ANIMAL WELFARE AND TRESPASS LEGISLATION AMENDMENT BILL 2021

Committee

Resumed from an earlier stage of the sitting. The Deputy Chair of Committees (Hon Sandra Carr) in the chair; Hon Matthew Swinbourn (Parliamentary Secretary) in charge of the bill.

Clause 10: Section 70A amended —

Committee was interrupted after the clause had been partly considered.

Hon MATTHEW SWINBOURN: Before we were interrupted for question time, Hon Colin de Grussa asked a question about definitions in clause 10 that reference the Animal Welfare Act. Specifically, the definitions of "abattoir" and "knackery" were under review, and he asked whether they would require further changes in this bill when it becomes an act. We do not anticipate that it will, but I suppose within the realms of things that are possible, it could be possible if those definitions did change. In the future, if a bill were brought to Parliament that dealt with those matters that changed those definitions, the Criminal Code would have to be amended as a consequence. It would form part of the bill. We do not anticipate at this stage that the things the member pointed out would be subject to change, but, for example, the numbering might change so that would have to be updated.

Hon COLIN de GRUSSA: Thank you, parliamentary secretary. I guess where I was going with that was to make sure contemplation is given to the fact that if those acts are amended, reviewed or changed, these definitions within the Criminal Code would have to reflect those changes.

Hon Matthew Swinbourn: Yes, they would have to be updated.

Hon COLIN de GRUSSA: They would have to be updated, yes. Clause 10 will amend section 70A of the Criminal Code, and the definition of animal source food production facility will be quite broad. It includes things like a farm or other place where animals are reared or fattened—dairy farms, egg farms and so on. The application of the trespass provisions will be broader than the earlier application of the powers of inspection. An inspector will be able to inspect only an intensive production place, but these are deliberately broader. That is my understanding; is that correct?

Hon Matthew Swinbourn: By way of interjection, your characterisation is correct.

Hon COLIN de GRUSSA: That is correct. The idea is that protection will be provided as broadly as possible; however, the inspections will be limited quite specifically to intensive production places.

Hon Matthew Swinbourn: They are narrow, yes.

Hon COLIN de GRUSSA: That is all I have on that one.

Hon STEVE MARTIN: I refer to the definitions that will be inserted in section 70A. Paragraph (c) of the proposed definition of "animal source food production facility" states —

> an egg farm or other place where poultry are kept to produce eggs;

That is apparently the extent of the interest in poultry farming. Is there a gap? I assume there are poultry farms that are designed to produce chickens for Red Rooster.

Hon MATTHEW SWINBOURN: And not just Red Rooster, but Chicken Treat as well! I indicated in a previous session of the Parliament my love of Masters iced coffee, crumbed cheese sausages and Chicken Treat. More seriously, paragraph (a) of the proposed definition will encapsulate a chicken farm for the purposes of breeding chickens for meat. As Hon Steve Martin quite rightly pointed out, paragraph (c) relates only to eggs. Paragraph (a) will capture other chicken-farming facilities.

Hon STEVE MARTIN: At the end of clause 10, proposed section 70A(2B)(a)(i) talks about a supervision requirement. It states —

> a supervision requirement with a direction that the offender must not enter or remain on an animal source food production place specified, or of a kind specified, in the order …

Proposed subsection (2C) then states —

> Subsection (2B) does not apply in a particular case if the court is satisfied that exceptional circumstances exist in that case.

They seem contrary to me. Can the parliamentary secretary outline what those exceptional circumstances might look like?

Hon MATTHEW SWINBOURN: At this stage, I will refer the member back to the explanatory memorandum, because it provides some explanation of examples that could be contemplated. I could not give the member an exhaustive list of the kind of circumstances that might fall under that term. However, we have anticipated the example

of an offender who has an impaired decision-making capacity or is experiencing financial difficulty, such that the minimum fine would not be appropriate. The member also needs to understand that in this particular circumstance, it will be incumbent on the person who has been charged under this provision to make the case for the exceptional circumstances. They will have to put that before the court and the court will have to be satisfied. It is quite a high threshold, but I think the purpose is to avoid an injustice happening. Obviously, the nature of the penalty provisions is that they are almost mandatory. As I said, we have stepped away from making them purely mandatory and will give the court the power to exercise at least some discretion, but only in those exceptional circumstances. We can imagine that an ordinary person who contravenes these provisions will not be able to satisfy them in that regard. As I said, they will have to be exceptional circumstances. I think it is highly unlikely that most people convicted of the previous offences would have been able to satisfy that requirement.

