# WESTERN AUSTRALIAN FORUM

# Criminal Law Reform 1983-1995: An Era of Unprecedented Legislative Activism

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*The Western Australian Parliament has been remarkably active in the area of criminal law reform in the past decade or so. This paper provides an analysis of these reforms. It argues that Parliament has been quick to 'modernise' when this has resulted in an expansion of the law and an increase in penalties, but very slow to reduce the scope of the law or to provide mechanisms to mitigate its severity. It also points to some fundamental difficulties raised by the law's expansion into new areas.*

The Criminal Code of Western Australia was first enacted in 1902, five years after the same Code had been introduced in Queensland.[1] It was re-enacted with minor amendments in 1913 and then remained substantially unchanged until the mid-1980s. Three examples demonstrate that the attitude of the legislature over this long period was simply to target specific anomalies and not to attempt wholesale reform. In 1932, the offence of unlawful use of a motor vehicle was introduced in response to the finding that borrowing a car for 'joy riding' did not constitute stealing.[2] In 1945, in response to the difficulty of obtaining a manslaughter conviction in cases involving negligent driving, an offence was introduced of failing to take reasonable precaution

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1. See generally E Edwards, R Harding & I Campbell *The Criminal Codes: Commentary and Materials* 4th edn (Sydney: Law Book, 1992) 3-11.
2. Criminal Code s 390A, introduced to combat the decision in *Bailey* [1924] QWN 38, was repealed in 1991 when such conduct was designated stealing.

in the use of a motor vehicle, thereby causing death.[3] In 1969, the provisions relating to fraud were amended to ensure that false representations as to the future could give rise to liability as well as false representations as to present fact.[4]

By contrast, the period since 1983 has witnessed remarkable legislative activism, with several hundred pages of statutory reform to the substantive criminal law, sentencing and procedure. This paper provides a conspectus on the reforms to the substantive law, referring to procedural and sentencing reforms only to the extent that they relate directly to the argument. It does not purport to reflect in detail on all aspects of the substantive reforms[5] but, rather, to evaluate the key shifts in the structure of the criminal law. The writer does not anticipate or even wish for universal agreement from readers; the purpose is to raise a number of concerns and to stimulate further debate.

## A SNAPSHOT FROM 1983

### 1. The Criminal Code

A newly arrived criminal lawyer who turned to the Criminal Code in 1983 would have been struck by several features. The fundamental structure of the Code, and especially the basic inter-relationship between the major offences, was clear enough. However, its accessibility and workability was hampered by the language which reflected the concerns and the terminology of a much earlier generation. At times it could be generously described as archaic and at others as unnecessarily technical and legalistic. For example, the kidnapping offences still sought to combat slavery[6] and the convoluted criminal damage provisions gave special protection to classic symbols of nineteenth century industrialisation — mills, engines, canals, aqueducts, railways and reservoirs.[7] On the other hand, there was nothing to deal with modern technology such as computers. The property offences posed particular problems with the basic definitions of offences such as fraud,

3. S 291A, introduced in 1945, was repealed when the Road Traffic Act 1974 (WA) introduced the offence of dangerous driving causing death or grievous bodily harm (s 59).
4. The decision in *Greene* (1949) 79 CLR 353 was one illustration of the fact that when the law was restricted to false pretences very technical debate could ensue on whether a future promise could be construed as containing a representation of present fact.
5. Some of the reforms have been the subject of detailed analysis elsewhere: see G Syrota 'Criminal Fraud in WA: A Vague, Sweeping and Arbitrary Offence' (1994) 24 UWAL Rev 261; G Syrota 'The Mental Element in Forgery — A Worthwhile Reform?' (1995) 25 UWALRev 166; N Morgan 'Law Reform (Decriminalization of Sodomy) Act 1989' (1990) 14 Crim L Journ 180. Those who wish to access general descriptions: see WA Law Society *The Murray Report and its Aftermath: Recent Amendments to the Criminal Code* (Perth, 1991).
6. S 322, as it then was.
7. S 453, as it then was.

forgery and burglary hinging on some highly technical distinctions such as whether there had been a 'breaking' into premises for the purposes of a burglary offence.[8] The inchoate offences were also couched in unduly complicated terms.

There were also areas in which the Code appeared to be out of tune with contemporary values. First, there were glaring gender issues, with women frequently portrayed as property objects or as the shadows of their husbands. For example, the extraordinarily intricate provisions relating to the detention from 'motives of gain'[9] of unmarried 'presumptive heiresses' and others were designed to protect the 'property value' of such women. Once married, women ceased to have an independent existence, whether as victims or as offenders; there was no offence of 'rape' within marriage[10] and there could be no criminal conspiracy between husband and wife alone.[11] Furthermore, because rape was defined by reference to 'carnal knowledge' there was no offence which adequately embraced other forms of sexual violence.[12] Secondly, there were areas where the law had fallen largely into disuse. The Code continued to criminalise consensual sodomy between adults and consensual acts of 'gross indecency' between adult males even in private. The grounds for legal abortions appeared to be far narrower than general medical practices.[13] In the area of punishments, the death penalty and whipping remained on the statute books even though neither punishment had been carried out for many years.[14]

