ARSON LEGISLATION AMENDMENT BILL 2009

Second Reading

Resumed from 21 October.

MS A.S. CARLES (Fremantle) [4.26 pm]: I resume my comments on this bill. I have spoken about the proposed amendments to the Bush Fires Act, which I support. I repeat that the Greens (WA) do recognise the seriousness of the crime of arson, and we want to ensure that the penalties for those who are found guilty of wilfully lighting fires are increased.

I turn now to some problematic amendments that are proposed to be made to the Criminal Code. I support the thrust of the legislation. However, there are some problems, particularly with the proposed penalties. Clause 10 of the bill proposes to insert into the Criminal Code a new section 444A. That proposed section places a duty on people who are in control of a fire, firstly, at the point of ignition, in proposed subsection (1); and, secondly, once the fire is under way, in proposed subsection (2). We are talking here about people who are lawfully lighting fires—CALM officers, local government staff, traditional owners and the like—and the consequences for them if things go wrong. We are proposing to amend the Criminal Code to provide that if a person in charge of a fire—essentially a public servant—fails to take reasonable care and loses control of the fire and causes damage to property, that person may be convicted and be given a penalty of life imprisonment.

Mr C.C. Porter: This will apply only if they unlawfully or wilfully light the fire.

Ms A.S. CARLES: No. That comes under the Bush Fires Act if they wilfully light a fire. Okay.

I support the amendment that was foreshadowed by the member for Mindarie, on behalf of the opposition, during the second reading debate on this bill at the Bunbury Regional Parliament. That amendment is to introduce the notion of "recklessness". I support that amendment because I, too, am very concerned that we may inadvertently capture people who have failed in their duty to take reasonable care when in control of a fire. I will not repeat the arguments put by the member for Mindarie. As I have said, I support what he has said.

The Greens also have a concern about, and will not be supporting, clause 11 of the bill. Clause 11 proposes to insert in section 444 of the Criminal Code a blanket penalty of life imprisonment. I foreshadow that I will be moving an amendment to remove that penalty of life imprisonment. The Greens have consulted with the Law Society of Western Australia about this penalty. The Law Society opposes the proposed increase in penalty to life imprisonment. It has advised us that such a penalty will mean that the offence will need to be dealt with by the Supreme Court, not the District Court, and that will add additional costs and complexities to the litigation. I support increasing the penalty in section 444 of the Criminal Code from 14 years to 20 years' imprisonment. This would be in line with the gist of the other amendments in the bill, it would be more in line with the scheme of the Criminal Code, and it would also be consistent with the increase in penalty from 14 years to 20 years in the Bush Fires Act, to which amendments are made through this bill.

This amendment would mean that a public servant doing his or her job could be charged, found guilty and sentenced to life imprisonment, yet someone who wilfully lights a fire could be sentenced to a maximum of 20 years. I see the Leader of the House shaking his head. That is what the amendment in the legislation says.

Mr R.F. Johnson: I don't think you're reading it properly.

Ms A.S. CARLES: I have read it properly; I have read it many times. The amendment to section 444 seeks to bring in a blanket life imprisonment penalty and remove the current penalty. It states —

> imprisonment for 14 years or, if the offence is committed in circumstances of racial aggravation, to imprisonment for 20 years; …

Mr J.R. Quigley: What the member is concerned about is that the penalty is not by death; you would rather hanging for the offence. We all know that Lord Haw-Haw would rather hang.

Ms A.S. CARLES: I am saying to the Attorney General that I support increasing the penalty from 14 years to 20 years. I also support adding a $500 000 pecuniary fine to that. Life imprisonment is not a proportionate response in the scheme of our Criminal Code. Currently, we have life imprisonment only for serious offences against persons. We have life imprisonment for murder, armed robbery and drug trafficking. These are the most serious crimes against people that can result in life imprisonment. We must remember that we are talking about property here. The maximum penalty on conviction for aggravated sexual penetration, serious drug offences, manslaughter or grievous bodily harm is 20 years. It seems to me that a 20-year sentence, not life, would be a more appropriate penalty for this crime against property. I leave it to the Attorney General to ponder this suggestion. My amendment would remove only the blanket life imprisonment penalty. Can members imagine

how it would feel to be a public servant knowing that he or she could be imprisoned for life if he or she were responsible for an out-of-control fire?

Mr C.C. Porter: Two offences are being created, one of which is with respect to a breach of a duty, which is a fire that potentially gets out of control. Life does not attach to that scenario. Life would attach only to a scenario in which the fire was wilfully and unlawfully lit. You're confusing the penalty and the offences.

Ms A.S. CARLES: No. What is the penalty then?

Mr C.C. Porter: You just said to me that a civil servant whose fire unintentionally got out of control could face life. What I am saying to you is that that is incorrect.

Ms A.S. CARLES: So what is the penalty for a proposed section 444A offence?

Mr C.C. Porter: Life imprisonment.

Ms A.S. CARLES: That is what I said—life imprisonment.

Mr C.C. Porter: No. The penalty for a proposed section 444 offence is life.

Ms A.S. CARLES: Yes, that is my point.

Mr C.C. Porter: No. There is proposed section 444A, proposed section 444 and proposed section 445A. Proposed section 445A attaches to proposed section 444A and establishes a penalty of 15 years' imprisonment.

Ms A.S. CARLES: That is for damage to vegetation, with 15 years' imprisonment.

Mr C.C. Porter: No; that is for a person who unlawfully omits or refuses to do any act that it is his duty to do. A person who breaches his duty would not face life; he would face 15 years' imprisonment. A person who wilfully and unlawfully lights a fire that damages property would face life. Your statement that a civil servant who unintentionally but negligently damages property would face imprisonment is just not right.

Ms A.S. CARLES: So the Attorney General is saying that it is just 15 years for a public servant?

Mr C.C. Porter: In the scenario that you have raised, if it were not wilful and unlawful damage of property, it would not be life; it would be 15 years.

Ms A.S. CARLES: Can a public servant be charged with life imprisonment under proposed section 444A?

Mr C.C. Porter: Yes, if he has wilfully and unlawfully lit a fire. But what you have said—that is, that a public servant who unintentionally or who breaches a duty, or whatever words you want to use, is going to face life—is not correct; it is 15 years. I understand your point; you don't like life attaching to wilful and unlawful damage.

Ms A.S. CARLES: Yes, to property offences; that is all. That is my point. I am very concerned that public servants who are responsible for back-burning will quit their jobs over this. I will conclude by foreshadowing an amendment to remove the life imprisonment penalty. My amendment is to delete lines 7 to 12 in clause 11 on page 6 of the bill.

DR J.M. WOOLLARD (Alfred Cove) [4.35 pm]: The Arson Legislation Amendment Bill 2009 obviously relates to how a person who has committed arson is dealt with by the law. Before I refer to the amendments in the bill, I will commend the work being undertaken by the Fire and Emergency Services Authority of Western Australia to better understand the motivations behind people who deliberately light fires. I also commend it for its endeavours in finding strategies to stop people from committing arson.

I have read the Attorney General's second reading speech and I have listened to the debate so far, and I have some reservations about proposed section 444A. Although I support the enactment of provisions that reflect the community's condemnation of offences such as arson, it is important that the proposed section capture only the people whose actions are at the higher end of wrongdoing. I am sure that the Attorney General will address this issue in his right of reply.

Proposed section 444A in clause 10 adopts an objective or reasonable person test in relation to the duty of a person who has charge of or who is in control of a source of ignition or a fire. The penalty for this criminal negligence is life imprisonment. In his second reading speech, the Attorney General said that the Model Criminal Code recommends arson offences with an intention element of recklessness. I have looked at the intention element of recklessness and I note that the member for Mindarie has an amendment on the notice paper in which he has copied word for word the definition of "recklessness" from the commonwealth's Model Criminal Code. The definition of "recklessness" is addressed in several sections of the Model Criminal Code. I like the definition of "recklessness" and I believe that the Western Australian Criminal Code could be modified to include the definition of "recklessness" in relation to arson. I appreciate that some states have adopted in various sections of their codes the definition of "recklessness" as used in the Model Criminal Code. However, I have looked at those

sections in which they use the definition of "recklessness", and I think that we have basically got it right in most parts of our Criminal Code. I think that a definition of "recklessness" in relation to arson is appropriate. I do not think that we have to accept this definition of "recklessness" and modify our Criminal Code just because the Model Criminal Code uses the definition of "recklessness". In a general sense, in considering arson, the government is proposing an amendment that involves criminal negligence, while the definition used by the member for Mindarie, which comes from the Model Criminal Code, involves recklessness. We should be considering recklessness because it is imperative that the new offence catches only those people who commit arson at the higher level of culpability. This is because, as the member for Fremantle has just outlined, the offence attracts a penalty of life imprisonment.

When the Attorney General responds to the second reading debate he will come back to the comments that were made when we considered this bill in Bunbury, about the definition and interpretation of recklessness. He said in Bunbury that he thought that recklessness might be a higher standard than criminal negligence. He said that criminal negligence requires grossness or moral culpability. He said that he would discuss the opposition's amendment with his advisers, particularly in relation to the commonwealth's standard of recklessness, and report back to this house about whether recklessness was a higher or lower standard than criminal negligence. I will be very interested in hearing of the advice that the Attorney General has received.

We need to get this clear because criminal offences involve thought elements: intention, recklessness and criminal negligence. That is the order of hierarchy in terms of the level of wrongdoing. Intention is higher than recklessness, which is higher than criminal negligence. A person has intent in his or her conduct if he or she means to engage in that conduct. In common law, recklessness requires an accused to foresee the consequence of his or her actions. The element of recklessness has a subjective limb and an objective limb. The subjective limb is foresight of the risk and a conscious decision to take the risk, and the objective limb is taking a risk that is unreasonable or unjustifiable. I mention this because in a while I will refer to some English cases. In one case just one limb of the element was applicable, while in another both were. This is the rationale for my belief that we should be going for recklessness rather than criminal negligence. Criminal negligence is where the accused ought to have foreseen the consequences based on what was reasonable in the circumstances.

The Attorney General referred us to the Model Criminal Code. The commentary on that code states that there may be some cases in which criminal negligence may be at the higher end of wrongdoing than criminal recklessness, but it is very clear that this is not the norm, and it only occurs when a specific definition of criminal negligence has been provided.

Mr C.C. Porter: Was this from your briefing?

Dr J.M. WOOLLARD: I did not actually get the briefing, but I am very lucky in the support that the government has given me. I have a fantastic research officer. I appreciate the offer by the Attorney General of a briefing, but I have been away on committee work.

Mr C.C. Porter: It sounds consistent with the views of the person who would have given the briefing.

Dr J.M. WOOLLARD: In that case, Abbey has done a very good job for me.

In considering the subjective element, one must look at case law from the United Kingdom. The member for Midland raised concerns about innocent people being captured by this legislation. We know that that has happened with these definitions from the UK cases. The term "criminal negligence" does not take into account an individual's weaknesses, which the term "recklessness" does. English cases concerning recklessness adopted a meaning that was generally the same as criminal negligence, which I believe is the definition currently used in this bill. The current definition does not have the subjective element.

The case that was pulled out for me was "Commissioner of Police of the Metropolis v Caldwell". In that case, the House of Lords departed from an earlier understanding of recklessness that contained both the objective and subjective elements and conceded only the objective element. The test became whether the consequence was obvious to a reasonable man. That was the test for criminal negligence. The problem with that definition, which was just an object of definition, surfaced in the later case of Elliot, in which a 14-year-old girl of low intelligence was convicted of criminal damage, after finding in a garden shed white spirit, into which she dropped lighted matches, destroying the shed. Although it was accepted by the court that, due to the girl's low intelligence she would not have appreciated the risk associated with her actions, she was convicted because the court held, following Caldwell, that the test for recklessness was whether the risk would have been obvious to a reasonable person; it did not matter that the risk would not have been obvious to the accused. The case illustrated that a purely objective approach to criminal liability fails to take into account the individual weaknesses of an accused that may, under a subjective assessment of fault, excuse the accused from criminal liability.

Returning to the definition of arson in this bill, we should be using what has been suggested by the model code. We should be putting in recklessness, so that we have both the subjective limb, which is foresight of the risk, and the objective limb, which is that the risk was unreasonable or unjustifiable. While I support the government's intent in introducing this bill, I believe the inclusion of a subjective test in proposed section 444A is essential. I would not be able to support a bill that could result in the incarceration of an innocent person such as the girl in the case of Elliot, or the other examples were given earlier in this debate. My preference is to include in proposed section 444A a fourth element of recklessness. I would anticipate that such an amendment would include a definition of "recklessness", as outlined on the notice paper. That amendment was put on the notice paper by the member for Mindarie and, in fact, comes from the Model Criminal Code. Further to the member for Fremantle's comments, I also add my support for changing the definition of "property" in proposed section 444A(4). I believe that the member for Girrawheen will move an amendment to change that definition. This amendment would ensure that there was consistency between this legislation and the Bush Fires Act. It would avoid ambiguity. The definition of "property" should include bush and fauna rather than being limited to vegetation.

MR R.H. COOK (Kwinana — Deputy Leader of the Opposition) [4.50 pm]: I rise to make a fairly brief contribution to the debate on the Arson Legislation Amendment Bill 2009. It is a debate about which I feel passionately. I make my comments in the context of proposed section 444A "Duty of person in control of ignition source or fire". Proposed section 444A(1) states in part —

> It is the duty of a person who has charge of or is in control of a source of ignition to use reasonable care and take reasonable precautions to avoid lighting a fire that destroys or may destroy or cause damage to property that the person is not entitled to damage or destroy;

I and other members of Parliament are invited to ponder the scenarios under which this section would take effect and contemplate the scenarios with which we are familiar. I will speak briefly about an incident that concerns me. It involves a family friend who lives on the Balingup-Nannup Road. My family also owns property on the Balingup-Nannup Road. This matter essentially concerns an incident that occurred on Saturday, 14 February when a Western Power power pole fell over because of structural failure. It hit dry grass, which caused a spark that started a fire that destroyed many properties in the area. In particular, it destroyed a good half of the property owned by a member of my family. Mercifully, no buildings were destroyed but it did burn trees and fence lines. The fire was fought that day by members of the volunteer fire brigade, who did a magnificent job under the circumstances. It was a very windy day and the fire was quickly getting out of control. They were soon joined by Department of Environment and Conservation firefighters, all of whom tried to extinguish the blaze.

I will paint a picture of this area for members. It is heavily wooded by pine plantations owned by the Forest Products Commission. Essentially, there was a tinderbox scenario. The fire rapidly got out of control and engulfed many properties in the area, as I said, and burnt much of the forest in the area. I am left to ponder whether Western Power in this instance exercised a proper duty of care in relation to what might be considered a source of ignition or fire. A report into the fire at that time concluded that live termite activity extended up the pole that fell over but that there was no evidence that the pole had been treated for termites. It found advanced rot within the pole and that the pole had little or no pole strength remaining. It found also that the spans either side of the pole were unusually long—between 530 and 580 metres long.

It could be suggested that Western Power could have taken a little more care with the pole. As I said, this fire took place on 14 February. Perhaps Western Power could be forgiven under the circumstances if it had been sometime since the pole was last inspected. However, I understand that the pole was last inspected on 9 January that year. Barely a month had passed since Western Power had inspected the pole, which had live termite activity and had not been treated for termites. The power spans either side of the pole were unusually long and potentially unsafe. I am told that the power pole had approximately only 50 millimetres of solid wood around it to keep it upright. A case could be made that Western Power had not taken a responsible approach to what might be called a source of ignition. It is debatable also whether Western Power used reasonable care.