Hon STEVE MARTIN: Correct me if I am reading this wrong—I may well be—but proposed section 70A(2) is about non-aggravated trespass and there is a penalty of jail time or a $12 000 fine. Proposed subsection (2A) is aggravated trespass and then under proposed subsection (2B), where those exceptional circumstances might exist, the penalty can become community service and a smaller fine. Does that relate just to aggravated trespass?

Hon Matthew Swinbourn: Yes.

Hon STEVE MARTIN: Can non-aggravated trespass be downgraded to community service and a smaller fine?

Hon MATTHEW SWINBOURN: The Sentencing Act will apply in those circumstances and those options will be available to whoever deals with it—probably a magistrate. We are obviously dealing only with aggravated trespass provisions in this case.

Hon COLIN de GRUSSA: I will take a step back to proposed section70A(2). There are two different forms of trespass—trespass on a place and aggravated trespass. My reading of the proposed subsections is that trespass of an animal source food production place will be considered trespass only if it is aggravated—that is, it will have to satisfy the criteria under the proposed definition of "interfere with". If someone trespasses on an animal source food production place but does not satisfy the criteria, will they be captured only by proposed subsection (2), which is trespass on a place? Is that correct?

Hon MATTHEW SWINBOURN: If they meet the elements of the offence, yes, the member is correct in that regard. Obviously, the aggravating circumstances are dealt with in the proposed definition of "circumstances of aggravation", which states —

> … in relation to a trespass on an animal source food production place, means …

It then provides the particular elements. A person must first commit trespass and then must interfere with or intend to interfere with the animal source food production, or they must assault, intimidate or harass, or intend to assault, intimidate or harass, a person who is there or a family member. If those elements are satisfied for aggravation, it will therefore fall under proposed subsection (2A), but if none of those elements are present other than trespass, it will just come under proposed subsection (2).

Hon COLIN de GRUSSA: Okay. That is where I was getting to. If the elements for aggravation are not satisfied, it will simply be a trespass on a place, which means they can expect 12 months' imprisonment or a fine of $12 000 as the maximum penalty, whereas in order to be subject to the higher penalty, they must meet the criteria for aggravation.

Hon Matthew Swinbourn: Yes, the circumstances of aggravation, which will be defined earlier in that section.

Hon NICK GOIRAN: Proposed section 70A(2C) is what I would describe as the now customary safety valve for any mandatory sentencing provisions. We normally see this with mandatory sentencing for terms of imprisonment; here we see the safety valve being applied for a community order. Why has it been deemed necessary to include that, given that the minimum mandatory sentence in this situation of circumstances of aggravation is going to be a supervised community order?

Hon MATTHEW SWINBOURN: The member helpfully described it as a "safety valve" for the mandatory sentencing provision, and he is correct. It will apply to the community order, which is a mandatory part of this provision; the fine of $2 400 is the other mandatory part. I think we already covered the exceptional circumstances that might apply in which that will be seen to be particularly harsh or oppressive. With regard to a community order under the Sentencing Act, we are contemplating at proposed section 70A(2C) a situation in which the court is satisfied that exceptional circumstances exist. For example, the person might live on a farm. Proposed section 70A(2B)(a)(i) provides that the person must not enter or remain on an animal source food production place. If they actually live on an animal source food production place, it could create an exceptional circumstance. They could also be employed in those circumstances. Because they are exceptional circumstances, we are straining a little to provide examples, but as the member says, the purpose is to act as a safety valve. The mandatory nature of those provisions means that exceptional circumstances can sometimes be beyond our contemplation, and we all know that mandatory provisions

are an extremely blunt instrument. As a matter of trying to avoid a potential injustice in a particular, dare I say exceptional, set of circumstances, we have included that additional provision.

