, 18 April 2007, p20.}

2.59 Both the Criminal Lawyers’ Association of Western Australia and The Law Society of
Western Australia were not convinced that proposed new section 321A(6) was
designed to override the rule against duplicity:

\begin{quote}
\textit{In my experience, the DPP is not protected from charges being
duplicitous, because of an argument that the DPP may make at first
instance that the charges are implicitly authorised by a particular
subsection. That does not, as a matter of logic, prevent charges from
being duplicitous. Were that subsection designed to overcome a
concern about duplicity, the legislature would have said so, and
should have said so, explicitly. As a matter of statutory
interpretation, I simply do not agree with the DPP’s point of view.}\footnote{Associate Professor Judith Fordham, President, Criminal Lawyers’ Association of Western Australia, \textit{Transcript of Evidence}, 2 May 2007, p4. The Law Society of Western Australia agreed with these comments: Mr John Prior, Councillor, The Law Society of Western Australia, \textit{Transcript of Evidence}, 2 May 2007, p5.}
\end{quote}

2.60 Proceeding on the basis that the proposed new subsection does not authorise
duplicitous charging, the two organisations were concerned that:

\begin{itemize}
  \item any duplicity might not be identified by the Judge; and
  \item even if the duplicity is identified, the Judge may rule against a request for the
        prosecution to elect the charge on which it will proceed. This would
        potentially result in many appeals.\footnote{Associate Professor Judith Fordham, President, Criminal Lawyers’ Association of Western Australia, \textit{Transcript of Evidence}, 2 May 2007, pp4-5. The Law Society of Western Australia agreed with these comments: Mr John Prior, Councillor, The Law Society of Western Australia, \textit{Transcript of Evidence}, 2 May 2007, p5.}
\end{itemize}

\textit{Committee Comment}

2.61 Having considered the words used in proposed new section 321A(6), the Committee is
of the view that that provision will expressly override the common law rule against
duplicity (and Schedule 1, Division 2, Item 2 of the CP Act) in this limited situation.
By employing the words “\textit{may also be charged, either in the same or a separate
indictment}” (emphasis added) the proposed new subsection will expressly authorise
not just the charging of the specific charge and the general charge, but the charging of
more than one offence in one indictment.
According to the High Court of Australia (High Court), a legislative intention to interfere with important common law principles can only be effected by unambiguous words or by necessary implication. In this case, the Committee considers that the language used in proposed new section 321A(6) is sufficiently clear and unambiguous in abrogating the common law rule against duplicity in the context of sexual offences against children under 16 years of age prescribed under current sections 320(2), (3) and (4), 321(2), (3) and (4) and proposed new section 321A of the Code.

The Committee accepts the DPP’s justification for the proposed new subsection and acknowledges that there is a need for it. The Committee is also satisfied that the DPP would be unlikely to proceed with both a specific charge and a general charge on the same indictment unless his office has sufficient particulars for at least the specific charge. However, the Committee notes that any indictment containing both a specific charge and a general charge will need to be carefully drafted to ensure that no confusion is caused to the defence.

Proposed New Section 321A(8) - No Court Power to Order Further Particulars of Sexual Acts

Proposed new section 321A(8) provides that, a court cannot order the prosecutor to give a person charged with persistent sexual conduct with a child aged under 16 years “particulars of the sexual acts alleged to constitute the offence”. This prohibition is imposed despite section 131(3) of the CP Act, which empowers a court to order a prosecutor to give an accused person further particulars of a charge. That is, any particulars of the alleged sexual acts which are provided in an indictment cannot be supplemented by a court order and subsequent provision of further particulars. The DPP confirmed that proposed new section 321A(8) is not intended to override the indictment requirements in Schedule 1, Division 2, Item 5 of the CP Act (that provision is quoted in paragraph 2.41 of this Report).

When the Committee queried the rationale for the proposed new section 321A(8), the DPP advised that the provision was drafted to complement proposed new section 321A(5)(b) (refer to paragraphs 2.31 to 2.46 in this Report). That is, proposed new section 231A(5) deals with the particulars which need not appear on an indictment and proposed new section 321A(8) deals with the authority of a court to order a prosecutor

83 Coco v The Queen (1994) 179 CLR 427 at p437 per Mason CJ, Brennan, Gaudron and McHugh JJ; and Daniels Corporation International Pty Ltd and Anor v Australian Competition and Consumer Commission (2002) 77 ALJR 40 at p43 per Gleeson CJ, Gaudron, Gummow and Hayne JJ, at p49 per McHugh J, and at pp65-66 per Callinan J.

84 Refer to paragraph 2.33 in this Report for a definition of ‘particulars’.

85 Letter from Mr Robert Cock QC, Director of Public Prosecutions, Office of the Director of Public Prosecutions, 1 June 2007, p1.

86 Mr Robert Cock QC, Director of Public Prosecutions, Office of the Director of Public Prosecutions, Transcript of Evidence, 18 April 2007, p16.
to provide particulars to an accused person after the presentation of the indictment.\textsuperscript{87}

In this respect, proposed new section 321A(8) appears to be continuing the principle contained in the current section 321A(5) of the Code that the prosecution is not required to specify dates, or otherwise particularise the circumstances, of the alleged sexual acts.

2.66 However, the words used in proposed new section 321A(8) to prescribe the type of particulars which cannot be ordered ("particulars of the sexual acts") differ from those used in proposed new section 321A(5)(b) and the current section 321A(5) to prescribe the type of particulars which are not required in a charge ("the dates, or in any other way particularise the circumstances, of the sexual acts").

2.67 It is a fundamental principle of legislative interpretation that the employment of different words in the same Act where the legislature could have used the same words may show that the legislature had different meanings in mind.\textsuperscript{88} ‘Dates and particulars of the circumstances of the alleged sexual acts’ appear to be different to ‘particulars of the alleged sexual acts’. The Criminal Lawyers’ Association of Western Australia advised that the term ‘circumstances’ is usually understood to mean ‘where it happened or what was going on at the time’, but ‘particulars of the sexual acts’ refers to the types of sexual acts that the accused person is alleged to have done.\textsuperscript{89}

2.68 According to the Association, the current section 321A(5) (which is effectively continued by proposed new section 321A(5)(b)) is widely different from proposed new section 321A(8):

\[ \text{What I am pointing out is that the current section 321A(5) … says that it is not necessary on an indictment to specify dates or particularise circumstances, … and new section 321A(8) … says a court cannot order the prosecutor to give a person charged particulars of the acts. We see that as being widely different.}\textsuperscript{90} \]

2.69 The distinction between proposed new section 321A(8) and the current section 321A(5) of the Code was also recognised by The Law Society of Western Australia.\textsuperscript{91}

2.70 Therefore, it appears that proposed new section 321A(8) goes beyond the scope of the current section 321A(5) of the Code. The proposed new section is introducing a

\textsuperscript{87} Letter from Mr Robert Cock QC, Director of Public Prosecutions, Office of the Director of Public Prosecutions, 1 June 2007, p2.

\textsuperscript{88} Pearce, DC and Geddes, RS, \textit{Statutory Interpretation in Australia}, 5\textsuperscript{th} Edition, Butterworths, Australia, 2001, paragraph 4.4.

\textsuperscript{89} Associate Professor Judith Fordham, President, Criminal Lawyers’ Association of Western Australia,\textit{ Transcript of Evidence}, 2 May 2007, p3.

\textsuperscript{90} \textit{Ibid}, p4.

\textsuperscript{91} Submission No 1 from Ms Maria Saraceni, President, The Law Society of Western Australia, 12 April 2007, Attachment 1.
prohibition on the court ordering a prosecutor to give an accused person further particulars of the alleged sexual acts; that is, further to any particulars which may already have been provided in the indictment. This would result in an effective reduction of the obligation of the prosecution to supply certain details of one of the elements of the offence. This is in addition to the prosecutor already being relieved of the requirement to provide the dates and circumstances of the alleged sexual acts in the indictment under proposed new section 321A(5)(b), which effectively continues the operation of the current section 321A(5) of the Code.

The DPP confirmed that ‘particulars of sexual acts’ means the type of sexual act which is alleged to have occurred. For example, if a person was charged with persistent sexual conduct with a child who was under 16 years of age, and one of the alleged sexual acts constituting the offence was sexual penetration of a child who was aged 13, proposed new section 321A(8) would prohibit the court from ordering the prosecutor to inform the accused person whether the penetration was digital or penile if this detail was not already provided in the indictment. In those circumstances, it would be sufficient for the prosecutor to identify in the indictment that there was a sexual penetration as defined in section 319(1) of the Code, which provides that:

“to sexually penetrate” means —

(a) to penetrate the vagina (which term includes the labia majora), the anus, or the urethra of any person with —

(i) any part of the body of another person; or

(ii) an object manipulated by another person, except where the penetration is carried out for proper medical purposes;

(b) to manipulate any part of the body of another person so as to cause penetration of the vagina (which term includes the labia majora), the anus, or the urethra of the offender by part of the other person’s body;

(c) to introduce any part of the penis of a person into the mouth of another person;

(d) to engage in cunnilingus or fellatio; or

---

92 Letter from Mr Robert Cock QC, Director of Public Prosecutions, Office of the Director of Public Prosecutions, 9 May 2007, p2.

93 Ibid.
(e) to continue sexual penetration as defined in paragraph (a),
(b), (c) or (d).

2.72 It was submitted by the DPP that it is not always possible for a child to accurately recall, on a particular day, the precise nature of the penetration, and in turn, the prosecutor may not be able to provide ‘particulars of the sexual acts’. The Child Protection Unit, Princess Margaret Hospital for Children, agreed that it is useful in the protection of child victims of repeated sexual assaults to not require the specification of dates and other particulars of the alleged sexual acts. If proposed new section 321A(8) is amended to refer to ‘particulars of the circumstances of the sexual acts’, the DPP contended that the prosecution would remain obliged to particularise the sexual acts to a degree which is not always possible.

2.73 The Law Society of Western Australia acknowledged that leading evidence from children who have suffered sexual abuse over a long period of time can be problematic. However, it submitted that the difficulty of proving such offences should not be “remedied by effectively reducing the prosecution’s obligation to prove its allegations beyond a reasonable doubt.”

2.74 The Criminal Lawyers’ Association of Western Australia and The Law Society of Western Australia strongly opposed proposed new section 321A(8) because it is “contrary to any notion of a fair trial and the right for an accused to know what he is charged with so as to mount an effective defence.” These organisations submitted that the current section 321A(5), which does not require the prosecution to specify the dates, times and other circumstances surrounding the alleged sexual acts, already makes it difficult for the accused person to defend a charge under current section 321A of the Code. They argued that proposed new section 321A(8) would tip the balance further in favour of the prosecution:

> In every other criminal proceeding other than an offence under this section a person is entitled to know precisely what he is alleged to have done. There is no sound reason to place an offence under s321A in a special category of offences where the possibility of a fair trial is dispensed with. It is (and has always been) a fundamental principle

---

94 Submission No 11 from Clinical Associate Professor Peter Winterton, Medical Director, Child Protection Unit, Princess Margaret Hospital for Children, 17 April 2007, p1.

95 Letter from Mr Robert Cock QC, Director of Public Prosecutions, Office of the Director of Public Prosecutions, 9 May 2007, p2.

96 Submission No 1 from Ms Maria Saraceni, President, The Law Society of Western Australia, 12 April 2007, Attachment 1, p2.

97 Submission No 12 from Associate Professor Judith Fordham, President, Criminal Lawyers’ Association of Western Australia, 1 May 2007, p2. An earlier version of this view was adopted by The Law Society of Western Australia: Submission No 1 from Ms Maria Saraceni, President, The Law Society of Western Australia, 12 April 2007, p1 and Attachment 2, p2.
of fairness in any trial that an accused person knows with some particularity the allegations he or she is facing.\footnote{See, for example, *Ex parte Graham; Re Dowling and Another* [1969] 1 NSWR 231 at p240 per Asprey JA.}

The prohibition against the provision of particulars means that a person must go to the trial not knowing precisely what he has been charged with and, consequently that he or she may not be able to prepare an adequate defence.\footnote{Submission No 12 from Associate Professor Judith Fordham, President, Criminal Lawyers’ Association of Western Australia, 1 May 2007, p2. An earlier version of this view was adopted by The Law Society of Western Australia: Submission No 1 from Ms Maria Saraceni, President, The Law Society of Western Australia, 12 April 2007, p1 and Attachment 2, p2.}

2.75 At a Committee hearing on 2 May 2007, the Criminal Lawyers’ Association of Western Australia voiced the following concerns:

*They [the accused person] will not be told anything if this amendment is passed. We see that as extraordinary. How could any accused possibly defend a charge while not knowing the dates or the circumstances and not even knowing the act?*

*I mean, what is left? Nothing, as far as we can tell. It is extraordinary that the court is not empowered. Surely the judge should have the discretion, or the court should have the power, in circumstances in which it is clearly possible, for example, for the state to provide particulars of any sort, to say, “You have those particulars. Do not keep them up your sleeve. You may as well tell the defence.” If the state cannot provide those particulars, that is another matter. This now says that the court cannot order the prosecutor to do so. That means we may have the extraordinary circumstance in which the prosecutor may know the precise acts, because the complainant may have been quite precise about that but may for whatever reason not have given a statement, and thereby, by virtue of full disclosure, nothing has been provided, yet the prosecutor may simply refuse to provide the particulars. I am not suggesting most prosecutors would do that. However, it would be an extraordinary state of the law if this did come to pass.*\footnote{Associate Professor Judith Fordham, President, Criminal Lawyers’ Association of Western Australia, Transcript of Evidence, 2 May 2007, p3.}

2.76 The above hypothetical situation was put to the DPP, who advised the Committee that the statutory disclosure requirements which are discussed in paragraphs 2.42 to 2.45 in this Report would still apply to the prosecution even if proposed new section 321A(8)
More specifically, the DPP advised that the prosecution’s disclosure requirements in section 42 of the CP Act stipulate that if there is no statement or recording of a person who the prosecution intends to call as a witness, a written summary of the evidence to be given by that person must be served on the accused person. He also advised that in prosecutions of sexual offences against children, the entire evidence of the victim will invariably be “either the subject of a video recorded statement or pre recorded evidence, in each instance, well before the trial” and the accused person would have access to this information well before the trial.

In *Ex parte Graham; Re Dowling and Another* [1969] 1 NSWR 231, Asprey JA made the following observations about the provision of the particulars of an offence:

> Particulars are not ordered as a matter of course and it follows from this that there must be some justification advanced for them when they are requested. In most instances the question whether or not particulars ought to be supplied would turn upon the nature of the offence charged and what is averred in the information. There would be many cases in which the facts upon which the guilt or innocence of a defendant is to be adjudged would lie within so narrow a field that a lack of particulars could not be held to be oppressive to the defendant … . On the other hand, if the nature of the charge is such as to permit of a wide variety of acts or omissions being alleged in its proof, particulars should be supplied where there is reason to believe that the defendant is in any doubt as to the precise case which he has to meet; and the prosecution should in most cases be ready to resolve that doubt for the defendant.

The Committee acknowledges the concerns of the Criminal Lawyers’ Association of Western Australia and The Law Society of Western Australia. While the Committee recognises that the prosecution is obliged to provide the accused person with all of the evidence in its possession that is relevant to the charge, it is the particulars which control the generality of the charge and which restrict the evidence which is to be led by the parties. The Committee is aware of the risk that if an accused person is provided with all of the evidence held by the prosecution but inadequate particulars of the alleged sexual acts are provided in the indictment, the accused person may still not
be informed of the precise nature of the charge(s) that he or she must answer until the trial (if any), given the joint effect of proposed new sections 321A(5) and (8).

2.79 For example, if the evidence suggests that one morning the accused person may have stroked the female complainant’s pubic area and later that day the accused person may have touched the female complainant’s breast, and the indictment does not identify which sexual act (among others) will be pursued in order to prosecute the persistent sexual conduct offence, the accused person would need to prepare a defence for both sexual acts.

2.80 Despite that risk, the Committee accepts the DPP’s arguments with respect to the particularisation of the sexual acts and the requirement of statutory disclosure. The Committee is of the view that there is an overriding need for proposed new section 321A(8). The Committee recognises that children’s evidence can often be unspecific, particularly where they have experienced persistent sexual abuse over a long period, but that in itself does not necessarily make their evidence unreliable. Proposed new section 321A(8) reflects this understanding.

Proposed New Section 321A(11) - Change in Requirement for Jury Unanimity

2.81 Proposed new section 321A(11) will introduce a new and significant factor into the offence of persistent sexual conduct with a child under 16 years of age: if there is evidence of sexual acts occurring on four or more occasions, the jurors need not all be satisfied that the same sexual acts occurred on the same occasions in order to return a guilty verdict. What will be required is that each of the jurors are convinced beyond a reasonable doubt that the accused person committed sexual acts against the child on at least three separate occasions within the alleged period, even if those occasions are all different. For example:

- if there was evidence of 15 sexual acts, each occurring on a different day within a 12-month period, a jury could return a guilty verdict if one half of the jurors were satisfied that three separate sexual acts took place in one month and the other half of the jurors were satisfied that three separate sexual acts took place in another month; or

- if there was evidence of three sexual acts, each occurring on a different day within a 12-month period, every juror must be satisfied of the same three separate sexual acts.

2.82 This amendment was drafted to overcome the High Court decision in KBT v The Queen\textsuperscript{105} (KBT).\textsuperscript{106} When interpreting the Queensland provision which was

\textsuperscript{105} (1997) 149 ALR 693; (1997) 191 CLR 417; and 72 ALRJ 116.
equivalent to the current section 321A of the Code, the High Court ruled that jury
unanimity was required in respect of each of the separate acts constituting the
offence.\textsuperscript{107} Section 229B of the Queensland \textit{Criminal Code} has now been amended
but prior to 1 July 1997, it provided, among other things, as follows:

(1) \textit{Any adult who maintains an unlawful relationship of a sexual
nature with a child under the age of 16 years is guilty of a
crime and is liable to imprisonment for 7 years.}

(1A) \textit{A person shall not be convicted of the offence defined in
subsection (1) unless it is shown that the offender, as an
adult, has, during the period in which it is alleged that the
offender maintained the relationship in issue with the child,
done an act defined to constitute an offence of a sexual nature
in relation to the child, … on 3 or more occasions and
evidence of the doing of any such act shall be admissible and
probative of the maintenance of the relationship
notwithstanding that the evidence does not disclose the dates
or the exact circumstances of those occasions.}\textsuperscript{108}

2.83 That principle in \textit{KBT} has been applied in Western Australia with respect to the
operation of section 321A of the Code,\textsuperscript{109} and the DPP advised the Committee that,
since the decision in \textit{KBT}, prosecutions under section 321A of the Code have been
prepared and determined on the basis of that principle.\textsuperscript{110}

2.84 The DPP advised the Committee that proposed new section 321A(11) was modelled
on section 229B of the Queensland \textit{Criminal Code},\textsuperscript{111} which now provides, among
other things, that:

(4) \textit{However, in relation to the unlawful sexual acts involved in
an unlawful sexual relationship—}

\begin{flushright}
\ldots
\end{flushright}

\textsuperscript{106} \textit{Explanatory Memorandum} for the Criminal Law and Evidence Amendment Bill 2006, p3; and
Submission No 6 from Mr Robert Cock QC, Director of Public Prosecutions, Office of the Director of
Public Prosecutions, 23 April 2007, p5.

\textsuperscript{107} \textit{KBT v The Queen} (1997) 149 ALR 693 at p696 per Brennan CJ, Toohey, Gaudron and Gummow JJ, and
at p704 per Kirby J.

\textsuperscript{108} \textit{Ibid}, pp700-701 per Kirby J.

\textsuperscript{109} \textit{Allegretta v R} [2003] WASCA 17 at paragraphs 109-110 per the court.

\textsuperscript{110} Letter from Mr Robert Cock QC, Director of Public Prosecutions, Office of the Director of Public

\textsuperscript{111} Mr Robert Cock QC, Director of Public Prosecutions, Office of the Director of Public Prosecutions,
The Criminal Lawyers’ Association of Western Australia and The Law Society of Western Australia were opposed to proposed new section 321A(11) on the basis that it will “legalise and formalise the precise unfairness and prejudice [of offences in the nature of section 321A] that the High Court has warned against in KBT.” These organisations also submitted that, in the experience of the writers, there have been no instances where section 321A in its current form has caused injustice.

In KBT, Kirby J made the following observation about section 229B of the Queensland Criminal Code:

_The provisions of s 229B(1A) are clearly intended to strike a balance between the need for a measure of precision in the proof of the offence, on the one hand, and, on the other, the need to recognise that it may not be possible for a complainant to identify exactly the dates and circumstances of the events said to prove the maintenance of the relationship._

Kirby J also discussed some of the problems associated with a provision such as section 229B of the Queensland Criminal Code, which, like section 321A of the Code (and proposed new section 321A), requires that multiple illegal acts be proved but does not require the dates and other circumstances of the acts to be alleged or proved. Some of his comments are listed here for the information of the Legislative Council:

_an accused facing a charge under the novel provisions of s 229B of the Code necessarily confronts a number of difficulties. They include the danger that generalised evidence, tendered by the prosecution to establish a s 229B “relationship”, will be used by the jury as propensity evidence. There is a risk that, once satisfied that a single “act” has been committed, a jury might conclude that an accused has_
a propensity to guilt of the type of crime charged, and hence is guilty of an offence under s 229B.\textsuperscript{116}

…

2. There is a special danger of unfairness where, as here, a crime which permits imprecise and general evidence to be proved is coupled in the indictment with other sexual offences specified with particularity. This court has noted the special risks of unfairness where a number of sexual offences are charged together.\textsuperscript{117} … the dangers inherent in the possibility that a jury may infer guilt of several offences from the proof of guilt of one or some, requires care in the joinder of counts, attention to the possible need to order separate trials, appropriate judicial warnings against the dangers of propensity reasoning and vigilant consideration of complaints of unfairness when these are brought on appeal following conviction.