The fire was fought over a number of days. On 15 February, the Department of Environment and Conservation firefighters who were fighting the fires around Balingup and Nannup were called away to Ludlow where another fire had started. I will come back to that fire. In the meantime, there had been a change in the wind patterns. Therefore, properties that the firefighters previously had thought were safe and would not come under threat came under threat. Mr Bob McGuinness is one of the neighbours and lives in a house along the Balingup-Nannup Road at a property that he had built over a number of years. He built the house himself. He had a shed which, in addition to large boat, contained the contents of his livelihood. He was a contractor and had tools and a range of equipment stored in the shed that he used to repair his contracting equipment. Mr McGuinness's house was surrounded by Forest Products Commission forest in a manner that he thought was dangerously close to his

house. He decided to stay and defend that property, and it is just as well that he did because it would appear that there were not enough firefighters left to undertake the defence of his property. He undertook the defence of his property and was able to save the house but was unable to save the shed and other equipment on the property. He informs me that he lost a large shed, the boat in the shed, the contents of the shed, fencing and numerous trees. He had to sell his cattle the next day because there was no pasture for them to graze on. As I said, he nearly lost his house in that fire. The cost of the damage was approximately $140 000. It appears to Mr McGuinness, without having any great knowledge of the law, and I think quite rightly, that there is a case to be made against Western Power for not taking proper and reasonable care of the power pole for which it was responsible. He also raises the question about whether the Forest Products Commission took reasonable care in ensuring that the plantation forests around his property were not so close to his property as to represent a danger to his property in the event that a fire broke out.

I return momentarily to the question of the Ludlow fire. I understand that the Ludlow fire in this case was purposely lit, and it was to the Ludlow fire that the firefighting services of the Department of Environment and Conservation were diverted to attend. Perhaps a case could be made out that by virtue of—it is not that boring, Premier!

Mr C.J. Barnett: It is fascinating.

Mr R.H. COOK: Perhaps a case could be made that by virtue of attending the Ludlow fire there were not enough resources to attend to the fire that was now bearing down on to the property of Mr McGuinness. Perhaps a case can also be made that the person who lit the Ludlow fire also conducted himself without reasonable care, because the direct effect of lighting the Ludlow fire was properties in the Balingup-Nannup area coming under threat. These are, by and large, rhetorical questions to which the Attorney General may or may not give some consideration or response, but I raise these to place on the record for the Parliament the complex nature of these scenarios. They are complex through the ignition point, the nature of the fuel, and the resources on hand to fight the fire that perhaps have been diverted elsewhere.

Mr McGuinness asked me to make these comments tonight because Western Power and the Forest Products Commission have a very solemn responsibility to the people who own property in the region of their infrastructure and pine plantations. It occurs to me that if Western Power has a power pole that is supported by 50 millimetres of wood that has an active termite infestation that has not been treated, perhaps Western Power has a problem. Mr McGuinness has made the observation that he undertook an inspection along the same powerline that caused the fire that destroyed a lot of his property. He found that other parts of the line were caught up in Forest Product Commission pine trees, and that in itself presented an ongoing risk to other properties in the area. Mr McGuinness has lived in this area for over 20 years. He has operated two businesses in the area; one is a contracting firm. His partner is traumatised by the experience and is undertaking ongoing counselling as a result of the bushfire that almost destroyed their home. It is with reluctance but with a certain amount of resignation that Mr McGuinness now has made the decision, with his partner and family, to sell up, because he cannot see a situation in which the house in which he currently lives will be made any safer by the practices of the Forest Products Commission and Western Power in the area. It is interesting that the government has brought this legislation forward, because those incidents involved infrastructure which is maintained by Western Power but which is patently not safe and Western Power has done nothing to mitigate the risk associated with it, and the Forest Products Commission grows its plantations dangerously close to properties, which means that in the event of fire those plantations pose a risk to property. It will be interesting to see how this legislation will impact on the commission's property because, as the legislation says, in this instance there may be people or persons who are in control of a source of ignition and they should be using reasonable care. It is fair to ask the question: did Western Power and the Forest Products Commission take reasonable care in that particular instance?

I am sad that Mr McGuinness is now in this position and that he feels he has to sell up and move elsewhere because he is worn down by the nature of the risks that are posed to his property. I would like to think that legislation such as this will more finely focus the minds of instrumentalities such as Western Power and the Forest Products Commission to ensure that they maintain infrastructure that is there for the benefit of the community but does not pose a risk to the community.

MR C.J. TALLENTIRE (Gosnells) [5.04 pm]: I rise to make a brief contribution to this debate. There is no doubt that the offence of arson causes enormous upheaval in our communities, especially our rural communities. It puts at risk lives, and destroys property and environmental values. Also, it is a problem that causes our hard-working volunteers and professional firefighters to put themselves at considerable risk. Recently I met with the Gosnells Volunteer Bush Fire Brigade, an organisation of outstanding citizens: people who want to contribute to our community, who are dedicated to the task, and who realise that at this time of the year, in early November,

they have many months ahead of them of exceedingly dry, hot days when the risk of fire is very high. The last thing they need to know is that they will be called out to many fires that will have been caused by arsonists. All too often those people, who display such goodwill and such a desire to help the community, find that their volunteer effort goes towards putting out fires caused by people who have stolen vehicles that are then ignited in state forests or plantations. They are called out to other bushfire ignitions that are sometimes caused by sources that are never determined. Invariably they are called out for substantial periods of time. They have to deal with the disruption that comes to their lives, and that is then a problem for their employers. Nevertheless, they have made this commitment to be good volunteer bush fire fighters. It is important to note in this debate that the volunteer bush fire brigades across the state do an absolutely sterling job. They deserve only the best resources.

On that point of resources, it is very important to note just how effective the volunteer bush fire brigade network is. A fast attack vehicle, which, basically, is a converted Toyota Land Cruiser with a pump and a tank with some 500 litres of water on it, is an incredibly useful vehicle to get quickly to a fire and extinguish it when it is at the very early stages. The beauty of this is that with a network of bush fire brigades that each have at their disposal a number of fast attack vehicles, we can have a system in place whereby these vehicles are able to get to fires in a very short space of time. That is the beauty of our bush fire brigade network, which has saved this state from the terrible consequences that we are so aware of from fires in Victoria, where fires can get out of control and become enormous, with sometimes hundreds of kilometres of fire front. It is the virtue of our system that it enables our firefighters to get out there quickly and extinguish a fire at a very early stage.

I mentioned the Gosnells Volunteer Bush Fire Brigade, and I especially commend the work of Brigade Captain Michael Battrick, who leads that brigade, and the work that he and his team put in. They have very cramped facilities. I come back to the point that these brigades need the very best of resources, yet at the moment the Gosnells brigade is squashed into a shed with the Gosnells State Emergency Service. The level of resources that we are giving these brigades is simply not good enough. They are the ones who have to deal with the arson attacks that we see. They will be very pleased that this legislation is being put forward. It is legislation that is much needed. My colleagues, especially the member for Mindarie, outlined some important amendments defining recklessness. Those proposed amendments will make the legislation better legislation and therefore make it much more workable and much more likely to be applied. Those amendments are important.

I will move on to firefighting and draw on some of my experiences as a former member of the East Gidgegannup Volunteer Bush Fire Brigade. It is a bit like many military situations in that people often say that fighting a fire is 90 per cent sheer boredom and 10 per cent panic. Sometimes we found ourselves in very frightening and dicey situations. The rest of the time there is the tedious work of mopping up and making sure that logs and embers do not suddenly flare up. Many hours can be spent doing graveyard shifts on a fire field just making sure that the fire is well and truly out. It is so disheartening to know that so much of that effort is caused by arson or sometimes sheer carelessness. A number of times when I was called out, the cause of ignition was more likely that of carelessness when someone caused a fire while using an angle grinder. This legislation needs to ensure that people are aware of the risks involved in carrying out that sort of activity or anything that could possibly cause a fire. At the same time we have to make sure that the penalties are equitable and proportionate to the level of intent. That is where those amendments put forward by the member for Mindarie really do come into their own. They are vital additions to this legislation.

This legislation also needs to be coupled with a stronger push to educate the community on the risk of fire, especially in the peri-urban and rural environments where we often find that people with no experience of living in fire-prone areas are living in dwellings and they are not even aware of the need to get a permit during restricted times and that there should be absolutely no ignition of a fire in an outside area at certain times of the year. Perhaps those people are new to an area, having moved from interstate or overseas. They can put communities at risk. That was certainly an experience that I had when I was living in Gidgegannup in the electorate of the member for Swan Hills. It was really quite frightening. We were in the very fortunate situation of having fast-attack vehicles about 10 minutes' travel time from where the fire was burning and it was possible to quickly extinguish the fire. Whenever we see a plume of smoke on the horizon in the rural regions of our state, it really does strike fear into the hearts of many, with good reason.

In preparing for this speech, I have had a look at some of the comments by criminologists on the psychological profile of people who are likely to be arsonists. From what I can see, it can be summarised that many arsonists are people who lack remorse for the carnage that they can sometimes cause and the sheer scale of damage that they cause. It is hard to believe, but, according to leading criminologists, arsonists are not people who suffer from mental illness. They carry out the dangerous activity of lighting fires without realising what they are doing but they are not mentally ill. They enjoy the excitement of it and are often motivated by a sense of revenge. Their desire is to not only cause havoc but also exact revenge on others in their community. Invariably, they are male.

There was one famous case in South Australia involving a female arsonist. Generally speaking, arsonists are male, they are typically between 24 and 27 years of age, they often live close to where they light fires and they are invariably loners. Interestingly, according to leading criminologists, they are not pyromaniacs. Only one to two per cent of the people convicted of arson are pyromaniacs. They have a very curious psychological profile. As I have said before, they lack any sense of remorse for what they have done. It seems that by having tougher penalties, as proposed in this legislation, we may have some means by which we can communicate with these people that their criminal intent is totally unacceptable in our society. We need to find other means of preventing this sort of criminal activity occurring beyond the penalties that exist in this legislation. That is where we really have to go. We always have to acknowledge that a preventive measure is far better than some sort of punitive measure that occurs after the event.

I have spoken a little about the social impact of the activity of arsonists. The environmental damage that is caused by fire when fire frequency far exceeds the natural fire frequency has to be better understood. A lot of work is going on in this state and elsewhere in the world into the general area of science known as fire science. It is very important that that work continue. It is very reasonable to say that in Western Australia we are only just beginning to understand how frequently many of our natural areas were burnt. In some areas the ecology has evolved to endure, survive and sometimes thrive with a fairly frequent fire regime. There may even be some ecosystem types that have adapted to a burn regime that may occur every seven or 10 years but those are probably few and far between; yet we see that in some areas of government policy that seven to 10-year fire frequency is suggested as a one size fits all. We have hundreds of different ecosystems in Western Australia and different vegetation types yet there is a tendency to impose the one fire frequency regime across all of those vegetation types. That would obviously be an inappropriate use of prescribed burning but in some cases we do have to burn for the preservation of property and to reduce fire risk, recognising that not only arsonists cause fire but also natural events such as lightning strikes. Much can be done to make sure that our planning system does not allow the building of dwellings in fire-prone areas. Our planning regime really has to get that right. At the moment there is an all-too-common occurrence of putting new subdivisions, often fairly cheaply priced—good value, people might say—small properties on the outer limits of the city in fire-prone areas. Through a poorly thought through planning regime, we could well be putting people in very dangerous situations where they are exposed to the serious threat of bushfires in the future.

I have spoken a little about the ecological impacts of overburning or inappropriate use of fire frequency that exceeds the natural. It is important to note that it is not just the vegetation that suffers but also bird species. We have some famous birds on the south coast, including the noisy scrub-bird, the western ground parrot, the western bristlebird, Carnaby's black cockatoo and malleefowl, that have all suffered because of inappropriate fire regime. So, too, have mammals. The once thought to be extinct Gilbert's potoroo has been more a victim of fire than just about anything else, with the possible exception of feral predators such as the fox. There have been some very serious ecological impacts as a consequence of arson.

We need to ensure that the legislation targets true arsonists; we have to ensure that the penalties in the legislation are correctly framed to allow for those who may be going about legitimate work—for example, undertaking a prescribed burn—that results in fire damage. We also have to recognise appropriate usage of fire on Indigenous lands in the form of firestick farming. In some cases, the skill of firestick farming needs to be re-learnt and developed, and we have to ensure that it is done in an ecologically sound way that is consistent with the way in which Indigenous people have conducted that activity for more than 60 000 years.

I fully support the intent of the legislation, but there is a serious need for amendments so that the legislation can be as effective as possible. Amendments in relation to recklessness need to be carefully examined by the government.

MR A.P. O'GORMAN (Joondalup) [5.21 pm]: I also support this legislation. I think it is appropriate that we try to tackle the causes of fire in our community and that we take a large sledgehammer to those who willingly and consciously set fire to things. Arson puts our firefighters in danger, particularly those in country areas where they are predominantly volunteers and have to leave their places of work and at times their places of enjoyment to fight fires.

In the time I have been in this Parliament I have served on the Community Development and Justice Standing Committee, and that committee has held a number of inquiries into emergency services. During the last inquiry we visited Fitzroy Crossing. Around eight o'clock one morning we drove out to one of the local communities with a Fire and Emergency Services Authority officer; his name escapes me at the moment. Far off in the distance we saw what seemed like a very small puff of smoke. As we were holding an inquiry into emergency services, the FESA officer informed us that that sort of thing was seen on a regular basis up there. He said that

nine times out of 10 those fires would fizzle away to nothing, but that on the occasions that they did flare up, they could become a major fire event in a very short time.

We drove back into Fitzroy Crossing a couple of hours later, and the small puff of smoke had by this time evolved into a fairly large plume on the horizon. It was still not an issue for the FESA officer; he did not seem too concerned about it. We then visited a pastoral station on the other side of Fitzroy, and were being shown through some of the firefighting and emergency services responses that the station took on. All the time we were doing that, I noticed that the FESA officer and the station owner—a female station owner—continuously kept their eyes on the horizon; they never once took their eyes off the horizon as they watched this plume of smoke develop.

We held a hearing in Fitzroy that started at about two o'clock that afternoon. When we got to the hearing we were told that the small plume of smoke we saw earlier, way off on the horizon, was now a major fire event in the area. In fact, some of the people we wanted to speak to in that hearing were local firefighters. We spoke to them in batches of only 15 or 20 minutes; two or three of them would come in at a time to speak to us. Most of them were black from head to toe with soot, and they were all fully kitted out.