Hon NICK GOIRAN: The parliamentary secretary said that the government is straining for examples of this exceptional circumstances provision. There is a good reason for that, because it is not readily apparent what the exceptional circumstances would be. I respectfully submit that the scenario put forward by the parliamentary secretary would not apply because the reference at proposed section 70A(2B)(a)(i) is to "an animal source food production place". It has to be a specified place, so it would have to be in the order. No self-respecting magistrate in Western Australia is going to specify the home of the individual; in any event, it would make no sense, because we are talking about trespass, and the person is hardly going to be trespassing on their own premises. With respect, I do not think that that exceptional circumstance applies at all. I am struggling to see what the exceptional circumstances would be. What would be the hardship for the person? If I am not mistaken, we are envisaging a scenario in which extreme vegan activists trespass on an animal source food production place, causing all kinds of mayhem and mischief, and harass the owners of that place. As I understand it, that is the type of scenario that this bill is trying to address, amongst others; it is not only that scenario. The person has the capacity to commit this offence, and the courts have deemed the person to have capacity. There is no suggestion that we are talking about the mental impairment scenario that will be the subject of a debate at a later stage; that is not the scenario here. We are talking about a person with capacity who has chosen to trespass on another person's property. Now the government is saying, "Well, look; at the bare minimum in these aggravated circumstances, we, the Parliament, are giving you, the judiciary, a direction that we want you, as the absolute minimum, to give this person a community order; you're not going to imprison them." I cannot see why a person who clearly has the capacity to commit a trespass offence could not comply with a community order. With regard to the fine of $2 400, as we know, there is also the capacity for a person to apply for a work and development permit scheme in circumstances of hardship and so forth. I am struggling to see why we have applied this safety valve to a community order.

We are making amendments to the Criminal Code. Is there information readily available to the parliamentary secretary as to other provisions within the Criminal Code in which this type of mandatory sentencing safety valve, as I have described it, has been applied to sentencing options other than imprisonment?

Hon MATTHEW SWINBOURN: There may be, but I do not have the advice at the table to be able to answer that for the member now. If we come across something, we can come back to that point.

Hon NICK GOIRAN: That is a little unsatisfactory, I have to say. We have before us a bill that seeks to amend three acts. One of the acts it seeks to amend is the Criminal Code. I would expect the government to make advisers available to the hardworking parliamentary secretary who are across the Criminal Code and the amendments being made here. The government has made a deliberate decision to impose a mandatory sentencing regime in the bill. It is quite within the government's rights to do that. There is, of course, a diversity of views across Western Australia, particularly within the legal profession, as to the appropriateness of having mandatory sentencing regimes. Nevertheless, the government, as a matter of policy, has decided that if a person trespasses in aggravated circumstances, they will be sentenced, as a minimum, to a community order. That is what the court must impose, according to the government's policy, which has the support of the opposition. I note that much of the consternation within the community, including the legal fraternity, around mandatory sentencing regimes particularly revolves around mandatory imprisonment. Members can well understand why that might be the case, because depriving a person of their liberty and jailing them is a very significant imposition indeed. There may well be a necessity for discretion to be given to the judiciary. That is the ordinary, customary approach—that the judiciary have discretion about whether they are going to place this imposition on a person's liberty by imprisoning them. That is not what we are talking about here. Here we are talking about a scenario in which it is a community order. I would like to know from the government where this idea has come from. Has this template come from another provision within the Criminal Code or from some other portion of our statute? Somebody has invented this idea that finds its place at proposed section 70A(2B). The words here have been deliberately drafted and agreed to by government. Someone must know where this has come from. Has this come from another jurisdiction? As I said, has it come from another place within our statute? It is not acceptable, now that the matter is before the house of review, to be told, "We don't know". Someone needs to go and do that work.

