



SECOND SESSION OF THE THIRTY-SIXTH PARLIAMENT

**REPORT OF THE
STANDING COMMITTEE ON LEGISLATION
IN RELATION TO THE
ROAD TRAFFIC AMENDMENT
(DANGEROUS DRIVING) BILL 2004**

Presented by Hon Giz Watson MLC (Acting Chairman)

Report 23
October 2004

STANDING COMMITTEE ON LEGISLATION

Date first appointed:

May 24 2001

Terms of Reference:

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

“1. Legislation Committee

- 1.1 *A Legislation Committee* is established.
- 1.2 The Committee consists of 5 members.
- 1.3 The functions of the Committee are to consider and report on any bill or other matter referred by the House.
- 1.4 Unless otherwise ordered, the policy of a bill referred under subclause 1.3 at the second reading or any subsequent stage is excluded from the Committee’s consideration.”

Members as at the time of this inquiry:

Hon Jon Ford MLC (Chairman) substituted by Hon Ken Travers MLC

Hon Giz Watson MLC (Chairman for this inquiry)

Hon Kate Doust MLC

Hon Bill Stretch MLC substituted by Hon George Cash MLC

Hon Peter Foss MLC

Staff as at the time of this inquiry:

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EXECUTIVE SUMMARY AND RECOMMENDATIONS

EXECUTIVE SUMMARY

- 1 The Legislative Council referred the Road Traffic Amendment (Dangerous Driving) Bill 2004 to the Standing Committee on Legislation on September 21 2004.¹ On September 24 2004, the Legislative Council ordered that the Committee report on, or before, October 27 2004.
- 2 The stated purpose of the Road Traffic Amendment (Dangerous Driving) Bill 2004 is to amend the *Road Traffic Act 1974* to simplify the requirements for proof of causation for the offences of:
 - dangerous driving causing death or grievous bodily harm (section 59 of the *Road Traffic Act 1974*); and
 - dangerous driving causing bodily harm (section 59A of the *Road Traffic Act 1974*).
- 3 The Committee was advised that the Road Traffic Amendment (Dangerous Driving) Bill 2004 is required because the current offences are deficient due to the difficulty in establishing causation between the dangerous manner of a person's driving and the resulting death, grievous bodily harm or bodily harm.²
- 4 This Report sets out the proposed amendments in the Road Traffic Amendment (Dangerous Driving) Bill 2004 to sections 59 and 59A of the *Road Traffic Act 1974* and outlines other key amendments contained in the Bill.
- 5 The Committee considers that the first unusual aspect of this Bill is that it removes the concept that criminal punishment is imposed because of a link between something that the accused has done and the harm that results. Instead, the criminal liability arises because a vehicle in the accused's control is involved in an incident that occasions death, grievous bodily harm or bodily harm and the accused at the time was incapable of controlling the vehicle or was driving dangerously. The element of fault or culpability, which is usually central to a criminal offence, is removed once it has been shown that the death, grievous bodily harm or bodily harm occurred while the accused was engaged in committing certain specified offences.

¹ Western Australia, Legislative Council, *Parliamentary Debates (Hansard)*, September 21 2004, pp6052-6053.

² Letter from Mr George Tannin SC, State Counsel and Instructing Officer, October 11 2004, pp1-2.

- 6 In the view of the Committee, the second unusual aspect is that the concept of fault and causation is brought back in only once the offence has been proven, because the accused is then given the opportunity to prove, on the balance of probabilities, that the death, grievous bodily harm or bodily harm was “*not in any way attributable to*” their criminal conduct. It is not strictly speaking a reversal of the onus of proof because the defence requires the proof of something that is not an element of the offence.
- 7 To assist the Legislative Council to consider the Road Traffic Amendment (Dangerous Driving) Bill 2004, Appendix 3 contains the relevant provisions of the *Road Traffic Act 1974* with the proposed amendments marked.
- 8 The majority of the Committee does not support a recommendation that the Road Traffic Amendment (Dangerous Driving) Bill 2004 do pass without amendment on the basis that the intent of this Report, in the view of the majority, is to better inform the Legislative Council in relation to any decision that it makes regarding the Road Traffic Amendment (Dangerous Driving) Bill 2004.
- 9 Whilst accepting that the role of this Report is to better inform the Legislative Council, Hon Ken Travers MLC and Hon Kate Doust MLC dissented from the decision not to recommend the passage of the Road Traffic Amendment (Dangerous Driving) Bill 2004 without amendment on the basis that:
- There are many precedents where the measures used in the Road Traffic Amendment (Dangerous Driving) Bill 2004 are contained in existing legislation and the seriousness of these offences warrants their inclusion on this occasion. Further, the Bill has sufficient safeguards to address the concerns raised in submissions.
 - Although the Road Traffic Amendment (Dangerous Driving) Bill 2004 simplifies the elements of causation, the prosecution is still required to prove that there was an incident occasioning death, grievous bodily harm or bodily harm and the driver was driving dangerously, either while under the influence of alcohol or drugs (or both) to such an extent as to be incapable of having proper control of the vehicle.
 - The recognition, by use of a ‘deeming provision’, that a person with a blood alcohol content of 0.15% or greater is incapable of having control of the vehicle is reasonable and reflects a similar existing provision in section 63(5) of the *Road Traffic Act 1974*.
 - The Road Traffic Amendment (Dangerous Driving) Bill 2004 will address deficiencies in the existing law to ensure that people who put lives at risk by driving when drunk or under the influence of drugs are made to bear the full

responsibility for the consequences of their actions and will be a powerful deterrent against driving under the influence.

RECOMMENDATION

10 The Recommendation appears in the text at the page number indicated:

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Recommendation 1: The Committee recommends that the House be fully cognisant of the impact of the Road Traffic Amendment (Dangerous Driving) Bill 2004 on the dangerous driving offences in the *Road Traffic Act 1974* which result in harm to persons, in particular:

- the effect of the removal of the requirement of a causal link between the driving by the “*person*” and the death, grievous bodily harm or bodily harm. Instead, the prosecution will be required to prove that the “*incident*” in which the driver was involved occasioned the death, grievous bodily harm or bodily harm thereby simplifying the proof of the offence;
- the effect of proposed section 59B(5) which is a ‘deeming provision’; and
- proposed section 59B(6) which places a burden on the accused to prove any causal break between the “*incident*” and the death, grievous bodily harm or bodily harm.

CHAPTER 1

INTRODUCTION

REFERENCE AND PROCEDURE

- 1.1 On September 21 2004, the Road Traffic Amendment (Dangerous Driving) Bill 2004 (**Bill**) was referred by the Legislative Council to the Standing Committee on Legislation.³
- 1.2 On September 24 2004, the Legislative Council made the following order:
1. *The Legislation Committee is ordered to report the Road Traffic Amendment (Dangerous Driving) Bill 2004 with such findings or recommendations as it may care to make on Wednesday October 27 2004 or before that day where SO 338 applies;*
 2. *On Wednesday October 27 2004, the next stage of the bill is an order of the day and the remaining stages are to be completed before the adjournment of the House on Thursday October 28 2004.*⁴
- 1.3 As the Bill was referred before the second reading question was put, the policy of the Bill was open for inquiry.
- 1.4 On September 24 2004, in accordance with Standing Order 326A, Hon Jon Ford MLC (Chairman) and Hon Bill Stretch MLC were granted leave of the Committee to be substituted by Hon Ken Travers MLC and Hon George Cash MLC, respectively, for the purposes of the inquiry. Hon Giz Watson MLC was endorsed to act as Chairman for the purposes of the inquiry. Thus the Committee comprised Hon Giz Watson MLC (Acting Chairman), Hon Kate Doust MLC, Hon Peter Foss MLC, Hon George Cash MLC and Hon Ken Travers MLC (**Committee**).
- 1.5 The Committee appointed a subcommittee comprising Hon Giz Watson MLC (Convenor), Hon Ken Travers MLC and Hon George Cash MLC to assist the Committee with the inquiry (**subcommittee**).

³ Western Australia, Legislative Council, *Parliamentary Debates (Hansard)*, September 21 2004, pp6052-6053.

⁴ Western Australia, Legislative Council, *Parliamentary Debates (Hansard)*, September 24 2004, pp6551-6557.

- 1.6 On September 29 2004, the subcommittee advertised in *The West Australian* newspaper seeking written submissions. A list of the submissions received by the subcommittee is attached as Appendix 1. Details of the inquiry were also placed on the parliamentary website (www.parliament.wa.gov.au).
- 1.7 The subcommittee wrote to the following people and organisations seeking their views in relation to the Bill:
- The Law Society of Western Australia.
 - The Criminal Lawyers Association of Western Australia.
 - Hon Peter Foss MLC (a Member who raised issues regarding the Bill in the referral debate in the Legislative Council).
 - Hon Murray Criddle MLC (the mover of the motion to refer the Bill to the Legislation Committee).
- 1.8 The subcommittee held the following public hearings:
- October 11 2004 - Mr George Tannin SC, State Counsel, Instructing Officer for the Bill (**Mr Tannin**); and
 - October 14 2004 - Mr John Prior, Criminal Lawyers Association (**Mr Prior**).
- 1.9 The subcommittee also held a private hearing on October 11 2004 with representatives of the Western Australian Police Service (**Police Service**):
- Mr Ian Barnes, Acting Senior Sergeant, Major Crash Investigation Section; and
 - Mr Ross Tomasini, Superintendent, Traffic Support.
- 1.10 The hearing was held in private because the matter is *sub judice*.⁵
- 1.11 The Committee particularly thanks the individuals and organisations that provided evidence, advice and information for their contributions given the time frames of the inquiry.
- 1.12 The Committee takes this opportunity to acknowledge the services of *Hansard* in the transcription of evidence gathered by the Committee. The Committee also expresses its appreciation to the staff of the Legislative Council Committee Office, in particular,

⁵ ‘*Sub judice*’ is defined as, “*before a judge. Still being considered by a court of law; not yet decided, unsettled and not to be canvassed publicly because of the risk of being in contempt of court.*” Dr P. Nygh and P. Butt, *Butterworths Australian Legal Dictionary*, Butterworths, Australia, 1997, p1123.

Johanna Edwards and David Driscoll for their assistance during the inquiry and the preparation of the Report.

BACKGROUND AND PURPOSE OF THE BILL

- 1.13 The background to the Bill was set out in the Second Reading Speech in the Legislative Council on August 12 2004 by Hon Nick Griffiths MLC, Minister for Housing and Works representing the Attorney General (**Hon Nick Griffiths MLC**) as follows:

The amendments to the Road Traffic Act 1974 contained within this Bill aim to address deficiencies in the law relating to dangerous driving causing death or serious injury. The deficiencies in the law were highlighted by the very sad death in August last year of Miss Jess Meehan, a 10-year-old girl. Jess Meehan died on 8 August 2003 after being hit by a car driven by an unlicensed and drunken driver. The police subsequently charged the driver with driving under the influence of alcohol and driving whilst under suspension and without a valid licence, and the minimum fine was imposed. The police took the view that a more serious charge, such as dangerous driving causing death, contrary to section 59 of the Road Traffic Act, could not be sustained upon the available evidence. Because of the deficiencies in section 59 of the Road Traffic Act, in particular, its requirement for a causative nexus to be established between the driver's intoxication and the collision causing death, the penalties imposed upon the driver involved in the incident that took Jess Meehan's life failed to address the true seriousness of his conduct. Justice was not served.⁶

- 1.14 On October 6 2004, subsequent to the Second Reading Speech and the referral of the Bill to the Committee, the police charged the driver referred to in the Second Reading Speech, Mr Walsh-McDonald, with dangerous driving causing death contrary to section 59 of the *Road Traffic Act 1974*.⁷
- 1.15 In light of the emphasis in the Second Reading Speech on the inability of the police to charge Mr Walsh-McDonald with an offence under section 59, the subcommittee held a private hearing with representatives of the Police Service in relation to the decision to charge Mr Walsh-McDonald.
- 1.16 The Police Service advised the Committee that they were prepared to indicate publicly that a recent review of the matter led to the charge of dangerous driving causing death

⁶ Western Australia, Legislative Council, *Parliamentary Debates (Hansard)*, August 18 2004, pp5074.

⁷ See Appendix 2.

being preferred on October 6 2004. Further, the Police Service provided a public statement, which is attached at Appendix 2.

- 1.17 Hon Jim McGinty MLA, Attorney General (**Attorney General**) was reported as stating that despite the more serious charge now being brought, the amendments proposed by the Bill are still crucial as “*the law as it stands is ambiguous and lacks certainty*”.⁸

- 1.18 In relation to the decision to charge Mr Walsh-McDonald, Mr Tannin advised that:

*Although the death of Miss Meehan was a universally distressing tragedy which everybody in this community was concerned about and which clearly was the genesis for the announcement of the reforms, the reforms are an attempt to change what is considered a deficiency....*⁹

- 1.19 Mr Tannin outlined the nature of the deficiency in the relevant sections of the *Road Traffic Act 1974* and how the Bill seeks to address this, as follows:

The Road Traffic Amendment (Dangerous Driving) Bill was enacted in response to deficiencies in the law, which were highlighted by the death of Miss Jess Meehan, a 10 year old girl. In its current form, section 59 of the Road Traffic Act requires proof of an actual causative nexus between the objectively dangerous manner of a person’s driving and the death or grievous bodily harm of another.

The changes to the law of dangerous driving are intended to simplify requirements of proof of causation for the offence of dangerous driving. The amendments draw from the legislative approach adopted in the NSW Crimes Act 1900. Pursuant to section 52A of the Crimes Act (NSW), a person driving whilst drunk or intoxicated who is involved in a vehicular impact occasioning the death of another person commits an offence. Proof of causation is made simple, as is proof of dangerous driving in defined categories. ...

Overall, the purpose of the Road Traffic Amendment (Dangerous Driving) Bill is to ensure that persons involved in motor vehicle incidents causing death, grievous bodily harm or bodily harm, who are drunk, intoxicated or driving in a dangerous manner, are held fully accountable for the entire consequences of their actions. The current regime is deficient because of the difficulty in establishing

⁸ Catherine Madden, ‘Charges upgrade in Jess tragedy’, *The Sunday Times*, Perth, October 10 2004.

⁹ Mr George Tannin SC, State Counsel and Instructing Officer, *Transcript of Evidence*, October 11 2004, p1.

causation between the dangerous manner of a person's driving and the resulting death, grievous bodily harm or bodily harm. The requirement that a person 'causes' the death or grievous bodily harm of another person by driving a motor vehicle, places difficult evidential burdens upon the prosecution. Therefore, the Bill's objective is primarily achieved in this Bill by the enactment of provisions simplifying causation requirements.¹⁰

1.20 The amendments in the Bill primarily relate to:

- section 59 of the *Road Traffic Act 1974* - the offence of dangerous driving causing death or grievous bodily harm; and
- section 59A of the *Road Traffic Act 1974* - the offence of dangerous driving causing bodily harm.

1.21 These offences sit within a hierarchy of dangerous driving offences in the *Road Traffic Act 1974* which are graded according to seriousness of the driving misconduct and the harm which results.¹¹ The Committee notes that the penalties for the offences reflect these factors.

1.22 The hierarchy of dangerous driving offences in the *Road Traffic Act 1974* with a descending order of seriousness are:

- section 59 - dangerous driving causing death or grievous bodily harm;
- section 59A - dangerous driving causing bodily harm; and
- section 61 - dangerous driving (without more).¹²

1.23 The Committee notes that the Bill only affects the two most serious dangerous driving offences. Mr Tannin advised that the amendments in the Bill are only intended to address issues surrounding dangerous driving offences resulting in injury.¹³

1.24 The Bill also contains ancillary amendments to sections 51, 65, 66, 67 and 72 of the *Road Traffic Act 1974*.

¹⁰ Letter from Mr George Tannin SC, State Counsel and Instructing Officer, October 11 2004, p1-2.

¹¹ *Wood v R* (2002) 130 A Crim R 518, 529-530.

¹² *Ibid*, 529.

¹³ Letter from Mr George Tannin SC, State Counsel and Instructing Officer, October 11 2004, p20.

SCOPE OF THE REPORT

- 1.25 In order to facilitate debate in the Legislative Council, the Committee has presented this Report on a clause by clause basis. However, due to the time constraints imposed by the Legislative Council requiring a report on or before October 27 2004, the Committee has focused on the issues raised by the submissions.
- 1.26 As indicated earlier, the stated primary objective of the Bill is to simplify ‘causation’ in relation to dangerous driving offences resulting in injury. The Committee understands that in a criminal law context, ‘causation’ is one of the elements that must be proved before an accused can be convicted of a crime in which the effect of the act is part of the definition of the crime.¹⁴
- 1.27 Sections 59 and 59A are examples of such offences. In particular, the offences created by these sections require the prosecution to prove that the dangerous driving ‘caused’ the death, grievous bodily harm or bodily harm and without this resulting harm, the offence is not established.
- 1.28 With respect to causation generally, the Committee notes that sometimes, a new act or event¹⁵ between the act and the effect may ‘break’ the chain of causation and relieve the accused from responsibility.¹⁶
- 1.29 The amendments to sections 59 and 59A of the *Road Traffic Act 1974* in clauses 5 and 6 of the Bill are the key to the reforms to causation. These amendments are considered in Chapters 2 and 3.
- 1.30 The other significant amendments are:
- proposed new section 59B(5), which deems a person with a blood alcohol level of, or exceeding, 0.15% to be incapable of controlling a motor vehicle; and
 - proposed section 59B(6), which creates statutory defences for the relevant dangerous driving offences which, might be considered to reverse the burden of proof.
- 1.31 These amendments are considered in Chapter 4.
- 1.32 In Chapter 5, the Committee briefly addresses the ancillary amendments contained in the other clauses of the Bill and minor issues not dealt with elsewhere.

¹⁴ Elizabeth Martin (Ed) *Oxford Reference: A Dictionary of Law, Third Edition*, Oxford University Press, Oxford, 1983, p55.

¹⁵ Also referred to as the *novus actus interveniens*.

¹⁶ Elizabeth Martin (Ed) *Oxford Reference: A Dictionary of Law, Third Edition*, Oxford University Press, Oxford, 1983, p55.

- 1.33 To assist the Legislative Council to consider the Bill, the Committee prepared a document which shows the proposed amendments marked on the relevant sections of the *Road Traffic Act 1974*. This document is Appendix 3.

CHAPTER 2

CLAUSE 5 - AMENDING THE OFFENCE OF DANGEROUS DRIVING CAUSING DEATH OR GRIEVOUS BODILY HARM

INTRODUCTION

2.1 Clause 5 contains amendments to section 59 of the *Road Traffic Act 1974*, which contains the offence of dangerous driving causing death or grievous bodily harm. The amendments to section 59 (and section 59A, which is considered in Chapter 3) are claimed to be principally directed to simplifying causation.

