ARSON LEGISLATION AMENDMENT BILL 2009

Committee

The Deputy Chairman of Committees (Hon Jon Ford) in the chair; Hon Michael Mischin (Parliamentary Secretary) in charge of the bill.

Clause 1: Short title —

Hon SUE ELLERY: I will use the opportunity of the short title to ask the parliamentary secretary whether he would make some more detailed comments on the government's response to the substantial matters raised in the report of the Standing Committee on Uniform Legislation and Statutes Review. I appreciate the comment he made in his reply to the second reading debate that some questions raised in that report were, in the government's view, raised only because the committee did not have the time to do a more substantial examination; and, if it had, those questions might not have been raised. There are at least two matters—that is, the difference between the language in the model and that in the bill before us, and the question of the use of the word "reckless", which I think he touched on in his second reading response. I would not mind if the parliamentary secretary could outline for us in a little more detail why the government says that the issues raised in the committee report should not stand in the way of the progress of the bill.

Hon MICHAEL MISCHIN: I do not want to be difficult, but can the member direct me precisely to the matters that she is referring to and then I might be able to address them? There is a raft of at least 21 dot points and a lot of subsidiary questions in the report.

Hon SUE ELLERY: I am not talking about the dot points. I am specifically talking about paragraph 4.9, which refers to some differences between the bill and the Model Criminal Code. At paragraph 4.9 the report states that the bill uses language associated with the concepts of reasonable care and breach of duty, whereas the Model Criminal Code uses the criminal concepts of intent and recklessness. At paragraph 4.13 the report states that the committee was not able to consider whether any of the terms of proposed section 444A would imply that section 24 did not operate. At paragraph 5.2 the report draws attention to the fact that the second reading speech uses the term "reckless" to describe the conduct prohibited by proposed section 444A, but the previous paragraph states that clause 10 of the bill does not appear to insert a strict liability offence. The committee makes the point that it is not certain in its view whether the two terms are interchangeable.

Hon MICHAEL MISCHIN: I will deal with those matters in order. Paragraph 4.9 of the committee report refers to the use of language that the committee says is associated with the civil tortious concepts of reasonable care, breach of duty and the like. That is not uncommon in the Criminal Code. Section 266 of the Criminal Code provides a general duty of care in the use of dangerous things—or any thing, in fact—that can cause harm or injury to a person. It uses the term "duty of care", which on first reading is akin to the civil standard for negligence. However, it is accepted law, and has been for a very long time, that the breach of the duty involved would have to be more egregious than that which would result in a breach of duty resulting in civil liability. We are talking about something that is such an egregious breach of that duty that it would attract some moral culpability and/or would go beyond that which could be compensable by damages and should attract criminal sanction. That sort of standard has often also been described as being either recklessness or akin to recklessness. There is no precise formulation, but the standard that we are talking about here could be described as being akin to recklessness, if not recklessness itself.

Hon Sue Ellery: Do you think there is an issue of whether we have an obligation to make things a bit clearer for juries? There is ongoing community debate about whether people see the outcomes from the justice system as reflecting the expectations of the community. Part of that debate is the capacity, if you like—I make no reflection on them—of juries to understand the complexities of something along the lines of what you have just explained and whether the use of language that is a bit more common, such as the use of the word "reckless", might make it a bit easier for juries.

Hon MICHAEL MISCHIN: The government's view is no. These concepts are well enshrined in the criminal law. Judges use a formulation of words to explain these concepts to juries as a matter of course. One of the most common instances in which they do that is in the case of motor vehicle manslaughter. These concepts are well known to judges and they are explained to juries all the time. Prescribing a formulation of recklessness that applies to this specific offence may well result in a distortion of the criminal law. Prescribing something in this bill, as opposed to in the general criminal responsibility provisions of the Criminal Code, may result in the court saying that Parliament obviously had a different concept of recklessness or criminal negligence in mind than would generally be applicable, and that may cause problems. The government has taken the view that unless there is a redefinition or an insertion of a definition in the criminal responsibility sections, it ought not be done

for these specific offences, as it may lead to unintended consequences and cause confusion and doubt in the law, rather than simply pick up on what is well established in the criminal law.

Hon GIZ WATSON: I followed that discussion with interest. I note again that it is very unsatisfactory that the standing committee could not complete its work and give members a conclusion from its point of view.

Hon MICHAEL MISCHIN: I am sorry to interrupt Hon Giz Watson. I realise that there were two other paragraphs that the member directed me to that I did not deal with. I will come back to those if she still wants to pursue them.

The DEPUTY CHAIRMAN (Hon Jon Ford): Members need to note that under standing orders, I give members the call. I do not like lengthy interjections and the reason for that is that a member might spend a lot of time making an interjection only to have the person from whom a response is sought reject that interjection; therefore, the member would have wasted his or her time because the interjection would not be recorded in *Hansard*. If members stick to the rules, we will all be happy.