As I recall, that fire was started deliberately. A person who deliberately starts a fire like that deserves the full force of the law to come down on him. My concern about this legislation—I know that the member for Mindarie has also spotted this problem—is how it will deal with fires that are started unintentionally. I come from a trade background, and I have on occasion found myself in such circumstances while welding. On one occasion I was working at Curtin University, welding in an exterior passageway. I had blocked the passage on both sides with physical barricades and tarpaulins so that the welding would not flash in people's eyes. Because I would be welding overhead, I put notices up and provided information through all the information channels available at the university. I had fire extinguishers and my trade assistant with me. While I was welding an overhead pipe, a couple of students came through the passageway. At the same time, there was a bit of a breeze and a piece of paper also entered the passageway. A spark from the welding happened to catch the piece of paper. I did not know anything about this, because I was up above with my helmet on and all my safety equipment. Within a matter of seconds, the burning paper was carried to a bush, and the bush caught fire. Given the way this legislation is drafted, I could in that circumstance have been subject to a charge. I had no knowledge that the piece of paper had caught fire and had escaped the corridor, but if it had happened to go a bit further, I would have been in breach of this legislation and subject to a fairly stiff penalty.

I am keen for the Attorney General to address some of these issues. As the legislation stands, the accidental escape of an ignition source that results in damage to a piece of property—in this legislation "property" includes vegetation—could result in people being subject to a penalty through no fault of their own. There are many tradesmen out there who will never be aware of this legislation, because it is just not something that they would ever think about. They will be welding in tight corners and sparks will get away from them; I have seen it happen many, many times. The example I gave is just one instance in which a small fire got away from me. Luckily, I had my trade assistant with me and he was able to switch my welder off, which told me that there was a problem and that I had to get out of there really quickly. We also had the appropriate equipment in place—we had a fire extinguisher on hand—and we put the fire out. However, even a fire extinguisher is only a first response; it is not a comprehensive firefighting tool. It is designed for a quick response, and if the fire is small enough it can be extinguished. If the fire had happened to get away from us, would we have been liable to prosecution under this legislation? These are the sorts of issues we need to address. We need to put this on the record in this place so that if people get into these situations, it will be quite clear how they should be dealt with by the law. I do not think it is the intention of the government or the Attorney General to catch people in situations like that, where they may receive a particularly harsh penalty through no fault of their own. That is where the element of recklessness comes in.

There are times of extreme fire danger in the wheatbelt and pastoral areas, and during these times, harvesting and the use of machinery in paddocks are not permitted. Under this legislation, will such bans extend into the metropolitan area? For example, will it be the case that, during times of extreme fire danger, welding will not be permitted even in enclosed situations such as workshops? Again, sparks can get away; one cannot see where the spark has gone, and it can sit and smoulder for a long time before there is a flare-up. I will be interested to hear what the Attorney General has to say about how we will deal with those situations. These are practical situations that happen every day with plumbers and electricians on building sites. Quite often there is a lot of rubble and rubbish on building sites that can quite easily be inadvertently set alight without anyone being aware of it, and fires can easily break out after people have left a building site in the evening.

My colleague the member for Kimberley has raised the issue of the land burning practices of Indigenous people. The burning of land by Indigenous people is a land management tool that was used long before the white man

ever came to this country. That tradition was explained to me when I visited the Kimberley a number of years ago. From my understanding of Indigenous culture, it is incumbent upon senior people in Indigenous communities in certain areas to burn their land so that it can regenerate. I am concerned that this traditional land management practice may be caught by this legislation. The Attorney General is not in the chamber at the moment, but I ask him to address this issue.

Members in this place have raised a number of valid issues. We need to be cognisant of the fact that, even though this may not be the intention of this legislation, people may be caught by this legislation by pure accident and may have a sentence of life imprisonment imposed upon them.

MR J.N. HYDE (Perth) [5.31 pm]: I have two areas of concern about the Arson Legislation Amendment Bill. I hope the Attorney General will address these issues in his second reading response. As with the Indigenous use of fire, many festivals that are held in multicultural WA also use fire or naked flame. One of those festivals is the Japanese Shinju Matsuri festival that is held in Broome. Another very important Japanese festival is the Obon festival. That is a ceremony that is used to send spirits on their journey. It is an annual event. It is traditionally held on Town Beach in Broome. During that festival, candles are lit and are put into small boats that are sent out from the mangroves and float on the water. It is very feasible that an accident could take place and one of those candles could cause a fire to occur. We need to be given some reassurance by the Attorney General that some allowance will be made for accidents that may occur during one of these multicultural festivals that uses fire or naked flame. Obon is traditionally held in August or September, depending on when the full moon occurs.

Two months later, in October or November, again depending on when the full moon occurs, the Thai community celebrates Loy Krathong. During this festival, a small candle is placed inside a paper lantern. It works on the same principle as a giant balloon. The hot air makes the paper lantern rise. The lantern is usually sent off from the beach and flies away over the ocean. When all the oxygen inside the lantern has been used up, the candle usually burns out. Members may have seen these paper lanterns on the news, or occasionally at the Loy Krathong festival in Perth. I am not aware of any situation in which a burning paper lantern has suddenly dropped one kilometre out of the sky and has still been burning by the time it reaches the ground or the ocean. However, it is feasible that such an accident could occur—perhaps because of a sudden wind gust, or because the Channel 7 chopper has been flying by too closely—and the candle, which might be only 20 or 30 metres off the ground, might fall into an area that is covered in scrub or winter growth, as would be likely in October or November, and cause that area to burn.

The third multicultural festival that I want to talk about is the Indian Diwali festival. Recently, I joined the member for Nollamara; the member for Riverton; the mayor of the City of Stirling; the deputy mayor of the City of Stirling, John Italiano; councillor David Michael; a number of other councillors; and about 15 000 Indian residents of Perth, to celebrate this festival. Diwali is known as the festival of lights. Those people who have been past my office will have noticed that I do not have naked flame there —

Mr M.P. Whitely: Where do you keep your naked flame?

Mr M. McGowan: Good question!

Mr J.N. HYDE: I am not taking any interjections!

I keep a considerable number of lights at my office to celebrate the Diwali in multicultural Northbridge. The Diwali festival does not often involve the use of candles or naked flame. However, after that festival at Stirling, a fireworks extravaganza was held at Herb Graham Reserve. There are houses that back onto that reserve. That creates the potential for an accidental fire to occur. I have given the example of three multicultural events—the Obon Japanese festival, the Loy Krathong Thai festival and the Diwali Indian festival—in which fire or naked flame is used as a part of those festivals.

I also have a concern about clause 11 of the bill. This clause proposes to amend section 444 of the Criminal Code to delete the words "imprisonment for 14 years or, if the offence is committed in circumstances of racial aggravation, to imprisonment for 20 years" and insert the words "life imprisonment". I believe we need to look at this in the context of the events that were taking place at the time section 444 was inserted into the Criminal Code. What the Parliament of Western Australia was saying at that time was that when the motivation for arson is racial aggravation, that offence should be treated as 50 per cent more serious than when the motivation for arson is for a commercial purpose, such as to make a dodgy insurance claim. I think that was a fair statement from the Parliament of Western Australia about how we need to deal very severely with people who use arson to terrorise others, as we saw with the arson convictions of Jack van Tongeren and other people associated with his racist group. It was considered important at the time that our legislation make such a statement.

The query that I have for the Attorney General is about the reality of a sentence of a life imprisonment. I say that because, in a number of cases, a sentence of life imprisonment could be less than a sentence of imprisonment for

20 years. In effect, by deleting the provision whereby Parliament has said that a racially aggravated arson attack is 50 per cent more severe than a commercial attack, we are actually downplaying the severity of racial aggravation. I am sure that that is not the intent of this amendment, but I think it is fair to ask whether that will be the effect. I think that would send a very poor message to the multicultural community. Those of us who were around at the time of the fire bombings of the Chinese restaurants knew not only the persecution of, but also the genuine fear felt by people in the various multicultural communities in Perth. Let us remember the time when the fire bombings were happening and before the perpetrators were caught. In that atmosphere of fear, I think there was a lot of justification for Parliament to say, "Yes, those attacks were 50 per cent more severe than run-of-the-mill commercial arson." That is an issue that I would like to be addressed. I would like some guarantee that the judiciary will use the Attorney General's second reading speech when deciding on terms of sentences or trying to understand the intent of Parliament when it amended legislation to recognise the severity and the horror of racial aggravation and deleted that provision from the legislation. Those two areas are my main concerns with this legislation. I look forward to the Attorney General addressing those concerns in his speech.

MR C.C. PORTER (Bateman — Attorney General) [5.41 pm] — in reply: I thank all the members for their contributions. They have raised a number of issues. The great majority of issues were considered in the drafting of this bill. I will start by saying that a criticism that is often levied in this place is that a bill takes too long to get to Parliament—why could it not have been done more quickly; it is only four or five pages or seven or eight clauses?—yet we have expensive and sometimes exhaustive debate on bills such as this. Let me say to all the members who made contributions that there were only one or two matters that were raised that were not matters of specific contemplation in the drafting of this bill. They were matters upon which we sought advice, received advice and asked for subsequent advice. We went through numerous drafts and tried to find the best balance to ensure that all the issues were addressed and that all the factual scenarios, of which there have been an enormous number in this debate, were understood as we drafted the legislation.

I will take the opportunity in this second reading response to go through as many of the concerns that have been raised by individual members as time will allow. No doubt there will be further time for those matters to be raised during the consideration in detail stage. After I have gone through the matters raised by each individual member that warrant some response, I will look at the clusters of issues that were raised and give some legal address to each of those issues. Secondly, we have heard example after example after example that fall into different categories of issues, and I want to address those as a group. Thirdly, I intend to go through the legislation as it is presented and try to explain it in context and to explain what it seeks to achieve and the matters in the Criminal Code that it seeks to improve upon.

I might work somewhat backwards and consider first of all the contributions that were made towards the end of the second reading debate by the member for Alfred Cove and the member for Fremantle. I understand the point that the member for Fremantle made in her contribution. It is a point that we gave some consideration to—that is, whether or not life imprisonment should attach to the penalty for what is, effectively, a property crime. The point I make, and it has to be absolutely clear for all members, is that the way in which we have structured these new offences, the brand-new negligence offence—I will use that as a shorthand way of referring to the offence to which a penalty applies if a person breaches a duty to take reasonable care and reasonable precaution with a fire that already exists or an ignition source—does not attract the life imprisonment penalty. A civil servant who is in some way grossly culpable or negligent will not face the life imprisonment penalty. Many members made a mistake in reading the bill and complained about the idea of a negligent person facing life imprisonment. That is not the case. The penalty for the negligence offence is set out in proposed section 445A. Proposed section 444A sets out the duty, and proposed section 445A sets out the offence and the penalty for breaching the duty, and that penalty is imprisonment for 15 years.

Yes, our code will now carry a life imprisonment penalty for property damage. First of all, members must keep in mind that the life imprisonment penalty will attach to a person who wilfully and unlawfully destroys or damages any property, in this instance, by fire. Members may agree or disagree that a penalty of life imprisonment is appropriate for a property offence. It is not a decision that this government has made lightly. It is a decision that this government has made in contemplation of the incredible devastation to property that can occur through lighting a fire, and having regard to how other jurisdictions in this Federation have dealt with that issue. Our penalties for the offence of wilfully and unlawfully damaging property were nowhere near the penalties of other jurisdictions. It is 25 years in the Australian Capital Territory, New South Wales and Victoria. Notably, it is life imprisonment in Queensland and the Northern Territory for an offence of, if I might paraphrase it, unlawfully and intentionally setting fire to structures, vehicles, stacks of cultivated vegetable produce or mines. Notwithstanding the interjections from the member for Mindarie, humorous as they were, this government considers that it is appropriate to levy a penalty of life imprisonment on the intentional, wilful and unlawful destruction of property by fire. No doubt we will have this debate in consideration in detail when the

member for Fremantle moves her amendments. However, I stipulate now in my response why the government felt it necessary to take that step.

The member for Alfred Cove raised a number of issues that go to a range of examples referred to by many members. She spoke quite properly about the fact that there are mental elements or fault elements to offences. It is useful to provide an overview to address each individual member. The member for Alfred Cove was quite right. I will read from the "General Principles of Criminal Responsibility" report on the Model Criminal Code, which report was released in December 1992. Undoubtedly, the critical question is: are we giving a person who normally lights a fire, but it gets out of control in circumstances in which that person did not take reasonable care and reasonable precaution, greater protection at law by having as the standard criminal negligence, as we propose, or recklessness? It is a question that the member quite properly raised. The report on the Model Criminal Code lists fault elements in order. The fault elements required for a particular physical element may be intention, knowledge, recklessness or negligence. The report states —

> (1) A person has intention with respect to conduct if he or she means to engage in that conduct.
>
> (2) A person has intention with respect to a circumstance if he or she believes that it exists or will exist.
>
> (3) A person has intention with respect to a result if he or she means to bring it about or is aware that it will occur in the ordinary course of events.

That is the standard that attaches to wilful and unlawful damage when life imprisonment follows. The report continues —

> A person has knowledge of a circumstance or a result if he or she is aware that it exists or will exist in the ordinary course of events.

It goes on to state —

> (1) A person is reckless with respect to a circumstance if:
>
> (a) he or she is aware of a substantial risk that the circumstance exists or will exist; and
>
> (b) having regard to the circumstances known to him or her, it is unjustifiable to take the risk.

The report then states —

> A person is negligent with respect to a physical element of an offence if his or her conduct involves:
>
> (a) such a great falling short of the standard of care that a reasonable person would exercise in the circumstances; and
>
> (b) such a high risk that the physical element exists or will exist;
>
> that the conduct merits criminal punishment for the offence.

They then talk about how those relate to each other. Of those four fault elements, on the face of it, from the way they are listed in this report, there is a consideration that recklessness is a higher standard than criminal negligence, but that very much depends on how criminal negligence is defined in each jurisdiction. What I would argue, and what my initial view in drafting this legislation was, and what is echoed in the advice that has come to me from the State Solicitor, is that the Western Australian code version of the definition and standard of criminal negligence is very high.

Dr J.M. Woollard: Are you then stating on the record that this definition includes both subjective and objective elements?

Mr C.C. PORTER: I will come to that in a moment, because that was a point given some consideration in the Law Reform Commission's review into the laws of homicide, which was undertaken by the previous government. I might just jump the gun, although I will consider that, and say that the commission considered at some length whether our code should adopt a subjective element. In offences such as manslaughter, where the duty exists, it is not subjective; it is objective. We have had a very lengthy review of the criminal law in this jurisdiction to establish that, with manslaughter, which is the section we are borrowing from here, it should stay objective. There are a number of reasons that that is said to be the case. The advice that I have is that the objective standard of criminal negligence is so high that it is indistinguishable from recklessness. In its outcome, it is in effect the same standard. I return to the report I have been quoting from, which prima facie says that recklessness is a higher standard. It goes on to state —

> The idea that recklessness is a more culpable state of mind than criminal negligence is put to the test when one defines criminal negligence as requiring a judgment that the falling short of community standards be so great as to warrant criminal punishment whereas recklessness is found by a mere decision to take a substantial and unjustifiable risk. This would have been even more of a problem had recklessness been defined in terms of foresight of possibility and the taking of an "unreasonable" risk.

The commentary on the recklessness provision says that the idea that recklessness is a more stringent standard actually gets put to the test depending on how criminal negligence is defined. If criminal negligence is defined as a falling short of community standards being so great as to warrant criminal punishment, the situation arises in which negligence—failure to take reasonable care and reasonable precautions—becomes, if not the same standard of recklessness, perhaps even slightly higher. This is the point that the member for Mindarie was making. He said that it may even be harder to prove, and offers greater protection.

Dr J.M. Woollard: What case law is there in Australia in relation to these definitions?