CLAUSE 5(1)

2.2 Clause 5(1) proposes amendments to section 59(1) of the *Road Traffic Act 1974*.

Section 59(1) - current operation

2.3 Section 59(1) currently provides that:

(1) *A person who causes the death of or grievous bodily harm to another person by driving a motor vehicle in a manner (which expression includes speed) that is, having regard to all the circumstances of the case, dangerous to the public or to any person commits a crime and is liable to the penalty in subsection (3).*

Summary conviction penalty: imprisonment for 18 months or a fine of 160PU and in any event the court convicting the person shall order that he be disqualified from holding or obtaining a driver's licence for a period of not less than 2 years.

2.4 An offence is committed under section 59(1) when:

- a person drives a motor vehicle in a manner dangerous to the public; and
- thereby causes death or grievous bodily harm.¹⁷

2.5 The section requires a causal link between the dangerous driving and the death or grievous bodily harm.¹⁸

¹⁷ *Kaighin v R* (1990) 11 MVR 119, 123.

- 2.6 The test as to whether the driving was dangerous is objective and thus the driving must in reality, and not speculatively, be actually or potentially dangerous to the public or another person.¹⁹
- 2.7 The Committee understands that evidence of consumption of alcohol is both probative and admissible on a charge under section 59(1) to the extent that it assists in determining whether the manner of driving was objectively dangerous.²⁰ The Committee notes that generally, evidence of the consumption of alcohol is not, of itself, determinative of whether the accused's driving was dangerous.²¹ As highlighted in advice from Mr Tannin, in *Greenham v R* (1997) 25 MVR 495, Justice Cox observed that:

*Typically the prosecution will lead evidence about the way the defendant drove his car on the occasion charged, and they may also lead evidence about any impairment of the defendant's physical or mental faculties as tending to explain why he drove as he did. Being affected by alcohol will not in itself amount to dangerous driving, but being unable to exercise effective control of a vehicle because of the amount of alcohol the driver has drunk may well support a finding of dangerous driving. Evidence that a defendant was affected by alcohol will generally be admitted, therefore, as relevant to the issue whether he was driving dangerously.*²²

- 2.8 However, the Committee understands that in rare circumstances, evidence of alcohol consumption may, of itself, be sufficient to allow a conclusion that the accused was, from this fact alone, incapable of properly controlling a motor vehicle and that the driving was, for this reason, dangerous.²³ Mr Tannin indicated, that such circumstances would require strong evidence of alcohol intake and appropriate supporting evidence from reliable observers or a medical expert on the impact of alcohol on human behaviour.²⁴

¹⁸ Ibid.

¹⁹ Ibid.

²⁰ *Jones v R* (1986) 19 A Crim R 236, 241.

²¹ Explanatory Memorandum, Road Traffic Amendment (Dangerous Driving) Bill 2004, p1 and letter from Mr George Tannin SC, State Counsel and Instructing Officer, October 18 2004, p6.

²² *Greenham v R* (1997) 25 MVR 495, 497 referred to in letter from Mr George Tannin SC, State Counsel and Instructing Officer, October 18 2004, p6.

²³ *Criminal Law Western Australia*, Butterworths online, paragraph 120,310.70. See also letter from Mr George Tannin SC, State Counsel and Instructing Officer, October 18 2004, pp6-7.

²⁴ Letter from Mr George Tannin SC, State Counsel and Instructing Officer, October 18 2004, p6.

- 2.9 For the purposes of section 59, “*grievous bodily harm*” means any bodily injury of such a nature as to endanger, or be likely to endanger life, or to cause, or to be likely to cause, permanent injury to health.²⁵
- 2.10 The Committee notes that an offence under section 59(1) is a “*crime*” which is an **indictable offence**.²⁶ **Indictable offences** are offences which may, and often must be, tried in the District or Supreme Court usually by a judge and jury.²⁷
- 2.11 Crimes are to be distinguished from **simple offences** which are tried in the Court of Petty Sessions before a magistrate without a jury.²⁸ Crimes are more serious than simple offences.²⁹ When a matter is dealt with in the Court of Petty Sessions it is referred to as being dealt with ‘summarily’.
- 2.12 An offence under section 59(1) is a “*crime*” punishable by:
- four years imprisonment or a fine of 400 penalty units.³⁰
- 2.13 However, significantly, the Committee notes that there is also a “*summary conviction penalty*” which involves a lesser penalty of:
- 18 months imprisonment or a fine of 160 penalty units.³¹
- 2.14 The inclusion of a “*summary conviction penalty*” means that if the person is charged in a Court of Petty Sessions with committing the indictable offence, that Court will try the offence summarily, unless, in limited circumstances, it determines otherwise.³²

²⁵ Section 59(2)(d), *Road Traffic Act 1974*, which uses the definition of the term in section 1 of the *Criminal Code*.

²⁶ Section 67(1a) of the *Interpretation Act 1984* provides that an offence designated as a crime is an indictable offence.

²⁷ E Colvin, S Linden and J McKechnie, *Criminal Law in Queensland and Western Australia*, Butterworths, Australia, 2001, p10. Note that pursuant to section 651A of the *Criminal Code*, a person accused of an indictable offence may elect to be tried by a judge alone.

²⁸ E Colvin, S Linden and J McKechnie, *Criminal Law in Queensland and Western Australia*, Butterworths, Australia, 2001, p10.

²⁹ *Ibid.*

³⁰ Section 59(3), *Road Traffic Act 1974*. A reference to a number of penalty units is a reference to an amount (in dollars) that is that number multiplied by 50. Section 5(1a), *Road Traffic Act 1974*.

³¹ Section 59(1), *Road Traffic Act 1974*. Where a person is convicted pursuant to section 59(1) the court is also required to order that the person is disqualified from holding or obtaining a driver’s licence for a period of not less than two years.

³² See section 5, *Criminal Code*. Section 5 was amended by the *Criminal Code Amendment Act 2004*. For further discussion with respect to this provision see Western Australia, Legislative Council, Uniform Legislation and General Purposes Committee, *Criminal Code Amendment Bill 2003*, December 2003, pp22-32.

- 2.15 Section 5(3) of the *Criminal Code* provides that the Court of Petty Sessions may only decide that the offence is to be dealt with on indictment³³ (in the District Court) if the Court of Petty Sessions considers:
- a) that the circumstances in which the offence was allegedly committed are so serious that, if the accused were convicted of the offence, the court would not be able to adequately punish the accused;
 - b) that the charge forms part of a course of conduct during which other offences were allegedly committed by the accused and the accused is to be tried on indictment for one or more of those other offences;
 - c) that a co-accused is to be tried on indictment;
 - d) that the charge forms part of a course of conduct during which other offences were allegedly committed by the accused and others and the accused or one or more of the others is to be tried on indictment for one or more of those other offences; or
 - e) that the interests of justice require that the charge be dealt with on indictment.
- 2.16 The Committee notes that if the Court of Petty Sessions subsequently convicts the accused, they are liable to the summary conviction penalty, except where the Court commits the accused to the District Court for sentencing and they are then liable to the higher penalty.³⁴

Section 59(1) - proposed amendments

- 2.17 Clause 5(1) proposes to replace section 59(1) with the following clause:
- (1) *If a motor vehicle driven by a person (the “driver”) is involved in an incident occasioning the death of, or grievous bodily harm to, another person and the driver was, at the time of the incident, driving the motor vehicle -*
 - (a) *while under the influence of alcohol, drugs, or alcohol and drugs to such an extent as to be incapable of having proper control of the vehicle; or*

³³ On indictment generally means that the trial occurs before a judge and jury in the District or Supreme Court rather than before a magistrate sitting alone in the Court of Petty Sessions. RG Kenny, *An Introduction to Criminal Law in Queensland and Western Australia*, Butterworths, Australia, 2000, p35.

³⁴ Explanatory Memorandum, Criminal Code Amendment Bill 2003, p11.

(b) *in a manner (which expression includes speed) that is, having regard to all the circumstances of the case, dangerous to the public or to any person,*

the driver commits a crime and is liable to the penalty in subsection (3). (emphasis added)

- 2.18 Proposed section 59(1)(b) retains the current offence of driving in a manner that is dangerous to the public³⁵ and a new paragraph (a) is inserted in relation to driving while under the influence of alcohol or drugs or both.

Causation

- 2.19 The Explanatory Memorandum indicates that the purpose of the amendment to section 59(1) is to:

overcome the evidentiary difficulties in establishing that intoxicated drivers who are involved in incidents occasioning death or grievous bodily harm (“GBH”) can be convicted of dangerous driving.³⁶

- 2.20 Mr Tannin explained more specifically how the Bill addresses these evidentiary difficulties as follows:

The Bill attempts to overcome difficulties in proving causation that exist under the current regime of liability. The Bill removes the requirement of “a person” causing the death or grievous bodily harm, and replaces it with “an incident”. Consequently, the prosecution is required to prove that the driver was involved in “an incident” that caused the death or grievous bodily harm, rather than establish a direct link between the person’s driving and the resulting death or grievous bodily harm.³⁷

- 2.21 As indicated, currently, section 59(1) requires a causal link between the dangerous driving and the death or grievous bodily harm. This arises from the following words of the subsection:

***A person who causes the death of or grievous bodily harm to another person by driving a motor vehicle in a manner (which expression includes speed) that is, having regard to all the circumstances of the case, dangerous to the public or to any person...** (emphasis added)*

³⁵ Explanatory Memorandum, Road Traffic Amendment (Dangerous Driving) Bill 2004, p1.

³⁶ Ibid.

³⁷ Letter from Mr George Tannin SC, State Counsel and Instructing Officer, October 11 2004, p19.

2.22 The proposed amendment to section 59(1) removes this causal link through the reference to “*an incident*” occasioning the death or grievous bodily harm rather than the “*person*” causing the harm.

2.23 Mr Tannin advised that the elements of the new offence under section 59(1) are:

- First, that the vehicle was involved in “*an incident*” resulting in death or grievous bodily harm.
- Secondly, that the driver of the vehicle was drunk or intoxicated to such an extent as to be incapable of having proper control of the vehicle, or driving in a manner that is dangerous to the public.³⁸

2.24 The Committee notes that these elements do not require a causal link between the person and the resultant harm.

2.25 On this issue, Hon Peter Foss QC MLC submitted that:

*It is not necessary that the driver or his driving caused the death or harm - it is enough that he is the driver of a vehicle that was involved in the incident. It is almost as if the vehicle commits the offence and the driver is held vicariously liable for it.*³⁹

2.26 The Committee also notes that the use of the word “*occasioning*” rather than the word “*causing*” appears to be a further reduction in the link between the driver’s or vehicle’s involvement in the death or grievous bodily harm **and** the death or grievous bodily harm itself.

2.27 Proposed sections 59B(1) and 59B(2) contain a list of provisions setting out the types of circumstances encompassed by the phrase “*an incident occasioning the death of, or grievous bodily harm or bodily harm*” for the purposes of sections 59(1) and 59A(1) (this latter section is considered in Chapter 3). Mr Tannin advised the Committee that the specified provisions do not create an exhaustive definition and do not limit the meaning of the phrase.⁴⁰

2.28 The Committee notes that the provisions are very broad and encompass situations that are not directly related to the harm. As Mr Tannin illustrated:

A person who is drunk to that standard [0.15%] might drive a car and roll the vehicle, which might distract the driver of an oncoming vehicle and the person in that car might perish. Under the present

³⁸ Ibid, p4.

³⁹ Submission No 5 from Hon Peter Foss QC MLC, October 13 2004, p2.

⁴⁰ Letter from Mr George Tannin SC, State Counsel and Instructing Officer, October 11 2004, p7.

*regime, we would then have to go through that whole sequence of events to try to tie responsibility for the ultimate end to the person who was full of grog and driving a car. This legislation says that if a person is in that situation, and someone dies, the driver has caused the person's death. It is incident-based rather than direct person causation. It may in all circumstances mean exactly the same thing. It is changing the requirements on the prosecution to go through all the rigmarole of proving a causal connection. We say that as a matter of logic the causal connection is already there if the incident occurs and the offender happens to be driving.*⁴¹

- 2.29 Mr Prior provided the following example in relation to the effect of connecting the “incident” to the death, grievous bodily harm or bodily harm rather than the “person”:

*you have 10 cars driving along Kwinana Freeway and crossing over the Narrows Bridge and heading south of Perth at five o'clock. Driver number five has had some drinks after work - obviously miles too many if he is 0.15 - and an accident occurs. That sort of accident is usually caused when someone slows down, and the tenth car hits the ninth car and there is a chain reaction. Generally speaking, when we are looking at who caused the accident, it is usually the tenth car. However, if the driver of that car is over 0.15 and the police come on the scene - everyone has to stay there, because it is peak hour - at 0.15 it would not be that hard to pick up that he may be under the influence, because he is probably going to show some physical signs, such as smelling of alcohol, so the police would say to the driver of car number five that they want him to have a breathalyser. Therefore, all of a sudden, on the definition of incident and how wide it is under this Bill, the driver of car number five theoretically is deemed to be incapable of driving a vehicle and is deemed to have caused the incident - that pile-up.*⁴²

- 2.30 The Committee notes Mr Prior's comments but recognises that depending on the circumstances, the police would retain discretion to charge other drivers and the judge or magistrate would be able to determine the appropriate penalty based on all the circumstances and the particular conviction.

- 2.31 The Committee observes that the removal of the requirement of a causal link between the “person” and the death or grievous bodily harm simplifies the task for the

⁴¹ Mr George Tannin SC, State Counsel and Instructing Officer, *Transcript of Evidence*, October 11 2004, p7.

⁴² Mr John Prior, Treasurer and Spokesperson, Criminal Lawyers Association of Western Australia, *Transcript of Evidence*, October 14 2004, pp5-6.

prosecution who instead must demonstrate that the “*incident*” in which the driver was involved occasioned the death or grievous bodily harm.

- 2.32 The Committee observes that the amendments operate to broaden the circumstances in which a prosecution may be commenced under section 59(1) thus ‘widening the net’ of the section and, as indicated later in this Report (at paragraphs 4.44 to 4.51), placing the burden on the accused to show any causal break.

Intoxication generally

- 2.33 The Explanatory Memorandum states that the effect of the amendment to section 59(1) is such that “*a driver involved in an incident causing death or GBH who is under the influence of drugs, alcohol or both, commits an offence under section 59*”.⁴³
- 2.34 However, advice from Mr Tannin confirmed that the simple fact of being under the influence is not sufficient for an offence to be committed against proposed section 59(1)(a), rather, the driver must be under the influence of alcohol, drugs or both **to such an extent as to be incapable of having proper control of the vehicle**.⁴⁴
- 2.35 In relation to a driver who is under the influence of alcohol (and not drugs), the question whether he or she is under the influence **to such an extent as to be incapable of having proper control of the vehicle** is affected by the ‘deeming provision’ in proposed section 59B(6) in clause 7. This is considered at paragraphs 4.4 to 4.14.
- 2.36 The Committee notes Mr Tannin’s advice that the amendments place great evidential significance upon the level of intoxication of the driver.⁴⁵

Drugs

- 2.37 The subcommittee asked Mr Tannin whether the reference to “*drugs*” in the proposed amendments to sections 59(1) and 59A(1) includes lawful and unlawful drugs and he advised that:

The term “drugs” is not defined in the Bill and therefore its ordinary meaning must be adopted. In this context, it would appear that “drug” would include both lawful and unlawful drugs.

For example, the Australian Butterworths Encyclopaedic Legal Dictionary provides that “drug” includes both:

⁴³ Explanatory Memorandum, Road Traffic Amendment (Dangerous Driving) Bill 2004, p1.

⁴⁴ Letter from Mr George Tannin SC, State Counsel and Instructing Officer, October 11 2004, p5.

⁴⁵ Ibid, p3.

1. *A chemical substance or mixture of substances, either synthetic or organic, used as medicine for the purpose of treating or preventing disease; and*
2. *Any narcotic or psychotropic substance that influences, inhibits or modifies physiological processes in human beings, producing a state of euphoria, depression or intoxication.*

The relevant question is the effect of those drugs upon the person driving the vehicle. A person must be intoxicated with drugs (whether legal or illegal) to such an extent as to be incapable of having control of the vehicle.

This could occur from any number of drugs, or combination thereof. For example, a person who has taken an illegal substance, for example, speed or amphetamines, might be intoxicated to an extent as to be incapable of having proper control of the vehicle. Likewise, a person who might have consumed large quantities of legal drugs (such as sleeping tablets or Sudafed) of themselves or in combination with others, might be intoxicated to such an extent as to be incapable of having proper control of the vehicle.⁴⁶

CLAUSE 5(2)

2.38 Clause 5(2) proposes to amend section 59(2) as follows:

- (2) *For the purposes of this section -*
 - ~~(a) a person causes the death of or grievous bodily harm to another person whether he does so directly or indirectly;~~
 - (b) *it is immaterial that the death or grievous bodily harm might have been avoided by proper precaution on the part of a person other than the person charged or might have been prevented by proper care or treatment;*
 - (c) ~~when a person causes grievous bodily harm to another person and that other person receives surgical or medical treatment, and death results either from the harm or the treatment, he is deemed~~

⁴⁶ Ibid, pp8-9.

to have caused the death of that other person, when an incident occasions grievous bodily harm to a person and that person receives surgical or medical treatment, and death results either from the harm or the treatment, the incident is deemed to have occasioned the death of that person although the immediate cause of death was the surgical or medical treatment if the treatment was reasonably proper in the circumstances and was applied in good faith; and

(d) *the term “grievous bodily harm” has the same meaning as is given thereto in The Criminal Code.*

2.39 The Explanatory Memorandum does not indicate why section 59(2)(a) is to be deleted. Mr Tannin advised that:

Section 59(2)(a) and section 59A(2)(a) provide descriptions of causation under the old regime.

The amendments introduced by the Bill alter the method of proof of causation for the purposes of s 59 and 59A of the Road Traffic Act. It is necessary to delete the old regime as well to enact the new legislative method of proving causation.⁴⁷

2.40 Section 59(2)(c) is also to be amended. Currently, section 59(2)(c) operates to establish that surgical or medical treatment cannot be regarded as a new or intervening act which breaks the ‘chain of causation’ with respect to an offence contrary to section 59(1).⁴⁸

2.41 The Explanatory Memorandum indicates that the Bill introduces the following changes to section 59(2)(c):⁴⁹

- the requirement that the surgical or medical treatment was reasonably proper in the circumstances and was applied in good faith is removed; and
- the term “person” is replaced with the term “incident” as it is the “incident” in section 59(1) (as it is proposed to be amended) which occasions the death or grievous bodily harm.

2.42 The Committee notes that the Bill does not achieve the first change as is evident from paragraph 2.38. Mr Tannin advised that the Bill retains the requirement that the

⁴⁷ Ibid, pp6-7.

⁴⁸ Ibid, p6.