Hon GIZ WATSON: I think I was probably pre-empting what the parliamentary secretary has just indicated. I was seeking answers to the other two questions.

Hon MICHAEL MISCHIN: Section 24 of the Criminal Code deals with honest and reasonable but mistaken belief in the existence of any state of things. The operation of that rule may be excluded by express or implied provisions of the law relating to the subject. It must be remembered that it is dealing with mistaken belief in the existence of a state of things, not mistakes as to the effect of law or what the law is. In essence, if a person acts on particular factual information and honestly believes, on reasonable grounds rather than simply speculation or guesswork, that a certain state of affairs exists and that person acts in a particular way, that person is no more criminally liable for the consequences than he would be if the state of affairs was in fact what that person believed it to be. That is a long way to go about it. In this particular case there is no express, or we would suggest implied, exclusion of section 24. Hence it would apply to affect a person's criminal responsibility for any offences charged under the proposed changes to the law. In the government's view, it is neither expressly nor implicitly excluded.

Clause put and passed.

Clauses 2 to 9 put and passed

Clause 10: Section 444A inserted —

Hon SUE ELLERY: I move —

Page 5, line 11 — To delete "It is the duty of a" and insert —

Any

Page 5, lines 12 and 13 — To delete "to use reasonable care and" and insert —

recklessly fails to

Page 5, line 19 — To delete "It is the duty of a" and insert —

Any

Page 5, line 20 — To delete "to use reasonable care and" and insert —

recklessly fails to

Effectively, my amendments on the supplementary notice paper are two sets of amendments. For the benefit of the house, the first set of amendments relate to our proposal to insert the word "recklessness". Members who followed the debate on the first clause of the bill will have observed that we have already discussed this matter in part. In the event that the amendments to clause 10 in my name fail to be passed, the amendment standing in my name at the end of the supplementary notice paper to insert a definition of "recklessness" will be withdrawn. If members do not agree to insert the word "recklessness" in this clause, there will be no need to insert the definition of "recklessness". That leaves my second amendment regarding whether the maximum penalty is life imprisonment or 25 years.

As I have indicated, these amendments ensure that the net of those captured by this legislation is not so wide that it will capture people who make a mistake but who do not do so recklessly. I understand the government's position because I listened to the parliamentary secretary outline that position in the second reading reply and again in the debate on the short title. I am fairly sure what will be the view of the house. Nevertheless, I will move these amendments because our view is there is a risk that this legislation casts the net too wide. If we insert the word "recklessness" and then the definition of "recklessness" in proposed new section 442A, we will add an

extra level of protection for those who might do something or omit to do something that leads to dreadful consequences but who did not do it recklessly.

Hon MICHAEL MISCHIN: The government does not support the amendments. These amendments propose to establish a duty—not a standard of the breach of that duty, but a particular duty. Secondly, the amendments do not read correctly. The amendment to proposed section 444A(1), for example, would read —

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

There are a couple of words missing. In any event, "reasonable precautions" is the standard that must be met. With respect, it does not make any sense to say that a person has "recklessly" failed to take reasonable precautions. A person has either taken reasonable precautions or he has not. The government cannot support the proposed amendments. The opposition is introducing the concept of "recklessly", which is not present in the scheme of the Criminal Code. That would require judicial attention and it might very well distort the jurisprudence on the subject of criminal negligence in an unpredictable way.

Amendments put and negatived.

Clause put and passed.

Clause 11: Section 444 amended —

Hon SUE ELLERY: I move —

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

This is the second amendment that I referred to in my opening comments on clause 10. I also mentioned this during the second reading debate. The amendment concerns whether it is the view of the house that a distinguishable difference applies when life is lost, as opposed to when property is lost. I noted the comments of the parliamentary secretary in his second reading reply. I do not want this amendment to be seen to be diminishing the impact that the effect of fire has, particular when it is deliberately lit, when it destroys a person's home, which is more than a house because of the emotional and psychological attachments. We are moving this amendment because we believe that it is important that those who come out of the justice system at the other end can see that causing damage to a home, to a community and to people's livelihoods and lives is a serious offence, and it carries a serious penalty. There is a distinguishable difference between the loss of material and the impact it has on a community, and loss of all of those things plus the loss of life. It is for that reason the opposition seeks to delete "life imprisonment" and insert instead "25 years".