The homicide offences were also striking. The Code retained the distinction between 'wilful' murder (based on an intent to kill) and murder (based on an intent to do grievous bodily harm)[15] and had not incorporated a variety of reforms which had attracted widespread support elsewhere as a means of mitigating the severity of the law. In particular, 'dangerous act murder', the Code's version of the common law felony-murder rule remained[16] despite the abolition of the equivalent concept in many other

8. See N Morgan's commentary on *Galea* (1991) 15 Crim L Journ 52. It was also necessary to determine whether the offence had occurred at night or against a dwelling house.
9. S 329(2), as it then was.
10. S 325.
11. S 33.
12. For example, acts of oral penetration and vaginal penetration other than by the penis had to be dealt with as assaults or indecent assaults or, in extreme cases, as grievous bodily harm.
13. Ss 199-201 and 259.
14. The last person to be executed in the State was Eric Edgar Cooke who was hanged at Fremantle Prison on 30 October 1964: see B Purdue *Legal Executions in WA* (Perth: Foundation Press, 1993).
15. Ss 278-279(1). The distinction between wilful murder and murder was abolished in Queensland in 1971 in favour of a single offence of murder. The Northern Territory Code has adopted the Queensland model.
16. S 279(2).

jurisdictions. The Code also lacked flexibility in the area of partial excuses; for example, there was no provision for doctrines such as diminished responsibility and suicide pact which may reduce murder to manslaughter nor for the offence of infanticide, all of which were well established in much of Australia as well as in many overseas jurisdictions.

## 2. The Murray Report 1983

June 1983 saw the publication of a *Review of the Criminal Code* by Mr Michael Murray QC, then Crown Counsel.[17] The Murray Report, which deals concisely with a wide range of matters, has had a major impact on law reform within the State and has also been a significant point of reference during recent deliberations on a uniform, Australia-wide Criminal Code. Although it makes few express comments on its general themes, three precepts emerge consistently from the substance of the Report. Two — modernisation and simplification — were raised earlier. The third was the perceived need to broaden the scope of criminal liability. A particularly striking example of this was the proposal for a general offence of 'preparing' to commit an offence, the effect of which would be to extend liability far beyond the limits imposed by the law relating to inchoate offences and 'precursor' offences which already exist.[18] This proposal has not been adopted to date but in other areas, as the following analysis demonstrates, the Murray Report has already resulted in a significant broadening of the law.

## 3. The Police Act

There was also much scope for simplification and modernisation beyond the Code. Whilst some areas, notably drugs and road traffic offences were governed by specific legislation of recent origin,[19] the Police Act 1892 remained largely untouched. The Police Act was enacted only ten years before the Code but much of it was derived from English legislation from the *early* nineteenth century.[20] Aspects of the Act are considered in detail below, but five basic criticisms relating to the offences contained therein

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17. M Murray *The Criminal Code: A General Review* (Perth, 1983). Michael Murray is now a Justice of the WA Supreme Court. He commenced work on the project in early 1980 and originally presented his Report in March 1982.
18. Ibid. Murray's proposals on this are found in his discussion of s 557 of the Criminal Code which relates to the possession of explosive substances. Other 'precursor offences' include s 407 (being disguised etc with intent to commit an offence).
19. Misuse of Drugs Act 1981 (WA) and Road Traffic Act 1974 (WA).
20. See WALRC *Discussion Paper on Police Act Offences* (Perth, 1989) and WALRC *Report on Police Act Offences* (Perth, 1992).

should be noted at this stage.[21] First, the language was archaic and convoluted and, from the point of view of modernisation and simplification, was arguably in far greater need of reform than the Code. Secondly, far from being too narrow, many of the offences such as those relating to the power of the police to demand a person's name and 'evil designs' were extremely broad and raised serious issues of principle.[22] Thirdly, many offences were rooted in a quite different age and reflected the ethos of the infamous Victorian Poor Laws which sought to eradicate idleness and to create a stable and productive workforce for an industrialising society.[23] Fourthly, the Act contained numerous offences relating to drugs, driving offences, and food and public health which appeared otiose in that the subject matter was covered by other legislation.[24] Finally, the Police Act frequently departed from the normal rules relating to proof in casting the onus on the accused person to provide a 'satisfactory explanation' for his or her conduct.[25]

## 1983-1995: THE REFORMS

The following section examines aspects of the way in which the scope of the substantive law has altered over the past decade and demonstrates that, when the legislation is assessed as a whole, governments of all persuasions have demonstrated an eagerness to 'modernise' when that results in an expansion of the criminal law and an increase in penalties, but little inclination to reduce the reach of the law or to provide mechanisms to mitigate its severity.