⁴⁹ Explanatory Memorandum, Road Traffic Amendment (Dangerous Driving) Bill 2004, p1.

surgical or medical treatment was reasonably proper in the circumstances and was applied in good faith despite the statement in the Explanatory Memorandum that it is removed.⁵⁰

- 2.43 In considering section 59(2)(c), the Committee notes Mr Tannin's advice that it is irrelevant that the person who is killed, or suffers grievous bodily harm or bodily harm has a pre-existing medical condition or underlying susceptibility to injury.⁵¹
- 2.44 The second change which replaces the term "*person*" with "*incident*", reflects the amendments to section 59(1) with respect to causation, which are discussed at paragraphs 2.19 to 2.32.

CLAUSE 5(3)

- 2.45 As noted at paragraph 2.12, an offence under section 59(1) of dangerous driving causing death or grievous bodily harm is punishable by:

- four years imprisonment or a fine of 400 penalty units.

- 2.46 However, where a person is convicted on indictment,⁵² and the motor vehicle was being driven **without the consent of the owner**, there is an increased penalty under section 59(3) of a fine of any amount and imprisonment for:

- 20 years, where death is caused; or
- 14 years, where grievous bodily harm is caused.

- 2.47 The disparity between the penalty of four years when the car is not stolen and the increased penalties where the car is stolen, have been the subject of recent criticism by the Court of Criminal Appeal.⁵³ In response to these criticisms, the Attorney General indicated that amendments to increase the penalty for dangerous driving will be introduced.⁵⁴

- 2.48 Clause 5(3) proposes to amend section 59(3) to replace the reference to the motor vehicle being driven **without the consent of the owner** with a wider range of situations described as "*circumstances of aggravation*".

⁵⁰ Mr George Tannin SC, State Counsel and Instructing Officer, *Transcript of Evidence*, October 11 2004, p11.

⁵¹ Letter from Mr George Tannin SC, State Counsel and Instructing Officer, October 11 2004, pp10-11.

⁵² As noted at footnote 33, "*on indictment*" generally means that the trial occurs before a judge and jury in the District or Supreme Court rather than before a magistrate sitting alone in the Court of Petty Sessions. RG Kenny, *An Introduction to Criminal Law in Queensland and Western Australia*, Butterworths, Australia, 2000, p35.

⁵³ *Kay v R* [2004] WASCA 222 (Unreported, Murray, Wheeler and Miller JJ, September 30 2004), pp7-8.

⁵⁴ Anne Calverley, 'Death Drivers may get more jail', *The West Australian*, Perth, October 5 2004.

2.49 Proposed section 59B(3) in clause 7 provides that the “*circumstances of aggravation*” occur where, at the time of the alleged offence:

- (a) *the person was unlawfully driving the vehicle concerned without the consent of the owner or person in charge of the vehicle;*
- (b) *the person was driving the vehicle concerned on a road at a speed that exceeded, by more than 45 kilometres per hour, the speed limit (if any) applicable to that length of road; or*
- (c) *the person was driving the vehicle concerned to escape pursuit by a member of the Police Force.*

2.50 The penalties which currently apply under section 59(3) when the vehicle is stolen are not amended by the Bill and apply to the new circumstances of aggravation, namely a fine of any amount and:

- 20 years imprisonment, where death is caused; or
- 14 years imprisonment, where grievous bodily harm is caused.

2.51 In relation to the reference to “*unlawfully driving*” in proposed section 59B(3)(a), Mr Tannin advised that it clearly encompasses driving without the consent of the owner or person in charge of the vehicle and is not the same as driving without a licence.⁵⁵

2.52 Mr Tannin also advised that the words “*if any*” in proposed section 59B(3)(b) are used because there might be a situation where a speed limit has been temporarily changed or suspended.⁵⁶

2.53 Proposed section 59B(3)(c) relates to a person driving to escape pursuit by a member of the Police Force. In relation to that scenario, proposed section 59B(4) in clause 7 provides that:

For the purposes of subsection (3)(c) it does not matter whether the pursuit was still proceeding, or had been suspended or terminated at the time of the alleged offence.

2.54 The Committee sought clarification with respect to the period of time during which it could be said that a person was escaping pursuit even though the pursuit has been terminated. Mr Tannin advised that:

⁵⁵ Letter from Mr George Tannin SC, State Counsel and Instructing Officer, October 11 2004, p12.

⁵⁶ Ibid.

Determining whether a pursuit has been suspended or terminated, is a question of fact, to be determined by evidence relating to, for example, the facts of the chase, etc. which would be adduced at trial.

There is no time period set for determining the length of time for which s 59B(4) continues to operate after the pursuit has been suspended or terminated. Whether or not a time limit is appropriate is a policy question and it was decided that a time limit was not appropriate.⁵⁷

⁵⁷ Ibid, p13.

CHAPTER 3

CLAUSE 6 - AMENDING THE OFFENCE OF DANGEROUS DRIVING CAUSING BODILY HARM

INTRODUCTION

- 3.1 Clause 6 contains amendments to section 59A of the *Road Traffic Act 1974*, which contains the offence of dangerous driving causing bodily harm.
- 3.2 The amendments closely reflect the amendments to section 59 and thus are similarly claimed to be principally directed to simplifying causation.

CLAUSE 6(1)

Section 59A(1) - current operation

- 3.3 Section 59A(1) currently provides:

A person who causes bodily harm to another person by driving a motor vehicle in a manner (which expression includes speed) that is, having regard to all the circumstances of the case, dangerous to the public or to any person commits an offence.

- 3.4 The words of section 59A(1) essentially reflect section 59(1) but relate to bodily harm rather than death or grievous bodily harm. For the purposes of the section, “*bodily harm*” means any bodily injury which interferes with health or comfort.⁵⁸
- 3.5 An offence contrary to section 59A(1) is a simple offence with the penalty for a first offence being:
- nine months imprisonment or 80 penalty units.⁵⁹
- 3.6 The less serious nature of the harm of an offence contrary to section 59A (in comparison to section 59) is reflected in:
- the classification of the offence as a simple offence as opposed to a crime; and

⁵⁸ Section 59A(2)(c), *Road Traffic Act 1974*, which refers to the meaning of that term in section 1 of the *Criminal Code*.

⁵⁹ Section 59A(3), *Road Traffic Act 1974* which also provides that the court shall order that he be disqualified from holding or obtaining a driver’s licence for a period of not less than 18 months. Section 67(2) of the *Interpretation Act 1984* provides that an offence not otherwise designated is a simple offence.

- the lesser penalty of nine months imprisonment or 80 penalty units as opposed to four years imprisonment or 400 penalty units.
- 3.7 As indicated, a simple offence is tried in the Court of Petty Sessions before a magistrate without a jury.⁶⁰
- 3.8 As with section 59(1), section 59A(1) requires a causal link between the dangerous driving and the bodily harm and the test as to whether the driving is dangerous is an objective one.⁶¹

Section 59A - proposed amendments

- 3.9 Clause 6(1) proposes to delete section 59A(1) and replace it with the following clause:

(1) *If a motor vehicle driven by a person (the “driver”) is involved in an incident occasioning bodily harm to another person and the driver was, at the time of the incident, driving the motor vehicle -*

(a) *while under the influence of alcohol, drugs, or alcohol and drugs to such an extent as to be incapable of having proper control of the vehicle; or*

(b) *in a manner (which expression includes speed) that is, having regard to all the circumstances of the case, dangerous to the public or to any person,*

the driver commits an offence.

- 3.10 Similarly to section 59(1), the Explanatory Memorandum indicates that:

*The purpose of this amendment is to overcome evidentiary difficulties in establishing that intoxicated drivers who are involved in incidents occasioning bodily harm may be convicted of dangerous driving.*⁶²

- 3.11 The amendments to section 59A(1) proposed by clause 6(1) reflect the amendments to section 59(1). In particular, they are directed to simplifying the requirements of proof of the offence.

⁶⁰ E Colvin, S Linden and J McKechnie, *Criminal Law in Queensland and Western Australia*, Butterworths, Australia, 2001, p10. For a second or subsequent offence, the penalty is 18 months imprisonment or 160 penalty units. In relation to all offences, the court convicting the person is required to order that the person be disqualified from holding or obtaining a driver’s licence for a period of not less than two years, section 59A(3).

⁶¹ *Kaighin v R* (1990) 11 MVR 119, 123.

⁶² Explanatory Memorandum, Road Traffic Amendment (Dangerous Driving) Bill 2004, p2.

3.12 Mr Tannin advised that the elements of the new offence under section 59A(1) will be:

- First, that the vehicle was involved in “*an incident*” resulting in bodily harm.
- Secondly, that the driver of the vehicle was drunk or intoxicated to such an extent as to be incapable of having proper control of the vehicle, or driving in a manner that is dangerous to the public.⁶³

3.13 As the amendments are substantially the same as those to section 59(1), the Committee refers to its consideration of the issues raised at paragraphs 2.19 to 2.37 which apply equally to the proposed amendments to section 59A(1).

CLAUSE 6(2)

3.14 This clause proposes to delete section 59A(2)(a) which provides that for the purposes of section 59A, a person causes bodily harm to another person whether he does so directly or indirectly. Mr Tannin’s advice with respect to the deletion of this paragraph (and the equivalent paragraph in section 59) is set out at paragraph 2.39.

CLAUSE 6(3)

3.15 The amendment in this clause provides that the penalty provisions in section 59A are subject to the more serious penalties in the new proposed section 59A(3a) in clause 6(4).

CLAUSE 6(4)

3.16 Whilst section 59 currently has a higher penalty where a person is convicted upon indictment and the motor vehicle is stolen, section 59A does not contain an increased penalty in these circumstances.

3.17 Clause 6(4) proposes to amend section 59A to introduce a new section 59A(3a) which creates higher penalties with respect to the offence of dangerous driving causing bodily harm in “*circumstances of aggravation*”.

3.18 The circumstances of aggravation are contained in proposed section 59B(3) in clause 7 and were considered at paragraphs 2.49 to 2.54 in the context of section 59(1).

3.19 Significantly, although an offence against section 59A(1) is a simple offence, if the offence is committed in “*circumstances of aggravation*”, it is a “*crime*”⁶⁴ which may, and often must, be tried in the District or Supreme Court, usually by a judge and

⁶³ Letter from Mr George Tannin SC, State Counsel and Instructing Officer, October 11 2004, p4.

⁶⁴ A crime is a more serious offence than a simple offence. E Colvin, S Linden and J McKechnie, *Criminal Law in Queensland and Western Australia*, Butterworths, Australia, 2001, p10.

jury.⁶⁵ The more serious nature of the commission of an offence against section 59A(1) in circumstances of aggravation is reflected in the increased penalty of:

- seven years imprisonment and a fine of any amount.⁶⁶

3.20 However, proposed section 59A(3a) also contains a “*summary conviction penalty*” of:

- 18 months imprisonment or a fine of 160 penalty units.⁶⁷

3.21 The inclusion of a “*summary conviction penalty*” means that if the person is charged in a Court of Petty Sessions with committing the indictable offence, that Court will try the offence summarily, unless, in limited circumstances, it decides otherwise.⁶⁸

3.22 Section 5(3) of the *Criminal Code* provides that the Court of Petty Sessions may only decide that the offence is to be dealt with on indictment⁶⁹ (in the District Court) if the Court of Petty Sessions considers:

- a) that the circumstances in which the offence was allegedly committed are so serious that, if the accused were convicted of the offence, the court would not be able to adequately punish the accused;
- b) that the charge forms part of a course of conduct during which other offences were allegedly committed by the accused and the accused is to be tried on indictment for one or more of those other offences;
- c) that a co-accused is to be tried on indictment;
- d) that the charge forms part of a course of conduct during which other offences were allegedly committed by the accused and others and the accused or one or

⁶⁵ Pursuant to section 67(1a) of the *Interpretation Act 1984*, a “*crime*” is an indictable offence. See also E Colvin, S Linden and J McKechnie, *Criminal Law in Queensland and Western Australia*, Butterworths, Australia, 2001, p10. Note that pursuant to section 651A of the *Criminal Code*, a person accused of an indictable offence may elect to be tried by a judge alone.

⁶⁶ Clause 7, proposed section 59B(3a), Road Traffic Amendment (Dangerous Driving) Bill 2004. The Committee notes that where there are circumstances of aggravation in relation to the more serious offence of dangerous driving causing death or grievous bodily harm under section 59(1) there is a penalty of a fine of any amount and 20 years imprisonment (where death is caused) or 14 years imprisonment (where grievous bodily harm is caused).

⁶⁷ Clause 7, proposed section 59B(3a), Road Traffic Amendment (Dangerous Driving) Bill 2004.

⁶⁸ As noted at footnote 32, section 5, *Criminal Code*. Section 5 was amended by the *Criminal Code Amendment Act 2004*. For further discussion with respect to this provision see Western Australia, Legislative Council, Uniform Legislation and General Purposes Committee, *Criminal Code Amendment Bill 2003*, December 2003, p22-32.

⁶⁹ As noted at footnote 33, “*on indictment*” generally means that the trial occurs before a judge and jury in the District or Supreme Court rather than before a magistrate sitting alone in the Court of Petty Sessions. RG Kenny, *An Introduction to Criminal Law in Queensland and Western Australia*, Butterworths, Australia, 2000, p34.

more of the others is to be tried on indictment for one or more of those other offences; or

e) that the interests of justice require that the charge be dealt with on indictment.

3.23 The Committee notes that if the Court of Petty Sessions subsequently convicts the accused, they are liable to the summary conviction penalty, except where the Court commits the accused to the District Court for sentencing and they are then liable to the higher penalty.⁷⁰

⁷⁰ Explanatory Memorandum, Criminal Code Amendment Bill 2003, p11.

CHAPTER 4

CLAUSE 7 - PROPOSED SECTION 59B

INTRODUCTION

4.1 Clause 7 of the Bill proposes to insert a new section 59B into the *Road Traffic Act 1974* which contains matters affecting the operation of sections 59 and 59A of the *Road Traffic Act 1974*. The key amendments in clause 7 are:

- proposed new section 59B(5) which deems a person with a blood alcohol level of, or exceeding, 0.15% to be incapable of controlling a motor vehicle; and
- proposed section 59B(6) which creates statutory defences for the relevant dangerous driving offences which might be seen to reverse the burden of proof.

PROPOSED SECTIONS 59B(1) AND 59B(2)

4.2 Proposed sections 59B(1) and 59B(2) outline the meaning of the phrase “*an incident occasioning the death of, or grievous bodily harm or bodily harm to a person*” for the purposes of sections 59(1) and 59A(1) and were considered at paragraphs 2.27 to 2.30.

PROPOSED SECTIONS 59B(3) AND 59B(4)

4.3 Proposed sections 59B(3) and 59B(4) relate to the “*circumstances of aggravation*” which have been considered in addressing the amendments to sections 59 and 59A (see paragraphs 2.49 to 2.54).

PROPOSED SECTION 59B(5)

4.4 As previously indicated, for the purposes of an offence of dangerous driving causing death, grievous bodily harm or bodily harm under proposed sections 59(1) and 59A(1), the driver must be under the influence of alcohol, drugs or both **to such an extent as to be incapable of having proper control of the vehicle.**

4.5 Currently, evidence of alcohol consumption is probative and relevant in determining whether the driving was dangerous for the purposes of those sections. In rare circumstances, the level of intoxication alone may be sufficient to support a conclusion that the accused was incapable of properly controlling the motor vehicle.⁷¹

⁷¹ Letter from Mr George Tannin SC, State Counsel and Instructing Officer, October 18 2004, pp6-7.

- 4.6 Significantly, proposed section 59B(5) provides that for the purposes of sections 59 and 59A, a person who at the time of the alleged offence has a percentage of alcohol in his blood of or exceeding 0.15% shall be **deemed** to have been under the influence of alcohol **to such an extent as to be incapable of having proper control of the vehicle**. This proposed new subsection is a ‘deeming provision’.
- 4.7 The subcommittee sought advice from Parliamentary Counsel in relation to the use of ‘deeming provisions’ in Western Australian statutes. The response from Parliamentary Counsel is attached as Appendix 4.
- 4.8 The intended effect of proposed section 59B(5) is that, in relation to blood alcohol levels of or exceeding 0.15%, proof of the blood alcohol reading will be sufficient to prove the driver was incapable of having proper control of the vehicle⁷² thereby reducing the evidential burden on the prosecution.
- 4.9 As Mr Tannin stated:
- The effect of proposed s 59B(5) RTA [Road Traffic Act 1974], is that evidence of a blood alcohol content of 0.15% or greater will, of itself, be probative and determinative of dangerous driving. That is, proof of intoxication by adducing evidence of a blood alcohol level of 0.15% or greater is sufficient to establish that the driver was incapable of having proper control of the vehicle, without requiring any further evidence such as expert medical evidence or the evidence of eye witnesses.*⁷³
- 4.10 In relation to blood alcohol levels less than 0.15%, Mr Tannin advised that the prosecution will be required to establish the blood alcohol reading that was given and will also be required to adduce evidence from a qualified person as to the nature and effect of alcohol intoxication and its likely effects upon the person’s ability to have proper control of a vehicle.⁷⁴
- 4.11 The Committee notes that there is a similar ‘deeming provision’ in section 63 of the *Road Traffic Act 1974* which relates to the offence of driving under the influence.
- 4.12 Section 63(1) of the *Road Traffic Act 1974* provides that a person who drives or attempts to drive a motor vehicle while under the influence of alcohol, drugs or alcohol and drugs **to such an extent as to be incapable of having proper control of the vehicle** commits an offence.

⁷² Letter from Mr George Tannin SC, State Counsel and Instructing Officer, October 11 2004, p14.

⁷³ Ibid, p7.

⁷⁴ Ibid, p14.

4.13 Section 63(5) deems a person with a blood alcohol reading of or exceeding 0.15% to be **incapable of having proper control of the vehicle**.

4.14 The Committee notes that the ‘deeming provision’ in proposed section 59B(5), does not apply to intoxication through drug use because as Mr Tannin advised:

The level at which consumption of drugs leads to a person being incapable of having proper control of the vehicle is a question of fact which is a matter of evidence to be adduced at trial.

Intoxication following the consumption of drugs cannot be the subject of a deeming provision, such as s 59B(5), which relates to the consumption of alcohol. It is very difficult to have an objective standard for drugs, given the range of drugs, their different effects upon different people, and the fact that the effect of drugs might differ when used in different combinations. It is also difficult to test for the levels and existence of some drugs within a person’s system.⁷⁵

PROPOSED SECTION 59B(6)

4.15 With respect to an offence under section 59(1) or section 59A(1), irrespective of whether the ‘deeming provision’ applies, proposed section 59B(6) provides that:

(6) *In any proceeding for an offence against section 59 or 59A it is a defence for the person charged to prove that the death, grievous bodily harm or bodily harm occasioned by the incident was not in any way attributable (as relevant) -*

(a) *to the fact that the person charged was under the influence of alcohol, drugs, or alcohol and drugs; or*

(b) *to the manner (which expression includes speed) in which the motor vehicle was driven.*

4.16 Before addressing the issues raised in relation to this proposed subsection, the Committee notes Mr Tannin’s advice that, without the express exemption in proposed section 59B(6), the ‘deeming provision’ in proposed section 59B(5) (that is, that a person with a blood alcohol level of or exceeding 0.15% is incapable of having proper control of a vehicle) would not be rebuttable.⁷⁶

4.17 The Committee considers that the two significant issues in relation to proposed section 59B(6) are:

⁷⁵ Ibid, p8.