Hon MICHAEL MISCHIN: The government does not support this amendment. I understand the theory behind the opposition's position; however, the government's view is that it is not simply a property offence. We are not talking about the negligent starting of a fire but about someone who wilfully and unlawfully damages or destroys property by fire. Fire is unpredictable. It is one of the most dangerous things over which people can have control. Apart from the potential for destruction that can flow from the lighting of a fire, the sort of property that can be damaged or destroyed is limitless. We are not talking just about physical and inanimate objects, but animals—wildlife, fauna, people's pets, farm animals and the like. We are talking about the potential for loss of life as well as destruction of property. People can lose their livelihoods, everything they own, their histories and everything they possess in a fire. We only have to look at the tragedy of the 2008 Victorian bushfires. Even if no-one had been injured during the Boorabbin fires, the potential for harm would have been such to warrant the greatest sanction the law allows. The life imprisonment penalty is a maximum; it is not a mandatory sentence as it used to be for murder and the like. It is not unknown for other offences that do not involve physical harm or loss of life to carry a penalty of life imprisonment. We only need to look at the armed robbery provisions in the Criminal Code. It is the terror and the risk involved that needs to carry this sort of sanction. The government's view is that the prevalence of this sort of offence, the potential consequences to people and to communities, warrants Parliament sending the signal that we regard this as amongst the top tier of criminal offences under our code. Imprisonment for 25 years is certainly a severe penalty, but currently the penalty is 20 years for fire creating damage that is motivated by racial aggravation. We believe that a penalty of life imprisonment as a maximum properly reflects the community's condemnation of the wilful and unlawful destruction or damage to property by way of fire.

It is also hoped that it will form a deterrent. This is an offence that is notoriously difficult to investigate and for which to apprehend people. Again, by showing society's condemnation of those who resort to this conduct a very high penalty is warranted.

Hon GIZ WATSON: The Greens (WA) support the amendment moved by the Leader of the Opposition. It is a concern that we share. As much as the parliamentary secretary has made a good case for the seriousness of the offence that this is attempting to deal with, as we know with offences in the Criminal Code and the penalties attached to them, there needs to be a hierarchy of penalty. If we start to crank up penalties, there is an inevitable flow-on effect and other penalties are drawn into that kind of pattern. We need to be mindful of the consequences of increasing penalties, particularly a penalty that is life imprisonment, which is the highest level that can be brought against a citizen.

I have a couple of questions on this issue. The explanatory memorandum indicates that this approach is consistent with maximum penalties for similar offences in Queensland, South Australia, Tasmania and the Northern Territory. I think I am right in saying that the parliamentary secretary did not answer the question I asked during the second reading debate—perhaps he did not have the information to hand. The question was: what has been the experience in those other jurisdictions; how many people have been sentenced and, of those, how many have received the maximum penalty? Again, this is the problem of dealing with legislation in this manner, rather than with the assistance of a committee report, which probably would have provided this information to the house. Perhaps the parliamentary secretary can indicate whether he has that information?

Hon MICHAEL MISCHIN: No, I do not have that information. This legislation was not informed by what may be happening in other states in terms of criminal sanction and the way that offenders are dealt with; this is the way that the Western Australian government believes it should be dealt with, and the appropriate penalty sought to be imposed reflects the government's position on the seriousness of this type of offending. I make the point that it is a maximum penalty. It is very, very rare under any offence in the Criminal Code for the maximum penalty to be imposed. It would be a very, very extreme case, and I would have thought that something akin to what happened in Victoria should attract a life term of imprisonment, if not something like 25 years, if we are looking at a fixed term. We will have that flexibility. One of the unintended consequences, perhaps, of what Hon Sue Ellery is proposing is that if someone were to be sentenced to life imprisonment, at least they are eligible for review and release on parole after a period of seven years, but if we were to sentence them to 25 years because the offence is so egregious, there would be no review for 23 years. I do not know whether members opposite have taken that into account as one of the consequences; that is, it would make it more difficult for offenders to be rehabilitated and released at an earlier stage before the completion of their sentence. In any event, the government does not support the amendment.

Hon GIZ WATSON: I made the same comment in my second reading contribution last night. It is ironic that that is the case. Nevertheless, we cannot support a sentence of life imprisonment for a property offence. That is the fundamental principle that we are relying on in this regard. I have another question. I appreciate that the Western Australian Parliament can do whatever it likes, and what happens elsewhere should not necessarily have any bearing. However, it is not unusual for Parliament to consider a similar law that has been in operation in another Australian jurisdiction and to make some observations about how it is working and whether it is achieving what it is claimed to achieve. Again, I do not think it is terribly instructive to the debate to say that Western Australia can do whatever it likes and not take note of precedent or the operation of similar provisions in other states. My question is: are there similar offences in New South Wales, Victoria and the Australian Capital Territory to the parliamentary secretary's knowledge?

