ARSON LEGISLATION AMENDMENT BILL 2009

Second Reading

Resumed from 11 November.

HON SUE ELLERY (South Metropolitan — Leader of the Opposition) [8.14 pm]: The opposition will support the Arson Legislation Amendment Bill 2009. I note that the Standing Committee on Uniform Legislation and Statutes Review raised a number of questions about the bill in its forty-third report. I look forward to the answers that we will receive from the parliamentary secretary about some of those key matters, one of which relates to the use of the word "reckless" in the second reading speech and whether we need to ensure that it is incorporated into the bill itself so that we understand exactly how widely we are casting the net with this piece of legislation.

The second reading speech tells us that the bill will introduce a new bushfires offence into the Criminal Code, clarify the applicability of existing offences against the person to harm caused by fire, and increase the maximum penalties available under existing offences. Unfortunately, we find ourselves in a position in which we need to consider amending the Criminal Code to take account of the offence of arson and to recognise its seriousness. Fire is one of those events that is both terrifying and heartbreaking in the damage that it can do to people's property and ultimately in taking people's lives. Australia saw that very clearly earlier this year in Victoria and, indeed, in Western Australia. However, the heartbreak and the terror that ensues are magnified when the people who are the victims of fire or the families of those who lost their lives realise that the fire was deliberately lit.

My colleague in the other place Margaret Quirk referred to some research that identifies the demographics of the perpetrators of the crime. It is astonishing that people who are bored or looking for excitement or those people who are part of the response to bushfires start fires to give themselves a thrill or a sense of purpose in being part of putting out the fire. When we think about the demographics, the fact that they can cause so much damage in such a thoughtless way is really astonishing. It is a sad fact that we find ourselves in a position in which we need to put in place laws such as this.

The second reading speech states that section 266 of the Criminal Code reads as follows —

> It is the duty of every person … to use reasonable care and take reasonable precautions to avoid such danger;

Homicides caused by deliberately lit bushfires might not fall within the recognised categories of homicide offences. Consequently, the second reading speech tells us that this bill amends that section of the Criminal Code to define the word "anything" as including a source of ignition or fire. Those people who fail to take reasonable steps or reasonable care when in charge of a source of ignition or fire will be held to have caused whatever the consequences might be of that particular fire. The bill adds a new offence to the Criminal Code of recklessly or negligently causing property damage by fire and it sets new maximum penalties for that offence. We are told by the government that it is the intention to increase the capacity of the Office of the Director of Public Prosecutions to achieve successful prosecutions of people who go down this path.

However, our issue is twofold. We are concerned that the net might be cast too widely and that it might capture the conduct of people it did not intend to capture. It might capture the conduct of people who might lawfully start a fire or who are lawfully in charge of a fire but who fail to meet the reasonable standard of care. That is why there are amendments on the supplementary notice paper in my name. Those amendments will ensure that we set a test for whether people acted recklessly. They also include in the legislation the definition of "reckless" so that any person who has charge or is in control of a fire who recklessly fails to use reasonable precautions to contain that fire would be captured by the legislation.

The other area about which we will seek to move an amendment—obviously, I will do that when we get to that stage—is the penalty of life imprisonment. I thank the parliamentary secretary for sorting out an issue for one of my colleagues in the other place and me. We were trying to establish the other day whether "life imprisonment" can be interpreted as meaning the mandatory penalty or a penalty up to life imprisonment. The parliamentary secretary advises that it is the latter. I thank him for doing that. Nevertheless, the opposition still has the view that life imprisonment ought be reserved for those occasions when a life is lost.

We say that it is reasonable that a member of the community who has lost a person from his or her family should see that such a serious offence is dealt with by a very serious penalty. Life imprisonment is indeed a very serious penalty. However, is it the case that we want to create a law whereby the loss of land and property, as distressing and as terrible as that is for someone, is treated the same as the loss of life? We need to send a clearer message that the penalty for causing loss of property ought be less than that which applies in the event of loss of life. I will talk more about those issues when I move the amendment.