We have about 50 minutes left in this sitting day to try to deal with this bill. I do not have primary carriage of this bill; in fact, I do not have primary carriage of any bills at the present time—that is another matter—but as it so happens, for what it is worth from my perspective, I would have liked to have seen this particular bill dealt with today so that we could get on to some other matters, including the Guardianship and Administration Amendment (Medical Research) Bill 2023. We are going to struggle to make progress if the government is unable to answer this question. Somebody must know something about mandatory sentencing regimes. It is not just the McGowan Labor government that has done this. Of course, what has been referred to as the Barnett government was also from time to time a fond user of mandatory sentencing regimes and the reforms that have come through. This is something that officers within government are well versed in. They are well versed in the circumstances in which

a government of the day issues them a direction and says, "As a matter of policy, we want a mandatory sentencing regime." They are well versed in that respect. It is my contention at this time that that typically applies to when that court is going to impose a term of imprisonment. It is not so typical to see it applied to a community order. If my contention is wrong, and it is actually quite common on our statute book and quite common in the Criminal Code that a community order is subject to one of these safety valves, I am quite happy for that to be placed on the record and we can swiftly move on to the next clause. I struggle to be satisfied that the house of review can simply pass clause 10 of the bill without having a satisfactory answer to this particular question. I wonder, having taken a few moments to elaborate on my concern there, whether any further material might be able to be provided to the house at this time on this issue.

Hon MATTHEW SWINBOURN: I do not think I will satisfy the member with the answer I am about to give.

Hon Nick Goiran interjected.

Hon MATTHEW SWINBOURN: In order to manage expectations. The advisers at the table, who are very capable advisers, to my detriment, perhaps, were not involved in the original drafting of the 2020 bill which this 2021 bill is based on. As the member might recall, a process happened and these provisions were in that original bill as it was introduced to Parliament three years ago. It was also the subject of consultation with the community—an exposure draft or a green bill was put out so people had that opportunity. The exceptional circumstance provision was in there. I will say more broadly that the member and I both know that amongst the legal fraternity there is great degree of uncomfortableness about mandatory sentencing of any kind. Most of the mandatory sentencing within the Criminal Code relates to very, very serious matters. Although this matter is important, we cannot elevate it to the seriousness of murder, for example. Although I cannot give the member an explanation about how it came to be inserted, as a matter of policy it is appropriate to at least have this safety valve, even with this much lower level of offending and the supervision order. As I said, I do not know whether my answer will be satisfactory to the member. A policy decision has been made to include this safety valve. As to the point at which that was made, I cannot help the member with that. As to the Criminal Code, we are reasonably certain that provisions in the Criminal Code relate to community supervision orders being mandatory and there being an exceptional circumstances relief valve in relation to that.

Hon NICK GOIRAN: Is the parliamentary secretary essentially saying that he is reasonably confident that what we are doing here in terms of having a safety valve —

Hon Matthew Swinbourn: It is novel.

Hon NICK GOIRAN: Is it not novel or is it novel?

Hon Matthew Swinbourn: It is novel in terms of sentencing for supervision orders, and that is why we are reasonably confident. It is not an example that we can point to because it is not something that has previously had something to rely on.

Hon NICK GOIRAN: Yes, thank you. That is consistent with my understanding. I cannot recall having seen this before and that is why it attracted my attention. I am reluctant for the house to just simply, number one, not read these things and, number two, just pass what is effectively, then, the opportunity in due course for this to be considered some kind of precedent or template that should be followed in the future. I am not necessarily arguing the merits for or against the safety valve with regard to this lesser sentencing option. That is an important debate to be had. I can concede that this is at least retaining that important element of judicial discretion, but it is the lessening of that discretion that causes the consternation. If something positive can be said about the provision that is presently before us it is that it is maintaining that. I am happy to concede that particular point in terms of the argument, but I still think that a cogent comprehensive explanation needs to be provided as to why that would be necessary as distinct from desirable. Why would it be necessary when we are not talking about the severity of a term of imprisonment? Perhaps it would assist to take the matter a little further, because I accept that the parliamentary secretary has probably exhausted the options available to him in terms of advice on this point. Is any information available to the parliamentary secretary on the mandatory sentencing provision before us contained in proposed section 70A(2B) and (2C)—if we can see them as a package—and whether any reservations or concerns have been raised by any of the stakeholders either in the most recent round of consultation or during the earlier iteration of the bill?