Mr C.C. PORTER: I will absolutely come to that. Before I go into those general principles of criminal law as they relate to a whole range of examples, I will go through, in chronological order, some of the more pertinent and important examples that came from members opposite. First of all, the member for Mindarie properly focused on situations in which, if I can describe it this way, a fire is lit in normal or acceptable circumstances. Those are the terms I will use for present purposes. The member for Mindarie's proposed amendments are meant to try to achieve a higher level of protection for the normally or acceptably lit fire than exists in the bill that we are putting forward. I would argue that they do not in fact do that, and in fact might make the protection less, or indeed, when read in the context of the way the member has gone about it, become circular or nonsensical. I will get to that in a moment as well, but the important point to make is that, while the debate has focused largely on the issue of normally or acceptably lit fires, the point is that this legislation, in setting out an offence of criminal negligence for lighting fires, is not meant to address only the situation in which a normally or acceptably lit fire gets out of control due to negligence. It is also meant to take into account fires that are not normally or acceptably lit that go on to do damage, but go on to do so in circumstances in which it is objectively difficult or not able to be proven beyond reasonable doubt that the damage was likely.

We already have an offence of lighting a fire in circumstances in which it is likely to do damage, which is the Bush Fires Act offence. However, a very important point, to which we gave careful consideration—in fact the very reason for bringing this legislation forward—is that it is quite possible to imagine a situation in which someone damages property by lighting a fire in circumstances in which he did not mean for that damage to occur, and even though the damage did occur it would be very difficult to argue that the damage was, objectively speaking, likely. A person who throws a cigarette butt out the window engages in an act that we would not describe as an acceptable or normal use of an ignition source. That butt may go on to cause a great amount of property damage, but it would be very difficult in many circumstances to argue beyond reasonable doubt that, even though that damage did happen, it was an objectively likely outcome.

The member for Gosnells gave the example of a person who sets fire to a car for insurance fraud purposes or something of that nature. That person might do that in circumstances in which it appears that all reasonable precautions have been taken to stop the fire from spreading, but nevertheless it does. The fire might be lit in circumstances in which damage actually occurs to vegetation or property, but it is hard to argue beyond reasonable doubt that that was likely. The point I am seeking to make is that, although a great deal of focus has been placed upon the normally or acceptably lit fire, and about how we protect people in that circumstance, the offence we are creating with proposed section 444A is not about just that situation. It is about a situation in which a person might light a fire in what we would not describe as acceptable or normal circumstances, and the fire goes on to do an enormous amount of property damage. In those circumstances, even though the fire did cause the damage, it is very hard to argue that the damage was, objectively speaking, the likely result. A person who breaks a beer bottle or wine glass and drops it into bushland could conceivably have a source of ignition that could cause an enormous amount of damage, but it would be very hard in front of a jury to argue that that damage, if it did occur, was likely from the first instant. We are also trying to catch the cigarette butts thrown out the window—the very small fires that, contrary to all expectations, and as unlikely as it might be, go on to cause enormous damage, but were lit in circumstances that showed a lack of reasonable care and precaution. I want to make that first distinction about the fact that the legislation tries to take into account not only the normally or acceptably lit fires, but also fires that are not lit in normal or acceptable circumstances.

The point that the member for Mindarie raised in a number of statements, and also by placing his amendments on the notice paper, is that we all seem to agree that even with a fire that is normally or acceptably lit, a person must behave with respect to that fire according to some standard. Whether that standard is to not be reckless with

the fire or is, as we suggest, to take reasonable care and precaution with the fire, the question we are asking is: where does the bar sit on either of those standards?

Dr J.M. Woollard: Reasonable care?

Mr C.C. PORTER: Exactly. What gives more protection? Criminal negligence is a situation of what we call gross or wicked negligence—the highest level of negligence. I will cite some of the case law. Recklessness, as the member for Mindarie pointed out, speaks to knowledge and taking unacceptable risk in circumstances of knowledge as they are taken to be at that time. The advice that I have from the State Solicitor is to the effect that, given the definition of criminal negligence in the Criminal Code, the two standards are indecipherably the same; they are the same standard, given our definition of criminal negligence.

Dr J.M. Woollard: So are you saying that your definition of criminal negligence covers both the objective and the subjective test for any fire that is lit?

Mr C.C. PORTER: I will pre-empt that argument by reading the definition. I want to look at that definition in the light of all the examples that members opposite and the member for Alfred Cove have raised. Here is the definition of criminal negligence as it stands in this jurisdiction —

> The degree of negligence required to establish an offence relying on s 266 of the Criminal Code is described as gross or criminal negligence.

Section 266 requires a person to take reasonable care and precautions with dangerous things. It is the offence that works to give operation to the crime of manslaughter. The document continues —

> Criminal negligence is, in turn, described as recklessness involving grave moral guilt and as being of such a degree as to warrant the sanction of the criminal law: see *Callaghan v R* … *In R v Bateman* … Lord Hewart CJ defined negligence in the following terms:

Sitting suspended from 6.00 to 7.00 pm

Mr C.C. PORTER: Before the dinner adjournment I was reading from a case with respect to the issue of what constitutes criminal negligence in this jurisdiction. I had reached the point in reading from R v Bateman where Lord Hewart defined negligence in the following terms —

> In explaining to juries the test which they should apply to determine whether the negligence, in the particular case, amounted or did not amount to a crime, Judges have used many epithets such as 'culpable', 'criminal', 'gross', 'wicked', 'clear', complete'. But, whatever epithet be used and whether an epithet be used or not, in order to establish criminal liability the facts must be such that, in the opinion of the jury, the negligence of the accused went beyond a mere matter of compensation between subjects and showed such disregard for the life and safety of others as to amount to a crime against the State and conduct deserving of punishment.

Lord Hewart further stated —

> … Subsequent attempts to reformulate the test have included reference to the high risk of endangering the life, safety or health of another —

That is Nydam v R, and R v Taktak —

> In Pacino v R … Kennedy J stated … that it would have been desirable to make some reference to "risk" in the context of describing the degree of negligence necessary to be found to sustain a conviction. In R v EMJ … French J observed:
>
> > Although reference to such a high degree of negligence lacks precision, it is clear that this is an evaluative process that must of necessity amount to a judgment based on all the circumstances attending the individual case.

That is a very high standard, and a standard which involves the concept of risk, but which also attaches to ideas of culpable, criminal, gross, wicked, clear, complete negligence. It is a very high standard, and a standard which is based on all of the circumstances attending the individual case.

Dr J.M. Woollard: Those are his comments, but, again, his comments said all of the factors involved in negligence must be taken into account.

Mr C.C. PORTER: This is the point that the member sought to have me explain to her; that is, whether this is a purely objective or a subjective test. It is largely and fundamentally an objective test, but the fact that criminal negligence involves the trier of fact looking at the behaviour of the individual, based on all the circumstances attending the individual case, means that it is primarily objective but it has elements of subjectivity to it. The

judge would take into account, for instance, one of the issues that the member for Mindarie was concerned about, it being the state of knowledge of the person at the time.

Dr J.M. Woollard: And the mental capacity of the person?

Mr C.C. PORTER: No; it is not infinitely elastic, and it stops at that point. I will go on to explain how that works. But it does take into account matters such as that that the member for Mindarie has assessed as being important to have taken into account—that is, the state of knowledge; the state of available knowledge; and, the care that could have reasonably been taken to increase one's knowledge given the state of knowledge.

The member for Alfred Cove asked if it took into account the mental state or status of someone; no, it does not. When I look at the final report of the "Review of the Law of Homicide", which was project 97 undertaken by the Law Reform Commission of Western Australia, it went into some great detail in looking at whether or not the objective test of criminal negligence should be retained in Western Australia, or whether we should move to an objective test. This was in the context of looking at the offence of manslaughter. I will read from page 92 of that report —

> The objective test for criminal negligence has been criticised because a person might be held criminally responsible even if he or she was incapable of meeting the applicable standard of care. The Law Reform Commission of Victoria recommended that it should be a defence to manslaughter if the accused was 'unable to meet reasonable standards because of physical or mental deficiency'.

That is the member for Alfred Cove's point, but there is an alternative point of view. The report further states —

> In Lavender, Kirby J noted the theoretical argument that the objective standard for criminal negligence may hold a person criminally responsible even where that person was unable to meet that standard because of physical or mental incapacities. Nonetheless, Kirby J maintained that the objective standard was appropriate, emphasising that the high degree of negligence required under the criminal law means that criminal responsibility for negligence will only be imposed where there is 'very serious wrongdoing'.

Western Australia's Law Reform Commission was asked by the previous government to produce this report. In its report the WA Law Reform Commission stated —

> … if an accused was incapable of meeting the standards of a reasonable person (due to youth or mental impairment) the defences of immature age and insanity may relieve an accused from criminal responsibility for causing death by criminal negligence.

Footnote 58 on page 92 states —

> The importance of maintaining a minimum objective standard was emphasised by the majority of the Canadian Supreme Court in Creighton … The majority did not favour the approach of taking into account personal characteristics such as inexperience or lack of education. It was explained that the standard of care required should not vary on the basis of the personal characteristics of the accused but may vary depending upon the nature of the activity. For example, a high standard of care is required when undertaking brain surgery. The majority also noted that mental impairment leading to incapacity would deny criminal responsibility.

The point is that, yes, criminal negligence is primarily an objective test. It has some elasticity in some matters that we might consider, colloquially, to be subjective, such as the state of knowledge at the time of the matter, the nature of the activity, what knowledge was reasonably available and so forth. But it is not infinitely elastic and it is not crossing the line into a primarily subjective test. The member for Alfred Cove may still hold the view that she held when she contributed to the second reading debate, but I am putting an alternative view that the standard is so high that having a base minimum objective standard is appropriate in all the circumstances. I think, whether the member agrees or not, it addresses the point she raised.

I cannot put it any clearer, I think, than to say that the debate has centred on this question: as a matter of law, is it going to be more likely, on the very same facts, to secure a prosecution under the standard of criminal negligence or recklessness, which is the higher standard. Ceteris paribus—all other things being equal—on the same facts on the same matter, if it were tried in front of the same judge alone, if I can use that example —

Mr J.R. Quigley: A judge alone, yes.

Mr C.C. PORTER: I will get to juries in a moment, because that was a point that the member for Mindarie made. But if it was tried as a matter of law on the same facts, on which charge is it more likely that a conviction

would be secured; criminal negligence or recklessness? The advice available to me—I must say that it is a view I share—is that they would be equally likely to secure a conviction, and that the same standard applies. I agree with that advice.

The member for Mindarie made a point that irrespective of the legal similarities between criminal negligence and recklessness, it may be that it is simpler to secure a verdict of guilt in front of a jury for recklessness because the way the offence is structured kind of leads a jury through. That is a view that I cannot measure. It strikes me as being dependent on all of the circumstances of the matter, but it is not a legal view. That is a view of instinct about how juries operate and what the psychology of juries is. But even if the member for Mindarie is right, he is suggesting that we take away the criminal negligence standard and put in a recklessness standard, which, in his view—not as a matter of law but as a matter of practice—is more likely to secure a conviction.

Dr J.M. Woollard: I disagree with that.

Mr C.C. PORTER: You may disagree; I do not know the answer to that question. I say to all members of the house that the standard of recklessness or criminal negligence is very much the same. In practical terms, we are talking about the same type of standard.

Dr J.M. Woollard: But it is not the same, Attorney General, when you have just said that it doesn't have both this objective and subjective test, and, therefore, whilst you said that knowledge might be taken into account, 25 per cent of the community is currently suffering from a mental illness. This could be a person with a mental illness, and that will not automatically be taken into consideration.

Mr C.C. PORTER: I accept the point, but neither would it be, in my view, taken into consideration under the recklessness standard. The recklessness standard is not a subjective standard either; it is an objective standard. The member is asking for something quite different from what I —

Dr J.M. Woollard: English case law now has both. That's why maybe I need more time to look at the cases that you have cited to see —

Mr C.C. PORTER: That will require a lot of photocopying and I can give that to the member. The member for Mindarie is proposing that a person is reckless with respect to a circumstance if he or she is aware of a substantial risk, or is aware that the circumstance either exists or will exist, or, having regard to the circumstances known to him or her, it is unjustifiable to take the risk. A person is reckless with respect to a result if he or she is aware of a substantial risk, or is aware that the risk will occur, or, having regard to the circumstances known to him or her, it is unjustifiable to take the risk. There is no subjective assessment of the person's mental capacity in that test of recklessness. Recklessness is not meant to be a subjective test. The member for Alfred Cove wants something that neither side of the house is offering.

Dr J.M. Woollard: I would have been quite happy if you had stood and said that in relation to our definition of "criminal negligence", the way we are looking at this legislation, we would expect the courts to take into consideration both a subjective and an objective measure, but you are not saying that, Attorney General.

Mr C.C. PORTER: They are not the subjective measures that the member wants. The court will not take into account that someone might argue he has a lower mental capacity or has a lower IQ or is suffering from a mental illness that does not constitute the definition of "insanity" under section 27 of the Criminal Code.

Dr J.M. Woollard: That was the case I cited from the UK in which a girl was charged when she had a known mental illness and was not aware that her actions would lead to that fire.

Mr C.C. PORTER: We will agree to disagree. All I am saying to the member is that neither side will make the member happy on that.

The member for Girrawheen mentioned the issue of vegetation and whether it would apply to peat fires, and the member for Kimberley asked about a fire that was normally or acceptably lit by an Indigenous person in the circumstances of traditional custom. The member for Balcatta talked about technicalities and whether we would be needlessly prosecuting firefighters. The member for Midland asked whether a person who had lit popcorn on a stove and burnt down a house would be liable to life imprisonment. I explained that unless a person wilfully or intentionally burnt down the house, the person would not be within the auspices of the life imprisonment penalty. The issue for the member for Midland is where the standard is set, and I will come to that in a moment. The member for Forrestfield talked about ordinary people who did ordinary things but did not do them carefully. That is the nub of the problem that we are dealing with. Someone mentioned the example of a person who falls asleep with a cigarette in his mouth while in bed. A person who does so is not wilfully or intentionally trying to burn anything but would potentially have behaved in a negligent fashion.

They are the matters raised individually by members, and I will go through them under the cluster of the types of issues that they give rise to. Firstly, there was a contention—one that I do not accept—that the bill could inappropriately criminalise acceptable or normal activities, particularly those undertaken by firefighters or farmers. Secondly, it was contended that the bill should thereby adopt the fault element of "recklessness" rather than "criminal negligence", which goes to the member for Mindarie's amendments. Thirdly, it was asked whether the bill will apply to peat fires, which is an important issue. Fourthly, there was the issue of whether the definition of "property" in the bill might differ from that used in the Bush Fires Amendment Bill. It does ever so slightly, but there is a reason for that, which exists in the context of the Criminal Code.