### 1. An overview of the Criminal Code reforms

Subject to the concerns expressed below, the reforms of the past decade are welcome in that they have rendered the Criminal Code far more up to date and accessible. Taking the examples raised above, criminal damage offences are now defined in straightforward terms and the basis of kidnapping

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21. The Act is also subject to two other fundamental objections which do not relate directly to the substantive law. First, legislation dealing with the regulation of the police force should simply deal with that task and not deal with a wide variety of unrelated offences. Secondly, it fails to spell out with clarity the basic rules relating to police powers of arrest, entry, search and seizure.
22. These offences are analysed in more detail below: see infra p 289.
23. For example, there are convoluted provisions dealing with people sleeping rough (s 66(9)) or having no visible means of support (s 65(1)).
24. Possession of a 'deleterious drug' is an offence under s 65(5); negligent or furious driving is an offence under s 57. Part VI contains numerous public health type offences of doubtful contemporary relevance.
25. Some examples of this are considered below: see infra pp 289-290.

has finally shifted from slavery to modern concerns of ransom and terrorism.[26] Instead of steam engines and presumptive heiresses, our legislators have moved to protect various icons of modern progress. Unlawful use of motor vehicles was symbolically elevated to 'stealing' during a perceived crime wave involving stolen vehicles[27] and new offences have been introduced relating to unlawful access to computers.[28] There has been particularly dramatic reform in the area of property offences; whilst the definitions of stealing, robbery and blackmail remain largely unchanged, burglary, fraud, and forgery have been redefined in simpler and generally broader terms.[29] In the area of sexual offences, the offence of rape has been abandoned in favour of sexual assault, an offence which embraces numerous forms of sexual penetration,[30] and consensual acts of sodomy and gross indecency between consenting adults in private are no longer criminal.[31] The basic structure of the offences of endangerering life and assaults is unchanged. However, there have been useful amendments to ensure that the definitions of bodily harm and grievous bodily harm can embrace the spreading of disease[32] and some 'tidying up' amendments which more clearly distinguish the two general types of 'serious assault' formerly embraced by section 318; namely those assaults aggravated by the accused person's intention and those aggravated because of the victim's status.[33] In addition, broad new offences have been introduced to deal with threats and stalking [34] and there are new offences of incitement to racial hatred.[35] The basic definitions relating to homicide are unchanged except for the abolition of the rule requiring death to occur within a year and a day[36] and the introduction of infanticide.[37] The whole area of inchoate offences has been revamped with the introduction of incitement and a complete re-writing of attempts and conspiracy.[38] Finally, obsolete punishments, the death penalty, whipping and hard labour have been abandoned.[39]

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26. Ss 441-444 (criminal damage) and ss 332-333 (kidnapping and deprivation of liberty).
27. Criminal Law Amendment Act 1991 (WA), discussed in R Harding (ed) *Repeat Juvenile Offenders: The Failure of Selective Incapacitation in WA* 2nd edn (Perth: UWA Crime Research Centre, 1995) 14.
28. S 440A, introduced in 1990.
29. Ss 401, 409 and 473. See also infra pp 296-297.
30 S 325, as defined by s 319.
31. Law Reform (Decriminalization of Sodomy) Act 1989 (WA).
32. The definitions of 'bodily harm' and 'grievous bodily harm' were expanded in 1992 by the insertion of s 1(4).
33. Criminal Law Amendment Act 1994 (WA).
34. Ch XXXIIIA was introduced in 1990 and Ch XXXIIIB in 1994.
35. Ch XI, inserted in 1990.
36. S 276 was repealed in 1991
37. S 281A was inserted in 1986; see further infra p 293.
38. Pt VII and s 4 were amended in 1987.
39. The death penalty was abolished in 1984 and whipping and hard labour in 1992.

## 2. The Police Act

The Police Act has survived remarkably unscathed[40] even though the Law Reform Commission has pointed out the glaring need for reform and even though many of the offences which are still used in practice raise fundamental issues of civil liberties and criminal justice. Section 50 provides a prime example of the civil liberties issue. It empowers the police to demand a person's name and address and to apprehend without warrant any person who refuses to give such information or gives information which the police have reasonable cause to believe to be false. On its face, this power can be exercised at the whim of a police officer. Even though the courts have sought to restrict its operation to situations where the officer 'reasonably suspects' that the person has been involved in or is a witness to wrongdoing,[41] it is a section which is clearly capable of abuse and which has no equivalent in most of Australia.[42]

Section 43 of the Police Act contravenes almost every basic tenet of criminal justice. The very structure of the section is objectionable in that it purports to deal with powers of arrest but actually creates a raft of essentially unrelated substantive offences. These include the extraordinary offence of being suspected of having 'evil designs' and failing to give a satisfactory account of oneself,[43] an offence which is objectionable on three main grounds. First, the language is unconscionably vague and imprecise. It is unclear what an 'evil design' is, although the section is generally interpreted as having a sexual connotation.[44] Secondly, commentators agree that it is wrong to impose liability for thought alone and the criminal law generally supports this stance, imposing liability for conduct or for proven omissions in breach of a duty to act. The 'evil designs' offence is out of line with this basic premise; although in practice it is the accused person's conduct which arouses suspicions, the offence as defined appears to countenance liability being imposed simply on the basis of what a person is *suspected to have been thinking*. If preventative offences of this type are needed they should be redefined to focus on relevant conduct. Finally, the requirement for the accused to give a satisfactory account infringes basic rules relating to the onus of proof and begs the obvious question of what a satisfactory account would entail.