- the reversal of the burden of proof; and
- the operation of the statutory defences and the excuses in Chapter 5 of the *Criminal Code*.

PROPOSED SECTION 59B(6) - REVERSAL OF THE BURDEN OF PROOF

Persuasive burden of proof

- 4.18 Submissions received by the Committee asserted that the amendments in the Bill reverse the “*burden of proof*” or “*onus of proof*”.⁷⁷ Consequently, in order to assist the Legislative Council to consider this issue, the Committee sets out the relevant legal principles concerning the burden of proof.
- 4.19 The Committee notes that at **common law** it is clearly established that the burden or onus of proving every element of an offence rests with the prosecution.⁷⁸ This burden is often referred to as the **persuasive burden of proof**.
- 4.20 The prosecution must discharge the persuasive burden of proof such that the case against the accused is established beyond reasonable doubt. This requirement is central to the common law right of a person to be presumed innocent until proven guilty.⁷⁹
- 4.21 The classic statement of this **common law** principle was set out by Viscount Sankey LC in *Woolmington v Director of Public Prosecutions* [1935] AC 462 at 481- 482:

Throughout the web of English Criminal Law one golden thread is always to be seen, that is the duty of the prosecution to prove the prisoner's guilt subject to what I have already said as to the defence of insanity and subject also to any statutory exception. If, at the end of and on the whole of the case there is a reasonable doubt, created by the evidence given by either the prosecution or the prisoner, as to whether the prisoner killed the deceased with a malicious intention, the prosecution has not made out the case and the prisoner is entitled to an acquittal. No matter what the charge or where the trial, the principle that the prosecution must prove the guilt of the prisoner is

⁷⁶ Mr George Tannin SC, State Counsel and Instructing Officer, *Transcript of Evidence*, October 11 2004, p4. This would mean that no evidence to the contrary could be led.

⁷⁷ Submission No 1 from Dr Neil Morgan, Director of Studies, Crime Research Centre, University of Western Australia, September 28 2004, p2; submission No 3 from the Law Society of Western Australia, October 6 2004, p1; submission No 4 from Criminal Lawyers Association, October 8 2004, p1; and submission No 6 from Mr Noel Crichton-Browne, October 14 2004, p4.

⁷⁸ See for example *DPP v United Telecasters* (1990) 91 ALR 1, 5 citing *Woolmington v Director of Public Prosecutions* [1935] AC 462, 481-482.

⁷⁹ See *Halsbury's Laws of Australia*, Butterworths online, paragraph 80-1620 citing *Woolmington v Director of Public Prosecutions* [1935] AC 462.

part of the common law of England and no attempt to whittle it down can be entertained.

- 4.22 The Committee notes that in Western Australia, the criminal law is not based on the **common law** but is principally based on the *Criminal Code*.⁸⁰ However, as the *Criminal Code* is silent in relation to the persuasive burden of proof, it has been accepted that the rule in *Woolmington v Director of Public Prosecutions* operates with respect to criminal proceedings.⁸¹
- 4.23 The persuasive burden of proof rests with the prosecution not only in relation to the positive elements of the offence but also in relation to certain matters of **excuse**⁸² which may arise on the evidence.⁸³
- 4.24 Chapter 5 of the *Criminal Code* contains matters of **excuse** such as ‘accident’ or ‘mistake of fact’. Section 36 of the *Criminal Code* provides that Chapter 5 applies to all persons charged with any offence against the **statute law of Western Australia**.⁸⁴
- 4.25 The effect of section 36 is that the excuses in Chapter 5 apply not only to offences against the *Criminal Code* but also to offences in other statutes. What flows from this is that a person cannot be guilty of an offence in the *Criminal Code* or another statute, such as the *Road Traffic Act 1974*, unless the prosecution negatives the application of any Chapter 5 excuse raised by the evidence (apart from insanity).⁸⁵
- 4.26 The quote from *Woolmington v Director of Public Prosecutions* indicates that there are exceptions to the principle relating to the persuasive burden of proof, namely:
- the defence of **insanity**; and

⁸⁰ RG Kenny, *An Introduction to Criminal Law in Queensland and Western Australia*, Butterworths, Australia, 2000, p1. See also for example *R v Hutchinson* [2003] WASCA (Unreported, Malcolm CJ, Steytler and McKechnie JJ, December 18 2003) 323, paragraph 33.

⁸¹ See for example *R v Hutchinson* [2003] WASCA (Unreported, Malcolm CJ, Steytler and McKechnie JJ, December 18 2003) 323, paragraph 34 citing *R v Mullen* (1938) 59 CLR 124. See also *R v Ward* (2000) 118 ACrimR 78.

⁸² These matters are said to be appropriately referred to as ‘excuses’ rather than ‘defences’ because the latter term is reserved for those matters where the persuasive onus of proof rests with the accused. RG Kenny, *An Introduction to Criminal Law in Queensland and Western Australia*, Butterworths, Australia, 2000, p76.

⁸³ RG Kenny, *An Introduction to Criminal Law in Queensland and Western Australia*, Butterworths, Australia, 2000, p71.

⁸⁴ In *Harper v Racing Penalties Appeal Tribunal* (1995) 12 WAR 337, Anderson and Owen JJ stated that although the term “statute law” was not defined for the purposes of the *Criminal Code*, the phrase would have a similar meaning to “written law” which is defined in the *Interpretation Act 1984* as an Act of Parliament and subsidiary legislation.

⁸⁵ See RG Kenny, *An Introduction to Criminal Law in Queensland and Western Australia*, Butterworths, Australia, 2000, p94; *R v Clare* (1993) 72 ACrimR 357 and *R v Hutchinson* [2003] WASCA (Unreported, Malcolm CJ, Steytler and McKechnie JJ, December 18 2003) 323. Insanity is an exception. See paragraph 4.26.

- **statutory exceptions** created by legislation.

- 4.27 Where the persuasive burden of proof is reversed by these exceptions, the accused only has to establish the matter they are required to prove on the balance of probabilities, which is less onerous than the requirement of proof beyond reasonable doubt.⁸⁶
- 4.28 The second exception to the principle in *Woolmington v Director of Public Prosecutions* - **statutory exceptions** - is relevant to the Bill and is considered in more detail at paragraphs 4.39 to 4.51.
- 4.29 When considering statutes other than the *Criminal Code*, the intention of the Parliament must be ascertained in order to determine who bears the persuasive burden of proof. The statute may contain an express reversal (for example a provision which declares proof of a particular matter to be a defence⁸⁷) or an implied reversal.⁸⁸
- 4.30 As a result of concerns raised by the submissions with respect to the Bill and the reversal of the burden of proof, the subcommittee sought from Parliamentary Counsel a list of those Western Australian statutes where the burden of proof is reversed. The advice received from Parliamentary Counsel is attached as Appendix 5.

Evidential burden

- 4.31 The Committee notes that the persuasive burden of proof should be distinguished from the related concept of the **evidential burden**. The evidential burden does not relate to proof of anything, instead it is “*simply a burden to show that there is some evidence which warrants the attention of the jury*”.⁸⁹ Thus, it is much easier to discharge the evidential burden than the persuasive burden of proof.
- 4.32 In order to understand this concept it is necessary to outline the different roles of the judge and jury in a criminal trial and how they relate to the evidential burden. This may be summarised as follows:

⁸⁶ See for example *DPP v United Telecasters* (1990) 91 ALR 1, 6.

⁸⁷ RG Kenny, *An Introduction to Criminal Law in Queensland and Western Australia*, Butterworths, Australia, 2000, pp75-76 at paragraphs 6.12 and 6.14 which provides as an example section 204A(4) of the *Criminal Code* which states that:

“(4) It is a defence to a charge under subsection (2) to prove the accused person -

(a) believed on reasonable grounds that the child was of or over the age of 16 years; and

(b) was not more than 3 years older than the child.”

⁸⁸ RG Kenny, *An Introduction to Criminal Law in Queensland and Western Australia*, Butterworths, Australia, 2000, pp75-76 at paragraphs 6.12 and 6.14.

⁸⁹ The authors of *Criminal Law in Queensland and Western Australia* assert that it is misleading to refer to the “*evidential burden of proof*”. See E Colvin, S Linden and J McKechnie, *Criminal Law in Queensland and Western Australia*, Butterworths, Australia, 2001, p15.

*The jury is responsible for making the relevant determinations of fact with respect to those matters which have been put in issue by the evidence. Nevertheless, in order to avoid confusing the jury and to protect the accused, the judge is responsible for first deciding what is in issue. The prosecution ordinarily carries the **burden of leading evidence which directly or inferentially supports all aspects of its case.** If it fails to do so, the case is withdrawn from the jury.⁹⁰*
(emphasis added)

- 4.33 Whilst the evidential burden rests with the prosecution with respect to the elements of the offence, the Committee notes that this is reversed and placed with the accused where:⁹¹
- the persuasive burden of proof is shifted to the accused, by the use of the defence of insanity or a statutory reversal of the burden of proof; or
 - an accused relies on an excuse in Chapter 5 of the *Criminal Code* (such as accident, extraordinary emergency or mistake of fact).

Other parliamentary committees

- 4.34 Parliamentary committees scrutinising bills have noted and raised concerns with provisions that reverse the onus of proof.
- 4.35 The Senate Standing Committee for the Scrutiny of Bills usually comments adversely on a bill which places the onus on an accused person to disprove one or more of the elements of the offence with which he or she is charged.⁹² As a matter of general practice that Committee has adopted the following approach:

[N]o policy considerations have been advanced which warrant an erosion of what must surely be one of the most fundamental rights of a citizen: the right not to be convicted of a crime until he [or she] has been proved guilty beyond reasonable doubt. While society has the role by means of its laws to protect itself, its institutions and the individual, the Committee is not convinced that placing a persuasive

⁹⁰ E Colvin, S Linden and J McKechnie, *Criminal Law in Queensland and Western Australia*, Butterworths, Australia, 2001, p15.

⁹¹ RG Kenny, *An Introduction to Criminal Law in Queensland and Western Australia*, Butterworths, Australia, 2000, p73.

⁹² Commonwealth, Senate Standing Committee for the Scrutiny of Bills, *The Work of the Committee during the 39th Parliament, November 1998 - October 2001*, June 2002, p31.

*burden of proof on defendants plays an essential or irreplaceable part in that role.*⁹³

- 4.36 The Scrutiny of Legislation Committee of the Queensland Parliament is directed by legislation to consider whether proposed legislation has sufficient regard to the rights and liberties of individuals including whether the provisions reverse the burden of proof in criminal proceedings without adequate justification.⁹⁴
- 4.37 The Legislation Review Committee of the New South Wales Parliament is also directed by legislation to consider whether any bill trespasses unduly on personal rights and liberties and thus considers provisions where the burden of proof is reversed.⁹⁵
- 4.38 Standing Committees of the Legislative Council of Western Australia have also noted and commented on provisions where the burden of proof has been reversed.⁹⁶

Proposed section 59B(6) - reversal of the persuasive burden of proof?

- 4.39 The submissions, including those of Dr Neil Morgan of the Crime Research Centre, the Law Society of Western Australia and the Criminal Lawyers Association of Western Australia, asserted that the Bill contains a reversal of the onus of proof or persuasive burden of proof.⁹⁷
- 4.40 Proposed section 59B(6) provides that it is a “*defence for the person charged to prove*” that the death, grievous bodily harm or bodily harm occasioned by the incident was “*not, in any way, attributable to*” certain conduct on the part of the accused.
- 4.41 By creating a statutory “*defence*” which the person charged has to prove, the emphasised words might be seen to expressly reverse the persuasive burden of proof.⁹⁸

⁹³ Commonwealth, Senate Standing Committee for the Scrutiny of Bills, *The Work of the Committee during the 39th Parliament, November 1998 - October 2001*, June 2002, p31.

⁹⁴ Queensland, Legislative Assembly, Scrutiny of Legislation Committee, *Annual Report 1 July 2002 to 30 June 2003*, October 2003, p2 and p7.

⁹⁵ See for example, New South Wales, Parliament, Legislation Review Committee, *Legislation Review Digest, No 11 of 2004*, September 13 2004, piii and p33.

⁹⁶ Western Australia, Legislative Council, Public Administration and Finance Committee, *Economic Regulation Authority Bill 2002*, May 2003, p22; Western Australia, Legislative Council, Uniform Legislation and General Purposes Committee, *Offshore Minerals Bill 2001, Offshore Minerals (Registration Fees) Bill 2001 and Offshore Minerals (Consequential Amendments) Bill 2001*, June 2002, pp49-50; and Western Australia, Legislative Council, Uniform Legislation and General Purposes Committee, *Censorship Amendment Bill 2002*, October 2002, p12.

⁹⁷ Submission No 1 from Dr Neil Morgan, Director of Studies, Crime Research Centre, University of Western Australia, September 28 2004, p2; submission No 3 from the Law Society of Western Australia, October 6 2004, p1 and submission No 4 from Criminal Lawyers Association, October 8 2004, p1.

⁹⁸ RG Kenny, *An Introduction to Criminal Law in Queensland and Western Australia*, Butterworths, Australia, 2000, pp75-76 at paragraphs 6.12 and 6.14 which provides as an example section 204A(4) of the *Criminal Code* which states that:

As indicated, when the persuasive burden of proof is placed on the accused, they are required to discharge that burden on the balance of probabilities.

- 4.42 If proposed section 59B(6) reverses the persuasive burden of proof, it follows that the accused will also bear the evidential burden with respect to the defences contained in that proposed subsection. However, significantly, Mr Tannin advised the subcommittee that it does not reverse the persuasive burden of proof stating as follows:

The amendments to the Road Traffic Act introduced by this Bill, in particular, proposed s 59B(6) to which the Subcommittee has referred, does not introduce a reversal of the persuasive burden of proof. Section 59B(6) of the Bill provides a defence which is available to a person charged with dangerous driving. ...

First, however, the prosecution would need to establish that an offence of dangerous driving occasioning death, grievous bodily harm or bodily harm has been committed. Therefore, the prosecution must establish that, first, the vehicle was involved in an incident, resulting in death, grievous bodily harm or bodily harm. Secondly, that the driver of the vehicle was drunk or intoxicated to such an extent as to be incapable of having proper control of the vehicle, or was driving in a manner that is dangerous to the public. ...

The amendments introduced by this Bill intend to simplify requirements of causation, for the offence of dangerous driving occasioning death, grievous bodily harm or bodily harm. In order to prove the commission of an offence, the prosecution is not required to prove a causative link between the person driving the vehicle and the death, grievous bodily harm or bodily harm that results.⁹⁹

- 4.43 The Committee notes that a similar provision in the *Crimes Act 1900* (NSW) was held by the Supreme Court of New South Wales to place the burden of proof on the accused with the standard of that proof being on the balance of probabilities.¹⁰⁰

“(4) It is a defence to a charge under subsection (2) to prove the accused person -
 (a) believed on reasonable grounds that the child was of or over the age of 16 years; and
 (b) was not more than 3 years older than the child.”

⁹⁹ Letter from Mr George Tannin SC, State Counsel and Instructing Officer, October 11 2004, pp15-16.

¹⁰⁰ The relevant provision is section 52A of the *Crimes Act 1900* (NSW). This phrase was considered by the Supreme Court of New South Wales Court of Criminal Appeal in *Regina v Ganderton* [1998] 60364/98 (Unreported, Sully, Sperling and James JJ, September 17 1998), per Sperling and James JJ.

Committee observations

4.44 In considering the conflicting views with respect to the burden of proof, the Committee is of the view that this issue needs to be considered in the context of the broader amendments to causation.

Current legislation

4.45 The Committee notes that currently, for the purposes of sections 59 and 59A, the prosecution is required to prove that:

- the person was driving dangerously; and
- the driving caused the death, grievous bodily harm or bodily harm. Thus a causal link must be shown.¹⁰¹

4.46 If there is an intervening event such as a pedestrian unexpectedly stepping in front of the vehicle, the causal link between the person's driving and the harm might be broken and the prosecution is required to show that the harm still would have occurred despite that event.

Proposed amendments

4.47 The Bill seeks to remove the requirement in sections 59(1) and 59A(1) for the prosecution to prove a causal link between the driving of the "*person*" and the death, grievous bodily harm or bodily harm that results. Instead the prosecution is required to prove:

- an incident occasioned the death, grievous bodily harm or bodily harm; and
- the driver who is involved in that incident is under the influence to such an extent as to be incapable of controlling the vehicle or was driving in a dangerous manner.

4.48 The Committee notes that if there is an intervening event, such as a pedestrian unexpectedly stepping in front of the vehicle, proposed section 59B(6) requires the accused to show that the death, grievous bodily harm or bodily harm was in no way attributable to their conduct (as described in this subsection).

4.49 Thus under the proposed amendments there is no requirement for the prosecution to establish a causal link between the person's driving and the harm. Instead the prosecution is required to establish that the "*incident*" occasioned the harm. This amendment combined with proposed section 59B(6) means that if there is a causal break, the prosecution is no longer required to overcome this factor but the accused is

¹⁰¹ *Kaighin v R* (1990) 11 MVR 119, 123.

required to prove the causal break. In this manner, the amendments might be seen as reversing the persuasive burden of proof.

- 4.50 The Committee considers that the first unusual aspect of this Bill is that it removes the concept that criminal punishment is imposed because of a link between something that the accused has done and the harm that results. Instead, the criminal liability arises because a vehicle in the accused's control is involved in an incident that occasions death, grievous bodily harm or bodily harm and the accused at the time was incapable of controlling the vehicle or was driving dangerously. The element of fault or culpability which is usually central to a criminal offence is removed once it has been shown that the death, grievous bodily harm or bodily harm occurred while the accused was engaged in committing certain specified offences.
- 4.51 In the view of the Committee, the second unusual aspect is that the concept of fault and causation is brought back in only once the offence has been proven, because the accused is then given the opportunity to prove, on the balance of probabilities, that the death, grievous bodily harm or bodily harm was "*not in any way attributable to*" their criminal conduct. It is not strictly speaking a reversal of the onus of proof because the defence requires the proof of something that is not an element of the offence.

PROPOSED SECTION 59B(6) - STATUTORY DEFENCES AND *CRIMINAL CODE* EXCUSES

- 4.52 With respect to section 59B(6), the Committee also considered:
- the operation of the statutory defences; and
 - the interaction between those defences and the Chapter 5 excuses in the *Criminal Code*.

Statutory defences

- 4.53 The Committee notes that a key element of statutory defences is that a defence is only established if the death, grievous bodily harm or bodily harm is "*not in any way attributable to*" certain conduct on the part of the accused.
- 4.54 The Explanatory Memorandum indicates that these words mean that if the death or harm was, in part, attributable to the influence of drugs or alcohol and partly attributable to some other factor, then the defence will not be established.¹⁰² This construction is supported by cases on a similar provision in the *Crimes Act 1900* (NSW).¹⁰³

¹⁰² Explanatory Memorandum, Road Traffic Amendment (Dangerous Driving) Bill 2004, p3.