3. Section 229B(1A) provides that the prosecution must prove that the offender has done an act constituting an offence of a sexual nature on three or more occasions. This statutory prerequisite must be given full effect. This is because it amounts to a parliamentary recognition of the risks involved in the offence. Those risks include the exposure of a person to conviction upon generalised evidence which it may be difficult or impossible to disprove, which need not be confirmed by testimony other than that of the complainant and which may result in a trial involving little more than accusation and denial. These risks provide reasons, quite apart from the general rule of construction ordinarily applied to a criminal statute, for adopting an approach to the preconditions laid down by parliament which is rigorous and defensive of the fair trial of the accused.\textsuperscript{118} (emphasis added)

\textbf{2.88} Brennan CJ, Toohey, Gaudron and Gummow JJ also noted that “evidence of a general course of sexual misconduct or of a general pattern of sexual misbehaviour” would not be likely to satisfy the conditions set by section 229B(1A) of the Queensland \textit{Criminal Code}.\textsuperscript{119}

\textbf{2.89} It appears that the Judges in \textit{KBT} viewed the requirement in section 229B(1A) (for the jurors to be satisfied as to the commission of the same three or more sexual acts) as a

\textsuperscript{116} Ibid, p703.
\textsuperscript{117} \textit{De Jesus v R} (1986) 68 ALR 1; 61 ALRJ 1; \textit{cf R v B} [1989] 2 Qd R 343.
\textsuperscript{118} \textit{KBT v The Queen} (1997) 149 ALR 693 at p704.
\textsuperscript{119} Ibid, p696.
'safetynet' for what they considered to be an offence which was otherwise general in
nature, and at least in Kirby J’s view, prone to resulting in injustice for the accused
person.

Committee Comment

2.90 The Committee observes that proposed new section 321A(11) will have the effect of
easing the prosecution’s task of proving the offence of persistent sexual conduct.
Rather than having to convince all of the jurors (beyond reasonable doubt) of the same
three or more separate sexual acts alleged to constitute the persistent sexual
conduct, the prosecution will only need to satisfy the jurors (again beyond reasonable
doubt) that any three or more separate sexual acts did occur within the alleged period.

2.91 While the Committee acknowledges the concerns of the Criminal Lawyers’
Association of Western Australia and The Law Society of Western Australia, it
disagrees with their view that proposed new section 321A(11) will “legalise and
formalise” the risks discussed by the Judges in KBT. The requirement for juror
agreement in the proposed new subsection is less strict than the requirement in current
section 321A, but, in order to return a guilty verdict under proposed new section
321A, the jurors will still be required to be satisfied of three separate sexual acts rather
than a general course or pattern of sexual misconduct.

2.92 Therefore, the Committee is of the view that the proposed new subsection strikes an
appropriate balance between the need for precision in the proof of the offence of
persistent sexual conduct and the need to recognise that it may not be possible for the
complainant to identify the exact details of the alleged events. However, the
Committee also recognises that the addition of proposed new section 321A(11) will
require the court to be even more vigilant and thorough in its directions to the jury in
order to ensure that the accused person is tried fairly.

Proposed Section 321A(12) - Possible Conviction for Specific Sexual Act if Not Guilty of
Persistent Sexual Conduct

2.93 Proposed section 321A(12) provides that if a person is found not guilty of persistent
sexual conduct with a child who is under 16 years of age (the ‘general offence’), the
jury may still convict him or her for committing one or more sexual acts during the
same period as the general offence was alleged to have occurred (the ‘specific
offence’) if those sexual acts are established by the evidence. That is, if the accused
person is found not guilty of the general offence, he or she may still be found guilty of
one or more of the specific offences alleged to have constituted the general offence.

---

120 Submission No 12 from Associate Professor Judith Fordham, President, Criminal Lawyers’ Association
of Western Australia, 1 May 2007, p3. An earlier version of this view was adopted by The Law Society
of Western Australia: Submission No 1 from Ms Maria Saraceni, President, The Law Society of Western
Australia, 12 April 2007, p1 and Attachment 2, p3.
The proposed subsection largely continues the effect of current section 321A(9), with one exception - it applies despite the operation of section 10A of the Code, which provides, among other things, that when a person is charged with an offence, he or she may be convicted of that offence only:

(1) A person charged with an offence cannot be convicted by the court dealing with the charge of any other offence instead of that offence unless —

(a) the accused is charged with the other offence as an alternative to that offence; or

(b) this Chapter [Chapter IIA] provides otherwise.

That is, under proposed section 321A(12), an accused person who is charged with the general offence and found not guilty of the general offence may be convicted for a specific offence for which he or she may not have been charged. This differs from the current situation.

It was observed by the Committee that proposed section 321A(6) authorises the charging of both the general offence and a specific offence, but that clause does not mandate the charging of both offences. For example, if the prosecution chose not to utilise proposed new section 321A(6) and only charged a person with the general offence, and that person was found not guilty of the general offence, he or she could still be convicted, pursuant to proposed section 321A(12), of a specific offence occurring during the same period alleged in the charge.

Despite the anticipated availability of proposed section 321A(12), the DPP advised the Committee that:

In dealing with charges against an accused under s321A, it is contemplated that the usual course would be to utilise the proposed section 321A(6), which provides that an accused may be charged with prescribed offences on the same (or different) indictment as a charge for persistent sexual conduct, a practice currently prohibited by s321A(4) of the Criminal Code.121

The Criminal Lawyers’ Association of Western Australia and The Law Society of Western Australia opposed the proposed subsection on the basis that the prosecution:

---

121 Email from Ms Annette Fox, Research Assistant to the Director of Public Prosecutions, Office of the Director of Public Prosecutions, 3 August 2007, p2.
• will not be required, in the indictment, to specify the dates, nor particularise the circumstances, of the alleged sexual acts; and

• cannot be ordered to provide further particulars of the alleged sexual acts, which constitute the general offence (which may be the only offence which is charged against the accused person).

2.99 However, the Criminal Lawyers’ Association of Western Australia and The Law Society of Western Australia would not have objected to proposed section 321A(12) in “normal circumstances”, that is, if the prosecution is subject to the usual requirements for particularisation.

2.100 It was noted by the Committee that Chapter IIA of the Code (Alternative offences), sections 10B to 10H, already provides for the circumstances in which an accused person may be convicted for offences for which he or she was not charged instead of an offence for which he or she was charged. For example, section 10B of the Code provides, among other things, that:

(2) If a person is charged with an offence (“offence A”), whether or not on indictment, the person, instead of being convicted as charged, may be convicted of any alternative offence that is provided for offence A.

2.101 As an illustration of the operation of section 10B of the Code, section 320(2) of the Code (sexual penetration of a child under the age of 13 years) provides that one alternative offence for that crime is ‘indecently dealing with a child under the age of 13 years’, which is a crime created under section 320(4) of the Code. If a person is charged with sexual penetration under section 320(2) only, he or she could be convicted of indecent dealing under section 320(4) instead if the evidence supports that alternative offence.

2.102 The following comments about early precursors of sections 10B to 10H were made in the 1983 review of the Code by Michael Murray QC, as he then was:

122 Refer to proposed new section 321A(5)(b): clause 10 of the Criminal Law and Evidence Amendment Bill 2006.

123 Refer to proposed new section 321A(8): clause 10 of the Criminal Law and Evidence Amendment Bill 2006.

124 Submission No 12 from Associate Professor Judith Fordham, President, Criminal Lawyers’ Association of Western Australia, 1 May 2007, p3. An earlier version of this view was adopted by The Law Society of Western Australia: Submission No 1 from Ms Maria Saraceni, President, The Law Society of Western Australia, 12 April 2007, p1 and Attachment 2, pp3-4.

125 Ibid.
It would seem from these provisions\textsuperscript{126} that the policy of the Code is that one criminal proceeding commenced by an indictment charging a particular offence should be apt to obtain an adjudication of the accused’s liability, with respect to other offences which may be open on the facts as an alternative to the offence charged, having regard to the way in which the facts unfold. I would agree with that policy. It involves no prejudice to the accused provided he knows what alternatives are open on the indictment against him. It does on the other hand, enable an immense saving in cost and time, if the facts should turn out to be different and related to a different offence from that originally anticipated and charged\textsuperscript{127}.

\textit{Committee Comment}

2.103 The Committee observed that the concept of convicting an accused person for an offence with which the person was not charged instead of an offence with which the person was charged is not new. However, the circumstances in which that concept will operate under proposed new section 321A appear to be unique because:

- the prosecution will not be required to provide particulars of the dates and circumstances of the acts alleged to have constituted the offence which is charged against the accused person (in this case, the general offence);

- the prosecution cannot be ordered by the court to provide further particulars of the acts alleged to constitute the offence which is charged against the accused person (in this case, the general offence); and

- by reason of this reduced obligation to provide particulars of the offence which is charged against the accused person (in this case, the general offence), the accused person may receive inadequate particulars for the alternative offence for which they may be convicted under proposed section 321A(12) (in this case, the specific offence).

2.104 The Committee noted that the DPP had confirmed that if a person is charged with both a specific offence and the general offence pursuant to proposed new section 321A(6), the prosecution, with respect to the specific offence, would still be required to comply with the normal rules of particularisation, which are to identify the date and the nature of the alleged act\textsuperscript{128}. Yet, if a person was convicted of a specific offence under proposed section 321A(12), he or she would not necessarily have been charged with, nor given particulars of, the specific offence.

\textsuperscript{126} Former sections 594 to 599 of The Criminal Code.


\textsuperscript{128} Mr Robert Cock QC, Director of Public Prosecutions, Office of the Director of Public Prosecutions, Transcript of Evidence, 18 April 2007, p16.
2.105 The Committee is of the view that proposed section 321A(12) may result in the accused person being prejudiced. Therefore, the Committee agrees with the Criminal Lawyers’ Association of Western Australia and The Law Society of Western Australia that a person who could be found guilty of a specific offence, which would usually be particularised, should be entitled to obtain adequate particulars of the alleged sexual act. Accordingly, the Committee is also of the view that a person should only be convicted of a specific offence pursuant to proposed section 321A(12) if he or she is first charged with the specific offence.

2.106 Given that the DPP will be able to charge for both the general offence and specific offences under proposed new section 321A(6), and the likelihood that the DPP will make use of proposed new section 321A(6), the Committee is not convinced of the need for proposed section 321A(12).

Recommendation 3: The Committee recommends that during debate on the Criminal Law and Evidence Amendment Bill 2006, the responsible Minister explain why proposed section 321A(12) of The Criminal Code is required given the effect of proposed new section 321A(6) of The Criminal Code.
CHAPTER 3
PART 3 - CRIMINAL PROCEDURE ACT 2004 AMENDED

CLAUSE 26 - SECTION 129 AMENDED

Judicial Determination of Material Facts after Guilty Plea

3.1 Clause 26 of the Bill proposes to amend section 129 of the CP Act, which deals with court procedures when an accused person pleads guilty. It seeks to insert a subsection (5) into section 129, which provides that:

This section does not affect a court’s power to decide the material facts of an offence on the basis of such information as it thinks fit.

3.2 As indicated in the Explanatory Memorandum to the Bill, the effect of the proposed subsection is to allow the court to decide on material facts which are different to those recorded on the statement of material facts which were last served on the accused person, and which are stated aloud to the court as the material facts of the offence to which the accused person has pleaded guilty.129

3.3 The DPP advised the Committee that the purpose of the proposed amendment is to ensure that, if there is an error in the latest statement of material facts, the court is not bound to sentence an offender on a “continued and false factual premise.”130 He informed the Committee of a situation where an accused person pleaded guilty at very short notice. The statement of material facts on which the plea was based contained a typographical error which suggested that the co-accused person had used a knife when it should have stated that the accused had used a knife. The typographical error resulted in the following scenario:

The accused then claimed that the State was bound by the Statement of Material Facts, which stated the co-accused had used a knife, which did not accurately reflect the facts, and made the accused less culpable. The Prosecutor claimed that the State was not bound and the interests of justice meant that the State should not allow the court to sentence on facts that were not true. The State was allowed to reassert the facts and the dispute on the facts was resolved by a trial of issues. The Judge found that the presentation of the Statement of

---

130 Letter from Mr Robert Cock QC, Director of Public Prosecutions, Office of the Director of Public Prosecutions, 9 May 2007, p3.
3.4 The Committee was advised that, if a statement of material facts does contain an error, the court would be alerted to the possibility of an error at the time that the prosecution addresses the court on the facts of the offence. This would occur after the plea of guilty but before the conviction is recorded.\textsuperscript{132}

3.5 Mr Michael Crowley was concerned that the proposed amendment would allow a judicial discretion to sentence an accused person on the basis of material facts which differ from those on which the accused person has based their guilty plea. He argued that these material facts should be fixed.\textsuperscript{133}

3.6 If the judicial discretion to determine a different set of facts was exercised, the DPP assured the Committee that the following procedures would take place:

- The court would determine the facts judicially.\textsuperscript{134}

- That judicial determination of facts would effectively amount to a trial,\textsuperscript{135} including a right for the accused person to be heard and be provided with a reasonable opportunity to adduce evidence or information to the extent to which he or she desired.\textsuperscript{136}

- The accused would be permitted to change his or her plea based on the new set of material facts.\textsuperscript{137}

3.7 The Committee noted that the court’s power in proposed subsection (5) is not restricted to erroneous statements of material facts. When it queried whether it would be beneficial to amend the proposed subsection so as to limit its scope to situations where the statement of material facts is erroneous, the DPP provided the following response:

\textsuperscript{131} Letter from Mr Robert Cock QC, Director of Public Prosecutions, Office of the Director of Public Prosecutions, 1 June 2007, p3.

\textsuperscript{132} Ibid.

\textsuperscript{133} Submission No 5 from Mr Michael Crowley, Lecturer in Law and Barrister, School of Law and Justice, Edith Cowan University, 20 April 2007, p2.

\textsuperscript{134} Letter from Mr Robert Cock QC, Director of Public Prosecutions, Office of the Director of Public Prosecutions, 9 May 2007, p3.

\textsuperscript{135} Letter from Mr Robert Cock QC, Director of Public Prosecutions, Office of the Director of Public Prosecutions, 1 June 2007, p2.

\textsuperscript{136} Letter from Mr Robert Cock QC, Director of Public Prosecutions, Office of the Director of Public Prosecutions, 9 May 2007, p3.

\textsuperscript{137} Letter from Mr Robert Cock QC, Director of Public Prosecutions, Office of the Director of Public Prosecutions, 1 June 2007, p2.
I question whether such an amendment would achieve anything substantial, as it is likely to be argued that any Statement of Material Facts which does not properly reflect the circumstances of the alleged offence is “erroneous”.

Committee Comment

3.8 The Committee is particularly concerned by the likelihood that the court and the accused person would only be informed of an error in the statement of facts after the accused person’s plea is entered. The Committee is also of the view that the judicial discretion to determine a different set of materials facts should not replace the need for the prosecution to be thorough and accurate in its work. However, the Committee also noted that:

- if the proposed judicial discretion to determine a different set of material facts was exercised, a trial of the facts would occur and the accused person would be given an opportunity to change his or her plea based on the new set of material facts; and

- these concerns are outweighed by the potential for injustice if the court was bound to sentence an accused person on the basis of erroneous facts.

3.9 In balancing these factors, the Committee supports the proposed amendment.

CLAUSE 28 - SECTION 143 AMENDED

Restriction of Defence Opening Address

3.10 Clause 28 proposes to amend section 143 of the CP Act, which deals with the opening addresses that may be given in a criminal trial before any evidence is given. Currently, section 143(2) allows the accused person to “give an opening address to the court about the accused’s case.” Clause 28 proposes to amend the section so that the accused person is entitled to:

give an opening address to the court that outlines the accused’s defence about the accused’s case.

3.11 The statutory right for the defence to open its case was introduced on 2 May 2005, when section 143(2) of the CP Act commenced operation. Prior to that, only some Judges would permit the defence to state the essence of its case by identifying the issues which were and were not in dispute.

139 Submission No 1 from Ms Maria Saraceni, President, The Law Society of Western Australia, 12 April 2007, p2.
3.12 The *Explanatory Memorandum* for the Bill indicates that the significance of the current words ‘about the accused’s case’, is that (in addition to outlining their own case) the accused person is entitled to explain to the jury each party’s role in the trial, the burden(s) and standard(s) of proof that are applicable to the prosecution and the defence, and any other obligations each party has in relation to the court. It appears that this proposed amendment is intended to remove these defence entitlements.\(^{140}\)

The *Explanatory Memorandum* justifies the proposed amendment on the basis that it gives effect to a recommendation of the Law Reform Commission of Western Australia:\(^{141}\)

> A legally represented defendant, by his or her counsel, and, unless excused by the trial judge, a self-represented defendant, should be required at the close of the prosecution opening address and before any evidence is led, to outline the essence of the defence case.\(^{142}\)

3.13 The DPP confirmed that the proposed amendment was designed to narrow the scope of the defence’s opening address to issues regarding the accused person’s defence and to “limit and prevent defence counsel speaking about wider issues such as the trial process generally.”\(^{143}\) He also advised the Committee that the proposed amendment was initiated by a request from Her Honour Judge Antoinette Kennedy, Chief Judge of the District Court,\(^{144}\) who advised the Committee that she is concerned about the length of some defence opening addresses, the wide scope of matters that are discussed during some of these opening addresses, and the potential to confuse jurors when irrelevant or barely relevant matters are discussed\(^{145}\).

3.14 From a practical perspective, the Criminal Lawyers’ Association of Western Australia and The Law Society of Western Australia were not convinced that the proposed amendment will necessarily have the effect that is suggested in the *Explanatory Memorandum* or address the concerns of the Chief Judge. The organisations submitted that it would be more appropriate and effective to rely on a Judge’s inherent...

---

\(^{140}\) *Explanatory Memorandum* for the Criminal Law and Evidence Amendment Bill 2006, p6.

\(^{141}\) *Ibid*.


\(^{143}\) Mr Robert Cock QC, Director of Public Prosecutions, Office of the Director of Public Prosecutions, *Transcript of Evidence*, 18 April 2007, p18.

\(^{144}\) *Ibid*, and Submission No 6 from Mr Robert Cock QC, Director of Public Prosecutions, Office of the Director of Public Prosecutions, 23 April 2007, pp8-9.

\(^{145}\) Letter from Her Honour Judge Antoinette Kennedy, Chief Judge of the District Court, Chief Judge’s Chambers, District Court of Western Australia, 26 April 2007.
power to control the court’s proceedings than to amend the legislation in this regard.\textsuperscript{146}

The following remarks were made during the Committee hearing with the Criminal Lawyers’ Association of Western Australia and The Law Society of Western Australia:

\textit{I think some judges will say that it is much the same as what the act presently reads.\textsuperscript{147}}

\ldots

\textit{I do not know that amending the act to say that the accused or his or her counsel can outline the accused’s defence is going to stop that [the accused person or the defence counsel from making inappropriate or inflammatory statements]. What is the remedy? The remedy is that judges are at liberty - they are the judges of the law - to address juries and say, “What Mr Prior said in his opening address was unnecessary.” I suggest that it probably has a negative impact on the accused’s case for juries to hear that sort of thing. If it is really bad, the judiciary can report a counsel to the Legal Practice Board.\textsuperscript{148}}

\ldots

\textit{My experience, whether prosecuting or defending - I am talking about defending a co-accused - is that I have not seen people encroach over what is permissible, but it obviously happens, from what the Chief Judge has said and what I have heard anecdotally. There are other remedies. Why give something in 2005 and two years down the track say, “We’re taking that right back,” or “We’re winding that right back.”? I think it is a bit too early to have an amendment of that nature. If there is a real problem, quite frankly, I do not think the amendment goes far enough. If that is the real concern - I am not suggesting this for one minute - just abolish section 143.\textsuperscript{149}}

\ldots

\begin{flushleft}
\textsuperscript{146} Submission No 1 Ms Maria Saraceni, President, from The Law Society of Western Australia, 12 April 2007, p2; and Submission No 12 from Associate Professor Judith Fordham, President, Criminal Lawyers’ Association of Western Australia, 1 May 2007, p4. An earlier version of this view was adopted by The Law Society of Western Australia: Submission No 1 from Ms Maria Saraceni, President, The Law Society of Western Australia, 12 April 2007, p1 and Attachment 2, p4.

\textsuperscript{147} Mr John Prior, Councillor, The Law Society of Western Australia, \textit{Transcript of Evidence}, 2 May 2007, p5.

\textsuperscript{148} Ibid.

\textsuperscript{149} Ibid, p6.
\end{flushleft}
judges, of course, still have that overriding role as referee to ensure that the trial is fair, so if someone is obviously going troppo, so to speak, in their opening address, the judge can and will and does intervene. I have seen it happen.\textsuperscript{150}

... defence counsel who waffle on over things that are not relevant or that are barely relevant are going to be fairly useless defence counsel anyhow, and I do not know that legislating is going to improve the advocacy ability of certain defence counsel or certain prosecutors. It is not the solution.\textsuperscript{151}

3.15 If the proposed amendment does have the suggested effect, the Criminal Lawyers’ Association of Western Australia and The Law Society of Western Australia would oppose clause 28 for the following reasons:

- Issues of the onus or standard of proof cannot always be separated from ‘the essence’ of the accused person’s case.\textsuperscript{152} For example, a defence may consist entirely of an allegation that the “factual elements sought to be proved by the State cannot be proven beyond reasonable doubt”\textsuperscript{153}, which is the standard of proof which must be met by the prosecution in a criminal trial.