I want to briefly touch on one other element. The committee report identified some areas in which there is a difference between the language in the Model Criminal Code that is referred to and the language in the bill before us. I am interested in what the parliamentary secretary has to say about how government resolves that issue in its collective mind.

We will move these amendments with the best of intentions because we want to ensure that people who cause arson are caught and convicted. We want to send a clear message to others who might be in that demographic of people who deliberately light fires that we take their actions seriously and that they will be held duly accountable. The point we make, though, is whether we have cast the net slightly too wide. Might we unintentionally capture those who, by the nature of their business as farmers or as Department of Environment and Conservation officers or rangers, are in charge of a source of a fire or are in charge of lawfully lighting a fire? If we do not include the word "reckless" in the bill, will we capture those people when that was not our intention? There may be circumstances in which they acted with all reasonable care, but devastation, and potentially loss of life, occurred as a result of their actions. Are we not really trying to make sure that the ones we capture are the ones who knowingly and recklessly act in such a way, when they have control over ignition material for a fire or, indeed, are in charge of a fire as a whole? Do we not really want to capture the ones who act recklessly in the conduct of those duties? I think that is who the legislation ought be targeted at. For those reasons, we will be moving the amendments that I have referred to.

Arson is a serious criminal offence. My colleague in the other place Margaret Quirk pointed out that arson in all its forms costs us as a nation about $1.6 billion every year. That does not take into account the cost of the loss of human life and the loss of community amenity and all the things that occur when bushfires such as those in Bridgetown in Western Australia and in Victoria tear through a community. For those reasons, we think it is important that this legislation is put in place. We are happy to support it being fast-tracked through the Parliament given the season that is upon us. We look forward to the parliamentary secretary answering the questions that were raised in the committee's report and to the discussion during Committee of the Whole about the amendments that we seek to move. With those words, on behalf of the opposition I am happy to commend the bill to the house.

HON GIZ WATSON (North Metropolitan) [8.24 pm]: The Arson Legislation Amendment Bill 2009 is a government bill. It aims to strengthen protection to people and property from arson offences by creating a new offence in the Criminal Code; clarifying the relevant existing offences, including arson; and increasing penalties for existing offences.

Following the Victorian bushfires earlier this year, the state government undertook a review of arson offences in Western Australia compared with interstate arson offences and penalties. It also took into account the Model Criminal Code provisions and the views of the Standing Committee of Attorneys-General regarding the arson provisions of the Model Criminal Code.

The bill passed the Legislative Assembly without amendment. The Legislative Council referred it to the Uniform Legislation and Statutes Review Standing Committee. The committee was required to report back by 19 November. I think it is worth talking about that process for a minute. The original referral gave a report-back date of 2 March 2010. The normal report-back date for that committee is 30 days. However, a subsequent motion in the Legislative Council required the committee to report back by 19 November. The standing committee's report is a very brief affair, not surprisingly. Interestingly enough, members will see it was done in a considerable hurry. I do not know about other members' copies of the report, but mine is numbered pages 1, 2, 3 and then pages 4, 4, 3, 2 and 1! I have never seen a standing committee report that basically has two copies of the report in the one cover! That confused me for a while. Nevertheless, it concerns me that this happened in our rush to meet a deadline. I appreciate the heightened anxiety about bushfires and the urgency expressed that we need to have changes to legislation in place before this year's bushfire season. It concerns me that we have not done justice to the work that standing committees in this place normally do. I will not take the time of the house to go through what the standing committee identified, suffice to say that the committee identified almost three full pages of issues in its preliminary consideration of the bill. They were issues that the committee had intended to explore in its inquiry, and some of them are quite substantial, in my view.

I am of the view that this house should always err on the side of not rushing legislation, particularly not rushing legislation that seeks to impose a penalty of life imprisonment. I would be so bold as to suggest that the risk of going through another bushfire season without these provisions in place is less problematic than the fact that a standing committee of the house has not been able to fulfil its functions of reviewing legislation and seeking the input of stakeholders. Again, this seems to be a pattern that is developing. It is of deep concern to the Greens (WA).