The Police Act offences do not only raise serious concerns in

40. The main amendment has been the abolition of the offence of public drunkenness, discussed infra p 292.
41. See *Yarran v Czerkasow* [1982] WAR 239.
42. See WALRC *Discussion Paper* supra n 20, 173.
43. The section also contains the offence of being suspected of having committed an offence or being about to commit an offence and failing to give a satisfactory account of oneself.
44. WALRC *Discussion Paper* supra n 20, 39.

themselves; their continued existence also subverts a key purpose of reforms to the Code. On submitting his Report, Murray stated that the Criminal Code should cover 'matters of general criminality' and that specialist legislation should deal with other particular matters. He expressly stated that it would be necessary, as part of the reform process, to consider other legislation. Although some areas of the Police Act are not directly related to the subject matter of the Code and must therefore await separate reform, it is submitted that Parliament should at least have revised those sections of the Act which related to the Code reforms. Far too many areas remain in which the parameters which have been set down by the Criminal Code with respect to matters of 'general criminality' are obscured or even subverted by the Police Act. For example, in 1990 the Criminal Code provisions relating to criminal damage were amended and now impose liability for intentional or reckless damage. However, the damage provisions of the Police Act were not reformed. The Police Act offences are broader in that no mental element is spelt out and there are obvious objections to imposing liability without proof of such a matter. The Code provisions relating to fraud were reformed and widened in 1990 without corresponding reforms to numerous old-fashioned fraud type offences under the Police Act.[45]

A final example summarises many of the concerns expressed in this section. Murray considered that the offence of receiving stolen property under section 414 of the Criminal Code set appropriate parameters and did not require major change. Parliament has amended that section to deal with the penalties which are applicable on summary conviction but does not appear to have turned its attention to related offences under the Police Act. Section 414 of the Code requires proof that the goods were *actually* the product of an indictable offence[46] and that the accused knew this fact. Recent caselaw has vigorously reaffirmed the principle that the fact that the accused person is found in possession of recently stolen goods does not establish the offence or raise any presumption of guilt; such possession is, at most, part of the total evidence against the accused person.[47] Section 69 of the Police Act undermines these basic requirements. First, the section does not require the prosecution to prove that the property was actually stolen, it being sufficient

45. For example, the provisions relating to valueless cheques (s 64A), obtaining unemployment benefits without entitlement (s 66(2)) and fortune telling (s 66(3)).

46. This led to some problems, as highlighted in *Gorman v Indich* (1990) WAR 131. At one time the Code stated that property offences involving goods worth less than $400 were to be regarded as simple offences. This meant that there could be no liability for receiving stolen goods if those goods were worth less than $400 because the goods were not the product of an indictable offence. The situation was subsequently rectified by providing that such offences were still regarded as indictable.

47. Eg *Ugle* (1989) 43 A Crim R 63; discussed by N Morgan 'Doctrine of Recent Possession' (1990) 14 Crim L Journ 110.

if a person has or conveys something which is *reasonably suspected* of having been stolen. Secondly, if this reasonable suspicion is established, the onus shifts to the accused person to give a 'satisfactory account' of how (s)he acquired such property.[48]

One must gravely doubt the wisdom of agonising over the scope of the law contained in the Criminal Code when related provisions are left unamended. At one time it might have been possible to attempt to defend the Police Act provisions on the basis that the Criminal Code deals primarily with indictable offences and that the Police Act provided a mechanism whereby trivial cases might be dealt with summarily. Given the matters of fundamental principle raised in the previous paragraph that was never, in this writer's view, a convincing argument. Any force it may once have possessed has now evaporated because the Code reforms have generally broadened the scope of offences, now provide for lower penalties when offences are dealt with summarily[49] and have effectively removed a person's right to a jury trial for minor property offences.[50] In truth, the failure to address reforms to the Police Act runs the risk that such offences will be used in situations where the evidence is too weak to establish an offence under the parameters of general criminality so recently evaluated for the purposes of the Code.

## 3. A promise of action?

In 1994, the government was asked to consider introducing, as part of the Young Offenders Act 1994 (WA), a statutory list of the basic rights of young people who have been arrested. Their response was that such reforms should await the wholesale reform of the Police Act on which action was promised.[51] However, no government has yet treated the question of Police Act reform with noticeable urgency. Almost a decade has passed since 1986 when the Law Reform Commission wrote to the then Attorney-General requesting a reference on the Police Act. The Commission was given such a reference and produced a Discussion Paper in 1989 and a Report in 1992. The writer understands that, after a series of discussions involving representatives of the police, the Ministry of Justice and the Law Reform Commission, work has commenced on preparing draft Bills. It remains to be seen how soon these will become available for public comment and whether there is a serious process of consultation with bodies who represent

48. S 71 also contains similar offences.
49. See infra p 299.
50. In 1990, s 426(3)-(4) of the Code was amended to permit the prosecution to request that a case be dealt with summarily if it involved property worth $400 or less. If the prosecution makes such a request, the matter *must* be dealt with summarily.
51. See Harding supra n 27, xiii.

other interest groups.[52] However, the contrast between the Police Act and the Criminal Code is already striking; within a year of the Murray Report, substantial changes were under way to extend the Code but three years after the Law Reform Commission's Report and six years after their Discussion Paper, there has been no concrete change to the Police Act.