¹⁰³ The relevant provision is section 52A of the *Crimes Act 1900* (NSW). This phrase was considered by the Supreme Court of New South Wales Court of Criminal Appeal in *Regina v Ganderton* [1998] 60364/98 (Unreported, Sully, Sperlberg and James JJ, September 17 1998).

- 4.55 Mr Tannin advised the Committee that discharging the onus in proposed section 59B(6) is not going to be easy and that the words “*not in any way attributable to*” were used deliberately so as to exempt only the most extreme cases in which, for example, there is no blame at all.¹⁰⁴
- 4.56 The subcommittee asked Mr Tannin how the statutory defences would operate if a person intending to commit suicide stepped in front of a vehicle. Mr Tannin advised that:

*if it could be proven that a person deliberately walked in front of a vehicle, if it could be established, on the basis of this evidence, that the ensuing death was in no way attributable to the drugs, alcohol or manner of driving, it would be open to negative causation.*¹⁰⁵

- 4.57 Mr Prior emphasised that it was critical to consider how the statutory defences would operate in practice, stating:

Let us understand practically what we are dealing with here. We are dealing with someone who, by definition, has a reading of 0.15. We are dealing with someone who has had an accident and, by law, you are saying that the onus is on them to collect the evidence because if they do not do it at the time, it will be difficult to do it later. That person will not be a trained person. If they happen to be wealthy, they might, in about a week's time, get some legal advice and instruct a lawyer, who then instructs a traffic engineer to reconstruct the accident and so on. Given these are traffic offences, a significant amount of them will be dealt with in the Court of Petty Sessions. People will not have legal aid. People who have financial backing and capital will be able to pay for lawyers, engineers and so on to get the relevant evidence to rebut the deeming provision. The other thing that should be indicated is this: let us think of the practical circumstances of trying to collect evidence when you are the accused person and, as I say, over .15 and possibly at the scene because you are advised of the change of the law. Someone, a young child or an adult, steps out immediately in front of you when you are driving a car. That person is the only witness. That person dies or is seriously injured and you are the only person in the car. You are then in a

¹⁰⁴ Mr George Tannin SC, State Counsel and Instructing Officer, *Transcript of Evidence*, October 11 2004, p4.

¹⁰⁵ Letter from Mr George Tannin SC, State Counsel and Instructing Officer, October 11 2004, p11.

*position in which you have to try to find evidence to rebut that presumption.*¹⁰⁶

- 4.58 The Committee notes that the police should also conduct investigations at the accident scene.
- 4.59 A submission raised concerns about the application of section 59(1) with respect to a situation where a person pulls over to the verge, parks the car and goes to sleep when a short time later a suicidal motorcyclist drives off the road and hits the car, killing himself. The Committee observes that in such a situation, a person may not need to rely on the statutory defences because the High Court has held that a person cannot be criminally responsible for driving in a car in a manner dangerous to the public whilst asleep, as their actions are not conscious or voluntary.¹⁰⁷

Excuses in Chapter 5 of the *Criminal Code*

- 4.60 One of the issues that arose during the inquiry was how section 23 in Chapter 5 of the *Criminal Code* (which provides the excuse of accident) interacts with the statutory defences.
- 4.61 As indicated in paragraph 4.25, the excuses in Chapter 5 of the *Criminal Code* apply to offences in other statutes, like the *Road Traffic Act 1974*. If any of those excuses apply to the offence then the prosecution is required to negative the application of that excuse. This contrasts with the statutory defences that the accused is required to prove.
- 4.62 In relation to section 23 of the *Criminal Code*, Mr Tannin advised that:

Section 23 of the Criminal Code provides:

Subject to the express provisions of this Code relating to negligent acts and omissions, a person is not criminally responsible for an act or omission which occurs independently of the exercise of his will, or for an event which occurs by accident...

However, s 23 of the Criminal Code must be read in light of s 266 of the Criminal Code, which provides that:

266. Duty of persons in charge of dangerous things

¹⁰⁶ Mr John Prior, Treasurer and Spokesperson, Criminal Lawyers Association of Western Australia, *Transcript of Evidence*, October 14 2004, p2.

¹⁰⁷ *Jiminez v R* (1992) 106 ALR 162.

It is the duty of every person who has in his charge or under his control anything, whether living or inanimate, and whether moving or stationary, of such a nature that, in the absence of care or precaution in its use or management, the life, safety, or health of any person may be endangered, to use reasonable care and take reasonable precautions to avoid such danger; and he is held to have caused any consequences which result to the life or health of any person by reason of any omission to perform that duty.

In Callaghan v the Queen (1952-3) 87 CLR 115, the High Court considered the relationship between section 23 and section 266 of the Criminal Code. Callaghan was convicted by a jury of dangerous driving causing death, pursuant to s 291A of the Criminal Code (now repealed). In a joint judgment, their Honours Dixon CJ, Webb, Fullager, Kitto JJ considered that:

'The reference to the express provisions of the Code relating to negligent acts and omissions covers s 266 ... [B]ecause s 23 is qualified by being made subject to the provisions relating to negligent acts and omissions and s 266 is such a provision, it must be taken that the fact that an event causing death occurs independently of the accused's will or by accident can afford no excuse within s 268 if it falls within s 266.'

Similarly, in Evgeniou v R [1965] ALR 209, the High Court considered the relationship between s 23 of the Queensland Code (which is identical to s 23 of the WA Criminal Code) and s 289, which is identical to s 266 of the Criminal Code (WA) outlined above. The High Court held that section 289 excluded the operation of s 23 of the Criminal Code.

It would appear that the offence of dangerous driving occasioning death or grievous bodily harm (s 59 Road Traffic Act) or occasioning bodily harm (s 59A Road Traffic Act) falls within s 266 of the Criminal Code, such that s 23 of the Criminal Code can provide no defence.¹⁰⁸

- 4.63 Consequently, it appears that section 23 of the *Criminal Code* cannot operate as an excuse for an accused in relation to an offence under section 59(1) or section 59A(1).

¹⁰⁸

Letter from Mr George Tannin SC, State Counsel and Instructing Officer, October 11 2004, pp16-17.

- 4.64 The Committee was also interested in the extent to which other excuses such as accident, mistake of fact or extraordinary emergency in Chapter 5 of the *Criminal Code* would be available to an accused charged with an offence under section 59(1) or section 59A(1).
- 4.65 Mr Tannin advised that with the exception of section 23 of the *Criminal Code*, the provisions of Chapter 5 of the *Criminal Code* apply to the dangerous driving offences in the *Road Traffic Act 1974*. Mr Tannin also provided a helpful summary of how the excuses in Chapter 5 operate in relation to dangerous driving offences. This advice is attached as Appendix 6.

CHAPTER 5

OTHER CLAUSES AND ISSUES

INTRODUCTION

5.1 In this Chapter, the Committee addresses:

- the other clauses of the Bill which are an adjunct to the changes to the dangerous driving offences in the *Road Traffic Act 1974*; and
- other issues raised in relation to the Bill which have not been dealt with elsewhere in the Report.

OTHER CLAUSES

Clause 4

5.2 This clause proposes to amend section 51 of the *Road Traffic Act 1974* to provide that if a probationary driver is convicted of an offence against section 59A (dangerous driving causing bodily harm) then their licence is cancelled.¹⁰⁹

5.3 Currently, section 51 of the *Road Traffic Act 1974* provides that a conviction of an offence under section 59 (dangerous driving causing death or grievous bodily harm) is a ground for the cancellation of the licence of a probationary driver.

5.4 The Committee notes that clause 4 proposes to extend the operation of section 51 to offences against section 59A which is the other dangerous driving offence in the *Road Traffic Act 1974* where the offence results in injury.

Clause 8

5.5 Clause 8 proposes that the definitions in section 65 of the *Road Traffic Act 1974* which relate alcohol and drug testing apply to proposed section 59B(5).

Clause 9

5.6 Clause 9 contains amendments to section 66 of the *Road Traffic Act 1974* which relates to the requirement to submit a sample of breath or blood for analysis. Clause 9 proposes to insert a new subsection into section 66 which provides that where a member of the Police Force:

¹⁰⁹ Explanatory Memorandum, Road Traffic Amendment (Dangerous Driving) Bill 2004, p1.

- has reasonable grounds to believe that an offence against either section 59 or section 59A has been committed; and
- does not know, or has doubt as to who the driver of the vehicle was, but has reasonable grounds to believe that the person may have been the driver of the vehicle;

the police officer may require that person to provide a sample for analysis.

5.7 Mr Tannin advised that the basis for extending the powers of the Police Force is:

to ensure that the serious consequences of driving under the influence of alcohol introduced by the amendments contained in this Bill cannot simply be frustrated by the refusal of a driver to submit blood or urine for analysis. Therefore, police officers are provided with additional powers under clause 9 of the Bill to ensure that the Bill is effective in operation.

Notably, the power to compel a police officer to require a person to give a sample is an incursion upon civil liberties. However, this incursion is considered necessary to ensure that the underlying policy of the Bill can be achieved. The police powers are limited, such that where a police officer requires a person to give a sample, the police officer is required to advise the person concerned that he or she believes that the motor vehicle of which the person was, or was believed to have been the driver has been involved in an incident occasioning the death of, or grievous bodily harm or bodily harm to, another person; and explains to the person the consequences of failure to comply with this requirement.¹¹⁰

Clause 10

5.8 The amendments proposed by clause 10 to section 67 of the *Road Traffic Act 1974*, make it an offence to refuse to provide a sample in the circumstances outlined in clause 9, if the police officer has explained to the person the consequences of a failure to comply with the requirement.

5.9 The penalty for a failure to comply in these circumstances is:

- 14 years imprisonment and a fine of any amount (plus disqualification from holding or obtaining a driver's licence for not less than two years).

5.10 The summary conviction penalty is:

¹¹⁰ Letter from Mr George Tannin SC, State Counsel and Instructing Officer, October 11 2004, p18.

- 18 months imprisonment or a fine of 160 penalty units (plus disqualification from holding or obtaining a driver's licence for at least 18 months).

5.11 The Committee notes that the penalty for refusing to provide a sample in these circumstances is substantial and equivalent to the penalty for an offence of dangerous driving causing grievous bodily harm where there are circumstances of aggravation.

Clause 11

5.12 Section 72 of the *Road Traffic Act 1974* enables regulations to be made for the purpose of carrying out or giving effect to those sections of the Act which relate to driving offences where alcohol and drugs are involved.

5.13 Clause 11 proposes to include proposed section 59B(5) in section 72.

OTHER ISSUES

5.14 The Committee sought advice from Mr Tannin in relation to the various issues raised by the submissions. In this part of the Report, the Committee sets out the advice from Mr Tannin regarding those issues which have not been canvassed elsewhere in the Report with the object of facilitating debate in the Legislative Council.

Clause 7 - proposed section 59B(1) - “as a passenger or otherwise”

5.15 The Committee received a submission querying the inclusion of the words “as a passenger or otherwise” in proposed sections 59B(1)(a), (b) and (c).¹¹¹ These proposed paragraphs relate to the meaning of the term “incident” for the purposes of sections 59(1) and 59A(1). With respect to this issue, Mr Tannin advised that:

The reference to “whether as a passenger or otherwise” was included to ensure that the ambit of the Bill was broad.

Similarly, section 52A(5) of the Crimes Act 1900 (NSW) also refers to a person ‘being conveyed in or on the vehicle (whether as a passenger or otherwise)’ (see ss 52A(5)(a), (b), (g), (h) Crimes Act 1900 (NSW)).

The use of the phrase “whether as a passenger or otherwise” ensures that persons would extend beyond merely passengers being driven in the vehicle and would include all persons being conveyed in or on vehicles, for example, persons being towed or persons car surfing (who might not be considered ‘passengers’ of the vehicle).¹¹²

¹¹¹ Submission No 2 from Hon Murray Criddle MLC, October 6 2004, p1.

¹¹² Letter from Mr George Tannin SC, State Counsel and Instructing Officer, October 11 2004, pp11-12.

Clause 7 - proposed section 59B(5) - alcohol and drugs

- 5.16 The Committee received a submission querying how proposed section 59B(5) (the ‘deeming provision’) applies to a situation where a person had consumed both drugs and alcohol.¹¹³ With respect to this issue, Mr Tannin advised that:

Section 59B(5) prescribes a strict measure in relation to the consumption of alcohol. Once a driver has been found to have a blood alcohol level of 0.15% or above, the driver is deemed to be so intoxicated so as to be incapable of having proper control of the vehicle.

When alcohol and drugs are consumed in combination, the effect of alcohol in combination with drugs may make a driver incapable of having proper control of the vehicle. This is a matter of fact to be adduced by evidence at trial.¹¹⁴

CONCLUSION

- 5.17 The Committee is of the view that in considering the Bill, the Legislative Council should be cognisant of the amendments in clauses 5 and 6 which are stated to simplify causation for offences against sections 59 and 59A of the *Road Traffic Act 1974* and consequently, should consider the effect of these amendments.
- 5.18 The Legislative Council should also be aware of the effect of proposed section 59B(5) which is a ‘deeming provision’ and proposed section 59B(6) which places a burden on the accused to prove any causal break.
- 5.19 The Committee is of the view that the Bill does not simply reverse the onus of proof but initially creates an offence where, whether the accused caused the death, grievous bodily harm or bodily harm, is irrelevant. This is followed by the statutory defences, which brings in the issue of causation, which is not part of the elements of the offence.
- 5.20 The majority of the Committee does not support a recommendation that the Road Traffic Amendment (Dangerous Driving) Bill 2004 do pass without amendment on the basis that the intent of this Report, in the view of the majority, is to better inform the Legislative Council in relation to any decision that it makes regarding the Bill.
- 5.21 Whilst accepting that the role of this Report is to better inform the Legislative Council, Hon Ken Travers MLC and Hon Kate Doust MLC dissented from the decision not to recommend the passage of the Bill without amendment on the basis that:

¹¹³ Submission No 2 from Hon Murray Criddle MLC, October 6 2004, p2.

¹¹⁴ Letter from Mr George Tannin SC, State Counsel and Instructing Officer, October 11 2004, pp13-14.

- There are many precedents where the measures used in this Bill are contained in existing legislation and the seriousness of these offences warrants their inclusion on this occasion. Further, the Bill has sufficient safeguards to address the concerns raised in submissions.
- Although the Bill simplifies the elements of causation, the prosecution is still required to prove that there was an incident occasioning death, grievous bodily harm or bodily harm and the driver was driving dangerously, either while under the influence of alcohol or drugs (or both) to such an extent as to be incapable of having proper control of the vehicle.
- The recognition, by use of a ‘deeming provision’, that a person with a blood alcohol content of 0.15% or greater is incapable of having control of the vehicle is reasonable and reflects a similar existing provision in section 63(5) of the *Road Traffic Act 1974*.
- The Bill will address deficiencies in the existing law to ensure that people who put lives at risk by driving when drunk or under the influence of drugs are made to bear the full responsibility for the consequences of their actions and will be a powerful deterrent against driving under the influence.

RECOMMENDATION

Recommendation 1: The Committee recommends that the House be fully cognisant of the impact of the Road Traffic Amendment (Dangerous Driving) Bill 2004 on the dangerous driving offences in the *Road Traffic Act 1974* which result in harm to persons, in particular:

- the effect of the removal of the requirement of a causal link between the driving by the “*person*” and the death, grievous bodily harm or bodily harm. Instead, the prosecution will be required to prove that the “*incident*” in which the driver was involved occasioned the death, grievous bodily harm or bodily harm thereby simplifying the proof of the offence;
- the effect of proposed section 59B(5) which is a ‘deeming provision’; and
- proposed section 59B(6) which places a burden on the accused to prove any causal break between the “*incident*” and the death, grievous bodily harm or bodily harm.

G. Watson

Hon Giz Watson MLC
Acting Chairman

Date: October 27 2004

APPENDIX 1
WRITTEN SUBMISSIONS RECEIVED

APPENDIX 1

WRITTEN SUBMISSIONS RECEIVED

	NAME	ORGANISATION	DATE
1	Dr Neil Morgan Director of Studies	Crime Research Centre, The University of Western Australia	September 28 2004
2	Hon Murray Criddle MLC	Member for Agricultural Region	October 6 2004
3	Mr Ian Weldon President	The Law Society of Western Australia	October 6 2004
4	Mr Hylton Quail President	Criminal Lawyers Association of Western Australia	October 8 2004
5	Hon Peter Foss MLC	Member for East Metropolitan Region	October 13 2004
6	Mr Noel Crichton-Brown	Citizen	October 14 2004
7	Mr Noel Crichton-Brown	Citizen	October 20 2004

APPENDIX 2

PUBLIC STATEMENT FROM THE WESTERN AUSTRALIAN POLICE SERVICE

APPENDIX 2

PUBLIC STATEMENT FROM THE WESTERN AUSTRALIAN POLICE SERVICE

Western Australia Police Service Response to the Standing Committee on Legislation – Subcommittee Inquiry Road Traffic Amendment (Dangerous Driving) Bill 2004

Response to questions touching the death of Jessica Meehan, 10 years on 8th August 2003 and the subsequent charge of Dangerous Driving causing Death preferred against Mitchell William WALSH-MCDONALD, 20 years of Carramar

As a result of preliminary enquiries Mr Walsh-McDonald was charged with Driving under the Influence of Alcohol and Driving without a current motor drivers license on 30 August, 2003.

He subsequently appeared in the Court of Petty Sessions, Joondalup on the 15 October 2003 and pleaded guilty to both offences receiving respective penalties of:

1. Driving under the influence – Fined \$1500 and Motor Drivers License disqualified and cancelled for a period of 2 years
2. No current motor drivers license (Fines Suspension) – Fined \$200

At the time of the initial inquiry into this tragic crash the investigator and his supervisor formed the opinion that there was insufficient evidence to support a prima facie case of Dangerous Driving Causing Death.

This opinion was based on the facts before them at the time in that:

- Walsh-McDonald was, at the time of the crash, driving within the 80kph speed limit associated with that area.
- Witness statements obtained at that time did not identify any errant driver behaviour prior to the crash.
- Walsh-McDonald stated that he did not see Jessica until she actually rode her bicycle in front of his vehicle.
- Evidence from Jessica's friend on the manner in which she (Jessica) crossed the road.
- Although a high alcohol reading was present in the driver there was no evidence to suggest that he was driving in a dangerous manner.
- Western Australia Case Law, on similar cases, does not support the nexus between high blood alcohol concentrations and dangerous driving – instead requiring the prosecution to prove some overt act to substantiate this.

Faced with this the investigators felt that, given the information at hand, they had insufficient evidence to substantiate the fact that a specific act committed by Walsh-McDonald had caused the crash and they believed there was no reasonable likelihood of a conviction.

