SENTENCING LEGISLATION AMENDMENT BILL 2013

Third Reading

Resumed from 9 April.

DR K.D. HAMES (Dawesville — Deputy Premier) [11.12 am]: I move —

That the bill be now read a third time.

Point of Order

Mr J.H.D. DAY: I know the member for Butler wanted to make some brief comments on this bill but he is not here so I am trying to provide an opportunity for him to be found if he is still keen to make some comments. Otherwise, the bill has been adequately dealt with.

Mr M. McGOWAN: Further to the point of order, has the relevant minister spoken on this matter?

Dr K.D. HAMES: Further to the point of order, on the last occasion we had finished the consideration in detail stage. I have made my second reading reply, so all that is left is for me to make a third reading response. If the member for Butler can be found, then we will be able to proceed to the third reading debate.

Debate Resumed

MR J.R. QUIGLEY (Butler) [11.14 am]: We come to the third reading of the Sentencing Legislation Amendment Bill 2013, which, as all in this chamber are aware, takes away or eliminates the prospect of parole when a person is sentenced to a mandatory prison term for assaulting a public officer under the provisions of the Criminal Code and under section 59 of the Road Traffic Act. A moment of great significance happened during the second reading debate of the bill because the scrutiny of the efficacy of mandatory sentencing regimes has not yet been properly examined in this jurisdiction, nor has there been sufficient analysis or, should I say, transparency by the government about the outcomes it has achieved under the mandatory sentencing regime.

These amendments do not come before the Parliament to achieve the outcome of fewer serious assaults on police officers, or fewer hoon drivers on our roads trying to evade the police, because no evidence has been put before the Parliament of the rather dismal effect that mandatory sentencing has so far had on these offenders. There is no evidence that this has, in any way, been improved by taking away or eliminating the possibility of parole while serving a mandatory term until that mandatory sentence expires. What precipitated these amendments is publicity in the local media about the event that the Deputy Premier referred to in his second reading reply. That was the conviction for the assault that I said happened on New Year's Eve 2011; however, it was actually in the early hours of 1 January 2011 that the assault occurred on the police officer. Of course, that was the female offender that I referred to in my second reading contribution who was seen on television repeatedly assaulting an officer from behind. She then pleaded not guilty, not because she was innocent, but because she was facing a mandatory term of imprisonment. I have no doubt this drove her to plead not guilty because anyone in Western Australia who saw the vision on TV marked her as being guilty and, like so many offenders facing a term of imprisonment, she put off the day of reckoning for as long as possible. That is why one of the effects of mandatory sentencing is to significantly increase the workload, if not clog the judicial system, with guilty people giving it a try in the hope that a witness will not turn up, or something else will happen during the trial that will cause the prosecution to fail thus allowing the accused to avoid a mandatory term.

I provide an explanation of what is happening at the moment in our courts. I have had concerned senior prosecutorial staff approach me because a directive has gone out within the prosecutorial branch of Western Australia Police that prosecutors must now accept more than one defended case a day at the discretion of the officer in charge of prosecutions. This means that there will be occasions when prosecutions will have to be adjourned because no prosecutor is available; for example a prosecutor assigned to defend a matter in court 53 may also carry in their briefcase a brief to prosecute in court 64. This is of concern to prosecutors because, if they have not finished in court 53, what happens in court 64? The defence counsel moves for the prosecution to be struck out because there is no appearance by the prosecutor. This has happened already in Western Australia.

People facing a mandatory term, even in circumstances where there is vision of the offence, still plead not guilty in the hope that something will go wrong during the course of the prosecution of the offence they were charged with. That is what this woman did. I say "woman", but she was a young lady. She was not a mature woman; I think she was aged in her early twenties. She assaulted these officers, and it was put off for about 18 months, but the day of reckoning came, and she had, of course, no viable defence to the charge and she was convicted, and we all saw on television her distraught family as she was sent to prison. What precipitated this amending bill was the vision of this young lady, about 10 or 11 weeks later, reappearing on the streets, having been released by the Prisoners Review Board after being considered a suitable candidate for parole.