## 4. Narrowing offence definitions and widening excuses

There are a number of mechanisms whereby conduct may be either removed from the criminal law 'net' or left in the net but treated as less serious. First, *direct* decriminalisation occurs where legislation decriminalises specifically targeted offences. There appear to be only two examples of this from the decade in review, both from 1989 when the offence of public drunkenness[53] was repealed and the Law Reform (Decriminalization of Sodomy) Act decriminalised certain types of sexual activity between consenting adults in private. Both these reforms were welcome in principle but it may be noted that neither was 'unqualified'. The Police Act substituted powers for the police to apprehend and detain drunken persons to permit 'sobering up'.[54] Whilst this has considerable merit in principle, the same cannot be said of the qualifications contained in the Decriminalization of Sodomy Act. The wordy, moralising preamble to this Act asserts that Parliament disapproves of relations between persons of the same sex and sections of the Act itself then create, via a circuitous route, some ill-defined 'proselytising' offences.[55] According to the proponent of these provisions,

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52. The saga of the passage of other legislation hardly sets a promising precedent for consultation. For example, in 1994 the Young Offenders Act was given to the Legislation Committee of the Legislative Council. The Committee attempted to meet a tight deadline but found that even this was curtailed at extraordinarily short notice. At 5.40 am on 30 November 1994 the government dominated Upper House told the Committee to report in 24 hours. As a result, the Committee was unable to complete its work or even to hear the submissions which it had invited from key people including the Chief Justice, the Commissioner of Police and the President of the Children's Court: see Harding *Repeat Juvenile Offenders* supra n 27, x-xiii.
53. Police Act s 53.
54. Pt VA was inserted into the Police Act following evidence which emerged during the Royal Commission *Inquiry into Aboriginal Deaths in Custody* (Canberra: AGPS, 1991). The author is unaware of how successful the measures have been; their success is, of course, directly related to resources.
55. S 24 of the Decriminalization of Sodomy Act makes it 'unlawful' to 'promote or encourage homosexual behaviour as part of the teaching in any primary or secondary educational institution'. No penalty is specified but an offence arises indirectly by virtue of the little known s 177 of the Code. It is unclear what 'homosexual behaviour' means and how 'promotion' and 'encouragement' will be interpreted. See N Morgan supra n 5, 188-189.

their main purpose related to the civil law and it was 'purely by way of coincidence' that they also attracted the criminal law.[56] This is an astounding statement. Criminal offences should only be created after rational and detailed evaluation and not indirectly and on the basis of 'pure coincidence'.

'Definitional' decriminalisation occurs when modernised offences are deliberately defined more restictively than their predecessors. There do not appear to be many examples of this but the law of criminal conspiracy has been commendably restricted to agreements to commit criminal offences.[57]

Finally, the criminal law net may be restricted through the extension of the various defences and excuses, both complete and partial. Legislative action has been restricted to two matters.[58] First, the right to defend private property did not originally permit the infliction of bodily harm. This was a serious limitation given that 'bodily harm' embraces any bodily injury which interferes with health or comfort[59] and in 1991 the relevant sections were sensibly extended to permit the use of such force as is reasonably necessary, provided that it is not intended to or likely to cause death or grievous bodily harm. Secondly, infanticide was introduced in section 281A in 1986. This applies if a woman kills her child when that child is under one year old and when the balance of the mother's mind is disturbed because of the effect of giving birth or because of the 'effects of lactation'. In effect, infanticide provides a partial excuse, reducing what would otherwise constitute murder or wilful murder to the lesser offence of infanticide.[60] However, given the avowed aim of modernisation, it is striking that the Murray Report and the subsequent legislation simply adopted the language used in the Infanticide Act 1938 (Eng). Many experts seriously doubt whether the effects of giving birth and/or lactation are truly at issue:

> A combination of *environmental stress and personality disorder* with low frustration tolerance are the usual aetiological factors in such cases and the relationship to 'incomplete recovery from the effects of childbirth or lactation' ... is often somewhat remote.[61]

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56. Hon Peter Foss MLA *Hansard* (LA) 15 Nov 1989, 4502.
57. It is, of course, astounding that it should ever be considered to extend beyond this — though this certainly has been the case, at least at common law: see *Shaw v DPP* [1962] AC 220.
58. Recent case law has probably also served to extend the scope of some of the excuses: see *Falconer* (1991) 65 ALJR 20; *Van Den Bemd* (1994) 68 ALJR 199.
59. Criminal Code s 1.
60. However, because it is a substantive offence in its own right, it is possible to charge a woman with attempted infanticide. For one such case: see T Hunter 'Reconsider Charge: Judge' *The West Australian* 11 March 1995, 11. See also *R* v *KA Smith* [1983] Crim LR 739.
61. Emphasis added. Evidence of the Governor and Staff of Holloway Prison: see Brit Parl (Butler Committee) *Report on Mentally Abnormal Offenders* Parl Papers (1975) Cmnd

Infanticide is obviously of very restricted use. The excuse of diminished responsibility would have had a wider operation, but seems unlikely to be introduced.[62] Most writers would agree that diminished responsibility is conceptually difficult and has sometimes been applied beyond its natural reading. However, the doctrine does have the advantage that it introduces a degree of flexibility which is needed if the punishment for murder is to remain mandatory. Professor Glanville Williams neatly summarised some of the dilemmas as follows:

> The defence of diminished is interpreted in accordance with the morality of the case rather than as an application of psychiatric concepts....One may question whether leniency has not sometimes gone too far; but there can be no doubt of the beneficial effect of the defence in mercy killing cases. Here it is invariably accepted by the jury on the flimsiest of evidence, and thankfully used by the judge as a reason for leniency.[63]