In its report, the committee identified several issues but made no recommendations. It clearly stated that the reason for this is that it had no time or opportunity to explore the issues that the bill raises. The bill is short.

Clauses 3 and 4 amend section 32 of the Bush Fires Act 1954. Section 32 of the current Bush Fires Act provides —

> **Offences of lighting or attempting to light a fire likely to injure**
>
> A person who —
>
> (a) wilfully lights or causes to be lit or attempts to light a fire; or
>
> (b) places a match or other inflammable or combustible substance, matter or thing in a position so that it may directly or indirectly be ignited by the rays of the sun or by friction or other means, or be exploded or set on fire, or whereby a fire may be lit or caused and with the intent to cause a fire,
>
> under such circumstances as to be likely to injure or damage a person or property, whether the fire be caused or not, is guilty of a crime.

The current penalty is $250 000 or 14 years' imprisonment, or both.

This bill seeks to increase the penalty to 20 years' imprisonment. As I understand it, the reference to a fine will be removed. The remainder of the bill amends the Criminal Code. Clauses 6 and 7 amend section 23A of the Criminal Code, "Unwilled acts and ignitions". Clause 7 amends section 23B, "Accident", to make offenders subject to the new section 444A.

Clause 8 amends section 266 of that part of the Criminal Code that deals with offences against the person. This provision currently imposes a duty on a person in charge of a dangerous thing to use reasonable care and to take reasonable precaution to avoid danger to the life, safety or health of others. A person is held to have caused any consequence to the life or health of any person through failure to perform the duty. The amendment clarifies that a source of ignition and a fire are dangerous things. The change arises out of a concern raised at the April meeting of the Standing Committee of Attorneys-General that homicide offences would not cover deaths caused by deliberately lit bushfires.

Clause 10 inserts a new section 444A into the property offences part of the code. This new section imposes a duty on a person in control of an ignition source or fire to use reasonable care and to take reasonable precautions to prevent damage or destruction of property that the person is not entitled to damage or destroy, and provides that the person is held to have caused any damage or destruction to that property by reason of an omission to perform this duty. The definition of "property" includes vegetation, which is welcome. The clause notes say that there have been some lower court cases in which the reference to property in section 32 of the Bush Fires Act has been held to exclude bushland on crown land. Judgements in superior courts have cast doubt on that interpretation. The Bush Fires Act does not define "property". However the code does define "property" to include everything capable of being the subject of ownership. It was therefore thought unnecessary to include in new section 444A any specification of property "whether or not on crown land". My question in regard to this is: Why has the Bush Fires Act 1954 not been amended to remove the problem in that act? Perhaps the parliamentary secretary in responding to the second reading debate will give me an answer to that query.

Clause 11 amends section 444 of the code to increase the maximum penalty for criminal damage when property is destroyed or damaged by fire. It increases the penalty from 14 years' imprisonment, and to 20 years' imprisonment in circumstances of racial aggravation, to life imprisonment, and specifies that property capable of being destroyed or damaged by fire includes vegetation. The clause notes also say that this is consistent with the maximum penalties in Queensland, South Australia, Tasmania and the Northern Territory for similar offences. My question is: Is there a similar offence in New South Wales, Victoria and the Australian Capital Territory? If yes, what are the maximum penalties in those particular jurisdictions? How many people have been sentenced under the Queensland, South Australian and Northern Territory provisions; and of those, how many actually got the maximum penalty?

Clause 12 of the bill inserts a new section 445A, which makes it an offence to contravene the new section 444A. The penalty is imprisonment for 15 years. The heading is "Fires causing damage to vegetation". Current section 445 deals with damage to property of a person. The penalty for that is substantially less—12 months' imprisonment and a fine of $12 000. The clause notes say that the reason is to achieve consistency with the Model Criminal Code and that there is some overlap with section 32 of the Bush Fires Act. The clause notes say that this is intended to provide the Director of Public Prosecutions with some flexibility when prosecuting bushfire offences.