The investigator recently provided the completed file for forwarding to the Coroner.

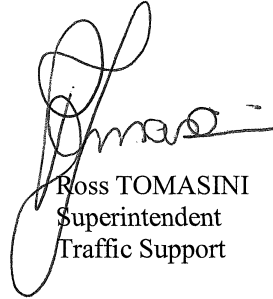
Major Crash Investigation Section undertook a complete review of the file and in so doing made further inquiries.

Resulting from the review process a charge of Dangerous Driving Causing Death was preferred on 6 October 2004. This has resulted from:

- Expert opinion provided from a pharmacologist that a driver with a blood alcohol concentration of 0.165 per cent is seriously impaired and at that level of alcohol concentration would be unable to recognise and respond in a timely manner to emergencies arising in traffic.
- This opinion is supported by evidence provided by witnesses and other supporting forensic evidence.
- Evidence Walsh-McDonald was cognisant of the effect that alcohol has on an individual's capacity to control a motor vehicle.
- The review of the complete investigation by a member of the Department of Public Prosecutions that supported a charge of Dangerous Driving Causing Death against Walsh-McDonald.



Ian BARNES
Acting Senior Sergeant
Major Crash Investigation Section



Ross TOMASINI
Superintendent
Traffic Support

13th October 2004

APPENDIX 3
ROAD TRAFFIC ACT 1974 - PROPOSED AMENDMENTS

APPENDIX 3

ROAD TRAFFIC ACT 1974 - PROPOSED AMENDMENTS

51. Cancellation of drivers' licences issued on probation

- (1) Where the holder of a driver's licence issued on probation -
- (a) is convicted of an offence -
 - (i) mentioned in section 277 of *The Criminal Code* and the offence arose out of the driving by him of a motor vehicle;
 - (ii) under section 378 of *The Criminal Code* where the property in question was a motor vehicle;
 - (iii) under section 53(1), section 54, 55, 56, 59, 59A, 61, 62, 62A, 64AA, 64A, 89, 90 or 97; or
 - (iv) under any regulation that may be prescribed for the purposes of this section;

or

 - (b) is disqualified by a court pursuant to the provisions of this or any other Act (other than the *Fines, Penalties and Infringement Notices Enforcement Act 1994*), from holding or obtaining a driver's licence,
- then, that licence is, by operation of this subsection, cancelled.
- (2) A person whose driver's licence is cancelled by operation of subsection (1) is disqualified from holding or obtaining a driver's licence -
- (a) for any period for which he is so disqualified by the court; or
 - (b) for a period of 3 months from the date of his conviction or, where he is convicted on more than one occasion of an offence mentioned in subsection (1), from the date of his latest conviction,
- whichever period terminates later.
- (3) Where a person who is the holder of a driver's licence issued on probation is disqualified by operation of section 103 from holding or obtaining a driver's licence -
- (a) the licence held by that person is, by operation of this subsection, cancelled; and
 - (b) that person is disqualified from holding or obtaining a driver's licence for a period of 3 months.

- (4) Where a person who is the holder of a driver's licence issued on probation is disqualified from holding or obtaining a driver's licence by a licence suspension order made under the *Fines, Penalties and Infringement Notices Enforcement Act 1994*, then that licence is, by operation of this subsection, suspended so long as the disqualification continues in force and during the period of suspension the licence is of no effect, but the provisions of this subsection do not operate so as to extend the period for which the licence may be valid or effective beyond the expiration of the period for which the licence was expressed to be issued or renewed.
- (5) Subsection (5a) applies to a person who does not hold a driver's licence under this Act and who, under this Act, could not be issued with a driver's licence except on probation.
- (5a) Where a person to whom this subsection applies is -
- (a) convicted of an offence such as is mentioned in subsection (1) or an offence against section 49(1)(a); or
 - (b) disqualified by a court from holding or obtaining a driver's licence,
that person is disqualified from holding or obtaining a licence -
 - (c) for any period for which he is so disqualified by the court; or
 - (d) for a period of 3 months from the date of his conviction or, where he is convicted on more than one occasion of an offence referred to in paragraph (a), from the date of his latest conviction,
whichever period terminates later.
- (5b) For the purposes of subsection (5), a person is not the holder of a driver's licence for any period during which the licence is cancelled or suspended or during any period of its invalidity.
- (6) Regulations made for the purpose of subsection (1)(a)(iv) may limit the application of that subsection to offences against the regulations that are attended by prescribed circumstances.

59. Dangerous driving causing death, injury, etc.

~~(1) A person who causes the death of or grievous bodily harm to another person by driving a motor vehicle in a manner (which expression includes speed) that is, having regard to all the circumstances of the case, dangerous to the public or to any person commits a crime and is liable to the penalty in subsection (3).~~

(1) If a motor vehicle driven by a person (the “driver”) is involved in an incident occasioning the death of, or grievous bodily harm to, another person and the driver was, at the time of the incident, driving the motor vehicle -

(a) while under the influence of alcohol, drugs, or alcohol and drugs to such an extent as to be incapable of having proper control of the vehicle; or

(b) in a manner (which expression includes speed) that is, having regard to all the circumstances of the case, dangerous to the public or to any person,

the driver commits a crime and is liable to the penalty in subsection (3).

Summary conviction penalty: imprisonment for 18 months or a fine of 160PU and in any event the court convicting the person shall order that he be disqualified from holding or obtaining a driver’s licence for a period of not less than 2 years.

(2) For the purposes of this section —

~~(a) a person causes the death of or grievous bodily harm to another person whether he does so directly or indirectly;~~

(b) it is immaterial that the death or grievous bodily harm might have been avoided by proper precaution on the part of a person other than the person charged or might have been prevented by proper care or treatment;

~~(c) when a person causes grievous bodily harm to another person and that other person receives surgical or medical treatment, and death results either from the harm or the treatment, he is deemed to have caused the death of that other person~~ when an incident occasions grievous bodily harm to a person and that person receives surgical or medical treatment, and death results either from the harm or the treatment, the incident is deemed to have occasioned the death of that person, although the immediate cause of death was the surgical or medical treatment if the treatment was reasonably proper in the circumstances and was applied in good faith; and

(d) the term “**grievous bodily harm**” has the same meaning as is given thereto in *The Criminal Code*.

(3) A person convicted on indictment of an offence against this section is liable -

~~(a) if at the time of the offence the motor vehicle was unlawfully being driven without the consent of the owner or person in charge of the motor vehicle~~ if the offence is against subsection (1)(a), or the offence is against subsection (1)(b) and is committed in circumstances of aggravation, to a fine of any amount and to imprisonment for —

- (i) 20 years, if the person has caused the death of another person; or
 - (ii) 14 years, if the person has caused grievous bodily harm to another person; or
- (b) in any other circumstances, to imprisonment for 4 years or a fine of 400PU,
- and, in any event, the court convicting that person shall order that he be disqualified from holding or obtaining a driver's licence for a period of not less than 2 years.
- (4) On the summary trial of a person charged with an offence against this section the person may, instead of being convicted of that offence, be convicted of an offence against section 59A, 61 or 62.

59A. Dangerous driving causing bodily harm

- ~~(1) A person who causes bodily harm to another person by driving a motor vehicle in a manner (which expression includes speed) that is, having regard to all the circumstances of the case, dangerous to the public or to any person commits an offence.~~
- (1) If a motor vehicle driven by a person (the “driver”) is involved in an incident occasioning bodily harm to another person and the driver was, at the time of the incident, driving the motor vehicle -
- (a) while under the influence of alcohol, drugs, or alcohol and drugs to such an extent as to be incapable of having proper control of the vehicle; or
 - (b) in a manner (which expression includes speed) that is, having regard to all the circumstances of the case, dangerous to the public or to any person,
- the driver commits an offence.
- (2) For the purposes of this section —
- ~~(a) a person causes bodily harm to another person whether he does so directly or indirectly;~~
 - (b) it is immaterial that the bodily harm might have been avoided by proper precaution on the part of a person other than the person charged or might have been prevented by proper care or treatment;
 - (c) the term “**bodily harm**” has the same meaning as is given thereto by *The Criminal Code*.
- (3) ~~A Subject to subsection (3a), a person convicted of an offence against subsection (1) is liable -~~
- (a) for a first offence, to a fine of 80 PU or to imprisonment for 9 months; and, in any event, the court convicting that person shall order that he be disqualified

from holding or obtaining a driver's licence for a period of not less than 12 months;

- (b) for a second or subsequent offence, to a fine of 160 PU or to imprisonment for 18 months; and, in any event, the court convicting that person shall order that he be disqualified from holding or obtaining a driver's licence for a period of not less than 18 months.

(3a) In the case of an offence under subsection (1)(a), or an offence under subsection (1)(b) committed in circumstances of aggravation, the offence is a crime and a person convicted of it is liable to a fine of any amount and imprisonment for 7 years and in any event the court convicting the person shall order that he be disqualified from holding or obtaining a driver's licence for a period of not less than 2 years.

Summary conviction penalty: imprisonment for

18 months or a fine of 160PU and in any event the court convicting the person shall order that he be disqualified from holding or obtaining a driver's licence for a period of not less than 18 months.

- (4) A person charged with an offence against this section may, instead of being convicted of that offence, be convicted of an offence against section 61 or 62.

59B. Section 59 and 59A offences: ancillary matters and defence

(1) For the purposes of sections 59 and 59A, the circumstances in which a motor vehicle is involved in an incident occasioning the death of, or grievous bodily harm or bodily harm to, a person include those in which the death or harm is occasioned through —

(a) the motor vehicle overturning or leaving a road while the person is being conveyed in or on the motor vehicle (whether as a passenger or otherwise);

(b) the person falling from the motor vehicle while being conveyed in or on it (whether as a passenger or otherwise);

(c) an impact between any object or thing and the motor vehicle while the person is being conveyed in or on the motor vehicle (whether as a passenger or otherwise);

(d) an impact between the person and the motor vehicle;

(e) an impact of the motor vehicle with another vehicle or an object or thing in, on or near which the person is at the time of impact;

(f) an impact with any object on or attached to the motor vehicle; or

(g) an impact with any object that is in motion through falling from the motor vehicle.

- (2) For the purposes of sections 59 and 59A, a motor vehicle is also involved in an incident occasioning the death of, or grievous bodily harm or bodily harm to, a person if the death or harm is occasioned through the motor vehicle —
- (a) causing an impact between other vehicles or between another vehicle and any object, thing or person;
 - (b) causing another vehicle to overturn or leave a road; or
 - (c) causing a person being conveyed in or on another vehicle to fall from that other vehicle.
- (3) For the purposes of sections 59 and 59A a person commits an offence in “**circumstances of aggravation**” if at the time of the alleged offence -
- (a) the person was unlawfully driving the vehicle concerned without the consent of the owner or person in charge of the vehicle;
 - (b) the person was driving the vehicle concerned on a road at a speed that exceeded, by more than 45 kilometres per hour, the speed limit (if any) applicable to that length of road; or
 - (c) the person was driving the vehicle concerned to escape pursuit by a member of the Police Force.
- (4) For the purposes of subsection (3)(c) it does not matter whether the pursuit was still proceeding, or had been suspended or terminated, at the time of the alleged offence.
- (5) In any proceeding for an offence against section 59 or 59A a person who had at the time of the alleged offence a percentage of alcohol in his blood of or exceeding 0.15% shall be deemed to have been under the influence of alcohol to such an extent as to be incapable of having proper control of a motor vehicle at the time of the alleged offence.
- (6) In any proceeding for an offence against section 59 or 59A it is a defence for the person charged to prove that the death, grievous bodily harm or bodily harm occasioned by the incident was not in any way attributable (as relevant) -
- (a) to the fact that the person charged was under the influence of alcohol, drugs, or alcohol and drugs; or
 - (b) to the manner (which expression includes speed) in which the motor vehicle was driven.

65. Definitions

For the purposes of section 59B(5) and sections 63 to 73, inclusive -

“analyst” means a person certified by the Director of the Chemistry Centre (WA) as being competent to determine the percentage of alcohol in bodily substances;

“authorised person” means a person certified by the Director of the Chemistry Centre (WA) as being competent to operate all types of breath analysing equipment;

“breath analysing equipment” means apparatus of a type approved by the Minister for ascertaining the percentage of alcohol present in a person’s blood, by analysis of a sample of his breath;

“drugs analyst” means a person certified by the Director of the Chemistry Centre (WA) as being competent to ascertain whether and to what extent drugs are present in bodily substances;

“medical practitioner” has the same meaning as it has in, and for the purposes of the *Medical Act 1894*;

“percentage of alcohol”, in relation to the blood of a person, means the number of grams of alcohol contained in 100 millilitres of blood;

“preliminary test” means a test of a sample of a person’s breath by means of apparatus of a type approved by the Minister for the purpose of providing an indication of the percentage of alcohol in the blood of the person or an indication as to whether or not the percentage of alcohol in the blood of a person equals or exceeds a predetermined percentage or an indication of whether or not alcohol is present in the blood of a person;

“registered nurse” means a person registered in division 1 of the register as defined in the *Nurses Act 1992*;

“self-testing breath analysing equipment” means breath analysing equipment of a type that is designated as self-testing apparatus under section 72(2a).

66. Requirement to submit sample of breath or blood for analysis

(1) A member of the Police Force may require the driver or person in charge of a motor vehicle, or any person he has reasonable grounds to believe was the driver or person in charge of a motor vehicle, to provide a sample of his breath for a preliminary test in accordance with the directions of the member of the Police Force, and for the purposes of this subsection may require that person to wait at the place at which the first-mentioned requirement was made.

(1aa) A member of the Police Force may -

(a) call upon the driver of a motor vehicle to stop the vehicle;

- (b) direct the driver of a motor vehicle to wait at a place indicated by the member of the Police Force,

in order that a requirement may be made under subsection (1).

(1a) Where a member of the Police Force -

- (a) has reasonable grounds to believe that the presence of a motor vehicle has occasioned, or its use has been an immediate or proximate cause of, personal injury or damage to property; and
- (b) does not know, or has doubt as to, who was the driver or person in charge of the motor vehicle at the time of that presence or use,

the member of the Police Force may require any person who he has reasonable grounds to believe may have been the driver or person in charge of the motor vehicle at that time to provide a sample of his breath for a preliminary test in accordance with the directions of the member of the Police Force, and for the purposes of this subsection may require that person to wait at the place at which the first-mentioned requirement was made.

(2) Where -

- (a) a person having provided a sample of his breath for a preliminary test -
- (i) it appears to a member of the Police Force that the preliminary test indicates that the percentage of alcohol in the blood of the person equals or exceeds 0.05% of alcohol; or
- (ii) it appears to a member of the Police Force that the preliminary test indicates that there is alcohol present in the blood of the person and the member of the Police Force has reasonable grounds to believe that the person is a person to whom section 64A applies;

or

- (b) a person having been so required, refuses or fails to provide, or appears to a member of the Police Force to be incapable of providing a sample of his breath for a preliminary test or refuses or fails to provide, or appears to a member of the Police Force to be incapable of providing, a sample of his breath in sufficient quantity to enable a preliminary test to be carried out; or
- (c) a member of the Police Force has reasonable grounds to believe that a person has committed an offence against section 63; or

(ca) a member of the Police Force -

- (i) has reasonable grounds to believe that an offence against section 59(1)(a) or 59A(1)(a) has been committed; and
- (ii) does not know, or has doubt as to, who was the driver of the motor vehicle concerned.

but has reasonable grounds to believe that a person may have been the driver of the motor vehicle; or

- (d) a member of the Police Force -
- (i) has reasonable grounds to believe that the presence of a motor vehicle has occasioned, or its use has been an immediate or proximate cause of, personal injury or damage to property; and
 - (ii) does not know, or has doubt as to, who was the driver or person in charge of the motor vehicle at the time of that presence or use,

but has reasonable grounds to believe that a person may have been the driver or person in charge of the motor vehicle at that time and that, if he was, he has committed an offence against section 63,

a member of the Police Force may require that person to provide a sample of his breath for analysis or to allow a medical practitioner or registered nurse to take a sample of his blood for analysis or to allow a sample of blood to be so taken and to provide a sample of his urine for analysis, pursuant to the provisions of subsections (4), (5), (6a), (7) and (8a), and for the purposes of this subsection may require that person to accompany a member of the Police Force to a police station or some other place, and may require that person to wait at any such police station or place.

- (3) A person who is required to supply a sample of his breath for a preliminary test or for analysis shall comply with that requirement by providing the sample of his breath into approved apparatus in accordance with the directions of a member of the Police Force or an authorised person, as the case may be.
- (4) A person shall not be required under subsection (2) to provide a sample of his breath for analysis if it appears to a member of the Police Force that -

[(a) deleted]

- (b) the sample of breath could not be provided within 4 hours after the time at which driving, attempted driving, use or management of a motor vehicle in circumstances giving rise to the requirement is believed to have taken place; or
 - (c) because of his physical condition he is incapable of providing the specimen of breath or a specimen of breath in sufficient quantity for analysis.
- (5) Where -
- (a) a member of the Police Force might require a person to provide a sample of his breath for analysis under subsection (2) but is precluded from so doing by subsection (4) or section 68(11); or
 - (b) a member of the Police Force might, by virtue of subsection (1) or (1a), require a person to provide a sample of his breath for a preliminary test but it appears to the member of the Police Force that the physical condition of the person is such as to render him incapable of providing a sample of his breath

in accordance with the directions of the member of the Police Force for a preliminary test,

then the member of the Police Force may require the person to allow a medical practitioner or registered nurse nominated by the person to take a sample of his blood for analysis or where the person is incapable of complying with that requirement, that member of the Police Force may cause a medical practitioner or registered nurse to take a sample of the blood of the person for analysis.

- (6) A person shall not be required to allow a medical practitioner or registered nurse to take a sample of his blood, and a medical practitioner or registered nurse shall not be caused to take a sample of the blood of a person under subsection (5) if it appears to the member of the Police Force that the sample cannot be taken within 4 hours after the time at which driving, attempted driving, use or management of a motor vehicle in circumstances giving rise to the requirement is believed to have taken place.

(6a) Where -

- (a) a member of the Police Force might, by virtue of subsection (2)(c), (ca) or (d), require a person to provide a sample of his breath for analysis but is precluded from so doing by subsection (4); and
- (b) under subsection (5), the member of the Police Force requires the person to allow a medical practitioner or registered nurse nominated by the person to take a sample of his blood for analysis,

the member of the Police Force may also require the person to provide the medical practitioner or registered nurse with a sample of his urine for analysis.

- (7) A person who might, under the preceding provisions of this section, be required to provide a sample of his breath for analysis or to allow a medical practitioner or registered nurse to take a sample of his blood for analysis may himself require that he be permitted to do either of those things; and a person who has been required to provide a sample of his breath for analysis may himself require that, instead of so doing, he be permitted to allow a medical practitioner or registered nurse nominated by him to take a sample of his blood for analysis.

- (8) A member of the Police Force shall give effect to the requirement of a person under subsection (7) if that can be done in terms of subsection (4) or (6), as the case may be.