Without a mechanism such as diminished responsibility, the law of murder in Western Australia is very inflexible compared with other jurisdictions. It may well be that diminished responsibility is not the way forward but it has become even more important to inject greater flexibility. In addition to the problem of 'mercy killings' identified by Glanville Williams, there has been increasing recognition that the defences of provocation and self-defence are 'gender biased'. The recent Report of the Chief Justice's Gender Bias Taskforce argued that the definitions of these excuses largely reflect male life experiences and cater primarily for the situations in which men kill. Consequently, they do not adequately address women's experiences and, especially, the circumstances in which women have killed violent partners after prolonged abuse. The Taskforce specifically criticised the mandatory nature of the penalty which follows a conviction for murder or wilful murder as lacking flexibility.[64] However, this plea fell swiftly on stony ground; with effect from 15 January 1995, the mandatory

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6244. This is quoted in CMV Clarkson & HM Keating *Criminal Law: Text and Materials* 2nd edn (London: Sweet & Maxwell, 1990) 658. Judging by newspaper reports, this characterisation would also seem to fit the facts of the local case referred to in the previous footnote: see DJ West *Murder Followed by Suicide: An Inquiry Carried Out for the Institute of Criminology, Cambridge* (London: Heinemann, 1965). West also saw the one year cut off as unrelated to the circumstances in which women kill their infant children.

62. The Murray Report supra n 5, 179-180 rejected diminished responsibility. The WA Law Reform Commission also rejected it in its Discussion Paper (1987) but subsequently recommended its introduction in 1991: see WALRC *Report on The Criminal Process and Persons Suffering from Mental Disorder* (Perth, 1991) ¶¶ 2.50-2.58.

63. G Williams *Textbook of Criminal Law* 2nd edn (London: Stevens, 1983) 693.

64. Ministry of Justice *Report of the Chief Justice's Taskforce on Gender Bias* (Perth, 1994) ch 8. Malcolm CJ supported the abolition of the mandatory penalty in submissions to the WA Law Reform Commission: see supra n 62. Murray J is of the same view: see WA Law Society *The Murray Report* supra n 5.

consequences of a conviction for murder or wilful murder have been rendered even more draconian, without the introduction of any greater flexibility in the substantive law.[65]

At a time when politicians of all persuasions appear to be intent on proving themselves to be stronger than their opponents in their pursuit of 'law and order', there is the obvious danger that attempts to introduce flexibility will be interpreted as weakness. This is far from the truth; the aim is to reinforce the law by reserving its strongest response for the worst cases. The moral strength of the law is jeopardised if it is applied rigidly to situations where there are mitigating factors which call for recognition. It is further weakened if, as happens, either prosecutorial discretion or the sympathetic/perverse jury verdict become the mechanisms whereby an unduly draconian result may be avoided.[66] The political pendulum seems to have swung too far for the abolition of mandatory penalties to be a realistic option. However, it is interesting to observe that the Penal Code of Singapore — which is hardly renowned as being 'soft' on crime — has long recognised the need for flexibility and contains a wide range of partial excuses which have no counterpart in Western Australia, including diminished responsibility, consent, excessive private defence and 'sudden fight'.[67]

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65. It is ironic that the consequences of a murder conviction have become progressively more draconian since the death penalty was formally abolished in 1984. Prior to abolition, people convicted of wilful murder were sentenced to death, but for 20 years this had always been commuted to life imprisonment. The result of commutation was that the offender served a minimum of 10 years in prison from the date of commutation to first being reviewed with a view to possible release. In the case of a person sentenced to life imprisonment for murder, the minimum before first review was 5 years from date of sentence. There was, of course, no certainty of release in any of these cases. After a series of amendments, culminating in the Criminal Law Amendment Act 1994 (WA), the minimum periods before first review have increased significantly; a person convicted of murder must now serve a term set by the sentencing court of 7-14 years. A person convicted of wilful murder must serve between 15-19 years before first review if sentenced to life imprisonment and 20-30 years if sentenced to 'strict security' life: see Offenders Community Corrections Act 1963 (WA) s 34.

66. *Falconer* supra n 58 demonstrates the importance of prosecutorial discretion. Mrs Falconer shot her husband from close range after years of domestic violence and after hearing allegations that he had sexually abused their children. The High Court ordered a retrial on the basis that involuntariness should have been put to the jury under s 23 of the Code. The case appeared to be 'all or nothing' in the sense that if s 23 applied she would be acquitted and if it did not she was guilty of wilful murder. However, she ultimately pleaded guilty to *manslaughter* and was *discharged on entering a recognisance*. This may have been a 'fair' outcome but it was not achieved through the application of the rules of the substantive criminal law. The case of *R* (1981) 28 SASR 321 saw the jury return a 'sympathetic' verdict in another case where a woman killed her spouse against a background of appalling physical and sexual violence.

67. See KL Koh, CMV Clarkson & NA Morgan *Criminal Law in Singapore and Malaysia: Text and Materials* (Singapore: Malayan Law Journal, 1989) ch 20.