I have looked at a number of research sources in terms of statistics on bushfire offences. I am curious to know from the government: has this bill been informed by any particular research into arson—for example, research by the Australian Institute of Criminology—and, if yes, how? Also, why has this bill been introduced before the Victorian Bushfires Royal Commission has completed its investigation and report? The "Report on the National Forum to Reduce Deliberate Bushfires in Australia" dated 25 March 2009 refers at page 7 to the commonwealth Attorney-

General's Department investigating sentences of arsonists and, if appropriate, approaching the National Judicial College of Australia to discuss judicial education in sentencing arsonists. My question is: Has this been completed; and, if so, what was the outcome? If possible, can that report be tabled? Also, is this bill informed by that information as well? I think it is really important that the introduction of legislation such as this, which has significant penalties, be based on the latest information available. I have already noted that the Greens (WA) have concerns that the Standing Committee on Uniform Legislation and Statutes Review was unable to complete its inquiry.

I want now to talk about the increased penalty. The clause notes say that all but three Australian jurisdictions have a greater maximum term than that in WA for similar offences, and that 20 years was chosen to be consistent within the range of sentences in WA. My question is: What are the maximum terms for these sorts of offences in the Northern Territory, South Australia, Queensland, New South Wales et cetera? How many people have been convicted of these offences in the past 10 years; and, of those, how many were sentenced to the maximum, how many were fined, and how many were children? The deletion of reference to a fine is said to be based on the court's ability to impose a fine under section 41(5) of the Sentencing Act 1995, if the court considers it appropriate. I have actually confirmed this information with the Law Society of WA, which has confirmed that that is correct, so I am satisfied in that regard.

The next and most substantive concern about this bill, which has also been raised by the Leader of the Opposition, is the creation of a life imprisonment penalty under clause 11. We will be opposing this aspect of the bill. This clause relates to a property offence. In our view, the sentence of life imprisonment, as is currently the case, is available only on conviction for murder, armed robbery, and drug trafficking under federal laws. The maximum penalty on conviction for aggravated sexual penetration, serious drug offences, manslaughter and grievous bodily harm is 20 years. We are therefore contemplating putting in place in this bill a penalty of life imprisonment for a property offence conviction. That is well over and above the maximum penalty for some very serious offences against the person. The penalties mean that this offence would need to be dealt with by the Supreme Court, not the District Court.

In the other place my colleague the member for Fremantle moved an amendment to reduce the life imprisonment provision to 25 years, and I note that the honourable Leader of the Opposition in this place has a similar amendment on the supplementary notice paper. Indeed, the member for Mindarie moved that amendment in the other place. I indicate at this stage that we will support that amendment because we support the bill, but we do not support a penalty of life imprisonment for a property offence conviction.

Another matter that I would like clarified in this debate is a matter that was raised in debate in the other place also. A concern was raised that the sentence that is to be introduced will be mandatory. I believe this was introduced into the debate by the member for Mindarie. The response from the Attorney General in the other place was that that is not correct. I would appreciate again clarification from the parliamentary secretary, who I believe is dealing with this bill—is that correct?

Hon Michael Mischin: For the moment!

Hon GIZ WATSON: For the moment! That is also a very significant matter, and I would like clarification if there is any intention that this clause will have the effect of making it a mandatory life sentence. I do not read it that way and I think the Attorney General is correct, but I seek confirmation of that again in this place.

During the debate in the other place the Attorney noted a consequence that flows from a sentence of life imprisonment pursuant to section 96 of the Sentencing Act 1995, being that a person cannot be released before the person has served seven years of his or her sentence. He suggested that from a prisoner's point of view it is actually preferable to a sentence of 25 years, as parole would not be considered until long after seven years had passed. In fact, the Attorney General suggested it would be 23 years, which is an interesting twist on this provision.