Hon MATTHEW SWINBOURN: The adviser is checking her notes. Apparently, there were 185 submissions in total, but from her recollection the answer is no. The only specific issue raised was that the President of the Children's Court identified a technical issue that could have resulted in certain juvenile offences being liable to the minimum penalty. The bill has remedied that particular concern so that young offenders are not subject to the mandatory provisions, but in terms of anybody saying that there should not be an exceptional circumstances relief valve, we have nothing. We can check overnight if we are still on the bill, but it is not something that is screaming

out at us, if I can put it that way, as an overriding concern. As I say, we had 185 submissions, so I would not want to exclude the possibility that someone raised it in an abstract way or something of that kind.

Hon STEVE MARTIN: Clause 10(2) deletes section 70A(2) and inserts proposed subsections (2) and (2A) that deal with penalties. From memory, during my contribution to the second reading debate and in the parliamentary secretary's reply we raised the possibility of dealing with crowdfunding as a consequence of the escalation of fines. The parliamentary secretary's response was that it is obviously not being considered. He also mentioned that our level of penalty is significantly higher than that of some other jurisdictions. Do any other jurisdictions double up for subsequent offences?

Hon Matthew Swinbourn: Do you mean double the penalty?

Hon STEVE MARTIN: Is there an escalation of penalty for the second, third and subsequent offences?

Hon MATTHEW SWINBOURN: The member mentioned crowdfunding in the first instance and I covered that off in my reply, but just to round that out for the purposes of today, crowdfunding for the payment of penalties is an issue that goes beyond just what we are dealing with here. It comes back to what governments and courts can do to make sure that a person who commits an offence feels the sting. It might be, for example, a circumstance that comes to the attention of a court during sentencing in terms of what might be an appropriate penalty. For example, if somebody had a public GoFundMe page that is for committing offences, a court might be more inclined to impose a term of imprisonment. That is possible, but it really depends.

In relation to the other part of the member's questions, which I think was in three parts, about where other jurisdictions are at and the differences here, South Australia did its reforms and it is 12 months' imprisonment or a $10 000 fine for being on a premises for an unlawful purpose in circumstances of aggravation, and six months' imprisonment or a $5 000 fine if the offence is not committed in circumstances of aggravation. South Australia's previous maximum penalty was six months' imprisonment and a $2 500 fine. Our penalty with aggravation is two years' imprisonment or a fine of $24 000. Plain old ordinary trespass under this legislation will be 12 months' imprisonment or a $12 000 fine, so we are significantly ahead of South Australia.

In New South Wales, which is a bit closer to us, it is 12 months' imprisonment or a $13 200 fine for unlawfully entering agricultural land in aggravated circumstances, and three years' imprisonment or a $22 000 fine if the offender was accompanied by two or more people or if circumstances of aggravation apply—that is, the person presented a risk to the safety of a person on the land. The maximum penalty for the aggravated offence used to be $5 000. New South Wales has a longer term of imprisonment than we are proposing but its maximum penalty is $2 000 less for offences in the circumstances of aggravation. It is not necessarily one for one in terms of the offence because each jurisdiction has its own, for want of a better word, bespoke provisions that are not reflected uniformly. These are roughly comparable offences. In Queensland, it is 12 months' imprisonment or a $2 875 fine for unlawfully entering farmland; the previous maximum penalty was six months' imprisonment or a $1 334 fine. As members can see from the examples of those three jurisdictions, there is some difference in the penalties but generally speaking ours are higher.

I think the member's last point was about what I would perhaps describe as a stepping up of the financial penalty if people commit further offences. We do not structure our fines regime in that way. It is not our practice to do that and I am not aware of other jurisdictions doing it. The member will find that a court will deal with a person's first offending and give the appropriate penalty. If subsequent offending happens, they will work their way up to the maximum penalty. Courts do not generally do that unless they are mandatory amounts. We have a mandatory minimum amount not a mandatory maximum amount at proposed subsection (2B)(b) of at least $2 400, which is 10 per cent of the maximum. A range of sentencing principles have been developed by the courts over a long period for how they deal with things, but obviously in each particular circumstance. If a person keeps coming back, the court theoretically will do that.