What has brought about these amendments to the Sentencing Act is not some twitching up to make the mandatory sentencing regime more effective, but rather it is the government's response to what it saw as adverse publicity about the mandatory sentencing regime. We know that the mandatory sentencing regime has not improved the justice system, because I read into *Hansard* yesterday the figures provided by WA Police to the Western Australian Police Union of Workers of the number of assaults on police and the number of offences. I will not go into too much detail about that, but, to summarise, in the first year after the mandatory sentencing legislation came into effect, the number of incidents went down by 10.2 per cent, and, in the following year, the number of incidents went up by 17.4 per cent. So over that two-year period, there was an overall increase of 5.4 per cent in the number of assaults on police officers. The number of offences dropped by 6.7 per cent in the first year, and it went up by a whacking 16.4 per cent in the second year. So it cannot be said that the mandatory sentencing regime has had a positive effect in reducing the number of assaults on police. I believe this legislation is in response to media publicity.

As I said at the start, there has been no transparent review of the mandatory sentencing regime, either in relation to the limited number of charges that these amendments deal with, or to mandatory sentencing of a broader nature, which will be discussed in a later bill. But it will take time for this analysis to wash through the system, and it will be an incremental acquisition of knowledge by the community that will question some of these policies, and justifiably so. It is not for myself or the Labor opposition to get ahead of the community in this matter. However, because this is such an important area, it behoves me as the shadow Attorney General, and it behoves all members of Parliament, to address this issue analytically and sensibly and not be driven by ideology or publicity.

Sentencing is one of the most serious functions undertaken by the judiciary. I urge members in the chamber to read—I doubt many will have done—a publication that can be found on the website of the Supreme Court of Western Australia. It is titled "Judge for yourself: A Guide to Sentencing in Australia", and it is published by the Judicial Conference of Australia, supported by, among others, the Sentencing Advisory Council of Victoria and the Judicial Commission of New South Wales. This publication sets out some of the difficulties presented to a sentencer. It also contains a number of accounts by senior judicial officers of the challenges that they face when they strike a sentence. When I say "officers", I mean judges. About a dozen judges are quoted in this paper. It is a 43-page paper, and I urge all members to read it in view of the debate that we are about to embark upon—the home burglaries legislation. Those judges all talk about the sentencing function of their role as being the most difficult and challenging task that they undertake. They state also that there needs to be variation in sentencing for the same crime. For example, as one judge points out, should a hit man who has murdered another person in consideration of a monetary payment, and an 83-year-old man who has engaged in an act of euthanasia by administering a fatal dose of medication to his terminally ill wife, at her urging, be regarded as equally culpable? Should an 83-year-old man who, at the urging of his terminally ill wife, has assisted in the administration of a fatal dose of an opiate, suffer the same penalty as a hit man who has been brought in from the eastern states to take someone's life? That is an extreme case, and it happens not all the time, but not infrequently. These are the sorts of balancing acts that our judiciary is required to perform all the time. That is a very serious and challenging task that they undertake, and, if we read the accounts of the judiciary, it is at times very melancholy.

As we examine mandatory sentencing generally as a proposition, we will see that these things will happen over time. I have been in the law since 1974. I should not say that and give away my age or hints to my age, but I was admitted as a legal practitioner in 1974.

Mr P. Papalia: You started when you were 10!

Mr J.R. QUIGLEY: Thank you, member; you are being kind to me!

I have seen a lot of things come and go. The pendulum never moves swiftly, but when it does start to arc the other way, it is unstoppable until it reaches the zenith of its travel. Here it is slowly starting to be seen for what it is; that is, the forging of public policy in the crucible of an election, which is a recipe for bad public policy. I am not saying that there should not be some mandatory sentencing. The forging of this in the crucible of an election campaign is a recipe for mistakes because in that campaign we are not competing for the best law and order outcome, but for the most votes. I cannot wait until the Minister for Police returns to the chamber to debate the Criminal Law Amendment (Home Burglary and Other Offences) Bill 2014. We cannot satisfy the public's expectations. I will come to this later today when we get to the other debate, but when the minister announced the home burglaries mandatory sentencing of 15 years, which a lot of people would regard as severe, the online comments under the minister's press release as reported in *The West Australian* newspaper were not "what a jolly good minister" or "what a good girl". The online comments berated her for not making it 18 or 20 years' mandatory imprisonment. We cannot satisfy the public. We cannot administer the law, forge public policy and satisfy the people at the same time, and nor do we want to. It is not possible and it is not desirable. I will come to this later today. If any one of us sitting in the chamber—I am sure it would not happen—got drunk in the members' bar and were charged with half a dozen traffic offences because we had a prang on our way home, to