I will deal firstly with the issue of criminalising acceptable or normal activities, which was raised variously by the members for Mindarie, Kimberley, Balcatta and Midland. Specific examples were raised of firefighters or emergency service workers who attempt to extinguish a fire, farmers who conduct a back-burn on their property, the spiritual or cultural burning of country by native title holders, and various domestic incidents such as using candles or stove tops. Proposed section 444A imposes "a duty to take reasonable care upon persons who have charge or are in control of a source of ignition or fire". Those words have a plain, ordinary meaning. The *Oxford English Dictionary* states that "to have charge of" is to have a task, a duty, a commission, or to be in the care or the custody of something. It also states that "to be in control of something" is to have the power of directing or commanding, to have the ability to restrain, to have the means of restraint, and to be able to check. Cases exist to show that there already are duties at common law with respect to property owners and fires on their property. One case that was brought to my attention was that of Goldman v Hargrave. Lightning strikes had set fire to a tree on Mr Goldman's property. He made some partially successful attempts to douse the fire and left it smouldering. Some days later the fire spread from the tree to the rest of the property and then to the neighbouring property owned by Mr Hargraves. The High Court found that Mr Goldman was liable for the damage to Mr Hargrave's property. One of the judges in that matter said that Mr Goldman's liability arose from his knowledge of the fire and the fact that he could have rendered it harmless or reduced the danger to his neighbours by exercising reasonable care. It was noted in that case that it was important that mere knowledge of the fire and some theoretical ability to extinguish it were insufficient. Merely owning the property upon which a fire started would not be sufficient to attract liability; there must be some attempt to either use the fire for one's own purposes or some attempt to extinguish the fire such that the person got it under his charge, control or care. Simply being the owner of a property where there was a fire would not mean that the owner would be liable under this offence. The owner would have to take charge, control or care of the fire.

Mr J.R. Quigley: Or start back-burning?

Mr C.C. PORTER: If the person doing the back-burning started the fire, yes. I will say to the member for Mindarie that a person could, prima facie, come under the terms of this provision in terms of charge or control if the person started the fire, whether that be in normal or acceptable circumstances or in abnormal and unacceptable circumstances, or whether the person tried to use a fire that was started by someone else for one's own purposes, such as for back-burning. If a person took measures to extinguish a fire that was not started by that person and the fire was brought to a level whereby the person who took measures to extinguish the fire was able to extinguish the fire, that person would take ownership and charge of and responsibility for that fire. They are the prima facie circumstances that we are looking at.

The following factual scenarios, I agree, could primarily give rise to the types of liability that we are talking about. If a firefighter was attempting to extinguish a fire that was lit by another person and the firefighter brought the fire to a level whereby it could easily be extinguished entirely, the duty might be activated. If a firefighter or a farmer lit a fire to create firebreak or back-burn, then, prima facie, that is a situation whereby the firefighter or farmer would be in charge or control of the fire. If a firefighter or another person undertook a prescribed burn under the Bush Fires Act 1954, the firefighter or farmer would be in charge or control of the fire. If an Indigenous person or persons lit a fire on land under which they had native title rights as part of the spiritual or cultural burning of country, they would be considered to be in charge or control of that fire. If a person uses a source of fire ignition within the home, such as a candle or a stove top, that person is in charge, care and control of that fire. I will stop there and say that all of those scenarios apply equally to the offence of manslaughter. In any of those scenarios, whether it is a traditional custodian of the land or a firefighter, the person who is in charge of and care of the dangerous element in "manslaughter" has the duty to take reasonable care and precautions. If when lighting a fire or being in charge of the fire or the source of ignition the person fails to take that care, he could be liable for manslaughter, as the law presently stands. All these people and scenarios are caught within the offence of manslaughter, which establishes a duty as the law presently stands. It is important to again stress that the Criminal Code, which will impose the duty to take reasonable care of and precaution with the fire for which a person is in charge or has control, places a very high standard. One has to be

grossly negligent, wickedly negligent or culpable. We take into account circumstances such as the person's state of knowledge and all the circumstances accompanying the case.

It is necessary to remember also with respect to all the firefighting examples that were raised that there are statutory safety standards that will always be considered by a court when determining whether someone took reasonable precautions. Those standards already exist. The procedures contained in the Bush Fires Act, the Fire and Emergency Services Authority of Western Australia Act and the delegated legislation made under those acts will all influence a court because they are the circumstances that constitute reasonable care or "reasonable precaution". The view is, and the advice I have received is, that members of fire and emergency services authorities who comply with the usual procedures when they are in charge and in control of a fire could not be found criminally negligent. Compliance with those procedures would not even get them close to the standard of culpable or reckless criminal negligence.

Again, we must have some regard to proposed section 445A of the Criminal Code. This is very important and critical to the member for Mindarie's amendment. Proposed section 444A creates the duty; proposed section 445A imposes the liability for breaching the duty. The liability is imposed only when a person unlawfully omits or refuses to do any act that it is the person's duty to do under proposed section 444A. To do something unlawfully is to do it without lawful authority. Therefore, with a firefighter or a Department of Environment and Conservation worker or someone undertaking a prescribed burn, a prosecutor is going to have to prove beyond reasonable doubt that the firefighter was acting without lawful authority and had been grossly negligent. It is the word "unlawfully" in proposed section 445A that adds the extra protection on top of criminal negligence for people undertaking a lawful duty. The reason we have sought to not specifically exclude DEC and Fire and Emergency Services Authority workers is that, unfortunately, history tells us that it is sometimes the case that those workers, acting outside their lawful authority, light fires, because they have a predilection to light fires. There have been a number of cases in which the successful convictions have been against FESA officers in this jurisdiction and others when they have lit fires and later taken great gratification in putting them out. We have been unable to frame the protection around simply excluding categories of people who might otherwise have a lawful authority to be dealing with a fire. However, the way that that proposed section works is that it must be shown that they were acting without lawful authority and reached a standard of criminal negligence that is gross or wicked or morally culpable.

Mr M.J. Cowper: Minister, I have a real concern about the fuel loads in my electorate and the prescribed burning that you are talking about. I hope there is no provision in the legislation that would inhibit the decision makers within DEC from embarking on prescribed burns. At the moment, trying to do prescribed burns in sections of the forest so as to reduce fuel is somewhat difficult. I would hate to think that any legislation could be interpreted as being detrimental to that objective.

Mr C.C. PORTER: Indeed, it is difficult now. All the legislation and the regimes, such as the Bush Fires Act and the Fire and Emergency Services Authority of Western Australia Act and other acts and delegated legislation, have set up the circumstances in which a prescribed burn can be undertaken—controlled back-burning and so forth. The standards are quite high. The point is that if a person is lawfully acting under the authority of those acts and is meeting the requirements in those acts, it would be impossible, on my advice, for that person to be held guilty of the new offence that we are creating, because it could not be said that that person was acting without due reasonable care and reasonable precaution.

I might stop here and say that one of the difficulties that exists in adopting the type of amendment that has been put forward by the member for Mindarie is that our code does not have a concept of recklessness. That is not a fault element that our code uses at any point.

Dr J.M. Woollard: You can put this in. Other acts have "reckless" in one or two places only. Therefore, we could follow the Model Criminal Code and put "recklessness" in the legislation in relation to arson.

Mr C.C. PORTER: If there is no practical difference between the two standards of recklessness and criminal negligence, the first question is: why do it? The second question is: what are the unintended consequences of that? If we had a brand-new concept in criminal law of a fault element, it would be completely foreign to our very old, well-working, well-reviewed code—a concept of fault that was rejected by the review of the law of homicide with respect to manslaughter. What we would be doing is potentially vandalising our code and upsetting a very fine balance in the way that the code works. If we codify the requirements for recklessness, how does that bear upon what are very well understood principles of negligence? The answer is that we just will not know until that goes to the courts. There is no benefit to be gained from that in the circumstances.

Dr J.M. Woollard: But that becomes the third tier then, doesn't it, so that there would be intent, recklessness and criminal negligence?

Mr C.C. PORTER: It is a completely foreign idea to our code, with no jurisprudence in this jurisdiction to attach to it. I will add something else about the member for Mindarie's amendments. I understand that those proposed amendments are put forward in the spirit of trying to create a better legislative result. But one of the acute difficulties with the way in which the member for Mindarie has gone about them is that a reading of proposed section 444A would have the new section read as follows —

> Any person who has charge of or is in control of a source of ignition recklessly fails to take reasonable precautions to avoid lighting a fire …

Not only do we have recklessness as a standard, but also we still have criminal negligence as a standard, because the terms that activate the standard of criminal negligence are reasonable precautions and reasonable care. Therefore, the member for Mindarie's amendments, well meaning though they are, would mean that we have a piece of legislation that says that a person cannot light a fire in circumstances in which that person recklessly engages in criminal negligence. It would be unheard of, not only in the code, but also in any state or territory in Australia, and it would, in my view, create enormous amounts of confusion if that had to be dealt with by the courts. Although I understand the concerns that have motivated that type of change, it does not achieve any shifting of the bar in terms of the safety net that exists for people who might light a fire in statutory or normal or acceptable circumstances and who are protected by the concept of the word "unlawfully" in proposed section 445A, and also protected by virtue of the very high, commensurate standard to recklessness that is criminal negligence. I will stop there. No doubt there will be other matters to be addressed in consideration in detail.

Question put and passed.

Bill read a second time.

Leave not granted to proceed forthwith to third reading.

Consideration in Detail

Clauses 1 to 9 put and passed.

New clause 10 —

Mr J.R. QUIGLEY: I move —

> Page 5, after line 6 — To insert —
>
> **10. Section 442A inserted**
>
> After section 441 insert:
>
> **442A. Recklessness**
>
> (1) A person is reckless with respect to a circumstance if:
>
> (a) he or she is aware of a substantial risk that the circumstance exists or will exist; and
>
> (b) having regard to the circumstances known to him or her, it is unjustifiable to take the risk.
>
> (2) A person is reckless with respect to a result if:
>
> (a) he or she is aware of a substantial risk that the result will occur; and
>
> (b) having regard to the circumstances known to him or her, it is unjustifiable to take the risk.
>
> (3) The question whether taking a risk is unjustifiable is one of fact.
>
> (4) If recklessness is a fault element for a physical element of an offence, proof of intention, knowledge or recklessness will satisfy that fault element.

I listened with interest to what the Attorney General said. Of course, I take no issue with everything he has said in relation to the test for a person having a duty to take reasonable care to the criminal standard and the dissertation that the learned Attorney has given us as to what those cases tell us about that. That is not the issue that I raise. My issue is that it is not intuitive. From a practical perspective, we have seen this time and again in the courts when juries are set the task, member for Alfred Cove—and it is not the judge who is the fact finder—of taking on board this academic dissertation. I am not putting the Attorney down by saying "academic dissertation", but that is what it is; often a judge's charge to the jury on this sort of law amounts to an academic dissertation. When it comes down to a jury embracing the concept of an accused breaching the standard and the judge starts talking about "grossly breaching it" and the "moral culpability deserving of criminal sanction", this all becomes subjective for the jury. It is the jury that goes away to the jury room with those instructions and with

the facts of the case. In defence work I used to take the code to court for juries. My old mentor, the late Brian Singleton, said, "Mate, if we're going to worry about the law, we've already lost. What we're dealing with in jury trials is fact and how juries will accept the facts. We'll leave the Criminal Code and those law books to the appeal lawyers." That is how the jury will accept the facts and how they will interpret those facts and measure them against what are often difficult legal charges that the judges are required to deliver. I take the Attorney's point that elsewhere in the code the concept of criminal negligence in manslaughter cases is used consistently, not this definition of recklessness, but that is no argument against codifying the behaviour and the standard in this particular case as reckless.

Ms M.M. QUIRK: I am very interested in what the member for Mindarie has to say.

Mr J.R. QUIGLEY: Therefore, that is no reason in itself to strike down this amendment to insert a new clause.

Another very important reason that I brought this amendment forward is that the law, member for Alfred Cove and member for Fremantle, also has to be accessible to the people. I do not think many constituents on reading these new provisions for the arson laws and the insertion of section 444A and the duties that people have in relation to lighting fires and controlling fires would readily understand or have access to the case law cited by the honourable Attorney in his reply to the second reading debate. Look at the definition of "reckless"; there would be few people in the member for Alfred Cove's constituency, or in Western Australia I expect, who would have any doubt as to what was required of them when they were controlling a fire.

Dr J.M. Woollard: The definition that the member will put in states —

(a) he or she is aware of a substantial risk …

I believe that would be the subjective test. It also states —

(b) having regard to the circumstances known to him or her …

I emphasise the words "known to him or her". That would be the objective test. That is why I believe that this definition is a better definition to use. The Attorney General is saying that there is no object element within this definition, but with the words "known to him or her", if someone had a mental illness or —

Mr J.R. QUIGLEY: The objective test, member for Alfred Cove, is that one would have to objectively judge whether it was unjustifiable to take the risk. It could not be that the accused says that it is unjustifiable or not; there would be this objective test, so that the jury members, bringing together their common experience in life, would have to say, "What he did was unjustifiable."

Dr J.M. Woollard: But it would be unjustifiable because again, if we go back to the person with the mental illness, he or she would not have been aware of the risks.

Mr J.R. QUIGLEY: That is right. Under proposed new section 442A, people would need to be aware of the substantial risk that the circumstances exist or will exist.

Dr J.M. Woollard: That is the subjective.

Mr J.R. QUIGLEY: That is right and that is subjective for the person himself. Can we show that that person knew that danger existed or was about to exist? That is why I cited the Boorabbin bushfire, because the fire officers who opened the road looked at a weather report and did not understand the potent danger that that weather report presented to the highway, because the weather report, as we heard from the Coroner's Court, said there was likely to be a wind shift in about an hour and a half's time. That did not settle in their minds. Before people are liable for prosecution or conviction under this legislation, they have to be aware of that substantial risk or that it will exist—that is, that a wind shift will come. Then, having been aware of the fact and in the certain knowledge of that, if they start the back-burning—I will come to unlawful in a moment—in other words, if a farmer takes the unjustifiable risk knowing and being aware that a wind is coming —

Dr J.M. WOOLLARD: I am happy to hear more of the member for Mindarie in support of this new clause.

Mr J.R. QUIGLEY: Thank you very much, member for Alfred Cove.

The Attorney raised another point and that was if we go to proposed section 445A, the punishment section, it will not happen unless it is unlawful in starting the fire. Offences would not be created for Department of Environment and Conservation officers or people back-burning. I have seen so many times in my life that when the facts are examined ex post facto, with the benefit of the rear vision mirror looking back on the event, it can actually be picked up that it was unlawful. Perhaps the back-burning was not properly gazetted, as it is required to be. If the back-burning was not published in the *Government Gazette*, then it is unlawful. It might not have been known to the fire officer or the DEC officer at the time that the back-burning had not been properly

gazetted. We saw a potent example of that in the most publicised criminal trial this year, and that was the trial involving the McLeods and the victim Constable Butcher, in which it was argued by the defence that the use of a Taser was unlawful, because when it was examined with the wisdom of hindsight and against the Commissioner of Police's operation instructions it could only be fired when a person was under threat of immediate injury and, in that case, the fellow was walking backwards when the Taser went off. The defence used that; it argued whether it was lawful or unlawful use of the Taser.

Whether it was lawful or unlawful to start the fire can be tested against a whole lot of things. It is not just that the DEC officer will be protected because he is the DEC officer who started the fire; it is whether the whole back-burning procedure had been properly gazetted and was lawful. In the case of a farmer, had he been listening to ABC Radio or Radio National or whatever radio station fire bans are broadcast on? Did he hear that there was a total fire ban? If there was a total fire ban and even though he was back-burning his property, which is in other respects lawful, and he had not heard about the total fire ban perhaps it could be argued that the ignition of the fire was in itself unlawful.