- Opening addresses, when done effectively, can help to focus the Judge’s mind, and/or the jury’s collective mind, on the key issues in dispute and therefore, effectively reduce the length of the trial.\textsuperscript{154}

- At the commencement (and various other stages) of the trial, the prosecution and the Judge will invariably remind the jury of the issues associated with

\textsuperscript{150} Associate Professor Judith Fordham, President, Criminal Lawyers’ Association of Western Australia, Transcript of Evidence, 2 May 2007, p8.

\textsuperscript{151} Ibid, p9.

\textsuperscript{152} Mr John Prior, Councillor, The Law Society of Western Australia, Transcript of Evidence, 2 May 2007, p5; and Submission No 12 from Associate Professor Judith Fordham, President, Criminal Lawyers’ Association of Western Australia, 1 May 2007, p4. An earlier version of this view was adopted by The Law Society of Western Australia: Submission No 1 from Ms Maria Saraceni, President, The Law Society of Western Australia, 12 April 2007, p1 and Attachment 2, p4.

\textsuperscript{153} Submission No 12 from Associate Professor Judith Fordham, President, Criminal Lawyers’ Association of Western Australia, 1 May 2007, p4.

\textsuperscript{154} Mr John Prior, Councillor, The Law Society of Western Australia, Transcript of Evidence, 2 May 2007, p6; and Associate Professor Judith Fordham, President, Criminal Lawyers’ Association of Western Australia, Transcript of Evidence, 2 May 2007, p7.
onus and standard of proof. Consequently, it is appropriate that the defence also has an early opportunity to comment on these issues.\footnote{Submission No 1 from Ms Maria Saraceni, President, The Law Society of Western Australia, 12 April 2007, p2; and Submission No 12 from Associate Professor Judith Fordham, President, Criminal Lawyers’ Association of Western Australia, 1 May 2007, p4. An earlier version of this view was adopted by The Law Society of Western Australia: Submission No 1 from Ms Maria Saraceni, President, The Law Society of Western Australia, 12 April 2007, p1 and Attachment 2, p4.}

- The proposed amendment will ‘punish the whole class for the bad behaviour of a few individuals’.\footnote{Mr John Prior, Councillor, The Law Society of Western Australia, \textit{Transcript of Evidence}, 2 May 2007, p6; and Associate Professor Judith Fordham, President, Criminal Lawyers’ Association of Western Australia, \textit{Transcript of Evidence}, 2 May 2007, p7.}

3.16 Similarly, Mr Michael Crowley recommended that clause 28 should not proceed because it assumes, not always correctly, that the prosecution’s opening statement will only make legally correct submissions and will not seek to gain an advantage. He submitted that, in the interests of justice, the defence should be allowed to address the jury on issues such as the role of the prosecution and defence in a trial, burdens and standards of proof, and each party’s obligation to the court.\footnote{Submission No 5 from Mr Michael Crowley, Lecturer in Law and Barrister, School of Law and Justice, Edith Cowan University, 20 April 2007, p2.}

3.17 The Committee’s inquiries as to the general duration of defence opening addresses revealed that no statistics are kept in this regard. Rather, the Chief Judge indicated that her concerns about the amount of time taken for some defence opening addresses are based on a combination of her own experiences and anecdotal information. Her Honour advised the Committee that:

\begin{quote}
Very few accused persons act for themselves in the District Court but if they do they are given a degree of latitude.
\end{quote}

[With respect to defence counsel] \ldots I have received a number of complaints on this very issue about some counsel from a number of Judges.\footnote{Letter from Her Honour Judge Antoinette Kennedy, Chief Judge of the District Court, Chief Judge’s Chambers, District Court of Western Australia, 8 May 2007.}

3.18 Spark & Cannon, which provides court reporting services, advised the Committee that it did not maintain records of the duration of opening addresses in criminal trials.\footnote{Letter from Mr Greg Farmer, General Manager, Spark & Cannon, 4 May 2007.} However, it did provide the following information:

\begin{quote}
From experience, a “normal” criminal trial of two to three days would see the State open for around half an hour and on most
occasions, except where admissions are made, the accused does not open.

In more serious matters the State may well address for up to three hours. The accused generally opens as well. However, it is usually for a significantly less [sic] time.\textsuperscript{160}

3.19 The Department of the Attorney General could also only provide the Committee with anecdotal information about the general duration of opening addresses in criminal trials:

- \textit{In terms of the Magistrate’s Court, matters are generally prosecuted by Police and opening addresses are not made by Police or the representative for the accused;}

- \textit{At the Children’s Court, the average length of time taken to conduct the defence counsel’s opening address is approximately five minutes;}

- \textit{With the advice of Judges at the District Court, I have been advised that the commencement of a typical trial would entail the Judge speaking for approximately fifteen minutes, the Prosecutor would then conduct their opening address for approximately twenty minutes and then the Defence would conduct their opening address for approximately five minutes. I have also been advised that the defence would conduct an opening address in only around 2/3 of trials held; and}

- \textit{According to the experience of long serving Associates at the Supreme Court, a valid estimate of the average length of time taken to conduct opening addresses would be between thirty minutes and two hours.}\textsuperscript{161}

3.20 From their experience, representatives from the Criminal Lawyers’ Association of Western Australia and The Law Society of Western Australia, estimated that defence opening statements (if they are made) would last anywhere between five to 20 minutes.\textsuperscript{162}

\begin{itemize}
\item \textit{Ibid.}\textsuperscript{160}
\item Email from Mr Vincent Badham, Business Performance Analyst, Court and Tribunal Services, Department of the Attorney General, 18 May 2007.\textsuperscript{161}
\item Mr John Prior, Councillor, The Law Society of Western Australia, \textit{Transcript of Evidence}, 2 May 2007, pp6 and 10; and Associate Professor Judith Fordham, President, Criminal Lawyers’ Association of Western Australia, \textit{Transcript of Evidence}, 2 May 2007, pp7 and 10.\textsuperscript{162}
\end{itemize}
Committee Comment

3.21 The Committee is of the view that there is insufficient reason to amend section 143 of the CP Act as proposed in clause 28 of the Bill. Therefore, the Committee recommends that clause 28 be opposed.

Recommendation 4: The Committee recommends that clause 28 of the Criminal Law and Evidence Amendment Bill 2006 be opposed.
CHAPTER 4
PART 4 - CRIMINAL APPEALS ACT 2004 AMENDED

PROSECUTION RIGHT OF APPEAL

Introduction

4.1 According to the Second Reading Speech, Part 4 of the Bill contains “important reforms to continue to improve the efficient administration of justice in Western Australia.” One such reform is to the Criminal Appeals Act 2004 which provides for a limited right of appeal by the prosecution against acquittals in trials before juries. Of this reform, Hon Kim Chance MLC said:

Under our present system, a convicted person has the right of appeal against a conviction or sentence in respect of any matter that is tried before a magistrate, judge alone or judge and jury. Presently, in respect of indictable matters tried before a judge and jury, the prosecution has a right of appeal against a sentence but not against an acquittal.

The bill creates a statutory right of appeal against a verdict of acquittal in a trial before a judge and jury when there has been an error of law or fact by the trial judge or a decision to wrongly exclude admissible evidence or wrongly admit inadmissible evidence. That will ensure that the state can enforce its rights to a fair trial in much the same way as an accused person can.

4.2 The Committee noted that there has been a tendency for other jurisdictions and inquiries to consider both double jeopardy reform and the extension of prosecution rights of appeal together, for example, the Council of Australian Governments on Double Jeopardy Law Reform. Similarly, the Committee heard evidence for and against the proposition that Part 4 of the Bill either infringes, abrogates, erodes, modifies or indirectly reforms the rule against double jeopardy. For this reason, the Committee considered that a general overview of double jeopardy is helpful.

The Double Jeopardy Rule

4.3 The rule provides that:

---

163 Hon Kim Chance MLC, Leader of the House, Parliament of Western Australia, Legislative Council, Parliamentary Debates (Hansard), 23 November 2006, p8705.
164 Ibid.
165 See paragraph 4.14.
No man is to be brought into jeopardy of his life, more than once, for the same offence. If the prosecution attempts to do so, the accused may plead that he has already been convicted (autrefois convict) or acquitted (autrefois acquit) of the same matter.

4.4 In *R v Carroll*, the High Court referred to the rule as a fundamental underpinning of the criminal law in Australia. Its primary purpose is to ensure that no person is tried twice for the same offence. This prevents:

the unwarranted harassment of the accused by multiple prosecutions. Policy considerations that go to the heart of the administration of justice and the retention of public confidence in the justice system reinforce this rationale.

Judicial determinations need to be final, binding and conclusive if the determinations of courts are to retain public confidence. Consequently, the decisions of the courts, unless set aside or quashed, must be accepted as incontrovertibly correct. In addition, the double jeopardy principle conserves judicial resources and court facilities.

4.5 In *Pearce v The Queen*, the High Court described the rule as arising “from a basic repugnance against the exercise of the State’s power to put an accused person in repeated peril of criminal punishment”. The rule reinforces the principle of finality in criminal proceedings for an acquitted person. Finality is a fundamental characteristic of our criminal justice system, discussed in detail at paragraphs 4.51 to 4.55.

**History of Double Jeopardy**

4.6 Legal relief against double jeopardy was known to the laws of ancient Greece and Rome as well as ecclesiastical law in the 12th century. In *Pearce v The Queen*, the High Court referred to Old Testament writings of the prophet Nahum and how, in AD
391, St Jerome drew from those writings “that God does not punish twice for the same act”.\(^{175}\)

4.7 The rule was published in the 1876, fourth edition of Blackstone’s *Commentaries on the Laws of England*.\(^{176}\) In 1964, the House of Lords in *Connelly v Director of Public Prosecutions*\(^{177}\) provided the “first judicial statement of coherent general principle on the rule”\(^{178}\) when it held that a person should not be tried twice on substantially the same facts because it is an abuse of process. *Connelly v Director of Public Prosecutions* was approved in the seminal Australian case on double jeopardy - *R v Carroll*.\(^{179}\)

**Arguments for Reform of the Rule**

4.8 Although the rule has long-standing origins, law reform has been justified on the grounds that:

> in a changing world there is a need to make adjustments in order to ensure that an acceptable balance between truth and justice is maintained. There is danger that public confidence in the criminal justice system will be lost if it ignores the weight of new evidence offered by new technology and investigative techniques.\(^{180}\)

4.9 Other justifications include:

- “convicting those who are guilty serves justice and fosters public confidence in the legal system…”;\(^{181}\)

- “victims or the families of deceased victims have the right to expect offenders to be punished…”;\(^{182}\)

- “the law is not static and should evolve. The double jeopardy principle originated in a less sophisticated era when defendants had few protections and could receive the ultimate (death) penalty.”\(^{183}\)

\(^{175}\) *Ibid*.


\(^{177}\) [1964] AC 1254.


\(^{179}\) (2002) 213 CLR 635.


\(^{182}\) *Ibid*.
Arguments against Reform of the Rule

4.10 In *R v Carroll*[^184^], the High Court cited the following arguments against law reform of the rule:

- “there is public interest in concluding litigation through judicial determinations which are final binding and conclusive”;.
- “there is the need for orders and other solemn acts of the courts ... to be treated as incontrovertibly correct. This reduces the scope for conflicting judicial decisions which would tend to bring the administration of justice into disrepute”; and
- “There is the interest of the individual in not being twice vexed for one and the same cause.”[^185^]

4.11 The Committee noted that double jeopardy is a principle recognised in Article 14(7) of the *International Covenant on Civil and Political Rights*[^186^] and entrenched in some constitutions.[^187^]

4.12 The DPP was the only witness of three who submitted that the double jeopardy rule remains intact under Part 4 of the Bill. The DPP said:

> The debate about double jeopardy depends very much upon what the definition of double jeopardy is to start with. If your view of double jeopardy is that the state has one opportunity to bring a charge, and once you have brought it, regardless of how that is disposed of, you cannot do it again, then clearly this infringes double jeopardy; but if your theory is that it means once a person has been acquitted - validly acquitted - after a proper prosecution, then this does not infringe double jeopardy, because this is not a proper prosecution.[^188^]

[^183^]: Ibid.

[^184^]: (2002) 213 CLR 635.

[^185^]: Ibid, paragraph 86 per Gaudron and Gummow JJ.

[^186^]: This Article states: “No-one shall be liable to be tried or punished again for an offence for which he [or she] has already been finally convicted or acquitted in accordance with the law and penal procedure of each country.” However, the covenant has not been incorporated into Australian municipal law. In *Mabo v Queensland (No 2)* (1992) 175 CLR 1 at 42, the High Court of Australia commented that “where international law influences the elaboration of Australian common law, where there is doubt or ambiguity, it is not as such part of that law.”

[^187^]: In *Pearce v The Queen* (1998) 194 CLR 610 at p613, McHugh, Hayne and Callinan JJ refer to the United States of America Constitution where part of the 5th Amendment states “Nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb”.

[^188^]: Mr Robert Cock QC, Director of Public Prosecutions, Office of the Director of Public Prosecutions, *Transcript of Evidence*, 18 April 2007, p5. Also repeated in Submission No 6 from Mr Robert Cock QC, Director of Public Prosecutions, Office of the Director of Public Prosecutions, 23 April 2007, p11.
4.13 The Committee noted a difference of opinion between the DPP and the:

- submission and hearing of The Law Society of Western Australia;\textsuperscript{189}
- submission and hearing of the Criminal Lawyers’ Association of Western Australia;\textsuperscript{190} and
- submission of Mr Michael Crowley.\textsuperscript{191}

regarding whether or not Part 4 of the Bill reforms the double jeopardy rule.

The Council of Australian Governments on Double Jeopardy Law Reform

4.14 On 13 April 2007, the Council of Australian Governments (COAG) agreed that jurisdictions will implement the recommendations of the Double Jeopardy Law Reform COAG Working Group on double jeopardy law reform, prosecution appeals against acquittals, and prosecution appeals against sentence, noting that the scope of reforms will vary amongst jurisdictions reflecting differences in the particular structure of each jurisdiction’s criminal law. However, Victoria and the Australian Capital Territory reserved their positions in relation to the recommendations.\textsuperscript{192}

4.15 With respect to prosecution appeals against acquittals the model, agreed by COAG is as follows:

1. Legislation in all jurisdictions should allow the prosecution to appeal against an acquittal, at least on a question of law against an acquittal for an indictable offence:
   a. by a jury at the direction of a trial Judge; or
   b. by a Judge alone.

2. Depending on their assessment of matters of principle, jurisdictions may wish to consider implementing further modifications along the lines of:
   a. the Western Australian Criminal Law and Evidence Amendment Bill 2006, which would allow the

\textsuperscript{189} Submission No 1 from Ms Maria Saraceni, President, The Law Society of Western Australia, 12 April 2007, p3.

\textsuperscript{190} Submission No 12 from Associate Professor Judith Fordham, President, Criminal Lawyers’ Association of Western Australia, 1 May 2007, pp4-5.

\textsuperscript{191} Submission No 5 from Mr Michael Crowley, Lecturer in Law and Barrister, School of Law and Justice, Edith Cowan University, 20 April 2007, p3.

prosecution to appeal against an acquittal in a trial before a Judge and jury for a serious offence (14 years or more), on the ground that there was an error of fact or law made by the trial Judge; or

b. the Tasmanian Criminal Code, which allows the prosecution to appeal by leave of the Court or upon the certificate of the judge of the court of trial that it is a fit case for appeal, against an acquittal on a question of law.

3. Whether or not jurisdictions implement reforms as outlined in recommendation 2, they may also wish to consider, depending on local circumstances, enacting reforms to allow the prosecution to appeal against any interlocutory judgment or order made in a trial for an indictable offence, including a ruling on the admissibility of evidence where such a ruling eliminates or substantially weakens the prosecution’s case.193

4.16 The Committee noted COAG’s suggestion to Australian jurisdictions that the Western Australian Bill is an acceptable model for law reform.

Double Jeopardy Law Reform

4.17 The Committee noted development of Part 4 of the Bill within the context of media coverage of public concern over perceived guilty persons being freed, significant case law and international public inquiries. For example:

- R v Carroll;194
- the Western Australian Leon Robinson Case;195
- R v Moore;196 and

---

193 Ibid (viewed on 8 May 2007).

194 Carroll was convicted of murder of a toddler in a Queensland court in 1985, but was later acquitted on appeal. In 2000 he was convicted of perjury based on his denial of the murder charge on oath at his initial trial, but later was acquitted of this charge by the Court of Appeal. The High Court of Australia upheld this decision, holding that trying Carroll for perjury triggered the double jeopardy rule.

195 Leon Robinson’s accused attackers were acquitted in June 2005 on a charge of manslaughter (the first trial having been aborted in 2004). Subsequent charges laid in the Magistrates Court were assault occasioning bodily harm. These were dismissed by the magistrate as an abuse of process as it was held that those charges could have been presented against the accused as alternative charges on the manslaughter indictment, and it was unfairly burdensome to prosecute those charges subsequently and separately.
• the Stephen Lawrence Enquiry in the United Kingdom.  

4.18 Within Australia, double jeopardy reform received impetus when the Model Criminal Code Officers’ Committee of the Standing Committee of Attorneys-General (MCCOC) released a Discussion Paper titled: *Issue Estoppel*, *Double Jeopardy and Prosecution Appeals against Acquittals* in November 2003, shortly after *R v Carroll* was decided. The MCCOC developed three ‘protective principles’ that would operate in limited circumstances as a guarantee of certain procedural protections before a person who has been acquitted can be retried. These are:

• prosecution for an administration of justice offence connected to the original trial;

• a retrial of the original or similar offence where fresh evidence and compelling evidence arises; and

• a retrial of the original or similar offence if the acquittal is tainted.

4.19 The MCCOC recommended that the Crown be permitted only one retrial application in relation to a retrial of the original or similar offence where fresh evidence and compelling evidence arises, and a retrial of the original or similar offence if the acquittal is tainted.

---

196 (1999) 3 NZLR 385. Here the accused was acquitted of murder, only to be convicted later of conspiracy to defeat the course of justice because he procured a witness in the first trial to provide the Court with a false alibi. A report by the New Zealand Law Commission following this case recommended a tainted acquittal exception to the double jeopardy rule in order to maintain public confidence in the justice system: *Law Reform Commission in Acquittal Following Perversion of the Course of Justice* (NZLC Report 70. March 2001).

197 Sir William MacPherson of Cluny, *The Stephen Lawrence Enquiry: Report of an Inquiry*, February 1999. Stephen Lawrence was stabbed to death in front of eye witnesses. Nobody was ever convicted. The Crown Prosecution Service brought a case against two suspects but dropped it on 29 July 1993 after deciding that there was insufficient evidence. Three of the five suspects in the Lawrence case were acquitted of the murder. In April 1996, Stephen’s family initiated a private prosecution against those two and three other suspects. Charges against the original two suspects were dropped before the trial and the others were acquitted at trial when the judge disallowed eyewitness testimony. In a report into thebungled police investigation, Sir William Macpherson found that the police were institutionally racist and made a total of 70 recommendations for reform in his report dated 24 February 1999. His proposals included abolishing the double jeopardy rule. The Home Secretary told the House of Commons that he would ask the Law Commission to consider the proposal:  [http://www.archive.official-documents.co.uk/document/cm42/4262/sli-00.htm](http://www.archive.official-documents.co.uk/document/cm42/4262/sli-00.htm) (viewed on 1 July 2007).

198 ‘Issue Estoppel’ is concerned with the situation in which the Crown is seeking to re-litigate a precise factual issue determined in favour of the accused in a previous trial. It is about the finality of litigation and the prevention of inconsistent results.

199 Mr John Prior, Councillor, The Law Society of Western Australia, explained that ‘tainted’ means that “the jury has been suborned, bribed or threatened, or there has been perjured evidence.”. Mr John Prior, Councillor, The Law Society of Western Australia, *Transcript of Evidence*, 2 May 2007, p12.

Response of Other Jurisdictions

4.20 In *R v Carroll*, the High Court said:

> There is competition between (i) securing truthful testimony and hence protecting the integrity of the judicial process and public perceptions thereof and (ii) preventing successive criminal prosecutions in respect of what in substance may be the same elements of an offence for which an individual earlier has been acquitted.

> That competition is capable of legislative resolution in different ways and with various exceptions and qualifications detailed by statute.

4.21 The Committee compared Western Australia’s legislative resolution to that of five other jurisdictions which have either amended or are progressing amendments towards law reform. These are scrutinised in chronological order of implementation.

*The Tasmanian Model - 1924*

4.22 An Attorney General’s right of appeal against acquittal of indictable offences has always existed in Tasmania’s *Criminal Code* since royal assent in April 1924. Section 401(2) states:

> The Attorney-General may appeal to the Court -

> ...

> (b) by leave of the Court or upon the certificate of the judge of the court of trial that it is a fit case for appeal, against an acquittal on a question of law;

4.23 Section 402 then provides that the Court shall allow the appeal if it is of the opinion that the verdict of the jury should be set aside on the ground that it is unreasonable, or cannot be supported having regard to the evidence, or that the judgment or order of the court of trial should be set aside on the ground of the wrong decision of any question of law, or that on any ground whatsoever there was a miscarriage of justice.

4.24 Sections 401 and 402 have sat contemporaneously and harmoniously alongside section 11 of the *Criminal Code Act 1924* (Tas) which codifies the common law defence against double jeopardy. It states:

> Person not to be twice punished for same crime

---

201 *R v Carroll* (2002) 213 CLR 635 at paragraph 86 per Gaudron and Gummow JJ.
Where a person is punishable under the Code, and also under any other statute ... he may be tried and punished under the Code or such other statute ... but he shall not be punished twice in respect of the same act or omission, unless his act or omission renders him guilty of unlawfully causing the death of any person, and such death occurs after he has been once punished.