## 5. Net widening

### (i) Broadening offence definitions

Nobody could accuse the legislature of indolence when it comes to extending the tentacles of the law. There has been *direct* expansion through the introduction of offences into completely new areas such as incitement to racial hatred, unauthorised computer access and failure to wear a bicycle helmet. New offences have also been introduced to deal with matters which were touched upon but not adequately covered by existing laws, as in the case of the new offences of threats and stalking. With the exception of incitement to racial hatred which was narrowed after prolonged debate,[68] these new offences have tended to be defined in broad terms.[69] For example, the provisions relating to stalking potentially outlaw a wide range of activities and then place the onus on the accused to prove 'lawful authority or a reasonable excuse'. It should be a matter of concern that, depending on the way in which these terms are interpreted, the provisions could extend to conduct in the course of industrial disputes and political protests and that in Queensland, stalking offences have been used against Aboriginal youths loitering in shopping centres who would previously have faced, at most, much less serious charges.[70]

Similarly, there has been considerable 'definitional' widening as a result of existing offences being revamped in broader terms. This can sometimes result in the criminal law embracing activities which were not previously covered; for example, as pointed out in an earlier issue of this *Law Review*, the offence of fraud in Western Australia now extends far beyond both its traditional boundaries and the limits in other jurisdictions.[71] At other times it can mean that conduct which has always been regarded as criminal is ranked in a higher offence category. A good example of this is the area of sexual assault. In *Williams*,[72] the Queensland Court of Criminal Appeal debated at length whether the facts could establish 'attempted rape'; since there was digital penetration accompanied by considerable violence, those facts would indisputably now establish the completed offence of aggravated sexual assault.

The general approach of the legislation has therefore been not merely

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68. Originally it was proposed that no mental element be spelt out; eventually sense prevailed and the offences require proof of an intention to create hatred or cause harassment of a racial group: Code ss 76-80.
69. See further infra pp 298-299.
70. See M Goode 'Stalking: Crime of the Nineties?' (1995) 19 Crim L Journ 21, 27.
71. See Syrota 'Criminal Fraud in WA' supra n 5. See also below infra p 299.
72. [1965] Qd R 86.

to modernise the law but also to define it in broad terms. Whilst this has been appropriate in some areas, including sexual assault, it raises some serious concerns in other areas. One problem is that the criminal law may simply cover too much. Fraud now embraces not merely deception but also 'fraudulent means' and the 'victim' does not need to have suffered any loss or detriment; it is sufficient if the victim did something which (s)he need not have done or omitted to do something which (s)he was entitled to do. The prosecution must still prove an intention to defraud, but that term has generally been given a broad meaning by the courts.[73] Since most lies are told with a view to getting a person to do or not to do something, the law is obviously of enormous potential breadth.[74] To define the law in such broad terms has two important and related ramifications. First, law enforcement officers may be faced with complaints on an increasing range of matters which might be better regarded as civil law or consumer law disputes. This can lead to unnecessary duplication and to considerable resources being expended on matters for which there is alternative and adequate redress. Secondly, prosecutorial discretion will, to an even greater extent, become the factor which determines criminal liability rather than the way in which the law is written.

## (ii) Side-wind law reform

A further consequence of enacting broad definitions for one offence is that criminal liability may in future arise for conduct which is not regarded as criminal under the well accepted parameters of liability with respect to other offences. In some areas, this is no bad thing; for example, the effect of the new, broadly defined offence of threats is that liability can be imposed in situations of domestic violence where the threats may be merely verbal, conditional or future and would lack the immediacy required to establish an assault.[75] However, it is submitted that there are other areas where the ramifications may not have been fully considered.

All criminal law students learn that unauthorised 'borrowing' is generally not criminal for the simple reason that the borrower does not intend

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73. *Balcombe v De Simoni* (1972) 126 CLR 576 rejected the view that intent to defraud meant an intent to cause economic loss.

74. For example, a student asks a lecturer for an extension for handing in an assignment, falsely representing that his/her computer has been playing up. Believing that representation, the lecturer grants an extension. That student has deceived the lecturer and has thereby persuaded the lecturer to do something which he/she would not otherwise have done, namely to grant an extension. The student may also have intended to defraud, following the High Court decision in *Balcombe v De Simoni* supra n 73, to the effect that this term does not require proof of an intention to cause economic loss.

75. Code s 222.

*permanently* to deprive the owner of the goods in question.[76] Murray stated that he could see no particular defect in the definition of stealing which required a remedy and the only change made by Parliament has been to redesignate unlawful use of a motor vehicle as stealing. However, the redefined fraud offences and, even more surprisingly, the stalking offences may well have altered the law. Fraud now embraces the situation where a person obtains a benefit or causes a detriment by fraudulent means. The term 'fraudulent means' is not defined but Murray used the example of the person who sneaks into a cinema and watches a movie without paying. By analogy it is hard to see why it would not be fraud for a person to sneak into your garden shed and 'borrow' your tool box so that you are unable to complete those weekend chores.

The conduct element of the new offence of stalking includes 'depriving [a] person of possession of any property or hindering that person in the use of any property'.[77] The mental element includes intending to prevent a person doing something which that person is lawfully entitled to do. Again, this raises the prospect of liability arising for 'borrowing' unless the courts read the sections as concerned only with 'intimidation', as the chapter heading states. Even if the stalking provisions are so construed, they probably still make inroads on traditional learning. In *Bowman*[78] the Court of Criminal Appeal held that there was no offence of stealing where the accused, in an attempt to get back some money he was owed, took some property belonging to the debtor. Murray did not recommend any change to the definition of stealing in order to counteract *Bowman* but such conduct might well now constitute 'stalking'.[79]

It may well be that some of the long-standing limitations on the scope of some offences require amendment. However, any such changes should be the result of detailed debate and *direct* reform of the relevant sections and not a mere 'side effect' of reforms to other offences.