The Labor Party has said that it is better on balance. We are not here to produce academia. Not withstanding that this terminology has not been used in another section of the code, is it better on balance to lay out the obligation clearly and effectively in proposed section 442A? We are not beating our hairy chest and saying that we thought all this up. As the member for Alfred Cove has observed, we have gone to the commonwealth Model Criminal Code for Australia. There is no reason why we should not do that. It spells out how a person is reckless.

I take the Attorney's point that in criminal negligence cases a precedent is put to juries—they do not put the cases to the juries, but the judges derive from the cases the principles that they put to the juries. It is not easy for juries. That is why often the prosecuting authorities avoid that charge. It is harder to convict. It is like that chap who last week got only two years for driving down the wrong side of the freeway whilst full of cannabis and amphetamines and killed a lady. It was devastating. They did not prosecute for manslaughter, because this test is often very hard in cases involving motor vehicle accidents. The reason they use dangerous driving causing death so often is because it is codified. That is the reason we are moving this amendment. Labor does not resile from moving this amendment and is unshaken by the Attorney's criticisms of the amendment.

Mr C.C. PORTER: I certainly appreciate the motives pursuant to which the member for Mindarie has proposed this amendment. I simply do not think that the result is superior to what will be the result under the existing legislation. I will address a number of the comments the member for Mindarie made.

In giving an example in my second reading response about what would happen if a judge were determining the same matter on two different standards, I asked what would be the difference. Of course, I understand that the trier of fact is generally a jury, although not always. It is not inconceivable that a judge could try such a matter as a trier of fact on application. The point that I was seeking to make was that as a matter of law, is the standard any different? Could a judge looking at the same facts with a recklessness standard and the same judge looking at the same facts with a criminal negligence standard, as a matter of law, reach a different result under one or other standard? My view is no. The best advice that I have received is no; that his determination as a trier of fact would have to be exactly the same. Of course it is the case that, generally speaking, juries try these matters. Regardless of whether the legal standard is the same it could, as a matter of psychology or witchcraft, be such that a jury would make a different determination.

Mr J.R. Quigley interjected.

Mr C.C. PORTER: Apparently so. I am not subscribing to all of the views and psychology on which a jury might find it easier to convict under or less easy to convict under. If the member for Mindarie is right—that is to say, that the structure of the recklessness offence as opposed to the structure of the criminal negligence offence has such a pleasing vista to the eyes of jurors or is, generally speaking, easier for them to understand. However, under the amendment as a matter of practice rather than law or psychology rather than law they would be more likely to convict. Is it not clear to the house what that means. It means that the people they are seeking to protect—the firefighters, the Department of Environment and Conservation back-burners and the mothers lighting the candle in their room—are more likely to be convicted based on the assertions that the member made?

I am not sure whether the member is right or wrong. However, if he is right then the form of words he is proposing, even though it establishes essentially the same standard, will produce a different result, and the result is more likely a conviction and the protections are less. There is a certain sophistication and complication to the tried and tested method of determining someone's guilt or innocence under the offence of manslaughter pursuant to the standard of criminal negligence. It is a hard thing to reach, and appropriately so. When juries hear words such as "moral culpability" they will often take into account, I guess and assume, the matters that the member for Alfred Cove raised. Those matters are what we might colloquially term "subjective matters".

I ask the member for Alfred Cove to not let the member for Mindarie hoodwink her into believing that recklessness is a subjective test, because it is not. Each test—recklessness and criminal negligence—is objective, but each takes into account circumstances, such as knowledge that can be reasonably obtained. What is reasonable in terms of obtaining knowledge? Things which are subjective as a test are things like one's ethnicity; mental capacity, however one might define that; level of intelligence; mood; race; family background, and whether one was going through a divorce at the time.

Mr J.R. Quigley: Or proposed subsection 1(a); that is, whether a person is aware.

Mr C.C. PORTER: Indeed, but the point is that in the criminal negligence test—I have tried to labour this point—although references to such a high degree of negligence lack precision, it is clear that it is an evaluative process that must of necessity amount to a judgement based on all the circumstances attending to the individual case. A judge would say to a jury, "You have to evaluate all the circumstances attending to the individual case", which takes into account precisely what the member for Mindarie is concerned about. What the member for Mindarie is proposing in this amendment does not take into account, and what it should not in my view, the particular circumstances of the individual—their race, colour, creed, whether they are going through difficult family times and their mental capacity. Please do not be hoodwinked into believing that either of these tests provides that, because neither does, and I personally consider that they should not.

Mr A.P. JACOB: Madam Acting Speaker, I would very much like to hear more from the Attorney General.

Mr C.C. PORTER: The point is that this is a test, whether it is recklessness or criminal negligence. What the jury is being asked to determine in effect is, given the standard—it is the same: what would the average reasonable person, the man on the Clapham omnibus, have done in that situation? What would he have done, given all the circumstances—given his state of knowledge; given knowledge that could be reasonably obtained. What either the test of recklessness or criminal negligence does not ask a jury to do is ask: what would a particular person of this ethnicity, traditional background or mental fragility have done in the circumstances? Both tests are objective. Both tests take into account all the circumstances: the state of knowledge and the state of knowledge that might be reasonably obtained.

The point that goes to the issues raised by the member for Mindarie is that the types of concerns he has, and the examples he raised, apply equally to the offence of manslaughter as it exists at the moment. In those circumstances, he is quite right. What first of all has to happen, what must trigger a government employee facing even the possibility of being held guilty under this offence or guilty under manslaughter, is that he must be acting unlawfully. It may be a matter that may be in some instances as simple as not having regard for the legislation that allows government employees to act in a certain way. Even if that occurs, the additional feature is that they must have acted in a grossly negligent way. It is a very, very high standard. The protection is two-fold, but certainly the substance of the protection is such that the standard is very high. But that standard is not even activated for a government employee unless he is acting outside his lawful authority. That is the case for manslaughter, because whether a person is a government employee or not, he must adhere to certain standards when he does do a back burn or a controlled burn, because they are immensely dangerous things to engage in, as we have all seen from the Victorian experience.

As to the issue of whether it matters if we have a recklessness test for this offence and a criminal negligence test as we have had for 100 years for manslaughter, under the member for Mindarie's government a very long report was commissioned that considered this very issue: should we move to a recklessness offence with respect to manslaughter? The answer was no. I refer to page 103. When the commission was looking at whether or not there should be offences of criminal negligence or recklessness with respect to manslaughter, the commission did not consider that there was any need to excluded criminal negligence from the offence of manslaughter in Western Australia. The report states that the test for criminal negligence ensures that only extremely culpable negligence will suffice to establish criminal responsibility, and that, bearing this in mind, the two categories of unintentional manslaughter are essentially comparable in their terms of moral culpability. The juries are engaging in the same processes: objective with consideration for circumstances, but not subjective—never subjective under either. It states further that any difference in culpability can be taken into account during the sentencing because all sentencing dispositions are available for manslaughter.

The question of whether recklessness or criminal negligence should be the code standard was exhaustively examined. Due to the particular way in which this has been drafted, it is not even clear that it is recklessness, because it is a reckless failure to have reasonable precaution, so it is a kind of hybrid. I cannot be an Attorney General who vandalises the Criminal Code and changes from a point of clear consistency and application over 100 years to a muddled line of drafting that produces two different tests in the same circumstances.

Dr J.M. WOOLLARD: The Attorney General has stated that it is his belief that I am hoping that this amendment will ensure that the definition encompasses both the subjective and the objective test. But it is his belief that it is not covered in the member for Mindarie's amendment. I appreciate that the member for Mindarie is suggesting that any case is more likely to succeed using recklessness, which is in the member for Mindarie's amendment, but that the Attorney General does not necessarily agree with him on that. I do not agree with the member for Mindarie that it is more likely to succeed, because if we use recklessness based on the English cases that I referred to earlier, it is a higher level, and both those elements have to be proved in the court, and the jury would look at both the subjective and the objective test. The Attorney General is not accepting this amendment because he believes that the legislation that was debated in this house in relation to manslaughter did not include recklessness, and the words he used were "it would be vandalism" to insert this term into the Criminal Code. I do not believe it would be vandalism. As I said before, in other states the term "recklessness" has been used for just one or two clauses. I would have liked an opportunity to see what cases have been tried in the other states using the definition of recklessness to see what elements the courts or the juries took into consideration. The Attorney General has not put forward those cases this evening. Possibly there needs to be some further homework done on this. I hope that the Attorney General's department will look into that during the transmission of the bill from this house to the upper house.

I refer again to the English cases. Proposed section 444A refers to reasonable care and reasonable precautions. In the case I referred to earlier, the 14-year-old girl of low intelligence was convicted because the risk would have been obvious to a reasonable person. It was changed so that it would have cover both the subjective and the objective test. I do not feel that proposed section 444A is adequate.

Mr C.C. Porter: Under recklessness.

Dr J.M. WOOLLARD: Then it was changed to include both elements. That is the other case I referred to. It was felt that that was not satisfactory so it now has two limbs. I think it is preferable to have a definition that has both those limbs. Because of that I will be supporting this amendment moved by the member for Mindarie, although not for the reasons he has put to the house. Based on the English cases, I believe this is a more appropriate definition.

Mr J.R. QUIGLEY: I was very interested in what the member for Alfred Cove was saying. Does she not want to criticise my reasons any further?

Dr J.M. Woollard: No.

Mr J.R. QUIGLEY: I want to make it clear to the chamber that if on division this proposed amendment is lost, I will not be moving the other amendments standing in my name on the notice paper, as they are more to do with the word "reckless". However, I would like to address the point that the Attorney General makes. It is a cute point of debate more than anything else. He is rendering this proposed amendment meaningless by saying that it should read "recklessly fails to take reasonable precautions". He would therefore import the phrase again. The Attorney General is saying the same in his legislation: "use reasonable care and take reasonable precautions". It is the trigger point really. Are we going on "reasonable care and take reasonable precautions" or "reckless"? I do not see that that presents any difficulty at all for a judge charging a jury. However, what appealed to me is that it is set out in the commonwealth Model Criminal Code. We are not dealing with manslaughter here; we are dealing with people who in the ordinary course of their lives start fires. The fires may be unlawful because of a fire ban or because of the failure of the Department of Environment and Conservation to properly gazette an area that is being back-burned. It may be that the back-burning is going further than the gazetted area and the person has unwittingly gone outside that area. People who are considering arson need not refer back to the body of case law to interpret their duty. Their duty is set out here in these proposed amendments. The citizens of Western Australia who read the new clause in this proposed amendment, if it is adopted by the chamber this evening, will not flounder around asking, "What does this duty of reasonable care involve? I will have to go and see a lawyer to give me an opinion comparable to the Attorney General's dissertation tonight." People can read this new clause, if it is adopted, and know that if they undertake ignition, being aware of a substantial risk and having regard to that substantial risk, it is unjustifiable to proceed. They will know that they will be charged if property gets damaged. Equally, if they have lit a fire that has got away for some reason that they were unaware of, such as a sudden wind shift, they will know of the risk, whether or not they were aware of the existence or likely existence of that circumstance.

I therefore very much agree with the member for Alfred Cove. Just because this concept is not used in the offence of manslaughter, it should not preclude us as a chamber this evening from agreeing to this amendment. By the way, "reckless" is not a word that is alien to criminal law. It is also referred to in motor vehicle cases—

reckless driving, dangerous driving and careless driving. For those reasons I commend this amendment to the chamber, but if it is lost on division, I will not move the balance of the amendments.

Dr J.M. WOOLLARD: Following on from what I said earlier, in common law the concept of "recklessness" requires the accused to foresee the consequence of his or her actions. Under common law "recklessness" has both those limbs. It has both the subjective limb and the objective limb; the subjective limb being the foresight of the risk and the conscious decision to take the risk, and the objective limb being the taking of a risk that is unreasonable or unjustifiable. That is the current common law definition of "recklessness". I believe that if we include "recklessness" as set out in the Model Criminal Code, as stated by the member for Mindarie earlier, we will be codifying that criminal law. Although I disagree with the member for Mindarie that it would make it easier to convict someone, I think it would give more of an assurance that someone with a mental illness who was involved in an event of arson or who was unaware of what was happening would not be given a life sentence in jail.

Mr I.C. BLAYNEY: I preface my questions to the Attorney General by saying that I was a member of a bush fire brigade for 25 years and attended a reasonably large number of fires started by arsonists. Around Geraldton about 200 fires a year are started by arsonists. I want to ask the Attorney General about burning land in the Kimberley for what is called traditional or cultural reasons. Does a person starting such a fire need a permit; does that person need to notify neighbours that such an activity is going to take place; and is that cultural reason an out clause that enables arsonists to get off?

Mr C.C. PORTER: First, much turns on whether the act of lighting a fire by an Indigenous person is lawful. An Indigenous person who is trespassing on a property to which that person has no native title right and has lit a fire may well have started a fire in unlawful circumstances. That would be shown, but we would still have to show that that person was negligent in the circumstances of lighting the fire. For the purposes of this particular offence, bearing in mind that under the Bush Fires Act that person was lighting property that did not belong to that person, the person might be liable for that offence.

However, the point raised by the member, if I understand the question, is whether this is providing incentive to fire lighting by Indigenous people who have a native title right to land. Their right to light a fire, on my understanding, exists pursuant to their native title rights. If they have a right to move across land, use water and hunt, fish and gather in traditional circumstances and those traditional circumstances involve fire, they will have the right to light a fire. That right exists independent of this legislation.

Mr I.C. Blayney: Do they need a permit?

Mr C.C. PORTER: On the spot it is very difficult for me to answer that question. It would depend upon the land that they are going on. But I would envisage that it might depend on whether the native title holder's Indigenous land use agreement—for a person who holds native title to a pastoral lease—sets out whether that person has a right to engage in fire lighting. The point is that whether the right exists—which is a matter of ILUAs and native title law—the fire would have to be lit in circumstances that were lawful. That might be any number of circumstances. I am not sure whether this is answering the member's question.

Mr I.C. Blayney: Would they be subject to a fire ban, for example?

Mr C.C. PORTER: Yes. It is a conflict-of-laws question: which prohibition trumps someone's right? If an Indigenous person has a right to light a fire on certain property, just like a farmer has a right to light a fire on his property in certain circumstances, there are other legislation and prohibitions that go over the top of that right. That right can be overridden by those other matters. Therefore, an Indigenous person's native title rights to light a fire are not at large; they are subject to a range of other laws that exist, just as a native title holder's rights to enter into property is subject to the other laws of the state. It is not a right to go onto property and break a criminal law, for instance. That is a form of words that I have seen used both in consent determinations of native title and Indigenous land use agreements. The right exists. The right is granted to the native title holder, just like a farmer has a right with respect to his or her property or a pastoralist has a right, but it is subject to all other obligations that exist at law.

If I can put it this way: it may be that native title holders have a prima facie right to light a fire on a pastoral lease pursuant to the terms of the native title as determined in the consent determination and Indigenous land use agreement with the pastoralist. But not every fire they may light would necessarily be lawful. Whilst they have the prima facie right to light a fire, just as the pastoralist has, on the land, if either of them lights a fire during a total fire ban, the lighting of the fire is unlawful and then becomes subject to a standard of gross, culpable or criminal negligence. I hope that goes some way to answering the question.