4.25 The Director of Public Prosecutions for Tasmania told the Committee that:

it is misleading to speak of a [prosecution] ‘right’ as it requires a certificate of the trial judge or of the leave of the Court of Criminal Appeal. The appeal is limited to a question of law alone and must be instituted within seven days. The right is exercised sparingly. Since 2001 there have been only three appeals against acquittal, two of which were successful .... The preciousness which seems to prevail about the sanctity of a jury acquittal has not taken hold here.202

4.26 He gave the following examples from 2006:

I used the right of appeal successfully in respect of one judge who in virtually successive trials excluded evidence crucial to the Crown case resulting in acquittals. In both those cases it was held that he was wrong in law in doing so, and it seems to me a matter of elementary fairness that there should be a remedy available in respect of a judge who acts in this manner.203

4.27 It is unclear from the Criminal Code Act 1924 (Tas) whether more than one retrial is permitted in Tasmania. Section 402(5)(c) refers to how “a” new trial shall be had in such manner as the Court may direct. However, this has never been judicially determined. The Tasmanian Director of Public Prosecutions said:

Whether I would in fact try a matter a third time would be a decision I would have to make in all the circumstances, but there is no “rule” against it and there have been several examples of third trials proceeding (for example after a hung jury, then a verdict followed by a successful appeal and an order for re-trial).204

202 Letter from Mr TJ Ellis SC, Director of Public Prosecutions, Office of the Director of Public Prosecutions of Tasmania, 14 May 2007, p1.
204 Email from Mr TJ Ellis SC, Director of Public Prosecutions, Office of the Director of Public Prosecutions of Tasmania, 16 May 2007, p1.
The United Kingdom Model - 2005

4.28 The Committee noted the absence of a provision in the *Criminal Justice Act 2003* (UK) for a prosecutor to apply to the Court of Appeal for an order quashing a person’s acquittal and ordering the person to be retried for a qualifying offence on the basis of judicial error of fact or law.\(^{205}\)

4.29 Amendments to the *Criminal Justice Act 2003* (UK) came into operation on 4 April 2005 and pursuant to section 76, provide for a prosecutor to apply to the Court of Appeal for an order quashing a person’s acquittal and ordering the person to be retried for a ‘qualifying offence’\(^{206}\). For England and Wales, there are 29 ‘qualifying’ offences including murder, attempted murder, manslaughter, soliciting murder, sexual offences, drug offences, criminal damage offences, war crimes and terrorism offences and conspiracy. For Northern Ireland there are 20 qualifying offences. All these qualifying offences carry a maximum sentence of life imprisonment. The prosecutor can make only one application for a retrial\(^{207}\) and must obtain the written consent of the DPP. The DPP can only give that consent if satisfied that:

- there is new\(^{208}\) and compelling\(^{209}\) evidence against the acquitted person; and
- it is in the public interest for the application to proceed.

4.30 The Court of Appeal must be satisfied that there is new and compelling evidence against that acquitted person and that in all the circumstances it is in the interests of

---

\(^{205}\) Part 9 of the *Criminal Justice Act 2003* (UK) currently provides for a prosecution right of appeal against ‘rulings’ (defined as including “a decision, determination, direction, finding, notice, order, refusal, rejection or requirement”). The Court of Appeal may confirm, reverse or vary any ruling to which the appeal relates but under section 67, may not reverse a ruling on an appeal unless it is satisfied “(a) that the ruling was wrong in law, (b) that the ruling involved an error of law or principle, or (c) that the ruling was a ruling that it was not reasonable for the judge to have made.”

\(^{206}\) For a detailed list, see Schedule 5 of the *Criminal Justice Act 2003* (UK).

\(^{207}\) Section 76(5) of the *Criminal Justice Act 2003* (UK).

\(^{208}\) Section 78(2) of the *Criminal Justice Act 2003* (UK) states that “Evidence is new if it was not adduced in the proceedings in which the person was acquitted (nor, if those were appeal proceedings, in earlier proceedings to which the appeal related).”

\(^{209}\) Section 78(3) of the *Criminal Justice Act 2003* (UK) provides that evidence is “compelling if it is reliable, substantial and in the context of the outstanding issues, it appears highly probative of the case against the acquitted person.”
justice for the court to make the order.\textsuperscript{210} The United Kingdom model is retrospective in its operation.\textsuperscript{211}

The New South Wales Model - 2006

4.31 The Committee noted the absence of a provision in the \textit{Crimes (Appeal and Review) Act 2001} (NSW) for the Court of Criminal Appeal to order, on the application of the Director of Public Prosecutions, an acquitted person to be retried for a life sentence offence or a 15 years or more sentence offence on the basis of judicial error of fact or law.

4.32 Amendments to the \textit{Crimes (Appeal and Review) Act 2001} (NSW) came into operation on 15 December 2006\textsuperscript{212} following the passage of the Criminal Appeal Amendment (Double Jeopardy) Bill 2003. Amongst other things, the amendments provided for the retrial of an acquitted person of a “very serious offence”.\textsuperscript{213} Section 99 provides:

\begin{quote}
(1) The Court of Criminal Appeal may, on the application of the Director of Public Prosecutions, order an acquitted person to be retried for a life sentence offence\textsuperscript{214} if satisfied that:

(a) there is fresh and compelling evidence\textsuperscript{215} against the acquitted person in relation to the offence, and
\end{quote}

\textsuperscript{210} Section 79(1) of the \textit{Criminal Justice Act 2003} (UK) provides that in determining the interests of justice, the court must consider whether existing circumstances make a fair trial unlikely; the length of time since the qualifying offence was allegedly committed; whether it is likely that the new evidence would have been adduced in the earlier proceedings against the acquitted person but for a failure by an officer or by a prosecutor to act with due diligence or expedition; whether, since those proceedings or, if later, since the amendments came into operation on 4 April 2005, any officer or prosecutor has failed to act with due diligence or expedition.

\textsuperscript{211} Section 75(6) of the \textit{Criminal Justice Act 2003} (UK).

\textsuperscript{212} After receiving assent on 19 October 2006: \textit{New South Wales Government Gazette}, No 186, 15 December 2006, p11524.

\textsuperscript{213} Section 99 of the \textit{Crimes (Appeal and Review) Act 2001} (NSW). Although a definition of the term ‘very serious offence’ appeared in the Criminal Appeal Amendment (Double Jeopardy) Bill 2003, it is not defined in the \textit{Crimes (Appeal and Review) Act 2001} (NSW).

\textsuperscript{214} ‘Life sentence offence’ means murder or any other offence punishable by imprisonment for life. Usefuly, the Act provides information to the reader as to specific offences caught by the new definition. It states: “On the enactment of this Part, the following offences were offences punishable by imprisonment for life: (a) murder (section 19A of the Crimes Act 1900), (b) an offence under section 61JA (1) of the Crimes Act 1900 (Aggravated sexual assault in company), (c) an offence under section 23 (2), 24 (2), 25 (2), 25 (2A), 26, 27 or 28 of the Drug Misuse and Trafficking Act 1985, being an offence that relates to a large commercial quantity of certain prohibited plants or drugs.”

\textsuperscript{215} The Act provides that evidence is ‘fresh’ if: “(a) it was not adduced in the proceedings in which the person was acquitted, and (b) it could not have been adduced in those proceedings with the exercise of reasonable diligence.” Evidence is ‘compelling’ if: “(a) it is reliable, and (b) it is substantial, and (c) in the context of the issues in dispute in the proceedings in which the person was acquitted, it is highly probative of the case against the acquitted person.”
(b) in all the circumstances it is in the interests of justice\textsuperscript{216} for the order to be made.

4.33 Section 101 provides that:

\begin{enumerate}
\item The Court of Criminal Appeal may, on the application of the Director of Public Prosecutions, order an acquitted person to be retried for a 15 years or more sentence offence\textsuperscript{217} if satisfied that:
\begin{enumerate}
\item the acquittal is a tainted acquittal\textsuperscript{218}, and
\item in all the circumstances it is in the interests of justice for the order to be made.
\end{enumerate}
\end{enumerate}

4.34 Section 105(1) of the Act provides “not more than one application” for the retrial of an acquitted person. It has to be made within 28 days after the person is charged with that offence.\textsuperscript{219} The indictment for the retrial must be presented within two months of the order being made and at retrial\textsuperscript{220}, the prosecution is not entitled to refer to the fact that the Court of Criminal Appeal found fresh and compelling evidence against that acquitted person.\textsuperscript{221} The appeal of the New South Wales Director of Public Prosecutions can be on any ground that involves a question of law alone\textsuperscript{222} and appeals on questions of law are not retrospective.\textsuperscript{223} Section 110(2) provides for a presumption in favour of bail in respect of a person charged with an offence for which

\begin{itemize}
\item \textsuperscript{216} Section 104 of the of the Crimes (Appeal and Review) Act 2001 (NSW) provides that in determining whether to order a retrial of an acquitted person in the ‘interests of justice’, the following are matters for consideration: “(2) It is not in the interests of justice to make an order for the retrial of an acquitted person unless the Court of Criminal Appeal is satisfied that a fair retrial is likely in the circumstances. (3) The Court is to have regard in particular to: (a) the length of time since the acquitted person allegedly committed the offence, and (b) whether any police officer or prosecutor has failed to act with reasonable diligence or expedition in connection with the application for the retrial of the acquitted person.”

\item \textsuperscript{217} Section 98 of the Crimes (Appeal and Review) Act 2001 (NSW) provides that the term ‘15 years or more sentence offence’ means “an offence punishable by imprisonment for life or for a period of 15 years or more”.

\item \textsuperscript{218} Under section 103 of the Crimes (Appeal and Review) Act 2001 (NSW) an acquittal is ‘tainted’ if: “(a) the accused person or another person has been convicted (in New South Wales or elsewhere) of an administration of justice offence in connection with the proceedings in which the accused person was acquitted, and (b) it is more likely than not that, but for the commission of the administration of justice offence, the accused person would have been convicted.” “(3) An acquittal is not a tainted acquittal if the conviction for the administration of justice offence is subject to appeal as of right.”

\item \textsuperscript{219} Section 105(3) of the Crimes (Appeal and Review) Act 2001 (NSW) but the Court of Criminal Appeal may extend that period for “good cause”.

\item \textsuperscript{220} Section 106(1) of the Crimes (Appeal and Review) Act 2001 (NSW).

\item \textsuperscript{221} Ibid, section 106(5).

\item \textsuperscript{222} Ibid, section 107(2).

\item \textsuperscript{223} Ibid, section 107(8).
a retrial is sought. New South Wales also provides a degree of privacy for that person by restricting publication of identifying information without the court’s approval.\textsuperscript{224}

\textit{The Proposed New Zealand Model - 2007}

4.35 As at the date of tabling this Report, the Criminal Procedure Bill 2004 was at Committee of the Whole stage in the New Zealand Parliament.

4.36 The Committee noted the absence of a provision in the Criminal Procedure Bill 2004 (NZ) for the Court of Appeal to order the retrial of a person acquitted of a specified serious offence on the basis of judicial error of fact or law.

4.37 The Criminal Procedure Bill 2004 proposes to insert new sections 378A to F into the \textit{Crimes Act 1961} (NZ) under the heading of “Retrials of previously acquitted persons”. Section 378D proposes an order for a retrial of a person acquitted of a “specified serious offence”\textsuperscript{225}, defined as a “term of imprisonment 14 years or more” by the Court of Appeal on a question of law\textsuperscript{226} if satisfied that:

\begin{itemize}
  \item[(a)] there is new\textsuperscript{227} and compelling\textsuperscript{228} evidence to implicate the acquitted person in the commission of the specified serious offence; and
  \item[(b)] a further trial of the acquitted person is in the interests of justice.
\end{itemize}

4.38 The Solicitor General also has to be satisfied as to those proposed provisions.\textsuperscript{229}

4.39 Under proposed section 378D the interests of justice formula requires the Court of Appeal to have “particular” regard to the following matters:

\begin{itemize}
  \item[(a)] whether before or during the proceedings that led to the acquittal of the acquitted person for the specified serious offence all reasonable efforts were made to obtain and present all relevant evidence then available:
\end{itemize}

\begin{itemize}
\item[224] \textit{Ibid}, section 111.
\item[225] Proposed new section 378B of the Criminal Procedure Bill 2004 (NZ).
\item[226] Proposed new section 381A in clause 9 of the Criminal Procedure Bill 2004 (NZ). See also the clause 10 consequential amendments.
\item[227] Under proposed new section 378B(2) of the Criminal Procedure Bill 2004 (NZ), evidence is new if “(a) it was not given in the proceedings that resulted in the acquittal of the acquitted person and (b) it could not with the exercise of reasonable diligence, have been given in those proceedings”.
\item[228] Under proposed new section 378B(2) of the Criminal Procedure Bill 2004 (NZ), evidence is compelling if “(a) it is a reliable and substantial addition to the evidence given in the proceedings that resulted in the acquittal of the acquitted person, and (b) it implicates the acquitted person with a high degree of probability in the commission of the specified serious offence”.
\end{itemize}
(b) the length of time since the acquitted person is alleged to have committed the specified serious offence:

(c) whether the police and the Solicitor-General acted with reasonable speed in making the application after obtaining new evidence against the acquitted person:

(d) the interests of any victim of the specified serious offence alleged to have been committed:

(e) whether the retrial for which leave is sought can be conducted fairly.

4.40 Similar to New South Wales, the New Zealand proposal provides safeguards to ensure fairness such as excluding persons from hearing the Solicitor General’s application, forbidding reports or accounts of evidence and prohibiting publication of the acquitted person’s name.230

The Proposed Queensland Model - 2007

4.41 The Criminal Code (Double Jeopardy) Amendment Bill 2007 was introduced into the Queensland Parliament on 19 April 2007. As at the tabling of this report, it remains at second reading stage in the unicameral Legislative Assembly.

4.42 The Committee noted the absence of a provision in the Criminal Code (Double Jeopardy) Amendment Bill 2007 (Qld) for the Director of Public Prosecutions to apply to the Court of Appeal for an order for an acquitted person to be retried on the basis of judicial error of fact or law.

4.43 Essentially, a proposed new chapter 68 into The Criminal Code (Qld) titled “Exceptions to double jeopardy” provides for the Director of Public Prosecutions to apply to the Court of Appeal for an order for an acquitted person to be retried:

- for the offence of murder if there is fresh231 and compelling232 evidence against the acquitted person in relation to the offence; and in all the circumstances it is in the interests of justice for the order to be made233; and

---

229 Under proposed new section 378B of the Criminal Procedure Bill 2004 (NZ).
231 Under proposed new section 678D in clause 4 of the Criminal Code (Double Jeopardy) Amendment Bill 2007 (Qld), “Evidence is fresh if— (a) it was not adduced in the proceedings in which the person was acquitted; and (b) it could not have been adduced in those proceedings with the exercise of reasonable diligence.”
• for a 25-year offence\textsuperscript{234}, if satisfied that the acquittal is a tainted acquittal\textsuperscript{235}; and in all the circumstances it is in the interests of justice\textsuperscript{236} for the order to be made.\textsuperscript{237}

4.44 The Queensland Bill is not retrospective. Only one retrial is allowed unless an administration of justice offence is then proven to have occurred in relation to the retrial.

Table 1: Summary of legislation or proposed legislation in jurisdictions with reforms to prosecution rights of appeal

<table>
<thead>
<tr>
<th>Jurisdiction</th>
<th>Number of new trials allowed</th>
<th>Prosecution right of appeal for:</th>
</tr>
</thead>
<tbody>
<tr>
<td>Tasmania</td>
<td>Not stated. Never judicially determined</td>
<td>All indictable offences if a fit case for appeal on a question of law</td>
</tr>
<tr>
<td>Western Australia</td>
<td>Not stated but limitless under proposed DPP amendment guidelines.</td>
<td>An acquittal from a jury verdict where statutory penalty is 14 years imprisonment or more or life; but only if judicial error of fact or law.</td>
</tr>
</tbody>
</table>

\textsuperscript{232} Under proposed new section 678D in clause 4 of the Criminal Code (Double Jeopardy) Amendment Bill 2007 (Qld), “Evidence is compelling if—(a) it is reliable; and (b) it is substantial; and (c) in the context of the issues in dispute in the proceedings in which the person was acquitted, it is highly probative of the case against the acquitted person.”

\textsuperscript{233} Clause 4 of the Criminal Code (Double Jeopardy) Amendment Bill 2007 (Qld).

\textsuperscript{234} The term ‘25-year offences’ is defined as “an offence punishable by imprisonment for life or for a period of 25 years or more”. Life offences include serious riot offences; piracy; serious sexual offences (including rape, maintaining an unlawful sexual relationship, incest, sodomy, unlawful carnal knowledge); murder, attempted murder and manslaughter; serious offences relating to inflicting grievous bodily harm and disabling to commit offences; endangering the safety or railways and aircraft; robbery; burglary; and arson. Offences punishable by 25 years include sabotage and the most serious drug offences relating to drugs in schedule 1 of the Drugs Misuse Act 1987 (Qld).

\textsuperscript{235} Under proposed new section 678E(2) in clause 4 of the Criminal Code (Double Jeopardy) Amendment Bill 2007 (Qld), an acquittal is tainted “if the accused person or another person has been convicted in this State or elsewhere of an administration of justice offence in relation to the proceedings in which the accused person was acquitted; and it is more likely than not that, but for the commission of the administration of justice offence, the accused person would have been convicted”.

\textsuperscript{236} Under proposed new section 678F in clause 4 of the of the Criminal Code (Double Jeopardy) Amendment Bill 2007 (Qld), in deciding whether it is in the interests of justice for an order to be made for the retrial of an acquitted person, the Court has to be satisfied that a fair retrial is likely in the circumstances. The Court must have regard to “(a) the length of time since the acquitted person allegedly committed the offence; and (b) whether any police officer or prosecutor has failed to act with reasonable diligence or expedition in relation to — (i) the investigation of the commission of the offence of which the person was acquitted and the prosecution of the proceedings in which the person was acquitted; and (ii) the application for the retrial of the acquitted person”.

\textsuperscript{237} Clause 4 of the Criminal Code (Double Jeopardy) Amendment Bill 2007 (Qld). The original acquittal was ‘tainted’, in the sense that the acquitted person or someone else has since been convicted of an ‘administration of justice offence’ such as perjury or conspiracy to pervert the course of justice.
Table 2: Summary of legislation or proposed legislation in jurisdictions with double jeopardy reform

<table>
<thead>
<tr>
<th>Jurisdiction</th>
<th>Number of new trials allowed</th>
<th>Double Jeopardy Reform - Prosecution right of appeal for:</th>
</tr>
</thead>
<tbody>
<tr>
<td>New South Wales</td>
<td>One stated</td>
<td>(1) Life sentence offences. Defined as murder or any other offence punishable by imprisonment for life. If fresh and compelling evidence and in the interests of justice.</td>
</tr>
<tr>
<td></td>
<td></td>
<td>(2) Offences punishable by imprisonment for life or for a period of 15 years or more if tainted acquittal and in the interests of justice.</td>
</tr>
<tr>
<td>Queensland</td>
<td>One stated</td>
<td>(1) Murder</td>
</tr>
<tr>
<td></td>
<td></td>
<td>(2) Offences punishable by imprisonment for life or for a period of 25 years or more if a tainted acquittal.</td>
</tr>
<tr>
<td>United Kingdom</td>
<td>One stated</td>
<td>Qualifying offences carrying life imprisonment sentences if there is new and compelling evidence against the acquitted person and it is in the public interest for the application to proceed.</td>
</tr>
<tr>
<td>New Zealand</td>
<td>Not stated</td>
<td>Specified serious offences. Defined as a term of imprisonment 14 years or more on a question of law if there is new and compelling evidence; and in the interests of justice.</td>
</tr>
</tbody>
</table>

PART 4 - CRIMINAL APPEALS ACT 2004 AMENDED

4.45 Part 4 of the Bill contains nine clauses. The Committee focused on the following three clauses. The commentary below in relation to clause 34 also applies to clause 35 in relation to special verdicts.

Clause 34 - Section 24 amended

4.46 This clause proposes to amend section 24 of the Criminal Appeals Act 2004 by inserting the following additional right of prosecution appeal in section 24(2) against:

(da) a judgment of acquittal (other than a judgment of acquittal on account of unsoundness of mind) entered after a jury’s verdict
of not guilty of a charge the statutory penalty for which is or includes imprisonment for 14 years or more or life, but only on the grounds that before or during the trial the judge made an error of fact or law in relation to the charge.

4.47 Essentially this insertion adds to the rights of appeal available to prosecutors under section 24. These rights comprise the following:

24. Rights of appeal of prosecutor

(1) The prosecutor may appeal to the Court of Appeal against any one or more of the following decisions by a judge of a superior court in relation to a charge of an indictable offence —

(a) the sentence imposed on a person convicted of the charge or any order made as a result of the conviction;

(b) the sentence imposed on a person convicted by a court of summary jurisdiction of the charge and committed for sentence or any order made as a result of the conviction;

(c) a refusal to make an order that might be made as a result of a conviction.

(2) The prosecutor may also appeal to the Court of Appeal against any one or more of the following decisions by a judge of a superior court in relation to a charge of an indictable offence —

(a) a decision refusing to consent to the discontinuance of the prosecution of the charge;

(b) a judgment entered under the Criminal Procedure Act 2004 section 128(2) or (3)[238];

(c) a decision ordering a permanent stay of proceedings on the charge;

(d) a decision ordering an adjournment of proceedings on the charge;

238 These sections concern pleas of no jurisdiction and the consequences if upheld.
(e) a judgment of acquittal (other than a judgment of acquittal on account of unsoundness of mind) —

(i) entered after a decision by the judge that the accused has no case to answer on the charge; or

(ii) entered in a trial by the judge alone;

(f) any judgment entered as a result of any of the above decisions;

(g) any order made as a result of any of the above decisions or judgments.

4.48 The DPP submitted that clause 34 will ensure “that the State can enforce its rights to a fair trial in much the same way an accused can”. Proposed new section 24(2)(da) is an attempt to ‘balance the ledger’ which currently favours a convicted person challenging a jury decision.