hypothesise, and the police made an allegation against us of careless or reckless driving, can we imagine any member here then wanting the court to deliver judgement according to public expectation? No; none of us would want that because we have only to read the online comments to see what the public wants done with all politicians. Every member in this chamber, if they were reckless enough to conduct themselves so that the police charged them with an offence, would want an independent judiciary to hear the case against them and not for judgement to be delivered on the biased public perception of what should happen to them. Over the ensuing months, these issues will come into stark relief.

This is not an "I gotcha" moment. This is not ideology. This requires careful, intellectual examination of the facts, quite apart from vote-grabbing. I am not saying we are going to grab hold of this, but I acknowledge the remarks made by the Acting Premier of Western Australia in his reply to the second reading debate. If I can go to yesterday's uncorrected proof of *Hansard*, the Acting Premier quite correctly said—he can correct it if *Hansard* is wrong —

> The shadow minister repeatedly made the point that, although the numbers had gone down in the first instance, they have subsequently increased, and that is true.

It is true. The Acting Premier is an educated professional person. He would not try to deny the evidence on a matter of ideology. The Acting Premier went on —

> Clearly, the deterrent effect is perhaps not as great as we would like. We all know how that works; namely, in a scenario of alcohol-fuelled violence, a person does not always stop to think —

We are ad idem on this —

> "Well, I might go to jail if I hit this police officer." There are sorts of persons who might well continue with that violence regardless of the potential consequences.

That is what we have been saying about mandatory sentencing from day one. Just the appearance of it on the statute books will not stop the offences and nor will the amendments before the chamber to take away parole during a mandatory minimum term of imprisonment. That woman would have served, I think, eight weeks longer. Adding another eight weeks to her term was unlikely to deter anybody who has not already been deterred by mandatory sentencing.

There are a lot of hooks in this, but, as the Acting Premier who is a medical practitioner knows, there is never one easy solution in either medicine or law. The medical profession came out, for example, with statins, the most highly prescribed therapeutic drug in America, to drastically drop low-density lipoproteins in people's cholesterol and solve people's lifestyle problems. However, a longitudinal study—I believe it was in the United Kingdom, but it might have been reported in the United Kingdom—of 45 000 people taking LDLs over a decade revealed a 20 per cent increase in the likelihood of elevated blood sugar levels because of the LDLs' work on the liver and stopping the enzymes that reduce glucose. Therefore, there was a 20 per cent chance of long-term users of statins developing type 2 diabetes. There we have it in the medical field; there is never one easy solution in medicine and nor is there in law. Medicine requires the doctor to look at the patient in front of them and prescribe a treatment regime to deliver the best outcome for the patient. Type 2 diabetes might not be the issue if the person has already suffered two myocardial infarctions and is still labouring with high cholesterol. The doctor might tell them not to worry about the elevated blood sugar levels because there is a bigger problem with their ticker.

Similarly, we have to look at the particular circumstance of a prisoner appearing in the dock. I will come to this matter in more detail in debate on a later bill. For example, there is a very large cohort of young people in the Kimberley especially, and even a preponderance in the East Kimberley, who suffer foetal alcohol spectrum disorder. They have not abused their brain through the over-ingestion of alcohol; they were born with this syndrome. They are hapless victims. What do we know of foetal alcohol spectrum disorder? We know that the federal health department and the national medical profession are about to publish diagnostic criteria so that it can be classified as a disability. In discussing that, what do we know? They cannot cope with education, stress or react properly in social situations; they offend. Do we take into account, when sentencing these people, their mental infirmity? Under this legislation—no! Under these amendments, not even parole is considered; such a condition cannot be taken into account. There we have it. Unlike in the medical profession, where a practitioner can weigh up the whole thing discreetly for the patient sitting opposite them in the consulting room, for a prisoner in the dock, under this legislation, his or her life circumstances cannot be assessed so that the sentence is tailored appropriately. We take away that element of justice, for what result? As the Acting Premier says, not because the numbers will drop—the Acting Premier acknowledges the numbers have increased—but to deliver certainty, whatever that means! During the original debate, the government could not identify any case, bar one, which involved that dear man, Magistrate Anton Bloeman—the man who used to give away push bikes to Indigenous people when the other kids did not come back before him. He really loved them. On one occasion he