New clause put and a division taken with the following result —

Ayes (24)

Ms L.L. Baker	Mr F.M. Logan	Mr P. Papalia	Mr C.J. Tallentire
Ms A.S. Carles	Ms A.J.G. MacTiernan	Mr J.R. Quigley	Mr A.J. Waddell
Mr R.H. Cook	Mr M. McGowan	Ms M.M. Quirk	Mr P.B. Watson
Ms J.M. Freeman	Mrs C.A. Martin	Mr E.S. Ripper	Mr M.P. Whitely
Mr W.J. Johnston	Mr M.P. Murray	Mrs M.H. Roberts	Dr J.M. Woollard
Mr J.C. Kobelke	Mr A.P. O'Gorman	Mr T.G. Stephens	Ms R. Saffioti *(Teller)*

Noes (26)

Mr P. Abetz	Mr G.M. Castrilli	Dr G.G. Jacobs	Mr D.T. Redman
Mr F.A. Alban	Mr V.A. Catania	Mr R.F. Johnson	Mr A.J. Simpson
Mr C.J. Barnett	Mr M.J. Cowper	Mr A. Krsticevic	Mr M.W. Sutherland
Mr I.C. Blayney	Mr J.M. Francis	Mr P.T. Miles	Mr T.K. Waldron
Mr J.J.M. Bowler	Mr B.J. Grylls	Ms A.R. Mitchell	Mr J.E. McGrath *(Teller)*
Mr I.M. Britza	Mrs L.M. Harvey	Dr M.D. Nahan	
Mr T.R. Buswell	Mr A.P. Jacob	Mr C.C. Porter	

Pairs

Mr D.A. Templeman	Dr E. Constable
Mr B.S. Wyatt	Mr W.R. Marmion

New clause thus negatived.

Clause 10: Section 444A inserted —

Dr J.M. WOOLLARD: I move —

Page 5, line 31 — To delete "vegetation" and substitute —

bush and fauna

As I mentioned earlier, the Bush Fires Amendment Bill 2009 was recently passed through this house. In that bill, under clause 11 the definition of "property" is defined as —

property means personal or real property, including Crown land, and includes the bush and fauna.

I believe that the legislation before the house should be consistent with the Bush Fires Amendment Bill. If the government accepts this amendment, I will also move to delete the word "vegetation" on page 6, line 17 and substitute the words "bush and fauna". This would mean there would be consistency between the two bills that have come through this house.

Mr C.C. PORTER: Again, I understand why the member seeks the amendment. Perhaps she will be convinced by my explanation of why it is an unhelpful and unnecessary amendment. I preface my comments by saying that the member for Girrawheen raised questions about peat fires and also this same question. I might address them collectively. Would peat be considered vegetation under the definition that we have in the Criminal Code? The member for Girrawheen is quite right; it is different from the definition under the Bush Fires Act. The member for Girrawheen's concern was that peat might not be considered vegetation in the proposed —

Ms M.M. Quirk: Animal, mineral or vegetable.

Mr C.C. PORTER: Exactly; it is very difficult. Peat is formed from partially decayed vegetable matter often combined with other organic material such as animal remains and water. It forms when plant matter is prevented from fully decaying by acidic and anaerobic conditions.

Ms M.M. Quirk interjected.

Mr C.C. PORTER: Exactly; that is the problem. When partially dried or under low moisture conditions, peat is easily lighted and can smoulder for very long periods of time. Peat is partially decayed vegetable matter and that may suggest an argument that it is vegetation. One piece of advice that I have is that it could be considered vegetation on the basis that it contains vegetable matter. There is some authority in England to the contrary. Therefore, whether peat is vegetable, animal or mineral, if it is embedded in the ground and capable of ownership, then it would constitute property under the Criminal Code.

Ms M.M. Quirk: But it is encompassed by the word "vegetation"?

Mr C.C. PORTER: It might or might not be, but, in any event, it will certainly be classed as property under the definition.

Ms M.M. Quirk: It is capable of being owned.

Mr C.C. PORTER: That is right. That brings me to the point about why the definitions are different. The definition of "property" that the member read from the Bush Fires Act is a narrower definition of property than in the Criminal Code. The definition of property in the Criminal Code is an extremely broad definition and covers everything, animate or inanimate—fauna, birds, lizards; whatever it was the member for Gosnells was speaking about. The definition states —

> … everything, animate or inanimate, capable of being the subject of ownership;

The definition of "property" in the Criminal Code is very important to many, many clauses in the Criminal Code and has existed for an extraordinarily long period of time. We looked at whether or not we would amend the definition of "property" or amend the definition in these particular sections to specifically state "flora and fauna", or specifically state "bush", or specifically use the wording "whether or not on Crown land". The advice I received was that by specifying "vegetation", we would cover absolutely conceivably everything that can be burnt, and not run any risk. The risk was said to be that there is a rule of interpretation called the sui generis rule, which means that if something is specifically stated somewhere, it may mean that it has been deliberately omitted somewhere else. Importantly, one thing that the drafters did not want us to do, and which State Counsel advised us against, was to pick up the definition from the Bush Fires Act, being "whether or not on Crown land", because all of the case law and precedent suggests that property —

Mr P.B. Watson: Point of order! Where's my book?

Mr C.C. PORTER: Has the member ever owned a book?

Mr P.B. Watson: You're turning your back on the Speaker is what I said.

Mr C.C. PORTER: I am addressing the member for Alfred Cove; I am sure Mr Speaker understands.

The point is, whether or not on crown land, the longstanding definition of "property" is that it does not matter whether or not it is on crown land. If the words "whether or not on Crown land" were inserted into this section, it might mean that for every other section, people will be concerned that it should be specified as well.

Dr J.M. WOOLLARD: I was not seeking to have "whether or not on Crown land" inserted by way of this amendment. The amendment was that "Property that is capable of being destroyed or damaged by fire includes", and the wording I had suggested was that it includes "bush and fauna". In view of the Attorney General's comments about the classification and definition of peat, I accept that the word used should be "vegetation", but I still believe that for consistency with the Bush Fires Act, it should then be includes "vegetation and fauna". That would then keep the consistency. In that case, I would like to move an amendment to my amendment. Rather than to delete "vegetation" and substitute "bush and fauna", I would like my amendment to read —

> Page 5, line 31 — To insert after "vegetation" —
>
> and fauna

The SPEAKER: Member, I am just going to give you the opportunity to get your words on paper. The best instruction, perhaps, is that you seek the leave of the house to withdraw the amendment that you have in front of the house.

Dr J.M. WOOLLARD: I seek leave to withdraw the amendment I have in front of the house.

Amendment, by leave, withdrawn.

Dr J.M. WOOLLARD: I move —

> Page 5, line 31 — To insert after "vegetation" —
>
> and fauna

This amendment does not affect the issues that the Attorney General was concerned about in relation to crown land, but it does mean that the Arson Legislation Amendment Bill 2009 is consistent with the Bush Fires Amendment Bill 2009.

The SPEAKER: Member, we will need a written copy of that so that it can be copied and circulated to those who might like to have a copy. Please continue, member.

Dr J.M. WOOLLARD: That would then mean that there is consistency, because both the Bush Fires Amendment Bill 2009 and this bill consider whether property is, for the sake of the Bush Fires Act, bush, but because of the peculiarities in relation to peat with this act, it would be "vegetation", and then both would also then include "and fauna".

The SPEAKER: Member for Alfred Cove, just for the benefit of everybody in the house, could you just read aloud your new proposed amendment?

Dr J.M. WOOLLARD: The amendment reads —

Page 5, line 31 — To insert after "vegetation" —

and fauna

Amendment put and a division taken with the following result —

Ayes (24)

Ms L.L. Baker	Mr F.M. Logan	Mr P. Papalia	Mr C.J. Tallentire
Ms A.S. Carles	Ms A.J.G. MacTiernan	Mr J.R. Quigley	Mr A.J. Waddell
Mr R.H. Cook	Mr M. McGowan	Ms M.M. Quirk	Mr P.B. Watson
Ms J.M. Freeman	Mrs C.A. Martin	Mr E.S. Ripper	Mr M.P. Whitely
Mr W.J. Johnston	Mr M.P. Murray	Mrs M.H. Roberts	Dr J.M. Woollard
Mr J.C. Kobelke	Mr A.P. O'Gorman	Mr T.G. Stephens	Ms R. Saffioti *(Teller)*

Noes (27)

Mr P. Abetz	Mr G.M. Castrilli	Mr A.P. Jacob	Mr C.C. Porter
Mr F.A. Alban	Mr V.A. Catania	Dr G.G. Jacobs	Mr D.T. Redman
Mr C.J. Barnett	Mr M.J. Cowper	Mr R.F. Johnson	Mr A.J. Simpson
Mr I.C. Blayney	Mr J.H.D. Day	Mr A. Krsticevic	Mr M.W. Sutherland
Mr J.J.M. Bowler	Mr J.M. Francis	Mr P.T. Miles	Mr T.K. Waldron
Mr I.M. Britza	Mr B.J. Grylls	Ms A.R. Mitchell	Mr J.E. McGrath *(Teller)*
Mr T.R. Buswell	Mrs L.M. Harvey	Dr M.D. Nahan	

Pairs

Mr D.A. Templeman	Dr E. Constable
Mr B.S. Wyatt	Mr W.R. Marmion
Mr J.N. Hyde	Dr K.D. Hames

Amendment thus negatived.

Clause put and passed.

Clause 11: Section 444 amended —

Ms A.S. CARLES: My amendment seeks to delete the proposed penalty of life imprisonment in section 444. I move —

Page 6, lines 7 to 12 — To delete the lines.

It is unprecedented in this state to have life imprisonment as a penalty for a property crime. It is a matter of principle for the Greens (WA) that life imprisonment, which is the harshest criminal penalty of all, be quarantined for the worst crimes against people—that is, for murder and armed robbery. The Greens agree with the view of the Law Society of Western Australia, the state representative body of lawyers. Its view is that life imprisonment is not an appropriate penalty for this crime. We believe that a more proportionate response, in keeping with our Criminal Code, would be 20 years' imprisonment, in addition to a pecuniary penalty of $500 000.

The SPEAKER: Members, by way of explanation, I indicate that we also have a proposed amendment from the member for Mindarie, part of which coincides with the amendment moved by the member for Fremantle. Quite simply, we will put this to the house as a test amendment. I am going to put to the house, as a test vote, that all the words down to and including "insert" be deleted. If that is successful, I will put the second part to the house—that is, the words after "insert". That is to cover the proposed amendment by the member for Mindarie. If it is not successful, the member for Mindarie will be free to put his amendment as a proposed amendment after that.

Dr J.M. WOOLLARD: The clause notes that the Attorney General has provided us with state that the maximum penalty for an offence under section 444 is to be increased from 14 years, or 20 years if the offence is committed in circumstances of racial aggravation, to life imprisonment. This is consistent with the maximum penalties in Queensland, South Australia, Tasmania and the Northern Territory for similar offences. With this change to insert life imprisonment, can the Attorney General remind me, and maybe other members of the house, what that means in terms of the number of years and when a person can be released when he or she is charged with life imprisonment?

Mr C.C. PORTER: Under the Sentencing Act, life imprisonment is defined in section 95, I think. I seem to recall that the minimum non-parole period is 15 years. However, I could be wrong. If I get a copy of the Sentencing Act, I will be able to answer that question during the course of debate.

Dr J.M. Woollard: Whereas at the moment the clause refers to imprisonment for 14 years or 20 years, that is being changed to life imprisonment. What number of years would be set before the person would possibly be able to be released after 15 years?

Mr C.C. PORTER: I understand the point. Assuming that it is a minimum non-parole period of 15 years—I will check that in a moment—the way in which the offence would be structured is that if a person wilfully and unlawfully destroyed or damaged any property, that person would be guilty of a crime. If that person destroyed the property by fire, there would be a minimum non-parole period, but that could be exceeded. Therefore, the judge could sentence above that 15 years, above 20 years or above 25 years, depending on the circumstances of the case. However, in circumstances in which the property is not destroyed or damaged by fire, the set maximum would still be 10 years; or if property not damaged by fire is damaged in circumstances of racial aggravation, the set maximum would be 14 years. Therefore, the effect would be that there would be a minimum non-parole period, but it is one that could be exceeded upwards.

Dr J.M. WOOLLARD: The proposed amendment to section 444 that we are dealing with states —

> in paragraph (a) delete "imprisonment for 14 years or, if the offence is committed in circumstances of racial aggravation, to imprisonment for 20 years; or" and insert:
>
> life imprisonment;

I still did not quite follow. The Attorney General was a bit too quick for me then. The Attorney General is saying that for some offences under this legislation, it would be a minimum term of imprisonment of X years, and for other offences it would be a maximum term of Y years. Yet the Attorney General is deleting 14 years and 20 years and inserting instead "life imprisonment". Can life imprisonment can go from X years to Y years? I am seeking clarification from the Attorney General.

Mr C.C. PORTER: The way in which the Sentencing Act is structured is that section 90 reads —

> **Imposing life imprisonment for murder**
>
> (1) A court that sentences an offender to life imprisonment for murder must either —
>
> (a) set a minimum period of at least 10 years that the offender must serve before being eligible for release on parole; or
>
> (b) order that the offender must never be released.
>
> (2) Any minimum period so set begins to run when the sentence of life imprisonment begins.

So there is life imprisonment for murder, and there is an indefinite sentence for murder when the minimum non-parole period is higher. I might have given the member for Fremantle wrong advice previously. It seems to me that there would not be any minimum non-parole period whereby one could dip down under that 10 years, but it is elastic upwards. Therefore, a person could be sentenced to any period of time, just as life imprisonment for murder allows a person to be sentenced to any period of time, but there would not be a minimum non-parole period and there would not be a minimum sentence that a judge would be obliged to apply.

Dr J.M. Woollard: Therefore, in fact, by putting in "life imprisonment" it could be fewer years that someone was imprisoned?

Mr C.C. PORTER: Less than life?

Dr J.M. Woollard: Haven't you just said it would be 10 years before they could be released?

Mr C.C. PORTER: No, I am correcting that error; that is life imprisonment when it is imposed for murder. The scenario would be this: section 444(1)(a), as it would be amended, would read —

> if the property is destroyed or damaged by fire, to life imprisonment; or

That does not mean that there is an upward ceiling. Section 444(1)(b) would state —

> if the property is not destroyed or damaged by fire, to imprisonment for 10 years —

That is the upward the ceiling; the maximum —

> or, if the offence is committed in circumstances of racial aggravation, to imprisonment for 14 years.

The point about life imprisonment is that there would not necessarily be a ceiling on the number of years of imprisonment that a person could get.

Ms A.S. CARLES: I seek leave to withdraw my amendment because I understand that the member for Mindarie is proposing an amendment that effectively removes the life imprisonment penalty.

Amendment, by leave, withdrawn.