4.49 The DPP submitted that charges dealt with before Magistrates already attract a full right of prosecution appeal on errors of law and fact. Clause 34 will result in 82 offences in the Code and other legislation attracting a limited right of prosecution appeal. A list of these offences is included at Appendix 4.

4.50 The DPP said clause 34 will also have the anomalous effect of leaving a range of “middle” indictable offences that are “too serious for Magistrates but not serious enough to have 14 years penalty … [for which] … there is no [prosecution right of] appeal.” The Committee notes that this is a policy decision of the Executive.

4.51 The Law Society of Western Australia is of the view that the rationale for providing a limited right of prosecution appeal in clause 34 is primarily “about trying to make the prosecution have the same rights as the defence”. The Law Society of Western

---

239 Submission No 6 from Mr Robert Cock QC, Director of Public Prosecutions, Office of the Director of Public Prosecutions, 23 April 2007, p9.


241 Section 7(2) of the Criminal Appeals Act 2004 allows the Attorney General to appeal to the Supreme Court against a decision of a court of summary jurisdiction. Section 8(1) of the Criminal Appeals Act 2004 provides that an appeal may be made, (amongst other things), on the grounds that a court of summary jurisdiction “made an error of law or fact, or of both law and fact”.

242 Mr Robert Cock QC, Director of Public Prosecutions, Office of the Director of Public Prosecutions, Transcript of Evidence, 18 April 2007, p9.

243 Ibid.

244 Mr John Prior, Councillor, The Law Society of Western Australia, Transcript of Evidence, 2 May 2007, p12.
Australia contends that this offends the principle of finality in criminal proceedings for an acquitted person. Of this principle, the High Court said: “in our criminal justice system the finality of an acquittal is the keystone of personal freedom.”

The DPP is supportive of finality but only after there has been a trial according to law. In providing the example of drug offenders who are “perpetrating serious evil in our community,” the DPP said:

It is an absolute disgrace in my view if a drug offender escapes punishment because a judge makes an error. That is outrageous.

...

if there has been an error by the judge that has vitiated the outcome, a person has not had a first trial at all or a trial according to law.

Finality was described by the Law Commission of England and Wales as a “value which finds its roots in personal autonomy, and which serves to delineate the proper ambit of the power of the State, by the State acknowledging that it respects the principle of limited government and the liberty of the subject”.

The Committee acknowledges that clause 34 has the potential to delay finality in criminal proceedings.

In 1984 the High Court was highly critical of a then “disturbing trend towards erosion of the value of an acquittal”. Justice Murphy said:

A decision to permit the government to appeal against an acquittal presents another undermining of the finality of an acquittal and a serious undermining of personal freedom. It means that the right of personal freedom ... is to be subject to the delay and uncertainty of ordinary litigation, so that the final determination ... may only be arrived at by the last Court of Appeal.

Legal proceedings, especially criminal ones, can be an instrument of oppression by governments against their citizens; they can ruin an individual despite the fact that he or she is ultimately acquitted. Even a relatively minor charge can have this effect. It is common

---

245 Davern v Messel (1983) 155 CLR 21 at p64 per Murphy J.
246 Mr Robert Cock QC, Director of Public Prosecutions, Office of the Director of Public Prosecutions, Transcript of Evidence, 18 April 2007, p9.
247 Ibid.
249 Davern v Messel (1983) 155 CLR 21 at p64 per Murphy J.
knowledge that every year in Australia tens of thousands of citizens plead guilty to minor offences although they dispute their guilt. They do this rather than suffer the cost and inconvenience of the criminal justice process.

To add the risk that the prosecution will appeal against an accused person’s acquittal adds a new dimension and a further avenue of cost and inconvenience. It is of little concern to the government, as prosecutor, if it prosecutes a defendant once, twice or three times in an effort to secure a conviction.  

The Committee noted that the Bill does not contain any limit on the number of times an acquitted person can be retried. This places the acquitted person at a disadvantage as the State has greater resources and authority than the person. Unconstrained access to appeals removes the principle of finality and may result in multiple appeals and retrials.

The Committee sought information from the DPP as to the limits built into the system to prevent multiple appeals and retrials by offenders and prosecutors. With respect to offenders, the DPP said:

Section 23 CAA [Criminal Appeals Act 2004] creates a right of appeal and limits the time within which such appeal may be instituted and lays the procedure which must be complied with. An appeal is not a common law remedy and indictable proceedings are subject only to the statutory remedy.

Although the section includes no express words of limitation, it is settled law that a provision such as section 23 creates but one right of appeal. Such a construction is most recently confirmed by Foo v R ... [253], a review by the Court of Appeal of a decision by Roberts-Smith JA. Mr Foo appealed against a conviction in 2001 and the appeal was dismissed in December 2001[254] … .

I draw your attention to.. where the court held: “If a convicted person appeals, and the appeal is heard and determined on the merits, it

[250] Ibid.
[251] Mr Robert Cock QC, Director of Public Prosecutions, Office of the Director of Public Prosecutions, Transcript of Evidence, 18 April 2007, at p8 said: “there is no limit … As I have explained, my prosecution guidelines set out a principle that generally I will not retry a person more than three times for any offence.”
[253] [2005] WASCA 256.
cannot be made the subject of a second appeal, and nor can the first
appeal be reopened.^[255]

Once an offender has exhausted his or her rights of appeal, he or she
may appeal to the Court of Appeal by reference from the Attorney-
General on petition for exercise of the Royal Prerogative of
Mercy:[256] s 140 Sentencing Act.^[257]

4.57 With respect to prosecutors appealing under section 24 of the Criminal Appeals Act
2004, the DPP said:

The settled law regarding the existence of but one opportunity to
exercise a right of appeal applies to all statutory appeals.^[258]

4.58 The application of proposed new section 24(2)(da) is confined to judgments of
acquittal following a jury verdict:

• attracting a statutory penalty of 14 years imprisonment or more or life; but

• only if the Judge made an error of fact or law in relation to the charge.

4.59 Clause 38 of the Bill provides an additional safeguard that “Even if a ground of appeal
might be decided in favour of a prosecutor, the Court of Appeal may dismiss the
appeal if it considers that no substantial miscarriage of justice has occurred.”^[259]

4.60 The Committee canvassed with the DPP, the two types of cases that clause 34 is
designed to capture.

Error of Fact Cases

4.61 An error of fact is an error made by a decision-maker about the existence of a
particular fact^[260] The DPP provided the following example:

^[256] The Director of Public Prosecutions advised that in the past five years only one convicted offender has
appealed more than once. This was the case of Mr Foo.
^[257] Email from Ms Annette Fox, Research Assistant to the Director of Public Prosecutions, Office of the
Director of Public Prosecutions, 16 July 2007, p1.
^[258] The DPP advised that in the past five years prosecutors have not appealed more than once against any of
the decisions in section 24(1) and (2) of the Criminal Appeals Act 2004.
^[259] Clause 38 which proposes to insert a new section 33(2a) into the Criminal Appeals Act 2004.
^[260] The Honourable Dr Nygh, PE and Butt, P, General Editors, Butterworths Australian Legal Dictionary,
Consider a murder trial in which the accused denies committing the offence and calls witnesses to say that 30 minutes before the offence the accused was at a different location.

Assume that the judge in summing up to the jury suggests that the evidence of the alibi witnesses, if accepted, allows the accused’s alibi to be supported and hence require that the accused be acquitted.

This would be an error of fact, if on the evidence of other witnesses at the trial, it is possible for the accused to have been where the alibi witnesses say he was at the time they say they saw him, and still be able to get to the scene of the crime within the period during which the evidence discloses the offence occurred. If the judge refuses to make this factual correction, then the judge would have made an error of fact.  

4.62 The Law Society of Western Australia claimed error of fact appeals are too broad. Its representative said:

If the judge makes a mistake on a fact, I reckon I could find in any charge, if you challenge me now, an error of fact in any trial going on today, tomorrow or the next day.

…

I know a couple of QCs who do a lot more appellant work than I who seem to be able to find an error of fact [or law] in just about every judge’s charge to a jury. Whether they ultimately succeed is another issue.  

4.63 The Committee queried with the DPP whether error of fact constitutes too broad a ground of prosecution appeal. The DPP explained the Attorney General’s preference for a limited right of appeal “in the most serious cases” because of the substantial change to the law that the Government is seeking to introduce. The following exchange is noted:

The CHAIR: The categorisation in the second reading speech states - an error of law or fact by the trial judge or a decision to wrongly exclude admissible evidence or wrongly admit inadmissible evidence.

---

261 Letter from Mr Robert Cock QC, Director of Public Prosecutions, Office of the Director of Public Prosecutions, 12 June 2007, p1.

262 Mr John Prior, Councillor, The Law Society of Western Australia, Transcript of Evidence, 2 May 2007, p11.

263 Mr Robert Cock QC, Director of Public Prosecutions, Office of the Director of Public Prosecutions, Transcript of Evidence, 18 April 2007, p9.
That does not sound very restricted to me at all; it sounds very broad. Do you think “restricted cases” is the appropriate description?

Mr COCK: It is restricted in the sense that you need to show an error of fact or an error of law or a decision to exclude, to deny the prosecution the right to introduce relevant evidence or to allow irrelevant evidence. So, in my view those are all cases where there has been an error that has vitiated the fairness of the trial.

The CHAIR: I understand that. I suppose what I am saying is there is not much left that you would identify with, is there?

Mr COCK: There is, with great respect.

The CHAIR: Yes, that is what I am asking you.

Mr COCK: I would love to be able to go down, like an accused does, and argue that on the proper evaluation of the evidence it was a wrong verdict because the case just was not strong enough.

The CHAIR: Right.

Mr COCK: I have had many cases, which I have regarded personally as very strong, on which there have been acquittals by the jury. I would just love to be able to go and retry those cases and put them up, but obviously this stops me doing that. If an accused person felt that they were wrongly convicted on a weak case, they can pursue an appeal, even if there is no legal error by the judge. This stops me doing that. That is why I say I am restricted. There have been some notorious cases over the last two years, several of which have been prominent in our local newspaper, where I have been personally very angered by the outcome, and this does not give me a right of appeal there. That is the restriction upon me.264

Error of Law Cases

4.64 An error of law is a misinterpretation of a principle of law or the application of an inappropriate principle of law to an issue in fact.265 The DPP gave the example of a false pretence trial in Port Hedland in which the Judge told the jury that there were five elements of false pretences and that the Crown has to establish each of the five. The DPP said:

It turned out that there are only four elements and that the fifth one was not a legal element. The man was acquitted. The Director of Public Prosecutions did an Attorney General reference and the Court of Appeal agreed that there were only four elements for that offence rather than five, and that the judge was wrong. … there was no retrial.  

4.65 The DPP referred the Committee to The State of Western Australia v R where:

the judge misdirected the jury about what possession meant. The accused man had travelled from the eastern states with a truck, and on the back of the truck was a parcel in which there was a substantial amount of cannabis. In essence, the judge directed the jury about the level of knowledge that had to be established by the prosecution to enable a conviction. The judge directed the jury, in our view, wrongly, and overstated the level of knowledge needed. The man was acquitted. We lodged an Attorney General reference and the Court of Appeal found that the judge had, indeed, wrongly expressed the law in relation to knowledge and that there was in fact a lower level of knowledge required. Our submission was that had that man been retried, he would have been convicted. Of course, there was no right of retrial.

4.66 Of that particular case, a representative of The Law Society of Western Australia challenged the DPP’s view:

we will never know whether that [misdirection] affected the verdict. It was a Kalgoorlie jury and something else may have affected their decision - the evidence or anything, who knows?

4.67 Mr Michael Crowley supported the view of The Law Society of Western Australia. Mr Crowley questioned how it can be:

• demonstrated that an acquittal only occurs because of the alleged error; and

• determined whether or not the jury would not have acquitted regardless of the alleged error.

---

266 Mr Robert Cock QC, Director of Public Prosecutions, Office of the Director of Public Prosecutions, Transcript of Evidence, 18 April 2007, p7.
267 [2007] WASCA 42.
268 Mr Robert Cock QC, Director of Public Prosecutions, Office of the Director of Public Prosecutions, Transcript of Evidence, 18 April 2007, p7.
269 Mr John Prior, Councillor, The Law Society of Western Australia, Transcript of Evidence, 2 May 2007, p11.
The Criminal Lawyers’ Association of Western Australia claimed to be unaware of any jury trial where a Judge made an error of law “from which it could be said that an Accused’s acquittal has resulted, as a result of that mistake alone.”271 The Association said:

In any given case there are many reasons why a person might be acquitted, so it would be impossible to show that a Judge’s error alone would inevitably have led to an acquittal, absent an ability to eavesdrop on jury deliberations.272

Further, the Association submitted that if a Judge made an error of law, the prosecution would have the opportunity to persuade the Judge to a contrary position prior to the jury’s retirement.273 The Committee noted that whilst it is “correct that lawyers are able to debate before a judge, before the jury has determined its verdict whether the judge got it right”,274 the DPP’s focus in the legislative proposal is on those cases in which “the judge gets it wrong”.275

Currently if a judge makes an error, the only recourse available to the DPP is an ‘Attorney General Reference’. Attorney General References involve the Attorney General referring a matter to the Court of Appeal for a determination on a question of law. This occurs in marginal cases where there has been debate on a matter that the DPP has not been able to clarify through another appellate process. Attorney General References determine questions of law for the guidance of judges in the future, but do not permit another trial.276

**Impact of Clause 34 on a Fundamental Common Law Principle**

In 1915, the High Court of Australia entrenched in *R v Snow*277, the principle that the Crown does not have a right of appeal against a verdict of acquittal. In 1999, the New South Wales Supreme Court of Appeal said of *R v Snow*:

No doubt in the history of criminal justice in … [New South Wales] … and in other States and in the United Kingdom from which this

---

270 Submission No 5 from Mr Michael Crowley, Lecturer in Law and Barrister, School of Law and Justice, Edith Cowan University, 20 April 2007, p3.
271 Submission No 12 from Associate Professor Judith Fordham, President, Criminal Lawyers’ Association of Western Australia, 1 May 2007, p4.
272 Ibid.
275 Ibid.
277 (1915) 20 CLR 315.
tradition has emerged, community expectations have been disappointed … by verdicts of acquittal delivered by juries. Nevertheless, the proposition that the Crown cannot appeal from a verdict of acquittal is of long standing. It reflects a fundamental principle, of a character which requires clear statutory provision to modify. 278

4.72 The High Court 279 and other courts 280 have warned that general enactments do not abolish fundamental common law rights, rules, principles, privileges and immunities. 281 Thus, legislation empowering the granting of appeals in criminal matters will not be read as allowing an appeal against an acquittal unless the language is unmistakeable. General words are insufficient, there must be language which is specifically directed to acquittals to abolish or erode this fundamental principle. 282

4.73 The Committee was satisfied that clause 34 is not a general enactment. Rather, it manifests an intention in unambiguous language to modify or change a principle of the common law. However, as noted at paragraph 4.50, clause 34 leaves a middle group of offences for which the common law principle remains intact.

Director of Public Prosecution Guidelines

4.74 The Committee had concerns with the Bill failing to limit the number of times a person may be subjected to a new trial and considered whether this should be limited to one, as in other jurisdictions.

4.75 Currently, the DPP has discretion, through guidelines made under the Director of Public Prosecutions Act 1991, to consider the number of times a person can be retried. 283 A representative of The Law Society of Western Australia, expressed concern with the DPP guidelines:

[They are] not mandatory and it is not a piece of legislation. Guidelines are sometimes interpreted subjectively, depending on who the individual director of prosecution is and the matter. That is our concern.

279 For example, Coco v The Queen (1994) 179 CLR 427 at p437; and Bropho v Western Australia (1990) 171 CLR 1 at pp17-18.
280 For example, the New South Wales Supreme, Court of Appeal in Regina v Cheng [1999] NSWCCA 373.
281 Coco v The Queen (1994) 179 CLR 427 at p437.
282 Davern v Messel (1983) 155 CLR 21 at p63 per Murphy J.
At the moment, the DPP has general prosecution guidelines on when they perhaps may not proceed with the prosecution, because of no reasonable prospects of conviction and so on. Sometimes, when we hear the reasons from case to case, we scratch our head and ask why that prosecution was the subject of a non-prosecution notice and this one was not? Perhaps they know more than we know in defending people.

In his speeches to Parliament, the Attorney General has said, “There is the answer: the DPP, he or she, is a senior lawyer and they will follow the guidelines and so on.” We are a bit concerned about that.²⁸⁴

4.76 The DPP provided proposed amendment guidelines consequential to clause 34. (See Appendix 5). From these, the following is extracted:

**STATE APPEALS AGAINST ACQUITTAL**

148A. The State’s right to appeal against a judgment of acquittal entered after a jury’s verdict of not guilty is only to be exercised in circumstances where a substantial error is likely to have precipitated the verdict. The State’s right to appeal against acquittal is only to be exercised where there are reasonable prospects that the appeal will be allowed and where, on a retrial, there are reasonable prospects of conviction on the basis of the evidence available in relation to the charge, and it is in the public interest to continue the prosecution.

149B. The following additional factors are relevant to considering whether or not to institute and appeal against an acquittal -

(a) whether the error was so substantial as to have been likely to have affected the outcome;

(b) whether the error amounts to an inconsistent application of the law;

(c) whether the verdict of acquittal is so significant as to shock the public conscience; and

(d) whether there is a public interest in correcting the error.

The Parliament has significant interest in the subject matter of the proposed amendments as they affect an individual’s right to finality in criminal proceedings.

The Committee considered whether these proposed amendments, once incorporated into the current Statement of Prosecution Policy and Guidelines 2005, should be subject to disallowance or included in the Bill. Given their important subject matter and impact on individual rights, not making the Statement of Prosecution Policy and Guidelines 2005 subject to disallowance or including them in the Bill, arguably, fails to give sufficient regard to the institution of Parliament.

The DPP was of the view that making the proposed amendments disallowable is “highly undesirable” as they only “provide guidance and do not affect rights”. The DPP argued that the 2005 Guidelines are not legislative in character, rather they are administrative and assist in the consideration of the practical impact of the legislative proposal. If made disallowable and ultimately disallowed, “this would render the internal decision making process subject to discretion unassisted by any expression of the preferred approach or list of relevant considerations”.

Committee Comment

The Committee acknowledges that “an erroneous decision is capable of disappointing community expectations with respect to the conduct of the criminal justice system.”

The Committee notes the DPP’s frustration with Attorney General References that are “a waste of resources … and pointless”. These may correct the law on a particular point after a trial has concluded and the accused acquitted, but do not result in the retrial of that acquitted person.

The Committee (by a majority comprising Hon Graham Giffard, Hon Sally Talbot, Hon Peter Collier and Hon Donna Faragher) is of the view that the proposed amendments, in capturing the type of erroneous cases described by the DPP, will ensure that if a new trial is ordered, it will proceed on corrected points of law and fact.

The Committee (by a majority comprising Hon Graham Giffard, Hon Sally Talbot, Hon Peter Collier and Hon Donna Faragher) consider that error of fact is not too broad a ground of appeal, given that the Court of Appeal will ultimately determine the issue.

Letter from Mr Robert Cock QC, Director of Public Prosecutions, Office of the Director of Public Prosecutions, 5 June 2007, p5.

Ibid.

Ibid.

Regina v Cheng [1999] NSWCCA 373 at paragraph 18 per Spigelman CJ.

Mr Robert Cock QC, Director of Public Prosecutions, Office of the Director of Public Prosecutions, Transcript of Evidence, 18 April 2007, p7.

Ibid, pp6-7.
The Court of Appeal currently grants appeals from offenders against decisions under section 23 of the *Criminal Appeals Act 2004* and appeals from prosecutors against decisions by Judges in relation to charges of indictable offences under section 24 of the *Criminal Appeals Act 2004*.

4.84 The Committee has reservations with the establishment of a legal framework characterised by a potentially endless stream of prosecution appeals and retrials against an acquitted person.²⁹¹ The Committee is of the view that if the DPP wants to appeal more than once, then the DPP should be required to justify to the Court of Appeal the reasons for further appeals.

4.85 The objective of the legislative proposal is to enable a judicial error of law or fact to be redressed. The Committee notes evidence from Tasmania that endless prosecutions have not occurred. Therefore, while the majority of the Committee endorses clause 34, the majority would not expect there to be more than one retrial.

4.86 The Committee (by a majority comprising Hon Graham Giffard, Hon Sally Talbot, Hon Peter Collier and Hon Donna Faragher) concurs with the DPP that clause 34 is “merely saying that if you have an erroneous verdict, justice and the victims are entitled to have a proper verdict”.²⁹² A minority of the Committee (comprising Hon Giz Watson) does not concur with this view because it is undesirable to give latitude to the DPP as this may allow the State to repeatedly attempt to convict an acquitted person. A corollary of this is to increase the prospects of that person being wrongfully convicted, cause emotional suffering to the person, reduce the finality and efficiency of criminal proceedings and reduce the incentive for efficient investigations.

4.87 The Committee (by a majority comprising Hon Graham Giffard, Hon Sally Talbot, Hon Peter Collier and Hon Donna Faragher) is of the view that confining prosecution right of appeal to the two elements noted at paragraph 4.58, the Bill balances the interests of²⁹³:

- the community - which has an overarching interest in the administration of criminal justice to promote peace and order in society;
- the victims of crime, who are not ordinarily parties to prosecutions on indictment;
- the acquitted person; and

²⁹¹ Applying Foo v R [2005] WASCA 256, this may be limited to one appeal.
• the legal system itself. It is affronting to the system that when a Judge makes an error there is no effective recourse. The Bill provides an element of fairness in the event of judicial error.

4.88 A minority of the Committee (comprising Hon Giz Watson MLC) is of the view that:

• it is undesirable to give latitude to the DPP to repeatedly attempt to convict an acquitted person;
• Attorney General references provide capacity for a point of law to be corrected; and
• the Bill encompasses too many offences.