(8a) Where -

- (a) a person might be required under subsection (2)(c), (ca) or (d) to provide a sample of his breath for analysis and, under subsection (7), the person himself requires that he be permitted to allow a medical practitioner or registered nurse nominated by him to take a sample of his blood for analysis; or
- (b) a person has been required under subsection (2)(c), (ca) or (d) to provide a sample of his breath for analysis and, under subsection (7), the person requires that, instead of so doing, he be permitted to allow a medical practitioner or registered nurse nominated by him to take a sample of his blood for analysis,

a member of the Police Force may require the person to also provide the medical practitioner or registered nurse with a sample of his urine for analysis.

- (9) Where -
- (a) pursuant to subsection (5) a member of the Police Force requires a person to allow a medical practitioner or registered nurse nominated by the person to take a sample of his blood for analysis and the person fails to nominate a medical practitioner or registered nurse; or
 - (b) pursuant to subsection (5) or (7) a person nominates a medical practitioner or registered nurse to take a sample of his blood but a member of the Police Force has reasonable grounds to believe that the medical practitioner or registered nurse so nominated -
 - (i) is not available within a distance of 40 kilometres;
 - (ii) is not available within the time limited by this section for taking blood samples;
 - (iii) refuses to take the blood sample; or
 - (iv) cannot readily be located,

the member of the Police Force may require the person to provide a sample of his breath for analysis or to allow a medical practitioner or registered nurse nominated by the member of the Police Force to take a sample of the person's blood for analysis and, where a requirement has been made under subsection (6a) or (8a), provide the medical practitioner or registered nurse with a sample of his urine for analysis, and for the purposes of this subsection may require the person to accompany a member of the Police Force to a place, and may require the person to wait at that place.

- (10) Where a person is apparently unconscious or seriously injured a member of the Police Force shall facilitate the provision of medical assistance for that person.
- (11) Where a person provides a sample of his breath for analysis pursuant to a requirement made under subsection (2)(c), (ca) or (d), or pursuant to his own requirement made under subsection (7), and the analysis result obtained pursuant to section 68 indicates -
- (a) that there is no alcohol present in the blood of the person; or
 - (b) that the percentage of alcohol present in the blood of the person is such that it does not reasonably explain the conduct, condition or appearance of the person by reason of which the requirement was made,

a member of the Police Force may require the person -

- (c) to allow a medical practitioner or registered nurse nominated by the person to take a sample of his blood for analysis; or
- (d) to provide a medical practitioner or registered nurse nominated by the person with a sample of his urine for analysis,

or to do both of those things, and for the purposes of this subsection may require the person to accompany a member of the Police Force to a place, and may require the person to wait at that place.

- (12) A person shall not be required -
- (a) to allow a medical practitioner or registered nurse to take a sample of his blood; or
 - (b) to provide a medical practitioner or registered nurse with a sample of his urine,

under subsection (11), and a medical practitioner or registered nurse shall not be caused to take a sample of the blood of a person under that subsection, if it appears to the member of the Police Force that the sample cannot be taken or given, as the case may be, within 4 hours after the time at which driving, attempted driving, use or management of a vehicle in circumstances giving rise to the requirement is believed to have taken place.

- (13) Where pursuant to subsection (11) -
- (a) a member of the Police Force requires a person -
 - (i) to allow a medical practitioner or registered nurse nominated by the person to take a sample of his blood for analysis; or
 - (ii) to provide a medical practitioner or registered nurse nominated by the person with a sample of his urine for analysis,or to do both of those things, and the person fails to nominate a medical practitioner or registered nurse; or
 - (b) a person nominates a medical practitioner or registered nurse to take a sample of his blood or to collect a sample of his urine, or for both of those purposes, but a member of the Police Force has reasonable grounds to believe that the medical practitioner or registered nurse so nominated -
 - (i) is not available within a distance of 40 kilometres;
 - (ii) is not available within the time prescribed by subsection (12);
 - (iii) refuses to take the blood sample or collect the urine sample or to do either of those things; or
 - (iv) cannot readily be located,

the member of the Police Force may require the person -

- (c) to allow a medical practitioner or registered nurse nominated by the member of the Police Force to take a sample of his blood for analysis; or
- (d) to provide a medical practitioner or registered nurse nominated by the member of the Police Force with a sample of his urine for analysis,

or to do both of those things, as the case may require, and for the purposes of this subsection the member of the Police Force may require the person to accompany a member of the Police Force to a place, and may require the person to wait at that place.

- (14) A person who is required or is permitted under this section to allow a medical practitioner or registered nurse to take a sample of his blood for analysis may, subject to subsections (9) and (13), nominate a medical practitioner or registered nurse of his own choice to take that sample.
- (15) A person who is required under this section to provide a sample of his urine to a medical practitioner or registered nurse for analysis may, subject to subsections (9) and (13), provide that sample to a medical practitioner or registered nurse of his own choice.
- (16) Where under this section a member of the Police Force causes a medical practitioner or registered nurse to take a sample of a person's blood for analysis or requires a person to provide a medical practitioner or registered nurse nominated by the member of the Police Force with a sample of his blood for analysis, the medical practitioner or registered nurse is hereby authorised to take that sample.
- (17) No action shall lie against a medical practitioner or registered nurse by reason only of his taking a sample of a person's blood for analysis pursuant to this section.

67. Failure to comply with requirement as to provision of breath, blood or urine sample for analysis

- (1) In this section “**requirement**” means a requirement of a member of the Police Force made pursuant to section 66.
- (2) A person who fails to comply with a requirement -
- (a) to provide a sample of his breath for analysis;
 - (b) to allow a medical practitioner or registered nurse to take a sample of his blood for analysis; or
 - (c) to provide a medical practitioner or registered nurse with a sample of his urine for analysis,
- commits an offence.
- (3) ~~A~~ Subject to subsection (3a), a person convicted of an offence against this section is liable -
- (a) for a first offence, to a fine of not less than 16 PU or more than 50 PU; and, in any event, the court convicting that person shall order that he be disqualified from holding or obtaining a driver's licence for a period of not less than 6 months;
 - (b) for a second offence, to a fine of not less than 30 PU or more than 70 PU or to imprisonment for 9 months; and, in any event, the court convicting that person

shall order that he be disqualified from holding or obtaining a driver's licence for a period of not less than 2 years;

- (c) for any subsequent offence, to a fine of not less than 40 PU or more than 100 PU or to imprisonment for 18 months; and, in any event, the court convicting that person shall order that he be permanently disqualified from holding or obtaining a driver's licence.

(3a) If when a requirement is made a member of the Police Force —

- (a) advises the person concerned that the member of the Police Force believes that the motor vehicle of which the person was, or is believed to have been, the driver has been involved in an incident occasioning the death of, or grievous bodily harm or bodily harm to, another person; and

- (b) explains to the person the consequences under this subsection of failure to comply with the requirement,

an offence against this section of failing to comply with that requirement is a crime and a person convicted of it is liable to a fine of any amount and imprisonment for 14 years and in any event the court convicting the person shall order that the person be disqualified from holding or obtaining a driver's licence for a period of not less than 2 years.

Summary conviction penalty: imprisonment for

18 months or a fine of 160PU and in any event the court convicting the person shall order that he be disqualified from holding or obtaining a driver's licence for a period of not less than 18 months.

- (4) For the purposes of subsection (3), where a person is convicted of an offence against this section any offence previously committed by him against section 32 of the repealed Act or section 63 of this Act shall be taken into account and be deemed to have been an offence against this section (but not to the exclusion of any other previous offence against this section) in determining whether that first-mentioned offence is a first, second, third or subsequent offence but any offence committed by him against this section as in force before the coming into operation of section 16 of the *Road Traffic Amendment Act (No. 2) 1982* shall not be taken into account for that purpose.
- (5) It shall be a defence to a prosecution for an offence against this section if the defendant satisfies the court that there was some substantial reason for his failure to comply other than a desire to avoid providing information that might be used as evidence.
- (6) Without limiting the generality of subsection (5) it shall be a defence to a prosecution for failing to comply with a requirement mentioned in subsection (2)(c) if the defendant satisfies the court that he attempted to comply with the requirement.

72. Regulations, etc.

- (1) The Governor may make regulations prescribing all matters that are necessary or convenient for the purpose of carrying out, or giving effect to, the provisions of section 59B(5) and sections 63 to 73 inclusive, and, in particular and without limiting the generality of the foregoing, may make regulations -
- (a) prescribing the manner of providing samples of breath and taking samples of blood, and regulating the manner of dealing with samples of breath, blood and urine;
 - (aa) prescribing equipment for use in the taking of samples of blood and the collection of samples of urine;
 - (ab) prescribing the manner and methods by which samples of blood may be analysed for alcohol;
 - (b) prescribing the manner of operation of breath analysing equipment and of determining breath analysing equipment, other than self-testing breath analysing equipment, to be in proper working order;
 - (ba) prescribing the manner of indication of a result for the purposes of section 68(7) and (8);
 - (c) prescribing forms, including any certificate required for the purposes of the sections herein mentioned; and
 - (d) prescribing the fees payable to a medical practitioner or registered nurse attending a person for the purpose of taking a sample of his blood or collecting a sample of his urine and those payable in respect of the analysis of those samples and for the payment and recovery of those fees.
- (2) The Minister may, from time to time, by notice published in the *Government Gazette*, approve of -
- (a) types of apparatus for ascertaining by analysis of a sample of a person's breath the percentage of alcohol present in his blood; and
 - (b) types of apparatus for the purpose of conducting preliminary tests for the purposes of section 66,
- and may, by notice so published, revoke any such approval.
- (2a) Where approval is given under subsection (2)(a) in relation to a type of apparatus that, in the opinion of the Minister, does not need to be tested to determine whether it is in proper working order after each occasion on which it is used to make an analysis of a sample of breath, the Minister may, in the notice by which the approval is given, designate that type of apparatus as self-testing apparatus.
- (3) The Director of the Chemistry Centre (WA) may, from time to time -
- (a) certify a person as being competent to determine the percentage of alcohol in bodily substances;

- (aa) certify a person as being competent to ascertain whether and to what extent drugs are present in bodily substances; and
- (b) certify a person as being competent to operate all types of breath analysing equipment, and may rescind any certificates given under this subsection.

APPENDIX 4

ADVICE FROM PARLIAMENTARY COUNSEL - DEEMING PROVISIONS

APPENDIX 4

ADVICE FROM PARLIAMENTARY COUNSEL - DEEMING PROVISIONS



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Hon Giz Watson MLC
Convenor
Standing Committee on Legislation
Parliament House
PERTH WA 6000

21 October 2004

Your ref
Our ref PCO 2004/00047

Dear Ms Watson

Road Traffic Amendment (Dangerous Driving) Bill 2004 – Subcommittee Inquiry

I refer to your letter dated 19 October 2004 requesting information as to the use of "deeming provisions" in Western Australian statutes.

Deeming provisions are common in Western Australian statutes and serve a number of purposes.

First, a deeming provision may be used to impose an 'artificial construction' or a 'statutory fiction'. In this context, the deeming provision is a device for extending the meaning of a term to a subject matter which it properly does not designate and which may be, in the ordinary sense, impossible.

The word "deemed" is not always used in the fictional sense but rather a deeming provision may act to put beyond doubt a particular construction or give a comprehensive description that includes what is obvious and what is uncertain. Further, a deeming provision may act to simplify the evidence of certain matters which, whilst appearing self evident, may cause some difficulty or substantial inconvenience should they be required to be positively proven.

Given such a wide-ranging use of deeming provisions in Western Australia, a comprehensive list of statutes that contain a deeming provision like the proposed section 59B(5) in clause 7 of the *Road Traffic Amendment (Dangerous Driving) Bill 2004* would be both long and likely to be unhelpful. However, after reviewing a number of deeming provisions it is possible to detect a number of broad categories into which the majority of deeming provisions fall. Set out below are the most common categories of deeming provisions and a number of examples in each category.

“Deemed evidence or proof” provisions

This is the broadest category of deeming provisions and can be broken down into many subcategories. In effect, these deeming provisions provide that the existence (or absence) of a certain situation is deemed proof of a particular fact. Often the provision creates a rebuttable presumption such that a certain state of affairs is deemed to exist in the absence of proof to the contrary. Typically, deemed evidence or proof provisions either act to create legal fictions or facilitate proof of matters that are generally understood to be the case.

It should be noted that in several instances, the word “deemed” is not used, but the wording is clearly intended to rule out a physical or notional possibility in the same way as a deeming provision.

Deeming provisions can provide for ease of proof in relation to ownership or occupancy, incapability, causation or the carrying on of a business. For example:

- Deemed owner / occupier

Dog Act 1976

- s 46(5) A person who
- (a) has a dog in his possession or under his control; or
 - (b) is the occupier of any premises where a dog is ordinarily kept or ordinarily permitted to live,
- shall for the purposes of subsection (2) be deemed to be the owner of the dog whilst those circumstances subsist....

Marine and Harbours Act 1981

- s 18B (2) Where an infringement notice is served on the owner of a motor vehicle in the circumstances referred to in subsection (1), then, unless within the period stated in the infringement notice or that period as extended
- (a) the modified penalty is paid; or
 - (b) the owner
 - (i) identifies to an authorised officer the person who was the driver or person in charge of the motor vehicle at the relevant time; or
 - (ii) satisfies an authorised officer that, at the relevant time, the motor vehicle had been stolen or unlawfully taken or was being unlawfully used,
- the owner is deemed to be the driver or person in charge of the motor vehicle at the time of the commission of the alleged offence.

Carriers Act 1920

- s 6 For the purposes of this Act every office, warehouse, or receiving-house which is used or appointed by any such carrier as aforesaid for the receiving of parcels to be conveyed as aforesaid, shall be deemed and taken to be the office, warehouse, or receiving-house of such carrier....;

- Deemed incapability

Dog Act 1976

- s 33(2)(c) ...for the purposes of subsection (1)(a) of that section, a person shall be conclusively deemed to be incapable of controlling a greyhound if it is one of more than two greyhounds held by him at one time

The Criminal Code

- s 319(2) For the purposes of this chapter...
- (c) a child under the age of 13 years is incapable of consenting to an act which constitutes an offence against a child

Companies (Co-operative) Act 1943

- s 186 A company shall be deemed to be unable to pay its debts
- (i) if a creditor, by assignment or otherwise, to whom the company is indebted in a sum exceeding \$50 then due has served on the company, by leaving it at the registered office of the company, a demand under his hand, requiring the company to pay the sum so due, and the company has for 28 days thereafter neglected to pay the sum or to secure or compound for it to the reasonable satisfaction of the creditor; or
- (ii) if execution or other process issued on a judgment decree or order of any Court in favour of a creditor of the company is returned unsatisfied in whole or in part; or
- (iii) if it is proved to the satisfaction of the Court that the company is unable to pay its debts, and in determining whether a company is unable to pay its debts the Court shall take into account the contingent and prospective liabilities of the company.

- Deemed causation

Environmental Protection Act 1986

- s 50(2) A person who causes or allows waste to be placed in any position from which the waste
- (a) could reasonably be expected to gain access to any portion of the environment; and
- (b) would in so gaining access be likely to result in pollution, commits an offence.

This provision is aimed at overcoming the difficulties of proving that a defendant's conduct 'caused' pollution. The provision establishes the causal link between placement of material in a place where it is likely to flow, leak or otherwise find its way into a watercourse and 'pollution' of waters.

- Deemed proof of business

Agricultural Products Act 1929

- s 8(1) In any proceedings in respect of offences under this Act
- (a) no proof shall be required of the authority of the inspector to take the proceedings, or of his appointment as such inspector; and
 - (b) the person whose name is marked on the outside or inside of any package containing products for sale, or on any label thereon, as the seller or packer thereof, shall be deemed to be the seller or packer thereof until the contrary is proved.

Business Names Act 1962

- s 30(1) If, in any proceedings for an offence against this Act, proof is given that a business name has been displayed on any premises, and evidence is given from which the court may infer that the business name has reference to any business carried on at the premises, the person or persons carrying on the business shall, in the absence of proof to the contrary, be deemed to be carrying on the business under that business name.

“Deemed authority” provisions

Deemed authority provisions typically provide that, in certain circumstances, an act is deemed to have been done with the relevant authority without further need for conclusive proof. This is a particularly common deeming provision in relation to statutory authorities, boards, courts and actions undertaken by government officials

Coal Miners Welfare Act 1947

- s 25.
- (1) Any proceedings, whether civil or penal, may be taken in the name of the Board by the secretary or any officer of the Board authorised in that behalf by the Board.
 - (2) No proof shall be required of the appointment of the secretary or any officer of the Board, or of the authority of the secretary or officer to take civil or penal proceedings in the name of the Board, but the averment on the process that the secretary or officer aforesaid is so authorised shall be deemed to be conclusive proof of the fact.

Dog Act 1976

- s 44 (3) Where proceedings under this Act are taken by an employee of a local government no proof shall be required of the appointment of that employee as an employee of the local government or of his authority to take the proceedings, but the averment on the process that the person is so authorised shall be deemed to be sufficient proof of the fact.

“Deemed Service” provisions

Deemed service provisions typically provide for the circumstances in which a person will be considered to have been properly served with a document and allow for the simplification of proof of service. In many circumstances a fiction is created such that a person is deemed to have been served provided service was affected in the correct manner. Examples include:

Interpretation Act 1984

- s 75(1) Where a written law authorises or requires a document to be served by post, whether the word “serve” or any of the words “give”, “deliver”, or “send” or any other similar word or expression is used, service shall be deemed to be effected by properly addressing and posting (by pre-paid post) the document as a letter to the last known address of the person to be served, and, unless the contrary is proved, to have been effected at the time when the letter would have been delivered in the ordinary course of post.

Australia and New Zealand Banking Group Act 1970

- s 21 Service of a document, as defined in section 5(1) of the *Companies Act 1961*
- (a) on the Bank, shall be deemed to be service on each of the existing banks;
 - (b) on an existing bank, shall be deemed to be service on the Bank;
 - (c) on A.N.Z. Savings Bank, shall be deemed to be service on E.S.A. Savings Bank; or
 - (d) on E.S.A. Savings Bank, shall be deemed to be service on A.N.Z. Savings Bank

“Deemed Liability” provisions

Many deeming provisions, particularly in relation to criminal offences, deem a person to be liable for the conduct of another, or make that person liable for the acts or omissions of another. For example:

Boxing Control Act 1987

- s 56(1) Where an organization contravenes any provision of this Act each person who is a director of the organization or who is a person having the management or control of the organization shall be deemed to be guilty of the offence unless the person satisfies the court that
- (a) the offence was committed without his knowledge;
 - (b) he was not in a position to influence the conduct of the organization in relation to the offence; or
 - (c) he used all diligence to prevent the commission of the offence.

The Criminal Code

- s 115 The acts of authorised agents of candidates are, in matters connected with elections, deemed to be the acts of their principals, unless it be proved that such acts were

committed without their knowledge or consent, and that they had neither directly nor indirectly sanctioned, countenanced, nor approved of the same in any way.