Mr J.R. QUIGLEY: I move —

> Page 6, line 12 — To delete "life imprisonment" and substitute —
>
> 25 years

The Labor opposition moves this amendment on the basis that life imprisonment should be reserved for those cases in which, essentially, a life has been taken. Once a sentence of life imprisonment is imposed, we accept what the Attorney General says; that is, there is a statutory minimum for life, but the person remains under sentence for the rest of his or her life in that there is no requirement for the parole board, there is no finite term and there is no ending of the sentence. We believe for a number of reasons that the maximum penalty for an arson offence that involves the destruction of property should be less than life imprisonment. Substituting "25 years" would put that arson offence in those categories of offences that are very serious, such as drug trafficking, and right at the top of the calendar of criminal offences, but just below life so that there would be a finite term. I can imagine cases in which someone who has lost a loved one to murder says that the murderer got no more than someone who had burnt down a portion of state forest in circumstances whereby it was unlawful. We just think that the balance in the Criminal Code overall is best preserved by making it a finite maximum of 25 years' imprisonment. That would give ample scope to any sentencing judge to impose really condign punishment—if the offence was committed in circumstances that started a bushfire that wrecked townships et cetera, the offender could get 25 years. It would be different if it were bushfires, such as those Victoria suffered and experienced earlier this year, where people died, because the offence charge would not be burning property; the offence charge would either be manslaughter or murder, and different penalties would be imposed. I think we have the support of the member for Fremantle—which is why she withdrew her amendment—to this as an objection to life for destruction of property. Life should be reserved for the destruction of life. That is our basic principle.

Mr C.C. PORTER: I understand again the point, but it is not a point with which the government agrees and it is not an amendment with which it will join. To address the member for Fremantle's issues, it is unprecedented to have life imprisonment for a property offence in this jurisdiction; that is correct. I am sad to say it is not unprecedented in all Australian jurisdictions; two other jurisdictions that I have mentioned already have life imprisonment. In the government's view the term of life imprisonment provides a scope beyond the period of 25 years, which may in the most extreme circumstances be necessary. What we have seen in recent times in Victoria is the possibility of a fire lit wilfully to damage property going so far as to damage enormous amounts of property and cause enormous suffering to a range of individual property owners. That can justifiably be the subject of a term of life imprisonment, and this legislation offers the sentencing judge scope to give life imprisonment.

I inadvertently misled the member for Alfred Cove, because section 96 of the Sentencing Act does provide a minimum non-parole period for non-murder life imprisonment, which is seven years. Section 96(1) states —

> A prisoner serving a sentence of life imprisonment for an offence other than murder is not to be released before he or she has served 7 years of the sentence.

What is very interesting about that section, member for Fremantle, is that the Sentencing Act contemplates the possibility that this body will provide a sentence of life imprisonment for an offence other than murder, and in this case it will be for the offence of unlawfully and wilfully lighting a fire that destroys property. With respect to the member for Mindarie, we simply respectfully disagree and consider that in extreme circumstances, with a potential for enormous damage to property by virtue of the fact that bushfires can become so prevalent and get out of control so quickly, this would be appropriate. In practice, for instance, in the most extreme case of an unlawfully and wilfully lit bushfire that caused enormous damage, a 25-year sentence would mean, given the M minus two rule at parole, that the person must spend 23 years incarcerated before he could be considered for parole. Interestingly, the same person who got life imprisonment could be considered for parole much earlier but could potentially stay in jail much longer. I advise the member for Fremantle that it works a little bit both ways. In some ways it provides the flexibility for the Prisoners Review Board and, indeed, the Attorney General of the day, to consider each person on a case-by-case basis and to be more humane. It also provides the flexibility, by virtue of the decision of the sentencing judge and the Prisoners Review Board later and the Attorney General of the day, to ensure that the punishment meets the particular circumstances of the offence.

Dr J.M. WOOLLARD: I have looked at the two sections of the Sentencing Act to which the Attorney General referred. Section 90, "Imposing life imprisonment for murder", sets a minimum period of at least 10 years that the offender must serve before being eligible for release. Section 96, "Release from life imprisonment", states —

> A prisoner serving a sentence of life imprisonment for an offence other than murder is not to be released before he or she has served 7 years of the sentence.

I agree with the Attorney General that having the stipulation of life imprisonment is probably more humane than setting the term that the member proposes; that is, 25 years.

Mr J.R. QUIGLEY: I would like to answer the points raised by the Attorney General and the member for Alfred Cove. My amendment provides the penalty that is to be struck for when the fire is intentionally lit and the damage is done by fire intentionally lit. In those circumstances the fire may not cause the enormous damage that occurred recently in Victoria. It might be much less, but it was still caused by an intentional arson.

We do not believe that if a few acres of bush are burned intentionally that the only penalty should be life. The judge should have a discretion of something less than life. We accept that if the fire got away and burnt townships, as the recent fire in Victoria did, but did not cause death but, in any event, caused substantial economic loss, there should be severe punishment. This amendment will provide for a sentence of up to 25 years.

What the Attorney has not addressed, and I hope he does, is what would happen with a fire that is intentionally lit but is extinguished before massive damage is done—when one, 10 or even 100 acres of bush is burnt. The Attorney's response so far has been predicated on the fact that the fire will be massive like those in Victoria. What about a circumstance when the fire is intentional and property is damaged, but it is on a far more limited scale than the recent Victorian fires? For example, five acres of Kings Park could be burnt in a fire that was intentionally lit. Would the sentence be life or 15 or 20 years? We have seen fires in Kings Park, and they are a tragedy, but is it reasonable to be sentenced to life imprisonment for burning five acres? That is why we are opposed to life imprisonment as a mandatory sentence in this instance. I know that members opposite have a predilection for mandatory terms. The Premier has indicated that. The member for Hillarys really wants the sentence to be life imprisonment. However, should it apply to a fire that is of a more limited nature, albeit intentionally lit?

Dr J.M. WOOLLARD: I have had another chance to look at this. I believe I took what the member for Mindarie said to the extreme. I thought his amendment was more severe in that it deletes "life imprisonment" and inserts "25 years". Under the Sentencing Act, 25 years is the maximum penalty that the courts can impose.

I was previously going to support the Attorney General, because I thought he was being more humane with seven years and 10 years. However, taking into account the way in which this legislation is worded, with the offence being termed "criminal negligence" rather than "recklessness", so that we do not have both the subjective and objective limb of that test, I think it would be more appropriate, given the current definition, to impose 25 years. The courts would then be able to determine, based on the facts, that the person should be sentenced for a minimum of five years.

Mr C.C. PORTER: I will briefly address the point the member for Mindarie raised. It is a good point. We consider that the difference between the intentionally lit one-acre fire and the intentionally lit one-acre fire that turns into a massive, raging bushfire that destroys homes and properties is a very fine line. The member for Mindarie mentioned the bushfire in Kings Park that wiped out the entire cliff side that overlooks Mounts Bay Road. There was a possibility that it could have spread to neighbouring properties—to Crawley, to Claremont and to Subiaco. It came down to a question of wind shifts, or climatic conditions.

The whole point about this legislation is that we are giving the court the ability to impose the most serious penalty that can be given in circumstances whereby somebody unlawfully, wilfully and intentionally lights a fire. Whether that fire damages one hectare or thousands of hectares is a question of good or bad luck in the circumstances. We must have the ability to recognise that the intentional, unlawful and willing lighting of a fire is one of the single most dangerous things that a person in our society can do. That is our rationale, and members opposite might disagree with it.

Mr J.R. QUIGLEY: At the end of the day, the principle of sentencing is that the punishment must fit the crime. Let us consider the case in which one hectare of land is burnt, not in Kings Park but in Mukinbudin. If somebody intentionally lit a grassfire in Mukinbudin that damaged half an acre of native bushland, life imprisonment as the mandatory term would not fit the crime. No residences were endangered and there was no damage to farms and no economic loss. However, the local sergeant comes along and says, "Sunshine, you lit a fire that damaged half an acre. You get life." That would jar with the Western Australian community. I know the government wants to

be hard and extreme, but that is over the top for half an acre of grassfire. This is Western Australia, for heaven sake.

The judges must be given some discretion. Surely to goodness 25 years for the serious circumstances is ample. Why should people be given a mandatory life term for burning half an acre of bush or grass? It does not have to be trees. It could be a quarter of an acre of someone's wheat crop, but the offender would get life. The government is taking us back to the nineteenth century. It is draconian to say that that is the only penalty that can be imposed if the property is damaged by fire, no matter how small the damage—it does not say that an area of the magnitude burnt in the Victorian fire has to be damaged. Irrespective of how minor the damage, if it is damaged by fire intentionally lit the offender is sent down for life, even if only one tree was burnt. That does not have balance and the community will be jarred and will ask, "How did we get to the point whereby someone can get life for intentionally burning one tree, which is the same sentence imposed on a person who shoots somebody?" It brings the law into disrespect. People will say, "How are we going to get people to have more respect for the courts and the law?" This sort of approach does not engender respect, especially when people eventually realise that burning one tree equates to taking a human life. This is a government that has lost balance. I plead with the government, not as a matter of ego but as a matter of commonsense, to accept 25 years.

Mr C.C. PORTER: I understand the point the member is making, but his language is variable and, with respect, confused at times. Perhaps I can give the member this assurance. He used the words "Someone who lights a tree is potentially liable to life imprisonment". In other stages during that most recent contribution he talked about the penalty of life imprisonment that will appear in section 441 of the Criminal Code as being mandatory. My understanding is that that use of words "life imprisonment" is to be read as "is liable to life imprisonment"—that is, up to a maximum of life imprisonment. It is not a mandatory requirement that a sentencing judge give life imprisonment.

I will double check that with the drafters, but that has always been my understanding. If that is not the case, I will undertake to ensure an amendment is moved in the upper house that stipulates clearly that is the case. It is up to and liable to life imprisonment; it is a maximum. It gives the judge flexibility in all the circumstances to give a sentence of life imprisonment, which will have the result of a minimum non-parole period of seven years.

Mr M.P. Whitely: It has a consequence that the member for Mindarie has highlighted.

Mr C.C. PORTER: I do not believe it has that consequence.

Mr M.P. Whitely: Why not make sure of that before it leaves this place?

Mr C.C. PORTER: I am happy to give an undertaking that if it does have that consequence—I do not believe it does; the drafting instructions were quite clear on that matter—we can amend it in the upper house. These are matters of peculiar sensitivity in the Criminal Code. I understand that that form of words means it is a maximum; it is not a mandatory declaration that a judge must give a term of life imprisonment for that offence. It is a ceiling up to which he can go.

Mr J.R. Quigley: Doesn't it have to be given for murder?

Mr C.C. PORTER: They are different circumstances from these circumstances and it is different wording.

Dr J.M. WOOLLARD: I will be supporting the amendments on the notice paper. The Attorney General has said to the house that section 90 of the Sentencing Act imposes life imprisonment for murder. The Sentencing Act does not contain a section that addresses life imprisonment for arson. The Attorney General's understanding is that the interpretation of section 90 may not be the same for arson as it is for murder. In that case I believe clarification can be provided in the upper house, possibly by inserting a new section 90A that imposes life imprisonment for arson. If the Attorney General is not going to amend the Sentencing Act to address this, when this bill goes to the upper house he will change "life imprisonment" to a "maximum penalty of 25 years".

Mr C.C. PORTER: I understand the point, but the provision in the Sentencing Act that applies to the concept of life imprisonment for murder is section 90, which provides that life imprisonment must mean a minimum period of 10 years. Then there is section 96, "Release from life imprisonment", which reads in part —

(1) A prisoner serving a sentence of life imprisonment for an offence other than murder —

Dr J.M. Woollard: Subsection (2) refers to murder. That is why I was not sure. I thought section 96 related to murder as well.

Mr C.C. PORTER: My reading of it is that it applies to the offence we are considering so that the minimum non-parole period will be seven years. I understand the member for Mindarie's point. This form of drafting now means a maximum of life imprisonment because the changes the former Attorney General made were such that life imprisonment now for the collapsed offence of murder must be life imprisonment unless there are

exceptional circumstances that the judge must state in sentencing. That is why, as I understand it, this form of words means it is a maximum; it is up to; it is a ceiling; it is not a mandatory requirement that a judge give a term of life imprisonment.

Mr J.R. Quigley: But you are not sure.

Mr C.C. PORTER: I am very sure.

Dr J.M. WOOLLARD: I refer again to clause 96 "Release from life imprisonment" which reads in part —

(1) A prisoner serving a sentence of life imprisonment for an offence other than murder —

The Attorney General is suggesting that that could apply to arson, but even if it did apply to arson, the minimum sentence will be seven years; whereas, with this new definition, if a fire is lit by someone who has a mental instability, it will allow the courts to impose a sentence of one or two years rather than life imprisonment.

Mr C.C. PORTER: I am having some difficulty understanding the member's question. I can say that, on my reading, the minimum non-parole period for a term of life imprisonment, which applies in this case, will be seven years. Manslaughter brings a maximum of 20 years. One of the matters we said as a matter of public record is that we are giving consideration—it is my view that it should be—to increasing the sentence to life imprisonment for manslaughter, again for consistency and for the reason that a whole range of offences that used to sit inside murder before the previous government's reforms now sit inside manslaughter. I am not sure whether that answers the member's question. I am not able to discern exactly what the member was asking.

Dr J.M. WOOLLARD: I am not sure that section 96 of the Sentencing Act will necessarily apply to arson. But if it is put on the record in the upper house, it will mean that there will be a minimum period of seven years. Nonetheless, I agree with the intent behind the member for Mindarie's amendment; namely, if arson occurred, particularly under the new definition where the objective test applies and it does not take into consideration the objective and the subjective test, someone could be sentenced for a very long period through no fault of his own. I therefore think it is more appropriate that there be a lesser term of imprisonment to take into account those circumstances.

Amendment put and negatived.

Clause put and a division taken with the following result —

Ayes (26)

Mr P. Abetz	Mr V.A. Catania	Dr G.G. Jacobs	Mr D.T. Redman
Mr C.J. Barnett	Mr M.J. Cowper	Mr R.F. Johnson	Mr A.J. Simpson
Mr I.C. Blayney	Mr J.H.D. Day	Mr A. Krsticevic	Mr M.W. Sutherland
Mr J.J.M. Bowler	Mr J.M. Francis	Mr P.T. Miles	Mr T.K. Waldron
Mr I.M. Britza	Mr B.J. Grylls	Ms A.R. Mitchell	Mr J.E. McGrath *(Teller)*
Mr T.R. Buswell	Mrs L.M. Harvey	Dr M.D. Nahan	
Mr G.M. Castrilli	Mr A.P. Jacob	Mr C.C. Porter	

Noes (23)

Ms L.L. Baker	Mr F.M. Logan	Mr J.R. Quigley	Mr A.J. Waddell
Ms A.S. Carles	Ms A.J.G. MacTiernan	Ms M.M. Quirk	Mr P.B. Watson
Mr R.H. Cook	Mr M. McGowan	Mr E.S. Ripper	Mr M.P. Whitely
Ms J.M. Freeman	Mrs C.A. Martin	Mrs M.H. Roberts	Dr J.M. Woollard
Mr W.J. Johnston	Mr M.P. Murray	Mr T.G. Stephens	Mr A.P. O'Gorman *(Teller)*
Mr J.C. Kobelke	Mr P. Papalia	Mr C.J. Tallentire	

Pairs

Dr E. Constable	Mr D.A. Templeman
Mr F.A. Alban	Mr B.S. Wyatt
Dr K.D. Hames	Mr J.N. Hyde
Mr W.R. Marmion	Ms R. Saffioti

Clause thus passed.

Clause 12 put and passed.

Title put and passed.

Leave granted to proceed forthwith to third reading.

Third Reading

Bill read a third time, on motion by **Mr C.C. Porter (Attorney General)**, and transmitted to the Council.