Hon Giz Watson recommends that the Criminal Law and Evidence Amendment Bill 2006 be amended so that the number of times an acquitted person can be retried under proposed new section 24(2)(da) of the Criminal Appeals Act 2004 be limited to one.

4.89 Hon Giz Watson is attracted to the United Kingdom and New South Wales models noted at paragraphs 4.28 and 4.31 respectively, which restrict the number of times an acquitted person can be retried. Although R v Foo may restrict the number of times the DPP can appeal under proposed new section 24(2)(da) of the Criminal Appeals Act 2004 to one, Hon Giz Watson is of the view that the number of times an acquitted person can be retried should be confined to one.

4.90 Hon Giz Watson observed that the New South Wales and United Kingdom models are not directly comparable to the Western Australian legislative proposal and as such, not useful for modelling an amendment. Nevertheless, to assist the House, the following words are suggested to achieve Hon Giz Watson’s recommendation:

39. Section 33A inserted

After section 33 the following section is inserted -

33A. New trial on a prosecution appeal - limitation

In an appeal commenced by a prosecutor under section 24(2)(da) or 25(3)(aa), the Court of Appeal shall not order a new trial if the appeal is in relation to an acquittal resulting from a new trial ordered by the Court of Appeal in an appeal commenced by a prosecutor under section 24(2)(da) or 25(3)(aa).

4.91 Hon Giz Watson further recommends that proposed new section 24(2)(da) of the Criminal Appeals Act 2004 be amended as follows.
(da) a judgment of acquittal (other than a judgment of acquittal on account of unsoundness of mind) entered after a jury’s verdict of not guilty of a charge the statutory penalty for which is or includes imprisonment for 20 years or more or life, but only on the grounds that before or during the trial the judge made an error or errors of fact or law in relation to the charge which eliminated or substantially weakened the prosecution case.

Clauses 37 (Section 31 amended) and 41 (Section 41 amended)

4.92 Clause 37 states:

Section 31(2) is repealed.

4.93 Clause 31(2) currently states:

In deciding the appeal, the Court of Appeal may have regard to any relevant matter that has occurred between when the offender was convicted and when the appeal was heard.

4.94 With section 31(2) repealed, a proposed new clause 41(4) is then substituted. It provides:

(4) The appeal court deciding an appeal that does or may require it to impose a sentence, or to vary a sentence imposed, on a person for an offence (whether the appeal was commenced by the person or by the prosecutor) —

(a) may take into account any matter relevant to the sentence that has occurred between when the lower court dealt with the person and when the appeal is heard; but

(b) despite paragraph (a), must not take into account the fact that the court’s decision may mean that the person is again sentenced for the offence.

4.95 The effect of the proposed new section is that while the appeal court may take into account any matter relevant to the sentence that has occurred between when the lower court dealt with the person and when the appeal is heard, this must not include the fact that the court’s decision may mean that the person is again sentenced for the offence.

294 Additionally and similarly, clause 41(4) is repealed. It states “In exercising a power under this Act to vary a sentence an appeal court may consider any matter relevant to the sentence that has occurred between when the sentence was imposed and when the appeal was heard.”
The Chief Justice was of the view that this would preclude the application of the long standing principle (articulated in the High Court) that allows a court to take account of the hardship that might flow to an offender from being twice exposed to the judicial determination of whether he or she should be imprisoned and if so, for how long.295

The Chief Justice gave the following possible scenario:

*If a non custodial sentence was imposed at first instance*[296], and the State procrastinated in the prosecution of its appeal, so that by the time the appeal came on for hearing the offender’s circumstances had materially changed (eg: married, undertaken a substance abuse programme, remained in permanent employment, or from another perspective, had been convicted of and sentenced for other offences etc) those changed circumstances, which in a sense flow from the fact of the earlier sentence, should in my view be taken into account by the Court at the time of re-sentence.*297

4.97 The DPP indicated a willingness to consider the views of the Chief Justice.298

Committee Comment

4.98 The Committee makes the following recommendation.

**Recommendation 5:** The Committee recommends that the Government amend clause 41 of the Criminal Law and Evidence Amendment Bill 2006 to expressly enable the Court of Appeal to take into account any materially changed circumstances of an offender.

Review of Part 4 of the Bill

Committee Comment

4.99 The Committee notes that there is no provision for a review of the Bill or the Criminal Appeals Act 2004 and considers that the significant nature and scope of the changes

295 *Whittaker v The King* (1928) 41 CLR 230 at p248; and *Everett v The Queen* (1994) 181 CLR 295 at p299.

296 Under the Sentencing Act 1995, if the statutory penalty is “imprisonment only”, section 41(2) provides for various sentencing options in section 39(2) to apply. For example, section 39(2)(b) “with or without making a spent conviction order … impose a conditional release order and order the release of the offender.”

297 Submission No 3 from The Honourable Chief Justice Wayne Martin, Chief Justice of Western Australia, Chief Justice’s Chambers, Supreme Court of Western Australia, 17 April 2007, p4.

298 Letter from Mr Robert Cock QC, Director of Public Prosecutions, Office of the Director of Public Prosecutions, 9 May 2007, p1.
being proposed in Part 4 of the Bill, warrant a review of the proposed changes.
Therefore the Committee makes the following recommendation.

Recommendation 6: The Committee recommends that the proposed amendments to the Criminal Appeals Act 2004 in Part 4 of the Criminal Law and Evidence Amendment Bill 2006 be reviewed within five years.
CHAPTER 5

PART 5 - EVIDENCE ACT 1906 AMENDED

CLAUSE 43 - SECTION 36BE INSERTED AND CONSEQUENTIAL AMENDMENTS

5.1 This clause proposes to insert new sections 36BE(1) and (2) into the Evidence Act 1906. These state:

36BE. Expert evidence of child behaviour

(1) This section applies to any proceedings for a sexual offence in respect of a complainant who was under the age of 18 years at the time of the alleged offence.

(2) Evidence by an expert on the subject of child behaviour about any or all of the following —

(a) child development and behaviour generally;

(b) child development and behaviour in cases where children have been the victims of sexual offences,

that is relevant to the proceedings is admissible in them notwithstanding that the evidence —

(c) relates to a fact in issue or to an ultimate issue in the proceedings; or

(d) is a matter of common knowledge; or

(e) is relevant only to the credibility of the complainant.299

5.2 The Sexual Assault Referral Centre was supportive of proposed new section 36BE as it will “better assist those who have a mental impairment and have been a victim of an alleged sexual assault and or childhood sexual abuse to proceed through the judicial system.”300

299 At common law, the conduct of a witness cannot be used to attack his or her credit unless it is of such a nature as to tend to rationally and logically weaken confidence in his or her veracity. The credibility rule holds that evidence relevant only to a particular witness’s credibility is not admissible.

300 Submission No 7 from Ms Tania Towers, Manager, Sexual Assault Referral Centre, 23 April 2007, p1.
5.3 The Child Protection Unit, Princess Margaret Hospital for Children, said the proposed amendments “do not materially alter the primary focus of the previous Act, but endeavors (as it should) to enhance the importance of evidence from children and other vulnerable witnesses.”

The Law on Expert Evidence

5.4 At common law, expert evidence about the ways children might respond to abuse was inadmissible because it concerned the question that the trier of fact had to decide, or because, in the view of the court, it was about a matter that was within the experience of the trier of fact. These are known as the common law ‘ultimate issue’ and ‘common knowledge’ rules.

5.5 The Criminal Lawyers’ Association of Western Australia explained:

>If something is a matter of common knowledge that members of the jury can figure out for themselves, expert evidence will not be called. That is a sensible way for the law to be because you do not want to extend trials, given the battles with experts and so forth, if it is something that the jury as 12 representatives of the community are perfectly able to work out for themselves. The current law of experts also says that if there is something that would assist the jury, which they are not able to figure out for themselves, expert evidence can be called. That is already the law without this legislation.

Australian Law Reform Commission Recommendation

5.6 Clause 43 has its genesis in an Australian Law Reform Commission (ALRC) review of the operation of the Evidence Act 1995 (Cth). When it reported in December 2005, the ALRC noted the following:

- At common law, Australian courts have at times demonstrated a reluctance to admit expert opinion evidence of typical patterns of behaviour and responses of child victims of abuse.

---

301 Submission No 11 from Clinical Associate Professor Peter Winterton, Medical Director, Child Protection Unit, Princess Margaret Hospital for Children, 17 April 2007, p1.

302 Associate Professor Judith Fordham, President, Criminal Lawyers’ Association of Western Australia, Transcript of Evidence, 2 May 2007, p23.


There is a tendency to exclude expert evidence about the behaviour of child victims because it is considered to be within the ordinary experience of the jury.\(^{305}\)

Australian courts operating under the common law opinion rule are likely to continue being cautious in admitting expert evidence regarding patterns of behaviour in child abuse victims,\(^{306}\) although in South Australia, expert evidence regarding the behaviour of child sexual abuse victims may be admissible where that behaviour is so special and so outside ordinary experience that the knowledge of experts should be made available to courts and juries.\(^{307}\)

5.7 Clause 43 overcomes the problem under common law that for expert evidence to be admissible there must be in existence, a “field of specialised knowledge”.\(^{308}\) The amendments give statutory expression to a field of expert evidence of child behaviour about general child development and behaviour; and child development and behaviour in cases where children have been victims of sexual offences.

5.8 The ALRC policy position is as follows:

*In the Commissions’ view expert opinion evidence on child development and behaviour (including the effects of sexual abuse on the development and behaviour of children) can in certain cases be important evidence in assisting the tribunal of fact to assess other evidence or to prevent inappropriate reasoning processes based on misconceived notions about children and their behaviour.*\(^{309}\)

5.9 The ALRC made the following recommendation:

*Recommendation 9–1 Section 79 of the uniform Evidence Acts should be amended to provide that, to avoid doubt, the provision applies to evidence of a person who has specialised knowledge of child development and behaviour (including specialised knowledge of the effect of sexual abuse on children and of their behaviour during and following the abuse), being evidence in relation to either or both of the following:*


\(^{307}\) *Ibid,* quoting *C v The Queen* [1993] SASC 4095 at paragraph 17 per King CJ.


(a) the development and behaviour of children generally;

(b) the development and behaviour of children who have been the victims of sexual offences, or offences similar to sexual offences.\(^{310}\)

5.10 The common law currently allows a person to be qualified as an expert on the basis of experience alone.\(^{311}\) Clause 43 is an enhancement on the common law and in reflecting ALRC policy and recommendation, overcomes the traditional reluctance to accept that child development and behaviour is a subject of specialised knowledge. Clause 43 will ameliorate what the DPP described as “poor juror knowledge”\(^{312}\) in relation to behavioural responses of child victims of sexual assault.

5.11 The Law Society of Western Australia objected to the clause on the basis of:

- the clause being unnecessary because many jurors are themselves parents and able to access common knowledge\(^{313}\) and experience to come to a determination on aspects of child behaviour;\(^{314}\) and

- predicted increased legal costs for the defence in child sexual assault trials because the defence will “need an expert to check the [DPP] expert’s report”\(^{315}\). Hence the trial may be reduced to expensive, “expert wars”\(^{316}\).

5.12 Legal Aid Western Australia commented that there “may be cost implications for Legal Aid because in many cases the defence will wish to adduce its own expert psychological evidence relating to child behaviour”.\(^{317}\)

5.13 The Committee observed that the first limb of proposed new section 36BE(2)(a) expressly authorises an expert to give the court general evidence of child development

\(^{310}\) Ibid.

\(^{311}\) Submission No 10 from Ms Joanne Scott, Acting Executive Officer, Law Reform Commission of Western Australia, 27 April 2007, p3.

\(^{312}\) Submission No 6 from Mr Robert Cock QC, Director of Public Prosecutions, Office of the Director of Public Prosecutions, 23 April 2007, p12.

\(^{313}\) According to the Australian Law Reform Commission, common knowledge covers facts, both of local and general knowledge, which are so widely recognised that requiring proof of them would be a superfluous exercise. Common knowledge can encompass a vast number of facts that can change with time and place, including those created by advancements in science, technology and medicine: see Australian Law Reform Commission, Report 102, Uniform Evidence Law, 5 December 2005, paragraph 17.11.

\(^{314}\) Mr John Prior, Councillor, The Law Society of Western Australia, Transcript of Evidence, 2 May 2007, p22.

\(^{315}\) Ibid.


\(^{317}\) Submission No 13 from Mr George Turnbull, Director of Legal Aid Western Australia, Legal Aid Commission, 1 May 2007, p2.
and behaviour, not evidence related to a particular child or witness. Under the second limb in proposed new section 36BE(2)(c), (d) and (e) when the expert provides this general evidence, that evidence continues to be admissible even though it may:

- relate to a fact in issue or the ultimate issue; or
- be a matter of common knowledge; or
- be relevant to the credibility\(^{318}\) of the complainant.

5.14 The DPP’s view was that without the express inclusion of expert evidence relating to these three matters (above), that evidence would ordinarily be inadmissible.\(^ {319}\) Clearly, its inclusion will make the task of the prosecutor easier and thus, from the perspective of the DPP, is a desirable feature of the legislative proposal. Indeed the *Explanatory Memorandum* to the Bill states:

*In this way, the new section overcomes the common law rules of ultimate issue and common knowledge in relation to expert opinion evidence on the behaviour of a child.*\(^ {320}\)

5.15 Both The Law Society of Western Australia and the Criminal Lawyers’ Association of Western Australia objected to the inclusion of such evidence. A representative of The Law Society of Western Australia argued for exclusion on the grounds that this involves the ‘ultimate issue’ of who is telling the truth. The ultimate issue rule is that an expert’s contribution should not have the effect of supplanting the function of the court in deciding the issue before it.\(^ {321}\) The representative explained how this will work in practice:

*The ultimate issue is whether the person is guilty or not guilty. ... It is almost like saying - do we believe the expert because if we believe the expert, the person is guilty because they have just told us in one way or the another that a different five year child does not lie about this sort of thing happening.*\(^ {322}\)

5.16 A representative for the Criminal Lawyers’ Association of Western Australia, said:

\(^{318}\) The common law credibility rule provides that evidence cannot be admitted solely for the purpose of bolstering the credibility of a witness. This would include expert evidence.

\(^{319}\) Mr Robert Cock QC, Director of Public Prosecutions, Office of the Director of Public Prosecutions, *Transcript of Evidence*, 18 April 2007, p11.

\(^{320}\) *Explanatory Memorandum* for the Criminal Law and Evidence Amendment Bill 2006, p8.


The difference in this legislation is that that evidence is to be admissible even if it relates to the end issue in the trial - basically, did this person do it or not or is the child telling the truth or not? The difficulty with that is that utterly usurps the jury’s role.\textsuperscript{323} The jury is there to decide the ultimate issue. The jury is there to decide whether the accused is guilty or not guilty. The jury is there to make decisions on what they make of the facts in light of all the evidence, not just the expert evidence.

If an expert is to be able to draw conclusions which relate to the jury’s job, that presents an unprecedented encroachment upon the jury’s role. The jury’s role has always been very jealously guarded. The jury is what stands between the state and the individual, if you like. That is an extraordinary encroachment.\textsuperscript{324}

5.17 The representative continued:

What I can say from my research\textsuperscript{325} - obviously, I am somewhat limited in what I can say because the final conclusions have not been published yet - is that jurors in general are careful with expert evidence and cynical with expert evidence. They are cynical in the true sense of the word in that they judge it, balance it and do not necessarily swallow it holus-bolus because a person is an expert.

Having said that, it is a fact that experts walk into court and in a juror’s eyes have higher credibility than lay witnesses who may have reasons to lie or reasons to be mistaken.

Experts do have more inherent credibility, at least to begin with. For that reason, an expert testifying on facts in issue, ultimate issue, credibility of complainant and so forth, represents a real encroachment upon the jury’s role because of their inherent higher credibility. Having said that, I repeat that jurors do not simply swallow what experts have to say; they are careful with it. The experts have higher standing. I do not think I can emphasise too

\textsuperscript{323} This follows from the principle in \textit{R v Snow} (1915) 20 CLR 315 at p363 that the jury is the sole judge of the issues it is sworn to try.

\textsuperscript{324} Associate Professor Judith Fordham, President, Criminal Lawyers’ Association of Western Australia, \textit{Transcript of Evidence}, 2 May 2007, p23.

\textsuperscript{325} Fordham, J, ‘Illuminating or Blurring the Truth: Jurors, Juries and Expert Evidence’, included in Submission No 3 from The Honourable Chief Justice Wayne Martin, Chief Justice of Western Australia, Chief Justice’s Chambers, Supreme Court of Western Australia, 17 April 2007, pp8-30. At page 360 of that work, Associate Professor Fordham makes the following conclusion: “Strong evidence is emerging suggesting that jurors and juries are better equipped to deal with expert evidence than popularly thought, and that though they may be forensically aware, they may not be bedazzled by the so called ‘CSI effect’.”
strongly the fact that that is the case and has always been. Just because something has always been so does not make it right. The absolute cornerstone of the criminal justice system is that the jury stands between the state and the accused and represents the people sitting in judgement on individuals within society.\textsuperscript{326}

\textit{Committee Comment}

5.18 The Committee is of the view that the express inclusion of proposed new sections 36BE(2)(c), (d) and (e) in clause 43 may have the effect of placing the jury in the position of:

- attaching credibility to the evidence of an individual witness or complainant;
- considering that the evidence relates to the ultimate issue of whether a particular defendant is guilty or not guilty; or
- attributing that evidence to be common knowledge.

However, the Committee is reassured by the preliminary conclusions of the research being conducted by the representative of the Criminal Lawyers’ Association of Western Australia that jurors are both careful and cynical of expert witnesses. This suggests that jurors will have the ability to consider the generalised knowledge given in evidence but remain able to decide the ultimate issue for themselves. The Committee contemplates that an appropriate warning or direction from the Judge regarding the ultimate issue will reinforce the jury’s task.

\textit{Concerns of the Chief Justice}

5.19 The Chief Justice submitted that clause 43 raises the question as to the specifics of what the Judge should be warning a jury about in relation to this admissible expert evidence.

5.20 The Chief Justice explained how historically, different Justices of the High Court have suggested that it is the duty of a trial Judge to warn the jury to scrutinise the child’s evidence with particular care and that it is dangerous to convict on the child’s evidence without such scrutiny.\textsuperscript{327} As a result of the differing views, the Chief Justice commented that it is “\textit{very difficult for a trial judge to know what he/she should warn...}”

\textsuperscript{326} Associate Professor Judith Fordham, President, Criminal Lawyers’ Association of Western Australia, \textit{Transcript of Evidence}, 2 May 2007, p23.

\textsuperscript{327} The Chief Justice referred to a list of warnings compiled from \textit{Doggett v The Queen} (2001) 2008 CLR 343 and \textit{Tully v The Queen} (2006) 231 ALR 712.
a jury about with a consequently increased risk of a wrong direction being given.”

A warning (or lack of a warning) on the expert evidence may give rise to an appeal.

5.21 The Chief Justice posed four possible interpretations of clause 43 that may be led by counsel:

(a) that the section leaves untouched the responsibility of the trial judge to give warnings which the Court considers High Court authority to require;

(b) that the trial judge has a duty to warn about the various matters raised by the High Court unless the State adduces evidence directed to the topic about which the warning would otherwise have been given;

(c) that the trial judge has a duty to warn only where there is some evidence (adduced either by the State or by the accused) that suggests there is some reason for concern about the child’s evidence; or

(d) that the trial judge has no duty to warn in relation to any matter which either has been the subject of evidence pursuant to section 36BE or could have been the subject of such evidence.

5.22 In response to the concerns of the Chief Justice, the DPP said:

The purpose of [clause 43] is to enable experts to explain, to the jury, aspects of child development behaviour upon which some judges currently, although not universally pass comments. The purpose is to enable the replacement of what is sometimes ill informed judicial comment with evidence.

Naturally, Judges remain obliged to provide such warnings to a jury as precedent requires. However, it would be erroneous for a judge to warn of a supposed danger which is inconsistent with the evidence adduced in the trial. That is, for example, it would be wholly erroneous for a judge to tell a jury that they should be cautious before accepting the evidence of a child because ‘children of a relatively

328 Submission No 3 from The Honourable Chief Justice Wayne Martin, Chief Justice of Western Australia, Chief Justice’s Chambers, Supreme Court of Western Australia, 17 April 2007, p6.

young age are particularly likely to be unreliable' if the evidence adduced by an expert in the trial is to be contrary effect.\textsuperscript{330}

5.23 The DPP indicated that he will develop a provision to ensure clarity as to the legislative intent of clause 43, thus allaying the concerns of the Chief Justice. The DPP provided the following example:

\textit{if pursuant to \[\text{clause 43}\], evidence is adduced during a trial, any warning by a trial Judge as to the way in which a jury shall consider the evidence of a child shall not conflict with the evidence adduced in the case.}\textsuperscript{331}

\textbf{Committee Comment}

5.24 The Committee supports an amendment to this effect to ensure that the legislative intent is clear and makes the following recommendation.

\begin{quote}
\textbf{Recommendation 7:} The Committee recommends that the Government amend clause 43 of the Criminal Law and Evidence Amendment Bill 2006 so as to ensure that trial Judges give a warning to the jury in relation to admissible expert evidence.
\end{quote}

\textbf{Defining the Expert}

5.25 The DPP said he had considered defining the class of persons who may give expert evidence, for example, child psychologists or psychiatrists but rejected this on the basis that the common law principle is sufficient. This principle holds that expert opinion evidence is not admissible in relation to matters of common experience or common knowledge. It is based on the idea that an expert should not give evidence on matters on which the Judge would be able to form a sound judgment without assistance. The DPP has confidence in Judges making a finding that a particular person is an expert able to give an opinion and allowing that person to then give the opinion.\textsuperscript{332}

5.26 The Criminal Lawyers’ Association of Western Australia opposed defining the expert:

\textit{The law as it stands now is that one can become an expert by virtue of experience, qualifications or a combination of both. I think we can see the commonsense in that. We can reach our expertise in a particular way.}

\textsuperscript{330} Letter from Mr Robert Cock QC, Director of Public Prosecutions, Office of the Director of Public Prosecutions, 9 May 2007, p2.