failed to imprison an Indigenous first-time offender who in Fitzroy Crossing punched a policewoman and broke her jaw. I believe that that decision should have been appealed, but it was never appealed, and that is the only case that the former Attorney General, the former member for Bateman, could cite as the bench acting inappropriately. I do not know yet what the government means by saying that although it is not delivering a reduction in numbers of offences, at least it is delivering certainty—but at what price? It is the price of the doctor saying, "I have the prophylactic drug for you. I am going to give it to everyone in the community to get lower cholesterol." That would be regarded as irresponsible. We may as well put it in the water, like fluoride, but that would be irresponsible given what we know about the side effects. The opposition does not oppose this legislation. It is part of the government's package. But the opposition thinks that over time this package will be seen for something else—that is, a matter of political ideology and not a rational response to criminal problems that bedevil this community.

MR P. PAPALIA (Warnbro) [11.43 am]: I would like to participate in the third reading debate and follow on from the member for Butler's fine contribution. Firstly, I reflect on the Acting Premier's response to the opposition's second reading contributions, primarily his observation about the apparent contradiction of the opposition, which on the one hand says that mandatory sentencing is not effective—that many of us oppose it and are not naturally inclined to support it—yet on the other hand criticises the government's drafting of the Sentencing Legislation Amendment Bill. He believes that is a contradiction and it is difficult to reconcile. I do not think that is a problem. It is a natural conclusion to the course of the debate. In the event that the opposition exercises its opportunity to articulate its opposition to a policy, proposal or direction in which the government is heading, the opposition must still analyse the legislation. The opposition knows that ultimately in the event that the government opposes any amendments the opposition proposes, the government will get its legislation through anyway, but it is the obligation of opposition members to try to make any legislation as good as it can be and to try to improve it. We are still seeing a fantastic example of that with the member for Armadale striving valiantly to try to make the Mental Health Bill better; but to no avail unfortunately. Nevertheless, he keeps trying. That is an appropriate course of action. There is nothing wrong with that. On the surface it may appear to be a contradiction, but anyone who thinks about it for a moment recognises that that is a reasonable course of action. The Acting Premier draws that contradiction to the attention of the house—no doubt it will also be drawn to the attention of the house by the hapless Minister for Police in the debate on the Criminal Law Amendment (Home Burglary and Other Offences) Bill 2014—because the government sees political benefit in it. It is seeking to garner some benefit in the public domain by saying, "Look, these guys are all over the shop. They say they are opposed to mandatory sentencing and then they try to change the legislation that we are putting through and they do not oppose it." Ultimately, the government has the numbers. It will be putting through legislation that the opposition believes is flawed; we have tried to make it better and we will point out all the failings. The government will be held to account in due course. It will become obvious, and it will be obvious very quickly in the case of the forthcoming legislation. I am looking forward to that debate. There will be many opportunities to point out the flaws in what the government proposes in that legislation. I do not believe that it is inappropriate or that there is a big contradiction in opposing mandatory sentencing and then trying to fix the legislation to make it a little better. I do not have a problem with that. I am comfortable with pursuing that path and the opposition can easily answer that criticism.

I did want to go to the same space as the member for Butler and talk about the removal of judicial discretion, which will happen under any mandatory sentencing and will happen under this particular change to the sentencing legislation. The member for Butler identified the challenge associated with offenders who suffer foetal alcohol spectrum disorder. The people who suffer that disorder did nothing to acquire it, did not commit any crime to develop it; they were born with it and will live with it throughout their lives. A cohort of people will be vulnerable under this legislative change, because the judiciary will have no opportunity to apply any discretion. In the event that a person who suffers this disorder is charged, the discretion will lie with the police officer—in fact, as we have seen, as this legislation has been in force for some time, that discretion is with the prosecutor. How busy the prosecutor is, how available the witnesses are, their particular motivation on the day, will dictate whether those individuals go to gaol. That is noteworthy for FASD sufferers.