## (c) A more tangled net?

In some areas the introduction of new offences and the broadening of existing offences has led to increasing overlap between offences, with the result that the relationship between the main offences appears less clear than it was under the original Code. We have already seen this with respect

76. S 371.
77. S 338E.
78. (1980) WAR 65.
79. Another interesting example is burglary. This is defined as entering a 'place' with/ without consent and with intent to commit an offence or committing an offence therein (s 401). A 'place' is defined to include a 'conveyance' (s 400) and a conveyance includes a vehicle used to carry persons or goods (s 1). On its face, entering a car with intent to steal money is therefore burglary.

to stealing and fraud. The broad definition of fraud also means that the boundaries between fraud and forgery are more obscure.[80] Under section 473 of the Code it is an offence to forge a record or to utter a forged record with intent to defraud. It is possible to think of cases which would constitute forgery but not fraud, as where the drug addict forges a prescription. However, it would appear that all offences of 'uttering' could simply be covered by fraud or attempted fraud, as where the addict presents the forged prescription to a pharmacist. Another area of overlap occurs with respect to incitement. Prior to the introduction of the offence of incitement to commit an offence, the Code prescribed the rather clumsy offence of 'attempting to procure the commission of an offence'.[81] It is surprising and rather confusing that this has survived the introduction of incitement.

Perhaps the most confusing area in terms of the multiplicity of offences is in relation to offences based upon threats. In 1983, the law of assaults covered immediate threats to apply force and there were specific offences dealing with extortion, blackmail and threats to jurors and others. The specific provisions relating to threats to jurors have now been repealed in favour of broad threat-based offences which seem to cover the ground which is also covered by the very convoluted definitions of blackmail. On top of that, we have the stalking offences outlined above.

Whilst some degree of duplication is probably unavoidable, there seems to be excessive overlap in some areas. This serves to confuse rather than clarify the law. It must also be emphasised that criminal/social problems such as domestic violence are not solved by a 'belt and braces' approach to defining criminal offences; what matters is enforcement. Much of the conduct which, since 1994, has been hailed as falling under the rubric of 'stalking' could actually have been dealt with since 1990 under the threats offences.

## 6. Upwardly mobile penalty provisions (UPPIES)

Since 1984 there have been three significant changes to the system of maximum penalties. First, as part of the simplification process the Code has largely abandoned the earlier technique, particularly obvious in the area of property offences, of specifying a normal maximum and then identifying in detail a range of situations in which a higher penalty was appropriate. Generally it now prescribes a higher normal maximum and has dispensed with or reduced the number of 'special cases'.[82] Secondly, the maximum for some offences has increased in situations where that increase cannot be

80. See Syrota 'The Mental Element in Forgery' supra n 5.
81. S 556.
82. Eg, criminal damage now carries a general maximum of 10 years compared with 3 previously (s 444). The general maximum for stealing has increased from 3 to 7 years (s 378).

attributed to the repeal of the 'special cases'; this includes fraud, assaults occasioning bodily harm, serious assaults, wounding and the taking of motor vehicles. Finally, the Code frequently specifies a lower maximum penalty for indictable offences which are dealt with summarily.

These reforms have the advantage of greater simplicity but three comments must be made. First, UPPIES seem to be exclusively a creature of the 1980s and 1990s. Secondly, the trend in maximum penalties is inexorably upwards across a wide range of offences even though the rate of imprisonment in the State is acknowledged to be high. Finally, at the very time when the principle of imprisonment as a last resort was being espoused in legislation, the enhanced maxima have removed from the courts the power to use section 669 of the Criminal Code to extend leniency to first offenders convicted of trivial offences. This power can only be exercised in respect of offences carrying three years' imprisonment or less; in 1983, it therefore covered a wide range of offences such as stealing, fraud, assaults occasioning bodily harm and assaults on public officers. Today it no longer applies to such offences even though there are cases where both sides agree that justice would be served by such a disposition.[83]

## CONCLUSION

In some respects the last example is a microcosm of the general points raised in the article; whilst the simplification of the Criminal Code is generally to be welcomed, there has been a lack of holistic reform. For example, whilst numerous reforms have widened the law, there has been little effort either to address related areas of overreach, notably in the Police Act, or to introduce greater flexibility, especially in the area of homicide offences. There have also been examples of situations in which the effect of the new laws has been indirectly to challenge the accepted parameters of criminal liability. The challenge for the next decade is to address these and other questions to ensure that an appropriate balance is struck between the need for the criminal law to confront new problems and the need to ensure that it does not become too intrusive.

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83. In *Stokes* (1994) 71 A Crim R 75, Nicholson J confirmed the view expressed in an earlier article in this *Review* that if the general maximum is more than 3 years, s 669 cannot be used even if the offence was dealt with summarily and was subject to a summary conviction penalty of less than 3 years: see N Morgan 'Imprisonment as a Last Resort: Section 19A of the Criminal Code and Non-Pecuniary Alternatives to Imprisonment' (1993) 23 UWAL Rev 299, 311-312.