\textsuperscript{331} \textit{Ibid}, p5.

\textsuperscript{332} Mr Robert Cock QC, Director of Public Prosecutions, Office of the Director of Public Prosecutions, \textit{Transcript of Evidence}, 18 April 2007, p11.
My concern about prescribing particular sets of qualifications as leading to expertise is that that would automatically give certain people in possession of those qualifications an imprimatur as an acceptable expert. There are other fields of study. For example, do we say that a child psychiatrist is automatically an expert? Do we say that a psychologist who specifies in, say, education and learning has appropriate qualifications? You can conceive of, depending on the particular trial, that particular areas of learning might be the appropriate field of expertise.

All any legislation could do I would have thought would be simply to say a child psychologist or child psychiatrist is considered to be an expert. It could not go any narrower than that. We would then have perhaps experts in child pathology or on insanity in children or juvenile onset schizophrenia somehow automatically being qualified to speak on this topic on which they have no expertise at all. It has always been for the judge to decide whether someone is appropriately experienced and qualified. Some of those decisions can be argued with, but I cannot see how the legislation could cover the field, and operate fairly.\footnote{Associate Professor Judith Fordham, President, Criminal Lawyers’ Association of Western Australia, \textit{Transcript of Evidence}, 2 May 2007, p24.}

\textbf{Committee Comment}

5.27 The Committee concurs with this view.

\textbf{CLAUSE 47 - SECTION 106C REPLACED}

The Appropriateness of Associating Mentally Impaired Witnesses with Child Witnesses

5.28 Clause 45 of the Bill proposes to insert a definition of mental impairment in section 106A of the \textit{Evidence Act 1906}. The proposed definition is the same as section 8 of the \textit{Criminal Law (Mentally Impaired Accused) Act 1996}. Section 8 defines mental impairment as meaning “intellectual disability, mental illness, brain damage or senility”.

5.29 The Committee noted a submission from the Public Advocate commending the Bill for recognising the rights and distinct needs of mentally impaired people.\footnote{Submission No 8 from Ms Michelle Scott, Public Advocate, Office of the Public Advocate, 27 April 2007, p1.} However, the Public Advocate was of the view that the amendments to the \textit{Evidence Act 1906} continue to make links between mentally impaired people and young children. For example:
Section 106C of the Evidence Act 1906, currently carries the heading *Children under 12 may give unsworn evidence*. Clause 47 proposes to repeal that section and insert a new section 106C which has the heading *Child under 12 and mentally impaired witness may give unsworn evidence*.

Clause 49 proposes to insert new subsections (1a) and (2) into section 106HA of the Evidence Act 1906. The heading *Visual recording of interviews with children* remains unchanged, yet the proposed new subsections refer to visual recordings of interviews with a person with a mental impairment.

Clause 50 proposes to insert a new subsection (1a) into section 106HB of the Evidence Act 1906, carrying the heading *Admissibility in criminal proceedings of a visual recording of an interview with a child*. However, the proposed new subsection refers to how a visually recorded interview with “a person with a mental impairment is not to be admitted in the proceedings…”.

The Disability Services Commission was critical of the Explanatory Memorandum to the Bill, which states that “mentally impaired persons are likely to encounter difficulties in understanding and engaging in formal court proceedings in much the same way as young children”:

> It is not modern practice in the disability field to encourage the view that a person with a mental impairment is the same as a child. There are many causes of mental impairment in adults... The life experience and functioning of these people may be widely disparate and some may be married with children themselves. What they share is a reduced capacity to participate in the complex court situation …

> it would be preferable to include separate sections for people with mental impairment, rather than to include them under the same section as children.

The DPP conceded that the Bill uses provisions “which have been principally designed for children and made them applicable to mentally impaired people”.

However, the DPP disagreed with the views of the Disability Services Commission and the Public Advocate that the proposed amendments to the Evidence Act 1906 “link
or in any way equate mentally impaired people with children". The DPP stated that it would be “redundant to repeat verbatim, provisions which already exist in the statute.”

5.32 The Committee disagrees with the DPP and prefers a distinction be made between children and mentally impaired people by re-formatting the proposed amendments to the Evidence Act 1906. The Committee requested the DPP provide amendments and received the following response:

As I understand it, the primary reason [for not amending the Bill to isolate provisions for mentally impaired people from other vulnerable witnesses] was that while the requested amendments did not change the legal effect or substance of the Act they would serve to increase the complexity of the Evidence Act by introducing repetitive provisions, numerous consequential amendments and further cross referencing.

On 14 June the Attorney General advised Parliamentary Counsel that he was in general agreement with the view that the requested amendments were cosmetic in nature and if introduced would unnecessarily complicate the Evidence Act. Therefore the Attorney General has not acceded to the Committee’s request to amend Part 5 to separate the evidence of mentally impaired persons from other vulnerable witnesses.

Committee Comment

5.33 The Committee makes the following recommendation:

Recommendation 8: The Committee recommends that the Government amend the Criminal Law and Evidence Amendment Bill 2006 so that the Evidence Act 1906 distinguishes the evidence of mentally impaired people from that of children.

339 Ibid.
340 Ibid.
341 Letter from Mr Robert Cock QC, Director of Public Prosecutions, Office of the Director of Public Prosecutions, 2 July 2007, p1.
CHAPTER 6
PART 6 - OTHER ACTS AMENDED

CLAUSE 72 - SUITORS’ FUND ACT 1964 AMENDED

Costs of Retrial after Jury Acquittal can be Paid by the State

6.1 This clause proposes to amend section 14 of the Suitors’ Fund Act 1964 so that an accused person’s costs in a retrial (resulting from the successful appeal by the prosecution against a jury acquittal)342 can be paid out of the Suitors’ Fund. The Suitors’ Fund was established on 1 January 1965 to meet the liability for costs of certain litigation. For example, the Suitors’ Fund is already available to reimburse people for the costs of a trial where that trial led to their wrongful conviction due to a judicial error and they have had to undergo a retrial.343

6.2 It appears that the rationale of the proposed amendment is to provide accused people who are facing additional costs of a retrial as a consequence of judicial error with the same remedies for reimbursement, regardless of the nature of the error344 and regardless of whether the retrial results from a successful appeal by the accused person or the prosecution. Unless the context indicates otherwise, a reference in this discussion to the ‘accused person’ means a person who has been acquitted but is facing a retrial because of a successful prosecutorial appeal against their jury acquittal pursuant to the amendments proposed in Part 4 of the Bill.

6.3 Under the Bill, section 14 of the Suitors’ Fund Act 1964 will authorise the accused person to apply to the Appeal Costs Board for the reimbursement of the costs (or part thereof) which they incurred in the original trial, as determined by the Board. In this way, the accused person would effectively be reimbursed for costs which have been wasted345 or ‘thrown away’. This method of determining the appropriate amount of reimbursement for the accused person (that is, their indemnity costs346 for the original trial) was favoured over basing the payment on the accused person’s indemnity costs.

342 A limited prosecutorial right to appeal against a jury acquittal is proposed to be introduced by Part 4 of the Criminal Law and Evidence Amendment Bill 2006: refer to Chapter 4 of this Report.

343 Letter from Mr Robert Cock QC, Director of Public Prosecutions, Office of the Director of Public Prosecutions, 9 May 2007, p5.

344 Ibid.

345 Ibid.

346 ‘Indemnity costs’ are “All costs, including fees, charges, disbursements, expenses and remuneration, incurred by a party to litigation in undertaking proceedings provided they have not been unreasonably incurred or are not of an unreasonable amount …”: The Honourable Dr Nygh, PE and Butt, P, General Editors, Butterworths Australian Legal Dictionary, Butterworths, Perth, 1997, p586.
for the retrial. The DPP argued that the second method would be open to abuse by the accused person, effectively allowing an accused person to:

\[
\text{conduct his or her retrial without limitation to the legal resources to be applied at the retrial …} \quad 347
\]

6.4 The Criminal Lawyers’ Association of Western Australia and The Law Society of Western Australia submitted that the proposed amendment in clause 72 of the Bill will not adequately compensate the accused person for their legal costs thrown away. They argued that, in practice, the amounts which are payable from the Suitors’ Fund only amount to a fraction of the actual costs which are expended in a modest defence.\(^\text{348}\) In the experience of the representative from The Law Society of Western Australia, no Appeal Costs Board applicants get more than about $2,000.\(^\text{349}\) Both organisations submitted that, because of the general need for applicants to be legally represented for the application to the Appeal Costs Board, the costs of making the application would not make it financially viable.\(^\text{350}\) The Law Society of Western Australia was also of the view that the Suitors’ Fund is a “very small pool of money” which may not be able to maintain compensation payments.\(^\text{351}\)

6.5 It was suggested by both organisations that the accused person should be reimbursed for the costs of the retrial on an indemnity basis, provided that those costs are not unreasonable. In order to ensure that there is no abuse of this level of reimbursement, the rate of reimbursement should be assessed on the basis of the level of legal representation which was used by the accused person in the original trial.\(^\text{352}\)

6.6 In response, the DPP advised that the level of reimbursement under the proposed amendment would be “total”, effectively amounting to the payment of the accused

---

347 Letter from Mr Robert Cock QC, Director of Public Prosecutions, Office of the Director of Public Prosecutions, 9 May 2007, p5.
348 Submission No 12 from Associate Professor Judith Fordham, President, Criminal Lawyers’ Association of Western Australia, 1 May 2007, p5. An earlier version of this view was adopted by The Law Society of Western Australia: Submission No 1 from Ms Maria Saraceni, President, The Law Society of Western Australia, 12 April 2007, pp1, 3 and 4 and Attachment 2, pp5-6.
349 Mr John Prior, Councillor, The Law Society of Western Australia, Transcript of Evidence, 2 May 2007, p24.
350 Ibid, and Associate Professor Judith Fordham, President, Criminal Lawyers’ Association of Western Australia, Transcript of Evidence, 2 May 2007, p25.
351 Mr John Prior, Councillor, The Law Society of Western Australia, Transcript of Evidence, 2 May 2007, p25.
352 Submission No 12 from Associate Professor Judith Fordham, President, Criminal Lawyers’ Association of Western Australia, 1 May 2007, p5. An earlier version of this view was adopted by The Law Society of Western Australia: Submission No 1 from Ms Maria Saraceni, President, The Law Society of Western Australia, 12 April 2007, pp1 and 4 and Attachment 2, p6.
person’s indemnity costs for the original trial. The payment would not be subject to a statutory cap but it would be:

\[ \text{dependent on the accused establishing the quantum of costs incurred on the trial which has, in effect, been wasted.} \]

6.7 The DPP also advised the Committee that there have been past occasions where people who have faced a retrial have received very large sums of money. He acknowledged that there may be situations where the amount of reimbursement under other provisions of the *Suitors’ Fund Act 1964* are inadequate when compared to the costs actually incurred, and that payments made under sections 11 and 12A of the *Suitors’ Fund Act 1964* are subject to a statutory cap, but he understands that these provisions are currently being reviewed.

6.8 The DPP submitted that the size of the Suitors’ Fund would not be a limiting factor in amounts awarded by the Appeal Costs Board because the Treasurer can advance monies to the Board when the Fund levels are insufficient to meet payments which have been approved.

**Committee Comment**

6.9 The Committee accepts the advice provided by the DPP and supports the proposed amendment in clause 72 of the Bill. In arriving at this decision, the Committee observed that:

- it would be appropriate to base the level of reimbursement on the costs incurred by the accused person at the original trial because those are the costs which will have been wasted or ‘thrown away’ if a retrial is ordered; and

- with respect, the suggestion of the Criminal Lawyers’ Association of Western Australia and The Law Society of Western Australia to base the reimbursement on the accused person’s indemnity costs for the retrial, but assessed according to the level of legal representation which was engaged by the accused person during the original trial, would be likely to result in a similar level of reimbursement that would be achieved under the proposed

---

353 Letter from Mr Robert Cock QC, Director of Public Prosecutions, Office of the Director of Public Prosecutions, 9 May 2007, p5.
amendment, depending of course on the length of, and level of work required for, the retrial.

Hon Graham Giffard MLC
Chair
30 August 2007
APPENDIX 1
STAKEHOLDERS TO WHOM THE COMMITTEE WROTE
## APPENDIX 1

**STAKEHOLDERS TO WHOM THE COMMITTEE WROTE**

<table>
<thead>
<tr>
<th>NAME</th>
<th>ORGANISATION</th>
</tr>
</thead>
<tbody>
<tr>
<td>Mr Karl O’Callaghan APM Commissioner</td>
<td>Western Australia Police Service</td>
</tr>
<tr>
<td>Mr Michael Dean General President</td>
<td>Western Australian Police Union of Workers</td>
</tr>
<tr>
<td>The Hon Chief Justice Wayne Martin Chief Justice of Western Australia</td>
<td>Supreme Court of Western Australia</td>
</tr>
<tr>
<td>Her Honour Judge Antoinette Kennedy Chief Judge</td>
<td>District Court of Western Australia</td>
</tr>
<tr>
<td>Mr Steven Heath Chief Stipendiary Magistrate</td>
<td>Magistrates Court of Western Australia</td>
</tr>
<tr>
<td>Ms Maria Saraceni President</td>
<td>The Law Society of Western Australia</td>
</tr>
<tr>
<td>Mr Ken Martin QC President</td>
<td>Western Australian Bar Association</td>
</tr>
<tr>
<td>Ms Louise Botham President</td>
<td>Criminal Lawyers’ Association of Western Australia</td>
</tr>
<tr>
<td>Mr George Turnbull Director</td>
<td>Legal Aid Western Australia</td>
</tr>
<tr>
<td>Mr Frank Morgan Director</td>
<td>Crime Research Centre, University of Western Australia</td>
</tr>
<tr>
<td>Mr Dennis Eggington Chief Executive Officer</td>
<td>Aboriginal Legal Service of Western Australia</td>
</tr>
<tr>
<td>Ms Michelle Scott Public Advocate</td>
<td>Office of the Public Advocate</td>
</tr>
<tr>
<td>Ms Gillian Braddock SC Chair</td>
<td>Law Reform Commission of Western Australia</td>
</tr>
<tr>
<td>Mr Robert Cock QC Director of Public Prosecutions</td>
<td>Office of the Director of Public Prosecutions</td>
</tr>
<tr>
<td>Mr Keith Wilson President</td>
<td>Western Australian Association for Mental Health</td>
</tr>
<tr>
<td>Dr Peter Winterton</td>
<td>Child Protection Unit, Princess Margaret Hospital for Children</td>
</tr>
<tr>
<td>Mr Stephen Walker Chairperson</td>
<td>Mental Health Law Centre (WA) Inc</td>
</tr>
<tr>
<td>Mr Gerard King State President</td>
<td>St John Ambulance Australia</td>
</tr>
<tr>
<td>NAME</td>
<td>ORGANISATION</td>
</tr>
<tr>
<td>-------------------------------------</td>
<td>--------------------------------------------------</td>
</tr>
<tr>
<td>Ms Tania Towers</td>
<td>Sexual Assault Resource Centre</td>
</tr>
<tr>
<td>Manager</td>
<td></td>
</tr>
<tr>
<td>Ms Cheryl Cassidy-Vernon</td>
<td>Youth Legal Service</td>
</tr>
<tr>
<td>Manager</td>
<td></td>
</tr>
<tr>
<td>Ms Merlene Price</td>
<td>Armadale Information and Referral Service (Inc)</td>
</tr>
<tr>
<td>Co-ordinator</td>
<td></td>
</tr>
<tr>
<td>Ms Lynda Wennstrom</td>
<td>Fremantle Community Legal Service</td>
</tr>
<tr>
<td>Co-ordinator</td>
<td></td>
</tr>
<tr>
<td>Ms Dell Dennis</td>
<td>Gosnells Community Legal Centre Inc</td>
</tr>
<tr>
<td>Co-ordinator</td>
<td></td>
</tr>
<tr>
<td>Mr Dylan Desaubin</td>
<td>Midland Information, Debt and Legal Advocacy</td>
</tr>
<tr>
<td>Co-ordinator</td>
<td>Service Inc</td>
</tr>
<tr>
<td>Ms Karen Merrin</td>
<td>Northern Suburbs Community Legal Centre</td>
</tr>
<tr>
<td>Co-ordinator</td>
<td></td>
</tr>
<tr>
<td>Ms Gai Walker</td>
<td>Southern Communities Advocacy Legal and</td>
</tr>
<tr>
<td>Co-ordinator</td>
<td>Education Service Inc</td>
</tr>
<tr>
<td>Ms Denise Beer</td>
<td>Sussex Street Community Law Service Inc</td>
</tr>
<tr>
<td>Co-ordinator</td>
<td></td>
</tr>
<tr>
<td>Ms Fleur Townley</td>
<td>Albany Community Legal Centre Inc</td>
</tr>
<tr>
<td>Co-ordinator</td>
<td></td>
</tr>
<tr>
<td>Ms Selva Stenross</td>
<td>Bunbury Community Legal Centre</td>
</tr>
<tr>
<td>Co-ordinator</td>
<td></td>
</tr>
<tr>
<td>Ms Cathy Maxwell</td>
<td>Geraldton Family Advocacy Service</td>
</tr>
<tr>
<td>Co-ordinator</td>
<td></td>
</tr>
<tr>
<td>Mr Zane D’Mello</td>
<td>Geraldton Resource Centre</td>
</tr>
<tr>
<td>Co-ordinator</td>
<td></td>
</tr>
<tr>
<td>Ms Effie Harris</td>
<td>Goldfields Community Legal Centre</td>
</tr>
<tr>
<td>Co-ordinator</td>
<td></td>
</tr>
<tr>
<td>Ms Rose van Keppel</td>
<td>Kimberley Community Legal Services Inc</td>
</tr>
<tr>
<td>Co-ordinator</td>
<td></td>
</tr>
<tr>
<td>Ms Christine Grey</td>
<td>Marninwarntikura Fitzroy Women’s Resource Centre</td>
</tr>
<tr>
<td>Co-ordinator</td>
<td></td>
</tr>
<tr>
<td>Ms Lisa Craig</td>
<td>Peel Community Legal Service Inc</td>
</tr>
<tr>
<td>Co-ordinator</td>
<td></td>
</tr>
<tr>
<td>Mr Ruwan Silva</td>
<td>Pilbara Community Legal Service</td>
</tr>
<tr>
<td>Co-ordinator</td>
<td></td>
</tr>
<tr>
<td>Professor William Ford</td>
<td>Law School, Faculty of Law, The University of</td>
</tr>
<tr>
<td>Head of School</td>
<td>Western Australia</td>
</tr>
<tr>
<td>Professor Michael Gillooly</td>
<td>School of Law, The University of Notre Dame</td>
</tr>
<tr>
<td>Dean</td>
<td>Australia National College of Law</td>
</tr>
<tr>
<td>NAME</td>
<td>ORGANISATION</td>
</tr>
<tr>
<td>-------------------------------------</td>
<td>-----------------------------------------------------------------------------</td>
</tr>
<tr>
<td>Associate Professor Mark Stoney</td>
<td>School of Law and Justice, Edith Cowan University</td>
</tr>
<tr>
<td>Head of School</td>
<td></td>
</tr>
<tr>
<td>Professor Geoff Dobb</td>
<td>Australian Medical Association (WA)</td>
</tr>
<tr>
<td>President</td>
<td></td>
</tr>
<tr>
<td>Professor Gabriel Moens</td>
<td>School of Law, Murdoch University</td>
</tr>
<tr>
<td>Dean of Law</td>
<td></td>
</tr>
<tr>
<td>Mr Rob Guthrie</td>
<td>School of Business Law, Curtin University of Technology</td>
</tr>
<tr>
<td>Head of School</td>
<td></td>
</tr>
<tr>
<td>Dr Dorothy Goulding</td>
<td>Prisons Research Unit, The Centre for Social and Community Research, Murdoch University</td>
</tr>
<tr>
<td>Ms Nina Devlin</td>
<td>Miscellaneous Workers Union</td>
</tr>
<tr>
<td>President</td>
<td></td>
</tr>
<tr>
<td>Mr Mark Olson</td>
<td>Australian Nursing Federation</td>
</tr>
<tr>
<td>State Secretary</td>
<td></td>
</tr>
<tr>
<td>Mr Luke Garswood &amp; Ms Kaye Regan</td>
<td>People with Disabilities (WA) Inc</td>
</tr>
<tr>
<td>Joint Executive Officers</td>
<td></td>
</tr>
<tr>
<td>Mr Harvey Hatch</td>
<td>Victim Support Service</td>
</tr>
<tr>
<td>Manager</td>
<td></td>
</tr>
<tr>
<td>Ms Margaret Hunter</td>
<td>Homicide Victims’ Support Group Western Australia (Inc)</td>
</tr>
<tr>
<td>Convenor</td>
<td></td>
</tr>
</tbody>
</table>
APPENDIX 2