“Deemed signature” provisions

Some deeming provisions provide that any signature, stamp or seal is, in the absence of proof to the contrary, deemed to be the signature, stamp or seal of the person who is purported to have signed, stamped or affixed the seal. The purpose of these provisions is typically to do away with the requirement of proving that a particular person signed a particular document and that they had the authority to do so. For example:

Builders Registration Act 1939

- s 20 In any legal proceedings, any signature, which purports to be the signature of any person who is or has been chairperson or member of the Board or registrar shall, if such signature is attached to any certificate of registration or any document under this Act, and in the absence of proof to the contrary, be deemed to be the signature of such person.

Business Names Act 1962

- s 15(1) A statement lodged with the Commissioner under this Act shall be deemed to be signed by a person who is required to sign the statement if
- (a) in the case of an individual, it is signed on his behalf by a person authorised in writing to so sign the statement; or
 - (b) in the case of a corporation, it is signed by a director or manager or the secretary of the corporation.

Electoral Act 1907

- s 221(1) Any person required by this Act to sign his name may, on satisfying an attesting witness that he is unable to write, make his distinguishing mark, which shall be witnessed by the attesting witness and his distinguishing mark when so witnessed shall, for the purposes of this Act, be deemed to be the personal signature of that person.

“Deemed complete and correct records” provisions

Related to the deemed “signature” provision are provisions which provide that that any paper or record purporting to be kept pursuant to statute is deemed, unless proved to the contrary, to be a complete and correct copy. For example:

Evidence Act 1906

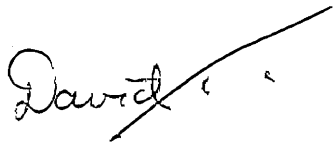
- s 53 (2) Any paper purporting to be a copy of any Act of the Parliament of the United Kingdom or of the Commonwealth, or of any State, or of any Australasian colony, whether passed before or after the commencement of this Act, and purporting to be printed by the Government Printer, shall *prima facie* be deemed to be a correct copy of such Act without any further proof thereof.

The date which appears on any such copy purporting to be the day on which such Act received the Royal Assent, or was proclaimed to commence, shall be received for all purposes as evidence of the date of such assent, or commencement.

- 69A. When by any Statute in force in the State any person is required to keep any register, then any register purporting or appearing to be kept pursuant to the Statute shall (save in so far as the contrary may be proved) be deemed to be and be admissible in evidence as a complete and accurate register and record and
- (a) any document purporting to be a copy of the register and to be certified as correct by the person aforesaid; or
 - (b) a *Gazette* containing what purports to be a copy of the register; or
 - (c) any document purporting to be a copy of the register and to be printed by the Government Printer or by the authority of the Government of the State,
- shall be prima facie evidence of the contents of the register as existing on the date when the document or *Gazette* purports to have been certified, or printed, or issued, and the production thereof in any court or before any person shall (save in so far as it may be proved not to be a true copy) be equivalent to the production of the original register.

I hope that this has sufficiently answered your request.

Yours faithfully



D A Taylor
Assistant Parliamentary Counsel

for Greg Calcutt
Parliamentary Counsel

APPENDIX 5
ADVICE FROM PARLIAMENTARY COUNSEL - REVERSAL OF THE BURDEN
OF PROOF

APPENDIX 5
ADVICE FROM PARLIAMENTARY COUNSEL - REVERSAL OF
THE BURDEN OF PROOF



Parliamentary Counsel's Office

Memorandum

To: Greg Calcutt
From: David Taylor
Date: 1 October 2004
Subject: Reversal of onus of proof in WA Acts.

Reversal of onus of proof

Query relating to the following clause—

Road Traffic Amendment (Dangerous Driving) Bill 2004 s.59B(6)

- (6) In any proceeding for an offence against section 59 or 59A it is a defence for the person charged to prove that the death, grievous bodily harm or bodily harm occasioned by the incident was not in any way attributable (as relevant) —
- (a) to the fact that the person charged was under the influence of alcohol, drugs, or alcohol and drugs; or
 - (b) to the manner (which expression includes speed) in which the motor vehicle was driven.

The Acts in List No. 1 are included because there is a specific reversal of criminal onus of proof – several Acts contain a reversal of a civil or administrative onus of proof, but do not appear to be relevant to the query.

Note:

There is a standing provision in the *Justices Act 1902* that reverses the onus of proof whenever a complaint is laid that alleges a person is not subject to an “exemption, exception, proviso, or condition” that would have made a particular act or omission lawful. If the defendant wishes to rely on an “exemption, exception, proviso, or condition”, then the defendant must prove it in those cases.

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Justices Act 1902**72. Proof of negative etc.**

If the complaint in any case of a simple offence or other matter negatives any exemption, exception, proviso, or condition contained in the Act on which the same is framed, it shall not be necessary for the complainant to prove such negative, but the defendant shall be called upon to prove the affirmative thereof in his defence.

Some Acts will specifically state this [e.g. *Equal Opportunity Act 1984*, s.123]

123. Proof of exceptions

Where by any provision of this Act, conduct is excepted from conduct that is unlawful under this Act or that is a contravention of this Act, the onus of proving the exception in any inquiry lies upon the respondent.

Averments are another specific method of forcing the defendant or accused to establish something, but the level of proof required to rebut an averment will vary [e.g. *Plant Diseases Act 1914*, s. 36]. Acts with specific averment provisions are included in List No. 2. (there may be some overlap with list No. 1).

36. Onus of proof

In all proceedings taken against any person for any offence against this Act, the averments of the prosecutor contained in a sworn complaint shall be deemed to be proved in the absence of proof to the contrary.

Also used is an “owner-onus” provision for motor vehicle parking and speeding offences, which deems the owner of the car to have been responsible for the vehicle at the time of an alleged offence. While this is relevant to the alleged commission of an offence, it is not a factor in a court-based prosecution for that offence, merely the administrative disposal of the matter by administrative payment. I have not listed Acts that just have these provisions and no other additional onus reversal provisions.

In general terms the particular offences are specifically noted as being subject to the reversal of the onus of proof, usually using the phrase of the type “**It is a defence to a charge under section ?? for a person to prove that...**”.

Less-used, and other more archaic or arcane phrases include -

“It is a defence for [the director] to establish that...”

“...the onus of proof that the provisions of this Act do not apply to any place or object lies upon the defendant”

“...unless the respondent establishes the contrary...”

“...the onus of proving that the requirements of subsection (1) have been complied with, or do not apply, shall lie on the person who alleges that to be the case...”

“...the onus of disproving the amount shall be upon the defendant”

“The onus of proving that a person has purchased an interest in goods free from a security interest is on the person asserting that the interest was so purchased.”

“...the following allegations contained in the complaint or information shall be deemed proved in the absence of satisfactory proof by the defendant to the contrary...”

List 1.**Western Australian Acts that contain one or more provisions that specifically reverse the criminal onus of proof**

Aboriginal Affairs Planning Authority Act 1972
Animal Welfare Act 2002
Associations Incorporation Act 1987
Auction Sales Act 1973
Cannabis Control Act 2003
Casino Control Act 1984
Censorship Act 1996
Chattel Securities Act 1987
Companies (Co-operative) Act 1943
Consumer Affairs Act 1971
Contaminated Sites Act 2003 (part not yet proclaimed)
Control of Vehicles (Off-road Areas) Act 1978
Credit (Administration) Act 1984
Credit Act 1984
Cremation Act 1929
The Criminal Code
Criminal Property Confiscation Act 2000
Dangerous Goods Safety Act 2004 (part not yet proclaimed)
Dog Act 1976
Door to Door Trading Act 1987
Education Service Providers (Full Fee Overseas Students) Registration Act 1991
Electoral Act 1907
Environmental Protection Act 1986
Fair Trading Act 1987
Fish Resources Management Act 1994
Gaming and Wagering Commission Act 1987
Gas Standards Act 1972
Gold Corporation Act 1987
Health Act 1911
Heritage of Western Australia Act 1990
Hire-Purchase Act 1959
Human Reproductive Technology Act 1991
Income Tax Assessment Act 1937
Industrial Hemp Act 2004
Justices Act 1902
Land Administration Act 1997
Legal Aid Commission Act 1976
Legal Contribution Trust Act 1967
Liquor Licensing Act 1988
Local Government (Miscellaneous Provisions) Act 1960
Local Government Act 1995
Misuse of Drugs Act 1981

Motor Vehicle Dealers Act 1973
Newspaper Libel and Registration Act 1884 Amendment Act 1888
Pearling Act 1990
Petroleum (Submerged Lands) Act 1982
Petroleum Act 1967
Petroleum Pipelines Act 1969
Petroleum Products Pricing Act 1983
Plant Diseases Act 1914
Poisons Act 1964
Pollution of Waters By Oil and Noxious Substances Act 1987
Prisons Act 1981
Prostitution Act 2000
Public Interest Disclosure Act 2003
Public Sector Management Act 1994
Radiation Safety Act 1975
Retirement Villages Act 1992
Road Traffic Act 1974
Royal Commissions Act 1968
Securities Industry Act 1975
Security and Related Activities (Control) Act 1996
State Records Act 2000
State Superannuation Act 2000
Stock (Identification and Movement) Act 1970
Strata Titles Act 1985
Taxation Administration Act 2003
Tobacco Control Act 1990
Trading Stamp Act 1981
Transport Co-ordination Act 1966
Travel Agents Act 1985
Trustees Act 1962
Veterinary Preparations and Animal Feeding Stuffs Act 1976
Waterways Conservation Act 1976
Weights and Measures Act 1915
Welfare and Assistance Act 1961
Western Australian Marine (Sea Dumping) Act 1981
Western Australian Marine Act 1982
Western Australian Products Symbol Act 1972
Wildlife Conservation Act 1950

List 2.

Western Australian Acts that contain specific averment provisions allowing for assertions to be treated as proven, unless evidence to the contrary is led by a defendant.

Aboriginal Affairs Planning Authority Act 1972
Aboriginal Heritage Act 1972
Agricultural Produce Commission Act 1988
Agricultural Products Act 1929
Agriculture and Related Resources Protection Act 1976
Argentine Ant Act 1968
Betting Control Act 1954
Building and Construction Industry Training Fund and Levy Collection Act 1990
Bush Fires Act 1954
Casino Control Act 1984
Conservation and Land Management Act 1984
Contaminated Sites Act 2003 (not fully proclaimed)
Control of Vehicles (Off-road Areas) Act 1978
The Criminal Code
Diamond (Argyle Diamond Mines Joint Venture) Agreement Act 1981
Dog Act 1976
Employment Agents Act 1976
Environmental Protection Act 1986
Evidence Act 1906
Explosives and Dangerous Goods Act 1961
Firearms Act 1973
Fish Resources Management Act 1994
Gaming and Wagering Commission Act 1987
Government Agreements Act 1979
Government Railways Act 1904
Health Act 1911
Human Reproductive Technology Act 1991
Income Tax Assessment Act 1937
Industrial Relations Act 1979
Land Drainage Act 1925
Liquor Licensing Act 1988
Local Government (Miscellaneous Provisions) Act 1960
Maritime Archaeology Act 1973
Marketing of Potatoes Act 1946
Mines Safety and Inspection Act 1994
Mining Act 1978
Occupational Safety and Health Act 1984
Painters' Registration Act 1961
Petroleum Safety Act 1999 (not fully proclaimed)
Plant Diseases Act 1914
Police Act 1892

Port Authorities Act 1999
Prostitution Act 2000
Public Transport Authority Act 2003
Radiation Safety Act 1975
Retail Trading Hours Act 1987
Road Traffic Act 1974
Spear-guns Control Act 1955
Swan River Trust Act 1988
Taxation Administration Act 2003
Taxi Act 1994
Transport Co-ordination Act 1966
Waterways Conservation Act 1976
Western Australian Marine Act 1982

APPENDIX 6

**EXTRACT OF ADVICE FROM MR GEORGE TANNIN SC, STATE COUNSEL -
CHAPTER 5 OF THE *CRIMINAL CODE***

APPENDIX 6

EXTRACT OF ADVICE FROM MR GEORGE TANNIN SC, STATE COUNSEL - CHAPTER 5 OF THE *CRIMINAL CODE*

The application of defences contained in Chapter V of the *Criminal Code* to dangerous driving offences has been clearly recognised by the Courts. For example in *Kaighin v The Queen* (1990) 11 MVR 119, the Court of Criminal Appeal (Malcolm CJ, Walsh and Ipp JJ) recognised that the defence contained in s 25 of the *Criminal Code* could apply to a charge under s 59 *RTA*. The court considered that:

"[s]ection 59(1) [of the *RTA*] does not exclude a defence based on absence of fault, including a defence based on s 25 of the *Criminal Code*, or a defence based on the conduct of another person." (123)

Indeed, s 36 of the *Criminal Code* expressly provides that:

"The provisions of this chapter apply to all persons charged with any offence against the statute law of Western Australia."

Therefore, with the exception of s 23 of the *Criminal Code* (for reasons which were discussed in my letter of 11 October), the provisions of Chapter V of the *Criminal Code* apply to the dangerous driving offences contained in the *Road Traffic Act*.

Section 22 of the *Criminal Code* provides that ignorance of the law is no excuse for an act or omission that would otherwise constitute an offence. Therefore, mistakes about the law (for example, a mistake about an applicable speed limit in a certain area) provide no defence. In contrast, s 24 of the *Criminal Code* provides that a person will not be criminally

responsible for an act or omission which is done under an honest and reasonable, but mistaken, belief in the existence of any state of things. It has been held that the defence of honest and reasonable but mistaken belief in the existence of a state of things is relevant to a prosecution in respect of dangerous driving: *Moore v Moore* [2001] WASCA 126 at [24] per McKechnie J.

Section 24 of the *Criminal Code* applies only to mistakes about the elements of the offence: *Ostrowski v Palmer* (2004) 206 ALR 422. It is difficult to envisage a circumstance under which the defence of mistake of fact might apply. In most cases where an accused has raised s 24, it has been held that the defence simply is not applicable. For example, in *R v Plath* [2003] QCA 567, the accused argued that he had an honest and reasonable belief that it was safe to go around the car ahead of him and that he honestly and reasonably believed that there was no pedestrian on the road. The Queensland Court of Appeal held:

"Those matters go to the very heart of the issue whether or not there was dangerous driving. One does not need to engage s 24 in order to make a reasonable belief held by the driver of the motor vehicle relevant when determining whether or not the vehicle was driven dangerously. Attempting to direct on s 24 in the circumstances would only have confused the issue in the minds of the jury." (at [7]).

Section 25 provides a defence in cases of extraordinary emergencies. It provides that:

"Subject to the express provisions of this Code relating to acts done upon compulsion or provocation or in self-defence, a person is not criminally responsible for an act or omission done or made under such circumstances of sudden or extraordinary emergency that an ordinary person possessing ordinary power of self-control could not reasonably be expected to act otherwise."

This defence has been raised in relation to dangerous driving offences on numerous occasions: see eg. *Dunjey v Cross* (2002) 36 MVR 170, *Hunter v R* [2001] WASCA 302, *Nairn v Berkerk* [2000] WASCA 372, *Dudley v Ballantyne* (1998) 28 MVR 209. The defence would continue to apply following the amendments to the *Road Traffic Act* introduced by the Bill.

Section 26 and 27 of the *Criminal Code* relate to insanity. Every person is presumed to be of sound mind until the contrary is proved: s 26 *Criminal Code*. Section 27 of the *Criminal Code* provides:

A person is not criminally responsible for an act or omission on account of unsoundness of mind if at the time of doing the act or making the omission he is in such a state of mental impairment as to deprive him of

capacity to understand what he is doing, or of capacity to control his actions, or of capacity to know that he ought not to do the act or make the omission.

A person whose mind, at the time of his doing or omitting to do an act, is affected by delusions on some specific matter or matters, but who is not otherwise entitled to the benefit of the foregoing provisions of this section, is criminally responsible for the act or omission to the same extent as if the real state of things had been such as he was induced by the delusions to believe to exist.

I have not found any examples of situations where a person charged with dangerous driving causing death, grievous bodily harm or bodily harm has relied upon this defence. Section 28 of the *Criminal Code* provides for the defence of intoxication. It provides that the defence of insanity contained in s 27 of the *Criminal Code* applies to a person whose mind is disordered by intoxication or stupefaction caused without intention on his part by drugs or intoxicating liquor, or by any other means. It does not apply to 'the case of a person who has intentionally caused himself to become intoxicated or stupefied.'

The defence of immature age would apply in relation to the offence of dangerous driving causing death, grievous bodily harm or bodily harm. A person under the age of 10 years cannot be held criminally responsible for any act or omission. A person under 14 is not criminally responsible unless it is proved that at the time of doing the act or making the omission he had the capacity to know that he should not do the act or make the omission: s 29 *Criminal Code*.

The defence contained in section 30 *Criminal Code* expressly relating to judicial officers exercising their judicial functions would obviously not be relevant to dangerous driving offences.

Section 31 of the *Criminal Code* provides:

A person is not criminally responsible for an act or omission if he does or omits to do the act under any of the following circumstances, that is to say —

- (1) In execution of the law;
- (2) In obedience to the order of a competent authority which he is bound by law to obey, unless the order is manifestly unlawful;
- (3) When the act is reasonably necessary in order to resist actual and unlawful violence threatened to him, or to another person in his presence;

- (4) When he does or omits to do the act in order to save himself from immediate death or grievous bodily harm threatened to be inflicted upon him by some person actually present and in a position to execute the threats, and believing himself to be unable otherwise to escape the carrying of the threats into execution;

But this protection does not extend to an act or omission which would constitute an offence punishable with strict security life imprisonment, or an offence of which grievous bodily harm to the person of another, or an intention to cause such harm, is an element, nor to a person who has, by entering into an unlawful association or conspiracy, rendered himself liable to have such threats made to him.

Whether an order is or is not manifestly unlawful is a question of law.

In *Dudley v Ballantyne* (1998) 28 MVR 209, the appellant successfully relied upon s 31(3) of the *Criminal Code* in relation to a charge under section 59A(1) of the *RTA*. In that case, the appellant decided to continue driving her motor vehicle where an individual was attached to the car, holding by holding on to the hair of one of the occupants of the vehicle. Justice Owen held that the appellant may have believed that to continue driving was reasonably necessary to avoid actual or unlawful violence to her or another person in the car.

Section 34, which relates to offences committed by partners and members of companies with respect to partnership or corporate property would not have any application in this context.

Overall, with the exception of s 23 of the *Criminal Code*, which was addressed in my written answers previously provided, the defences contained in Chapter V of the *Criminal Code* apply. However, as described above, the practical operation of Chapter V defences in this context is very limited.

Your question asks how the statutory defences in proposed section 59B(6) 'interact or operate' with Chapter V excuses in the *Criminal Code*. The Chapter V excuses operate *in addition to* the statutory defences provided for in section 59B(6) of the *Road Traffic Act*.