Parliaments and governments usually like to set mandatory amounts when the community is not happy with the amounts the courts have set for offending. We say: as elected representatives, we are providing you with very specific guidance about what we think a minimum sentence should be in this particular case for an aggravated trespass. Obviously, sometimes mandatory sentencing provisions are the maximum amount or a single set thing for very serious things. I hope that has covered off the three things that the member raised.

Clause put and passed.

Clauses 11 to 13 put and passed.

Clause 14: Section 35 amended —

Hon NICK GOIRAN: Clause 14 seeks to amend section 35. We have now moved to the third of the three acts that this bill deals with—that is, the Restraining Orders Act 1997. I draw the parliamentary secretary's attention

to proposed subsection (2A)(g). What are some examples of the kinds of matters that a court may consider relevant pursuant to paragraph (g)?

Hon MATTHEW SWINBOURN: I do not have anything specific to give the member as an example of other matters the court might consider relevant but I will draw the member's attention to section 35 of the Restraining Orders Act 1997, "Matters to be considered by court generally", which states —

> (1) When considering whether to make an MRO for reasons referred to in section 34(a)(i) or (ii) and the terms of the order a court is to have regard to —

That is followed by paragraphs (a) to (i). Paragraph (i) states —

> other matters the court considers relevant.

Subsection (2) states —

> When considering whether to make an MRO for reasons referred to in section 34(a)(iii) and the terms of the order a court is to have regard to —

That is followed by paragraphs (a) to (h). Paragraph (h) states —

> other matters the court considers relevant.

The point I am making is that the drafting in this bill to add proposed subsection (2A)(g) is consistent with the drafting that already exists in the Restraining Orders Act for those other provisions. I do not think we can take the member to any other matters because it is about the consistency of drafting rather than us having thought of other things that we did not include in that list. It is just things that obviously come up in paragraphs (a) to (f), and there is the safety valve, for want of another word, that is paragraph (g).

Hon NICK GOIRAN: In this particular instance, the misconduct restraining order is made against an individual. There is no other change to the Restraining Orders Act in that sense. Every other aspect of the procedure, including the considerations that are taken into account on whether to grant a misconduct restraining order and the terms of the misconduct restraining order, are the same. The system is one and the same. The additional factors are set out at proposed section 35(2A). Otherwise, is the system essentially the same?

Hon MATTHEW SWINBOURN: The member is correct.

Clause put and passed.

Clause 15: Section 36 amended —

Hon NICK GOIRAN: I indicate that I have only one question on clause 15 —

Hon Matthew Swinbourn: Do you promise?

Hon NICK GOIRAN: It is a good point that you make, parliamentary secretary. I should have said "one theme". We will see whether it is limited to one question, but thereafter I have nothing further to add in respect of the bill presently before us.

I refer to clause 15 and in particular the restraints that are listed in section 36(3) of the act. What kinds of restraints may be imposed on a respondent to prevent them from committing aggravated trespass pursuant to section 36(1)?

Hon MATTHEW SWINBOURN: This is not an exhaustive list in the circumstances because that would obviously be a matter for the court and the prosecuting authorities and the particular applicant who might be making an application. However, I think the kind of restraints that would be appropriate could be restraints on communication, what I would define as proximity restraints—for example, not to go to a certain place or go within a designated distance from a certain place—or restraints on the use of social media. Those are the kinds of thing that would relate here. If we think about the activities of the people who are engaged in this and how they do it, it is about place, they tend to engage in a trespass so the MRO would be explicitly saying —

Hon Nick Goiran: Publicity.

Hon MATTHEW SWINBOURN: It is about publicity; that comes under communication. That is where that would be. It might be that the court restrains them from further using their social media to promote what they intend to do or, alternatively, how they have contact with other people they are working in concert with in relation to those things. Those restraints can be quite effective in getting ahead of the behaviour in the first place.

Clause put and passed.

Title put and passed.

Report

Bill reported, without amendment, and the report adopted.

Third Reading

Bill read a third time, on motion by **Hon Matthew Swinbourn (Parliamentary Secretary)**, and passed.