WRITTEN SUBMISSIONS RECEIVED
# APPENDIX 2

**WRITTEN SUBMISSIONS RECEIVED**

<table>
<thead>
<tr>
<th>No</th>
<th>Name</th>
<th>Organisation</th>
<th>Date</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>Ms Maria Saraceni, President</td>
<td>The Law Society of Western Australia</td>
<td>12 April 2007</td>
</tr>
<tr>
<td>3</td>
<td>The Hon Wayne Martin Chief Justice of Western Australia</td>
<td>Supreme Court of Western Australia</td>
<td>17 April 2007</td>
</tr>
<tr>
<td>4</td>
<td>Mr Michael Dean General President</td>
<td>Western Australian Police Union of Workers</td>
<td>19 April 2007</td>
</tr>
<tr>
<td>5</td>
<td>Mr Michael Crowley Lecturer in Law and Barrister</td>
<td>School of Law and Justice Edith Cowan University</td>
<td>20 April 2007</td>
</tr>
<tr>
<td>6</td>
<td>Mr Robert Cock QC Director of Public Prosecutions</td>
<td>Office of the Director of Public Prosecutions for Western Australia</td>
<td>23 April 2007</td>
</tr>
<tr>
<td>7</td>
<td>Ms Tania Towers Manager Sex Assault Resource Centre</td>
<td>Sexual Assault Resource Centre 23 April 2007</td>
<td>23 April 2007</td>
</tr>
<tr>
<td>8</td>
<td>Ms Michelle Scott Public Advocate</td>
<td>Office of the Public Advocate 27 April 2007</td>
<td>27 April 2007</td>
</tr>
<tr>
<td>9</td>
<td>Dr Ron Chalmers Acting Director General</td>
<td>Disability Services Commission 27 April 2007</td>
<td>27 April 2007</td>
</tr>
<tr>
<td>10</td>
<td>Ms Joanne Scott Acting Executive Officer</td>
<td>Law Reform Commission of Western Australia 27 April 2007</td>
<td>27 April 2007</td>
</tr>
<tr>
<td>11</td>
<td>Clinical Associate Professor Peter Winterton Medical Director</td>
<td>Child Protection Unit Princess Margaret Hospital for Children 17 April 2007</td>
<td>17 April 2007</td>
</tr>
<tr>
<td>12</td>
<td>Associate Professor Judith Fordham President</td>
<td>Criminal Lawyers’ Association of Western Australia 1 May 2007</td>
<td>1 May 2007</td>
</tr>
<tr>
<td>13</td>
<td>Mr George Turnbull Director of Legal Aid</td>
<td>Legal Aid Western Australia 1 May 2007</td>
<td>1 May 2007</td>
</tr>
</tbody>
</table>
APPENDIX 3

WITNESSES WHO APPEARED BEFORE THE COMMITTEE
# APPENDIX 3

**Witnesses who Appeared before the Committee**

<table>
<thead>
<tr>
<th>Name</th>
<th>Organisation</th>
<th>Date</th>
</tr>
</thead>
<tbody>
<tr>
<td>Mr Robert Cock QC</td>
<td>Office of the Director of Public Prosecutions for WA</td>
<td>18 April 2007</td>
</tr>
<tr>
<td>Ms Annette Fox</td>
<td>Office of the Director of Public Prosecutions for WA</td>
<td>18 April 2007</td>
</tr>
<tr>
<td>Associate Professor Judith Fordham President</td>
<td>Criminal Lawyers’ Association of WA</td>
<td>2 May 2007</td>
</tr>
<tr>
<td>Mr John Prior Councillor</td>
<td>The Law Society of WA</td>
<td>2 May 2007</td>
</tr>
</tbody>
</table>
APPENDIX 4

OFFENCES ATTRACTING PROSECUTION RIGHT OF APPEAL
APPENDIX 4
OFFENCES ATTRACTION PROSECUTION RIGHT OF APPEAL

CRIMINAL LAW AND EVIDENCE AMENDMENT BILL 2006
List of all indictable offences subject to State appeals against acquittals in trials by
juries in clause 34 amending Criminal Appeals Act 2004 s 24

CRIMINAL CODE WA

<table>
<thead>
<tr>
<th>Part II</th>
<th>Offences against public order</th>
</tr>
</thead>
<tbody>
<tr>
<td>Chapter VIII</td>
<td>Sedition</td>
</tr>
<tr>
<td>Section 47</td>
<td>Unlawful oaths to commit crimes punishable with strict security life imprisonment</td>
</tr>
<tr>
<td></td>
<td>Maximum penalty 20 years’ imprisonment</td>
</tr>
<tr>
<td>Chapter XI</td>
<td>Racist harassment and incitement to racial hatred</td>
</tr>
<tr>
<td>Section 77</td>
<td>Conduct intended to incite racial animosity or racist harassment</td>
</tr>
<tr>
<td></td>
<td>Maximum penalty 14 years’ imprisonment</td>
</tr>
<tr>
<td>Section 79</td>
<td>Possession of material for dissemination with intent to incite racial animosity or racist harassment</td>
</tr>
<tr>
<td></td>
<td>Maximum penalty 14 years’ imprisonment</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Part III</th>
<th>Offences against the administration of law and justice and against public authority</th>
</tr>
</thead>
<tbody>
<tr>
<td>Chapter XVI</td>
<td>Offences relating to the administration of justice</td>
</tr>
<tr>
<td>Section 121</td>
<td>Judicial Corruption</td>
</tr>
<tr>
<td></td>
<td>Maximum penalty 14 years’ imprisonment</td>
</tr>
<tr>
<td>Section 122</td>
<td>Official corruption not judicial but relating to offences</td>
</tr>
<tr>
<td></td>
<td>Maximum penalty 14 years’ imprisonment</td>
</tr>
<tr>
<td>Section 124</td>
<td>Perjury</td>
</tr>
<tr>
<td></td>
<td>Maximum penalty 14 years’ imprisonment</td>
</tr>
<tr>
<td>Section 134</td>
<td>Conspiracy to bring false accusation</td>
</tr>
</tbody>
</table>
Maximum penalty for the offence results in a conviction liable to strict life imprisonment or imprisonment for life.

14 years’ imprisonment where the offence results in a conviction where the person is liable to sentenced to imprisonment, but for a term less than life.

**Part IV**

**Acts injurious to the public in general**

**Chapter XXII**

**Offences Against Morality**

Section 186(1)(b) Occupier or owner allowing certain persons to be on premises for unlawful carnal knowledge if the child is under 13 years

| Maximum penalty | 20 years imprisonment |

Section 187 Facilitating sexual offences against children outside Western Australia

| Maximum penalty | 20 years’ imprisonment |

**Part V**

**Offences against the person and relating to marriage and parental rights and duties and against the reputation of individuals**

**Chapter XXVII**

**Homicide: Suicide: Concealment of Birth**

Section 282 Penalty for wilful murder and murder contrary to s277 - unlawful homicide

| Maximum penalty | strict security life imprisonment or life imprisonment |

Section 287 Penalty for manslaughter contrary to s 277 – unlawful homicide

| Maximum penalty | 20 years’ imprisonment |

Section 288 Aiding Suicide

| Maximum penalty | imprisonment for life |

Section 290 Killing unborn child

| Maximum penalty | imprisonment for life |

**Chapter XXIX**

**Offences endangering life or health**
Section 292  Disabling in order to commit indictable offence, etc.
Maximum penalty  20 years’ imprisonment

Section 293  Stupefying in order to commit indictable offence
Maximum penalty  20 years’ imprisonment

Section 294  Acts intended to cause grievous bodily harm or prevent arrest
Maximum penalty  20 years’ imprisonment

Section 295  Preventing escape from wreck
Maximum penalty  20 years’ imprisonment

Section 297  Grievous bodily harm
Maximum penalty  14 years’ imprisonment where the
offence is committed in the course of
conduct that constitutes the stealing of a
motor vehicle.
14 years’ imprisonment where the
offence is committed in circumstances of
aggravation.
In all other cases, the maximum penalty
is 10 years’ imprisonment and not
subject to a State appeal.

Section 306  Female genital mutilation
Maximum penalty  20 years’ imprisonment (s306(2))

Section 318A  Assaults on members of crew of aircraft
Maximum penalty  14 years’ imprisonment

Chapter XXI  Sexual offences

Section 320  Child under 13, sexual offences against
320(2)  Sexual penetration of a child
Maximum penalty  20 years’ imprisonment

320(3)  Procures, incites or encouraging a child to engage in sexual
behaviour
Maximum penalty  20 years’ imprisonment

Section 321  Child of or over 13 and under 16, sexual offences against
321(2)  Sexual penetration of a child
Maximum penalty  14 years’ imprisonment (s 321(7)(a))
20 years’ imprisonment where child
under the care, supervision, or authority
of the offender (s 321(7)(b))

321(3)  Procures, incites, or encourages a child to engage in sexual
behaviour
<table>
<thead>
<tr>
<th>Section</th>
<th>Description</th>
<th>Maximum Penalty</th>
</tr>
</thead>
<tbody>
<tr>
<td>321A</td>
<td>Child under 16, sexual relationship with</td>
<td>14 years' imprisonment (s 321(7)(a))</td>
</tr>
<tr>
<td></td>
<td></td>
<td>20 years where child under the care, supervision, or authority of the offender(s 321(7)(b))</td>
</tr>
<tr>
<td>325</td>
<td>Sexual penetration without consent</td>
<td>Maximum penalty 20 years' imprisonment</td>
</tr>
<tr>
<td>326</td>
<td>Aggravated sexual penetration without consent</td>
<td>Maximum penalty 14 years' imprisonment</td>
</tr>
<tr>
<td>327</td>
<td>Sexual coercion</td>
<td>Maximum penalty imprisonment for life</td>
</tr>
<tr>
<td>328</td>
<td>Aggravated sexual coercion</td>
<td>Maximum penalty 20 years' imprisonment</td>
</tr>
<tr>
<td>329(2)</td>
<td>Relatives and the like, sexual offences by</td>
<td>Maximum penalty 20 years' imprisonment where the child is under 16 years of age (s 329(9)(a))</td>
</tr>
<tr>
<td></td>
<td>Sexual penetration of lineal relative or defacto child</td>
<td>Maximum penalty 20 years' imprisonment where the child is under 16 years of age (s 329(9)(b))</td>
</tr>
<tr>
<td>329(3)</td>
<td>Procures, incites, or encourages a child to engage in sexual behaviour who the offender knows is a lineal relative or defacto child</td>
<td>Maximum penalty 20 years' imprisonment where the child is under 16 years of age (s 329(9)(a))</td>
</tr>
<tr>
<td>330(2)</td>
<td>Incapable person, sexual offences against</td>
<td>Maximum penalty 14 years' imprisonment (s 330(7)(a))</td>
</tr>
<tr>
<td></td>
<td>Sexual penetration of incapable person</td>
<td>Maximum penalty 20 years' imprisonment where the incapable person is under the care, supervision or authority of the offender (s330(7)(b))</td>
</tr>
<tr>
<td>330(3)</td>
<td>Procures, incites, or encourages a person who the offender knows or ought to know is an incapable person</td>
<td>Maximum penalty 20 years' imprisonment where the incapable person is under the care, supervision or authority of the offender (s330(7)(b))</td>
</tr>
<tr>
<td>331B</td>
<td>Sexual servitude</td>
<td>Maximum penalty 20 years' imprisonment if the complainant is a child or incapable person (s331B(a))</td>
</tr>
<tr>
<td></td>
<td></td>
<td>14 years' imprisonment in all other cases</td>
</tr>
<tr>
<td>331C</td>
<td>Conducting business involving sexual servitude</td>
<td>Maximum penalty 20 years' imprisonment if the other person is a child or incapable person (s331C(2)(a))</td>
</tr>
</tbody>
</table>
NINTH REPORT

APPENDIX 4: Offences Attracting Prosecution Right of Appeal

<table>
<thead>
<tr>
<th>Section</th>
<th>Offence Description</th>
<th>Maximum penalty</th>
</tr>
</thead>
<tbody>
<tr>
<td>331D(2)</td>
<td>Deceptive recruiting for commercial sexual service – child or incapable person</td>
<td>20 years' imprisonment</td>
</tr>
<tr>
<td>332</td>
<td>Kidnapping</td>
<td>20 years' imprisonment</td>
</tr>
<tr>
<td>338B(a)</td>
<td>Threats to kill a person in circumstances of racial aggravation</td>
<td>20 years' imprisonment</td>
</tr>
<tr>
<td>343</td>
<td>Child stealing</td>
<td>20 years' imprisonment</td>
</tr>
<tr>
<td>378</td>
<td>Stealing</td>
<td>14 years' imprisonment</td>
</tr>
<tr>
<td>378(5)</td>
<td>stealing in certain circumstances</td>
<td></td>
</tr>
<tr>
<td></td>
<td>(a) stolen from the person of another</td>
<td></td>
</tr>
<tr>
<td></td>
<td>(b) if the thing stolen is in a dwelling and its value exceeds $10,000 or if the offender uses or threatens to use violence to any person in the dwelling</td>
<td></td>
</tr>
<tr>
<td></td>
<td>(c) if the thing stolen is from any kind of vessel or vehicle or place of deposit used for the conveyance or custody of goods in transit</td>
<td></td>
</tr>
<tr>
<td></td>
<td>(d) if the thing is stolen from a vessel in distress, wrecked or stranded</td>
<td></td>
</tr>
<tr>
<td></td>
<td>(e) if the thing is stolen from a public office in which it deposited or kept</td>
<td></td>
</tr>
<tr>
<td></td>
<td>(f) if the offender, in order to commit the offence, opens any locked room, box or other receptacle</td>
<td></td>
</tr>
<tr>
<td>XXXVII</td>
<td>Offences analogous to stealing</td>
<td></td>
</tr>
</tbody>
</table>
Section 379  Concealing registers  
Maximum penalty  14 years’ imprisonment

Section 380  Concealing wills  
Maximum penalty  14 years’ imprisonment

Chapter XXXVIII  Robbery: Extortion by threats

Section 392  Robbery  
392(c) where the offender is armed with any dangerous or offensive weapon or instrument or pretends to be armed  
Maximum penalty  imprisonment for life

392(d) where the offence is committed in circumstances of aggravation  
Maximum penalty  20 years’ imprisonment

Section 393  Assault with intent to rob  
393(c) if the offender is armed with any dangerous or offensive weapon or instrument or pretends to be so armed and the offence is committed in circumstances of aggravation  
Maximum penalty  imprisonment for life

393(d) if the offender is armed with any dangerous or offensive weapon or instrument or pretends to be so armed or the offence is committed in circumstances of aggravation  
Maximum penalty  14 years’ imprisonment

Section 397  Demanding property with threats with intent to extort or gain  
Maximum penalty  14 years’ imprisonment

Section 398  Attempts at extortion by threats  
Maximum penalty  14 years’ imprisonment  
if the accusation or threat of accusation is of  
(a) an offence for which the punishment or imprisonment for life may be inflicted; or  
(b) an offence under Chapter XXII or XXXI, or an attempt to commit such an offence; or  
(c) an assault with intent to have carnal knowledge of any person against the order of nature, or an unlawful and indecent assault upon a male person; or  
(d) a solicitation or threat offered or made to any person as an inducement to commit or permit the commission of any of the offences aforesaid  
Maximum penalty  20 years’ imprisonment

Section 399  Procuring execution of deeds, etc., by threats  
Maximum penalty  14 years
Chapter LIII  Personation
Section 510  Personation in general
  Maximum penalty  14 years’ imprisonment
Section 511  Personation of owner of shares
  Maximum penalty  20 years’ imprisonment

Part VII  Preparation to commit offences: Conspiracy: Accessories after the fact

Chapter LVII  Attempts and preparation to commit offences
Section 552  Attempts to commit indictable offences
  552(2)(a) if the principal offence is punishable on indictment with imprisonment for life
  Maximum penalty  14 years’ imprisonment
Section 553  Incitement to commit indictable offences
  553(2)(a) if the principal offence is punishable on indictment with imprisonment for life
  Maximum penalty  14 years’ imprisonment
Section 557  Making or possession of explosives under suspicious circumstances
  Maximum penalty  14 years’ imprisonment

Chapter LVIII  Conspiracy
Section 558  Conspiracy to commit indictable offence
  558(2)(a) if the principal offence is punishable on indictment with imprisonment for life
  Maximum penalty  14 years’ imprisonment

Chapter LIX  Accessories after the fact and property laundering
Section 562  Accessories after the fact to indictable offences
  562(2)(a) if the principal offence is punishable on indictment with imprisonment for life
  Maximum penalty  14 years’ imprisonment
Section 563A  Property laundering
  Maximum penalty  20 years’ imprisonment
Section 563B  Dealing with property used in connection with an offence
  Maximum penalty  20 years’ imprisonment
**MISUSE OF DRUGS ACT 1981 (WA)**

<table>
<thead>
<tr>
<th>Part V</th>
<th>General</th>
</tr>
</thead>
<tbody>
<tr>
<td>Section 34 34(1)(a)</td>
<td>Penalties</td>
</tr>
<tr>
<td>Section 6(1) intent to sell or supply, manufactures or prepares or sells or supplies or offers to sell or supply a prohibited drug (not including cannabis or cannabis resin or derivative: s 34(2))</td>
<td></td>
</tr>
<tr>
<td>Maximum penalty</td>
<td>25 years' imprisonment</td>
</tr>
<tr>
<td>Section 7(1) intent to sell or supply a prohibited plant or any prohibited drug obtainable therefrom to another, has in his possession or cultivates the prohibited plant, or sells or supplies or offers to sell or supply a prohibited plant (not including cannabis or cannabis resin or derivative: s 34(2))</td>
<td></td>
</tr>
<tr>
<td>Maximum penalty</td>
<td>25 years' imprisonment</td>
</tr>
<tr>
<td>34(1)(b)</td>
<td>Conspiring with another to commit an offence under s 6(1) or 7(1)</td>
</tr>
<tr>
<td>Maximum penalty</td>
<td>25 years' imprisonment</td>
</tr>
</tbody>
</table>

**EVIDENCE ACT 1906 (WA)**

<table>
<thead>
<tr>
<th>Section 102(2)</th>
<th>Interpreter on oath failing to translate or falsely translating material matter</th>
</tr>
</thead>
<tbody>
<tr>
<td>Maximum penalty</td>
<td>14 years' imprisonment</td>
</tr>
</tbody>
</table>

**FIREARMS ACT 1973 (WA)**

<table>
<thead>
<tr>
<th>Section 19(1)</th>
<th>Selling etc firearm when not licensed if in possession of drugs or money</th>
</tr>
</thead>
<tbody>
<tr>
<td>Maximum penalty</td>
<td>14 years' imprisonment</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Section 19(4)</th>
<th>Manufacturing firearms or ammunition other than with a licence</th>
</tr>
</thead>
<tbody>
<tr>
<td>Maximum penalty</td>
<td>14 years' imprisonment</td>
</tr>
</tbody>
</table>

**HUMAN REPRODUCTIVE TECHNOLOGY ACT 1991**

<table>
<thead>
<tr>
<th>Section 53C</th>
<th>Creating human embryo clone</th>
</tr>
</thead>
<tbody>
<tr>
<td>Maximum penalty</td>
<td>15 years' imprisonment</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Section 53D</th>
<th>Placing human embryo clone in human or animal</th>
</tr>
</thead>
<tbody>
<tr>
<td>Maximum penalty</td>
<td>15 years' imprisonment</td>
</tr>
</tbody>
</table>
Section 53E  Importing or exporting human embryo clone
Maximum penalty  15 years’ imprisonment

PROSTITUTION ACT 2000 WA

Section 16(1)  Causing or permitting a child to act as prostitute
Maximum penalty  14 years’ imprisonment
Section 16(2)  Inducing child to act as prostitute
Maximum penalty  14 years’ imprisonment
Section 17(1)  Obtaining payment for prostitution by child
Maximum penalty  14 years’ imprisonment
Section 18(1)  Entering agreement for child to act as prostitute
Maximum penalty  14 years’ imprisonment

ROAD TRAFFIC ACT 1974 WA

Section 59(1)  Driving under influence or dangerously and causing death
Maximum penalty  20 years’ imprisonment
Driving under influence or dangerously causing grievous bodily harm in aggravated circumstances
Maximum penalty  14 years’ imprisonment
Section 67(3)(a)  Driver not obeying request to provide breath etc sample where death, grievous bodily harm or bodily harm has been caused
Maximum penalty  14 years’ imprisonment

* Indictable offences in Acts other than the Criminal Code as at 1 September 2005.
The Censorship Amendment Act 2006 amending the Classification Enforcement Act 1996 and the Criminal Code Amendment (Cyber Predators) Act 2006 do not contain offences that carry at least 14 years’ imprisonment.

P:\FOX\RESEARCH ASSISTANT\Standing Committee Legislative Council\Criminal Law\Evidence Amendment\G:\CleOffences.doc
APPENDIX 5

DRAFT POLICY GUIDELINES ON STATE APPEALS
APPENDIX 5
DRAFT POLICY GUIDELINES ON STATE APPEALS

5 APPENDIX A Draft Policy Guidelines on State Appeals

To amend the Director of Public Prosecutions Prosecution Policy and Guidelines 2005 accordance with the Director’s power to issue guidelines under section 24 of the Director of Public Prosecutions Act 1991 (WA) by –

1. Inserting after clause 148:

“STATE APPEALS AGAINST ACQUITTAL

148A. The State’s right to appeal against a judgment of acquittal entered after a jury’s verdict of not guilty is only to be exercised in circumstances where a substantial error is likely to have precipitated the verdict. The State’s right to appeal against acquittal is only to be exercised where there are reasonable prospects that the appeal will be allowed and where, on a retrial, there are reasonable prospects of conviction on the basis of the evidence available in relation to the charge, and it is in the public interest to continue the prosecution.

148B. The following additional factors are relevant to considering whether or not to institute an appeal against an acquittal –

(a) whether the error was so substantial as to have been likely to have affected the outcome;

(b) whether the error amounts to an inconsistent application of the law;

(c) whether the verdict of acquittal is so significant as to shock the public conscience; and

(d) whether there is a public interest in correcting the error.”

2. Amending clause 149 by deleting the words “The role of the State in an appeal against a directed acquittal is an exception to the rule against double jeopardy.”

3. Amending clause 149 by deleting “such an appeal” and replacing those words with “an appeal against a directed acquittal.”

4. Amending clause 153 by inserting after the words “A State appeal” the words “against sentence”.

15