Other categories of people will be affected by this legislation. As I said in my second reading contribution, parents of mentally ill offenders have come to members of Parliament begging for some protection in the event that they have to call the police for assistance to escort their mentally ill adult child—or even adolescent—to an appropriate facility. That circumstance may unintentionally result in that individual being brought into close contact with the police, in a stressful environment, and an assault taking place. In the event that an assault takes place, under this legislation it is entirely at the whim of the prosecutor to dictate whether or not that person goes to jail. Police officers have a degree of discretion and they do get a bit of training but, let us face it, if I were a police officer, I would fully understand any police officer who had been bitten, had been punched, had their jaw broken or had any serious injury feel that it was appropriate to charge the individual with assault of a public officer, which attracts a mandatory sentence. I understand that. I also believe that in light of the circumstances,

removing judicial discretion is dangerous because it prevents the magistrate or judge from acting with any discretion and putting the assault into the context of that individual's mental capacity. We are putting it all onto the police officer or the prosecutor, and I do not think it is fair on those people.

Dr A.D. Buti: I totally agree. I am sure a medical professional would understand that. They would like to maintain their discretion on how to treat people who are mentally ill.

Mr P. PAPALIA: Exactly. The member for Butler, who was appealing to the minister's professionalism as a doctor, indicated that he would understand the nature of this particular debate.

The other pertinent category I want to draw to the attention of the house is that this week we passed a motion to hold a day of recognition in Western Australia for post-traumatic stress disorder. Consider an ex-serviceman serving at Campbell Barracks who was deployed to various theatres of war over the last decade—young men down there have done that—and who is exposed to significant trauma and visible and personal trauma on multiple occasions; he may have lost close mates and been wounded and mentally damaged. Once that individual has come back to this state, he may well be subject to this mandatory sentencing legislation. It is not an outrageous notion. As we heard from the Minister for Corrective Services, there are around 50 ex-soldiers in the prison system now. When I went out to Hakea Prison, I was told that in the remand prison there were five or six of these individuals. I asked whether they were suffering from PTSD and the prison officers said that some of them are so medicated they can barely operate. We are setting up people to be thrown into prison when they should be in a medical facility. I am not excusing assaults on police or other public officers—that is wrong—but some people, through the injuries they have sustained, either physical or mental or both, are incapable of avoiding a situation that may escalate to them assaulting a public officer. Through this legislation we are putting all the onus of responsibility for ensuring those people are not dealt with in an unjust fashion entirely on the police officer or the police prosecutor. I do not think that is fair or right. We are about to do it with another set of legislation that will have far greater consequences than this legislation. It is worth thinking about. I think every member of the government should consider what they are doing.

DR K.D. HAMES (Dawesville — Acting Premier) [11:53 am] — in reply: I would like to first address the comments of the members for Butler and Warnbro about my statements. Once again the member for Warnbro is misrepresenting my response. The point I was making, member for Warnbro, was not about him standing up and wanting to change legislation or opposing components of it. The contradiction was obvious and was repeated again by the member for Butler, who spoke at length against mandatory sentencing. He tabled pictures of two injured police officers and criticised the government because the people who committed those crimes were not given a mandatory sentence. That was the contradiction in his statement.

Mr P. Papalia: He was criticising the government because what it is doing is not working.

Dr K.D. HAMES: No; that is not what he was doing. The member should read *Hansard*. He put the photos of the injuries on the table and said, "Look how bad those injuries are; here I am supporting the police and they escaped that mandatory sentence." That was the point he made. The contradiction is in his statements. I want to discuss the comments by the members for Warnbro and Butler and the things that, in their view, should be taken into account against mandatory sentencing. The member for Warnbro used as examples foetal alcohol spectrum disorder, and post-traumatic stress disorder suffered by people who have been in the army. The same thing frequently happens in the police force. He suggested that the magistrate should have the discretion to not impose a mandatory sentence on someone who seriously injures a police officer. I 100 per cent do not accept that. I think the police should read the member for Warnbro's comments.