Hon MICHAEL MISCHIN: A number of Australian jurisdictions have arson-related offences currently with far higher penalties than Western Australia's. For the offence of intentional endangerment of the life of another by a fire, the penalty is 25 years' imprisonment under section 117(1) of the Crimes Act 1900 of the Australian Capital Territory, and under section 198 of the Crimes Act 1900 of New South Wales. For the offence of causing death by arson, the penalty is 25 years under the Crimes Act 1958 of Victoria. For the offence of intentionally or recklessly causing a bushfire, the penalty is 20 years' imprisonment under section 85B of the Criminal Law Consolidation Act 1935 of South Australia. For the offence of unlawfully setting fire to vegetation, the penalty is 21 years under section 268A of the Criminal Code Amendment Act of Tasmania. For the offence of unlawfully and intentionally setting fire to structures, vehicles, stacks of cultivated vegetable produce or mines, the penalty is life imprisonment under section 461 of the Criminal Code 1899 of Queensland and under section 239 of the Criminal Code of the Northern Territory.

Hon GIZ WATSON: I thank the parliamentary secretary for that information. I find it curious that he actually had it with him but he was not that keen to read it in. I note that the Queensland one is an 1899 provision.

Hon Michael Mischin: Not necessarily. That is the date that the Criminal Code was passed but, like our Criminal Code, it may very well have had extra bits grafted on over the past 100 years.

Hon GIZ WATSON: I appreciate that, although the interesting reference to stacks of vegetables was particularly intriguing.

Hon Michael Mischin: I think they probably had haystacks in mind. They weren't that backward!

Hon GIZ WATSON: Yes, that is right. Somehow it sounds like the nineteenth century to me.

It seems to me that the amendment to make the penalty 25 years' imprisonment is not inconsistent with the approach taken by at least some of the other jurisdictions of Australia. I note that that range of penalty is certainly comparable in a couple of jurisdictions. That gives me some comfort that that is the sort of range of penalty that is appropriate for this offence. I do not wish to discuss this any further; it is a fairly limited matter. But the Greens (WA) will be supporting the amendment.

Amendment put and a division taken with the following result —

Ayes (14)

Hon Matt Benson-Lidholm	Hon Sue Ellery	Hon Ljiljanna Ravlich	Hon Alison Xamon
Hon Helen Bullock	Hon Jock Ferguson	Hon Sally Talbot	Hon Ed Dermer *(Teller)*
Hon Robin Chapple	Hon Jon Ford	Hon Ken Travers	
Hon Kate Doust	Hon Lynn MacLaren	Hon Giz Watson	

Noes (19)

Hon Liz Behjat	Hon Phil Edman	Hon Alyssa Hayden	Hon Helen Morton
Hon Jim Chown	Hon Brian Ellis	Hon Col Holt	Hon Simon O'Brien
Hon Peter Collier	Hon Donna Faragher	Hon Robyn McSweeney	Hon Max Trenorden
Hon Mia Davies	Hon Nick Goiran	Hon Michael Mischin	Hon Ken Baston *(Teller)*
Hon Wendy Duncan	Hon Nigel Hallett	Hon Norman Moore	

Pairs

Hon Adele Farina	Hon Philip Gardiner

Amendment thus negatived.

Clause put and passed.

Clause 12 put and passed.

The DEPUTY CHAIRMAN (Hon Jon Ford): Hon Sue Ellery mentioned that she would not be moving new clause 10A standing in her name on the supplementary notice paper.

Title put and passed.

Report

Bill reported, without amendment, and the report adopted.

Third Reading

HON MICHAEL MISCHIN (North Metropolitan — Parliamentary Secretary) [11.10 am]: I move —

That the bill be now read a third time.

Question put and a division held, the Deputy President (Hon Matt Benson-Lidholm**)** casting his vote with the ayes, with the following result —

Ayes (29)

Hon Liz Behjat	Hon Wendy Duncan	Hon Nigel Hallett	Hon Ljiljanna Ravlich
Hon Matt Benson-Lidholm	Hon Phil Edman	Hon Alyssa Hayden	Hon Sally Talbot
Hon Helen Bullock	Hon Sue Ellery	Hon Col Holt	Hon Ken Travers
Hon Jim Chown	Hon Brian Ellis	Hon Robyn McSweeney	Hon Max Trenorden
Hon Peter Collier	Hon Donna Faragher	Hon Michael Mischin	Hon Ken Baston *(Teller)*
Hon Mia Davies	Hon Jock Ferguson	Hon Norman Moore	
Hon Ed Dermer	Hon Jon Ford	Hon Helen Morton	
Hon Kate Doust	Hon Nick Goiran	Hon Simon O'Brien	

Noes (4)

Hon Lynn MacLaren	Hon Giz Watson	Hon Alison Xamon	Hon Robin Chapple *(Teller)*

Question thus passed.

Bill read a third time and passed.