The next point I raise is that the likely effectiveness of the Arson Legislation Amendment Bill is questionable. For a good source of information, I turned to the Australian Institute of Criminology report 98 from its research and public policy series, which deals with the use of crime prevention to reduce arson. That paper was published this year, so it is up to date. The report made a number of interesting points but I will not refer to it at length. The report notes that it is preferable to prevent fires, the resultant damage and the depletion of resources of fire services, than to punish the offender later. The discrepancy between the number of fires reported and the number of offenders prosecuted for arson, particularly bushfire arson, shows that arson is rarely detected and is even more rarely prosecuted. Of those prosecuted, few offenders get the maximum sentence. The Law Society's anecdotal perception is that each year many people are charged and tried for arson and although they receive jail terms on conviction nowadays, the context is usually in relation to burning motor vehicles to collect insurance,

rather than causing bushfires. Therefore, my questions are: How many fires have been reported in Western Australia over the past 10 years? How many of those were bushfires? How many were thought to be arson? How many of those were prosecuted? How many convictions came out of those prosecutions? How many got the maximum penalty? How many were young children?

The Australian Institute of Criminology report also makes the point that arson is complex, multifaceted and poorly understood. The difficulties in understanding arson are compounded by the low rates of detection for arson. There is a considerable range of characteristics of offenders. There is no accepted data on the rate of recidivism for arson, although up to half of all arson defendants had prior convictions for other offences. It is likely that many are general offenders who also light fires, not dedicated arsonists—for example, many children engage in playing with fire. The latest Fire and Emergency Services Authority annual report refers to a joint study that was undertaken with the Office of Crime Prevention and was conducted by the University of Western Australia psychology department, to review arson offender data. I am interested to know whether that report is available and the outcome of that study.

The question of whether any potentially harsh penalty is likely to deter criminals is complex. Page 38 of the Australian Institute of Criminology report 98 states —

> It is likely that many firesetters, especially young people who set bushfires, do not consider the consequences of their actions, and are therefore unlikely to consider their possible punishments. Adult firesetters are rarely successfully prosecuted, and as such it would not be surprising if they did not consider the potential sentence to be a deterrent. Given that by the time an arsonist appears in court the damage has been done, and that there are few intervention prospects for adult arsonists, it is likely that primary or secondary prevention may be worthier of further development than would tougher sentencing guidelines.

The report also noted that although young offenders may cause as much damage as adult offenders, they are treated differently by the criminal justice system with specialist courts, diversion options and a legal requirement that imprisonment be used only as a last resort.

The paper examines several possible crime prevention strategies and suggests that given the low detection rates for arson, primary prevention strategies to change physical environments to reduce opportunity or community programs that raise awareness about the dangers of deliberate fires seem to be a more promising approach than approaches that require that the offender be known. What arson prevention strategies are in place in respect of a reduction of opportunity, community awareness raising and targeting known offenders? Are these strategies being evaluated? What research is being conducted to help better understand arson? The point we try to raise in these debates is that to simply take what is the kind of cheap and easy option of introducing tough legislation does not necessarily achieve the desired outcome. I also note that the FESA annual report and the "Report on the National Forum to Reduce Deliberate Bushfires in Australia" provide some information; however, it would be useful if the minister also answered the questions about which arson prevention strategies are in place in addition to the legislative approach being taken.

My preference is for this bill to be re-referred to the Standing Committee on Uniform Legislation and Statutes Review. However, in a gesture of cooperation I will not formally move a motion to that end because I understand that it is likely to not be successful. I put on the record that the impediment of the proper operation of the standing committees of the Legislative Council is not desirable and the committee has clearly flagged that it had lots of issues that it was unable to provide answers for.

We are likely to support the amendments on the supplementary notice paper in the name of Hon Sue Ellery. Our support for the third reading of the Arson Legislation Amendment Bill 2009 is dependent on the success or failure of those amendments. Again, as this is a sort of growing trend, I think that probably means that we will not be supporting this bill, as everything that comes out of cabinet is apparently set in concrete.