Mr P. Papalia interjected.

Dr K.D. HAMES: They can make their own judgement. I did not interrupt the member for Warnbro.

Mr P. Papalia: No; you took an interjection.

Dr K.D. HAMES: No, I am not taking interjections.

The ACTING SPEAKER (**Mr I.M. Britza**): Member for Warnbro!

Mr P. Papalia: You asked me to comment.

Dr K.D. HAMES: No; I did not.

Mr P. Papalia: Now you're verballing me.

The ACTING SPEAKER: Member for Warnbro! Thank you. The minister took your first interjection but he was not taking the second.

Dr K.D. HAMES: I do not accept those comments. People who read *Hansard* can make their own judgement about both members' comments. It does not have to reflect what I say about their comments; people can read them themselves and form their own judgement. The point I want to make is that I do not accept them. I know

that the member was not for one second suggesting that this extreme example I will give is anything like what he was talking about; I accept that, but if we take the member's argument to its full degree, a magistrate must take into consideration, for someone who commits rape or molests a young child, that the parents of the child were drug addicts at the time. By that argument, all those things might add up to say that somehow that person who molested the young child or someone who murdered a person should have a significantly reduced sentence. I know there are lots of circumstances that the magistrate, quite rightly, takes into account but I do not accept that any of the circumstances the member spoke about when someone commits an offence, such as breaking a police officer's jaw, are in any way acceptable to reduce that sentence. I do not accept that tenet.

As the member knows, my son has served in Afghanistan and twice in East Timor. If he were to suffer post-traumatic stress disorder and punched a female police officer in the face and broke her jaw, I would expect him to go to jail for the mandatory term. I would be devastated more because of what he did rather than for the jail sentence.

Mr P. Papalia interjected.

The ACTING SPEAKER: Member for Warnbro!

Dr K.D. HAMES: I did not interject on the member; this is my speech. It is my son I am talking about and the member for Warnbro, of all people, should have respect for that. I would be devastated if my son committed that offence and I would not regard the fact he had gone to Afghanistan as an excuse for punching a police officer in the face. On the contrary, I would find it abhorrent to think that one of our trained service people would ever think about doing such a thing. Personally, I do not believe they would.

FASD is clearly a different issue but it is the victim that matters in all of this—the police officer who is doing his duty on behalf of all citizens of Western Australia and who is on the front-line facing people who have these issues. People have all sorts of medical conditions, and FASD is just one of them. They might be fuelled by drugs or they might have had a tough upbringing or come from a disruptive and dysfunctional family. There are a whole pile of things. Does that mean it is okay for the police officer to have his jaw broken?

Dr A.D. Buti interjected.

The ACTING SPEAKER: Member for Armadale; he is not taking interjections.

Dr K.D. HAMES: As usual, the member for Armadale is getting the wrong end of the stick. He does it every time.

I am not suggesting that the member opposite is saying that is okay. I am saying that I do not think it is okay for someone to punch a police officer in the face and avoid a mandatory jail sentence based on the excuse of a medical condition, including FASD. If someone has a significant mental disorder that leads to their committing that offence, the law will determine that they are not fit to plead and they will be referred to a mental institution. The law deals with those things.

Several members interjected.

The ACTING SPEAKER (Mr N.W. Morton): Members, I am listening to the minister.

Dr K.D. HAMES: That is the point I wanted to make. There seem to be contradictory views on the other side. I do not accept the opposition's view, which has been clearly articulated. If people do not accept my interpretation of the opposition's views, they are free to read *Hansard* to see what has been said by members and people can form their own judgement. From my interpretation of the comments made by the member for Butler and the member for Warnbro, they are wrong. The government does not support their view.

The final point I make is that the member for Butler quoted accurately my statement on issues relating to the reduction in the number of assaults. He did not go on and quote the main point that I made in concluding, which is that whether or not there was any reduction, this government believes the people who commit those sorts of offences need punishing, and that the punishment should be mandatory. Hence, the government has corrected an anomaly in the bill to ensure that offenders serve the minimum mandatory sentence under the legislation.

Question put and passed.

Bill read a third time and passed.