HON MICHAEL MISCHIN (North Metropolitan — Parliamentary Secretary) [8.47 pm] — in reply: I thank members for their contribution to the Arson Legislation Amendment Bill 2009 debate. I will not address every one of the several matters that have been raised because I believe that it would be more appropriate to raise them in the committee stage where they can be dealt with in detail. However, I will address a couple of matters in the hope of indicating the government's position on them.

Firstly, I have read the report of the Standing Committee on Uniform Legislation and Statutes Review and it is unfortunate that it did not get to explore some of the issues that it flagged. However, it is apparent from reading the report that many of the things that the committee raised were issues that may quite properly have come to mind on initial perusal of the bill, but on further reflection and analysis of the bill would have proved to have been of no substance. I will deal with those matters as they arise in the committee stage.

The question of recklessness, and why that test has not been adopted, has been raised. The standard in Western Australia at the moment in terms of the breach of duty of care that give rise to criminal responsibility is high and is not unlike recklessness. In fact, many commentators have described it as being the equivalent of recklessness or to be so close to recklessness that it does not matter. Criminal negligence requires a breach of a duty of care, but such an egregious breach that it would attract moral culpability, criminal responsibility or criminal sanction. The most common example of that is the breach of duty of care involved in motor vehicle manslaughter. We have offences, for example, of dangerous driving causing death. But motor vehicle manslaughter requires a breach of a duty of care—that is, negligence. However, not every act of carelessness or negligence gives rise to criminal negligence. Therefore, what we are looking at with the breach of a duty of care under criminal law is very similar to what one commonly describes as recklessness, which is an appreciation of the risk and the consequences of one's actions but the disregard of them. It is very similar to what we would be looking at in the case of the breach of the several duties that have been prescribed under proposed section 444A.

Hon Giz Watson and other speakers raised the matter of life imprisonment and whether that is appropriate for a property offence. Again, I can address the detail of that issue at the committee stage; however, I will say this: it is very, very arguable whether setting a fire in circumstances that can cause an enormous amount of damage to property is simply a property offence. For example, the offence of armed robbery under the Criminal Code attracts life imprisonment. One argument that I heard raised many years ago was that armed robbery, such as stealing from a bank, is a property offence. That is not so; it is an offence of violence against the person. I think many people in Victoria, whether they were injured or whether they knew people who were injured or killed, would argue against the idea that the destruction of their homes and jeopardising their livelihoods and their lives, the lives of their friends and the lives of their animals is simply a property offence. It is an offence very much against the person, in the government's view. An offence in which substantial damage is caused or people are exposed to substantial risk goes beyond a mere property offence.

The question has been raised about whether the prescription of the penalty of life imprisonment for the wilful destruction of property is in fact a mandatory sentence. No, it is not. If any examples to illustrate the reasoning of that are required, I can point to them. But I assure the house that it is not the intention of the government to make it a mandatory sentence of life imprisonment; neither will that be the legal effect as presently advised.

I am not in a position to give an answer to the various questions about statistics, studies and the like. I may be able to provide some detail during the committee stage, but I suggest that that is hardly material to the policy behind the current legislation and what the government hopes to achieve. I take on board the comments of Hon Giz Watson that this legislation may not be effective. It may not prevent a single fire. The people who light these sorts of fires would, by and large, be unstable or sociopathic. They might be motivated by a desire for excitement or by some other reason. It may be that this legislation will not prevent a single fire. We hope that it will deter those who get a thrill out of lighting fires. We hope that, additionally, it will show society's condemnation of that sort of conduct and provide some deterrent. That is the hope. But the fact that it may not deter too many people is not a reason for doing nothing. If the argument is that this sort of legislation will not stop people from lighting fires, we may as well not have an offence for it. I do not believe that anyone is suggesting that we should repeal the Criminal Code simply because the Criminal Code has not deterred someone from committing a particular crime.

A number of questions of some generality have been asked, but they are not amenable to an easy answer unless some specifics are given for them. I suggest that those questions would be better dealt with at the committee stage. I move that the bill be read a second time.

Question put and passed.

Bill read a second time.