CRIMINAL LAW (UNLAWFUL CONSORTING) BILL 2020

Second Reading

Resumed from 11 November.

HON NICK GOIRAN (South Metropolitan) [11.03 am]: I rise to continue my contribution to the second reading debate on the Criminal Law (Unlawful Consorting) Bill 2020. This is, of course, the day after the disgraceful set of events that occurred yesterday. This bill is trying to tackle those people in our community who thumb their nose at the law. The whole point of this bill is to tackle individuals who are not law abiders, who think they are above the law of Western Australia. That is what this bill is trying to do, yet it has been brought in by a government that demonstrates that it acts in the same way. This is being brought in by a government that shows no regard for the law of Western Australia. The chief and prime culprit, in that respect, is the Leader of the House, who is away on urgent parliamentary business.

Yesterday, I set out for members in my introductory remarks some of the things that the bill is seeking to do. In particular, I outlined the ways in which the bill is, in effect, trying to stop organised criminals from associating and communicating for the purposes of organising and carrying out criminal activities, yet it was interesting to note that this bill specifically allows a defence for unions. At the heart of this we have the McGowan government—a government that has demonstrated time and again that it has no regard for the law of the land, and certainly not the orders of the Legislative Council—bringing in a bill that it says seeks to stop organised criminals from associating and communicating for the purposes of organising and carrying out criminal activities, and then it gives a defence to unions. Is the McGowan government really saying that unions are so closely connected to the work of organised criminals that they need a special defence? Is that what the McGowan government is saying? I would like some clarification from the Leader of the House about that.

It seems odd that in one breath we would say that this bill is very important because we need to stop organised criminals from associating and communicating, which is very important, but in the next breath we will give an exception to the unions. What is the McGowan government and the Leader of the House implying by that? What is the Leader of the House and her other non-law-abiding cabinet colleagues implying by this? We know full well because of what happened yesterday that it does not really matter what the Legislative Council thinks or says; the McGowan government will go ahead and do what it wants anyway, because, as far as it is concerned, it is above the law of the land. We know that. Yesterday's unseemly set of circumstances was a clear demonstration of that, with the person leading the charge yesterday being the Leader of the House. We saw that.

The DEPUTY PRESIDENT: Order! I think it is probably helpful if we focus on the specific bill before us and not allow personal reflections to intrude unnecessarily. I am sure the honourable member is skilful enough to steer us away from such hazards. I just give that reminder to the house before anyone gets too hot under the collar.

Hon NICK GOIRAN: Thanks, Mr Deputy President.

I note that the explanatory memorandum says that this bill —

> … will introduce a consorting offence to disrupt and restrict a convicted offender's ability to associate or communicate with other convicted offenders for the purposes of using or building up organised criminal networks.

I note that this same bill provides a defence for unions. I ask the government and the Leader of the House—the people who have demonstrated by their actions what they think of the law of Western Australia—why is that the case? I indicated yesterday that I have a series of amendments on the supplementary notice paper. There are quite a number of amendments on the supplementary notice paper in my name, but they all seek to do one thing—they all seek to address the issue of the oversight of the Ombudsman.

In the second reading speech, the Leader of the House highlighted the need for safeguards to be included in the bill to protect vulnerable members of our community. The Leader of the House noted that the New South Wales Ombudsman's report of 2016 documented the use of the New South Wales law against Aboriginal and Torres Strait Islander people, people experiencing homelessness, children and other member of the community.

[Quorum formed.]

Hon NICK GOIRAN: The Leader of the House claims that the New South Wales Ombudsman made a number of recommendations for improvement of legislation that have been recognised in the drafting of this bill before us. I look forward to unpacking that claim by the Leader of the House to determine which safeguards the government has cherrypicked for inclusion in this bill and how these protections will operate in practice when we move into consideration of clause 9 of the bill in the Committee of the Whole House. However, at this point, I wish to raise the serious concern I hold about one particular safeguard that the government claims it has included in this bill to protect against the misuse of this offence by the Western Australia Police Force—that is, the concern I hold around

part 3 of the bill, which provides for the Parliamentary Commissioner for Administrative Investigations, commonly known as the Ombudsman, to monitor the implementation of the provisions contained in the bill.

According to the explanatory memorandum, clause 21 requires the Ombudsman to scrutinise the powers conferred on police under this bill and enables the Ombudsman to inspect police records and obtain information relevant to the exercise of such powers. The Ombudsman is also empowered to recommend to the Commissioner of Police that an unlawful consorting notice should be revoked or varied. The explanatory memorandum goes on to note that to enable the Ombudsman to perform such duties, clause 26 requires the Commissioner of Police to keep a register of, amongst other things, the use of powers and to provide this information to the Ombudsman. Clause 27 provides that the Ombudsman must prepare an annual report that documents the outcome of those monitoring activities, including any impact of the scheme on a particular group if such an impact has come to the Ombudsman's attention.

The powers and functions given to the Ombudsman in part 3 of the bill are an ancillary function of the Ombudsman and, as such, will mean that the Ombudsman will need not only additional resources, but also, quite possibly, additional staff with particular skills to support the Ombudsman in exercising the powers that are provided for under the bill. My question is: how much funding and support has the McGowan government committed to provide to the Ombudsman for the Ombudsman to carry out this very important safeguarding function? We already know the answer to that question, because the McGowan government, which has no regard for the rule of law and orders of the Legislative Council, said in the other place that the answer is zero. No additional funding will be provided for the Ombudsman to meet the oversight demands created by this bill.

The New South Wales Ombudsman's 2016 report, upon which the government so heavily relies on in this bill, notes at page 111 —

> Consorting is a controversial offence as it involves 'the criminalisation of ordinarily harmless and seemingly innocent behaviour in order to allow authorities to intervene at an early stage' and attempt to prevent or reduce future offending.

Given the controversial nature of this offence and the potential for the offence to be misused by police against vulnerable community members, it is far more appropriate that the Corruption and Crime Commission hold the oversight function contained in part 3 of the bill rather than the Ombudsman. Those members who were here in 2012 might recall that amendments were made to the Criminal Investigation (Covert Powers) Bill 2011. Part 2 of that bill was amended in this place to replace references to the Ombudsman with the Corruption and Crime Commission. I remind members that the covert powers bill was referred to the Standing Committee on Uniform Legislation and Statutes Review and that a submission was made to that committee by the Joint Standing Committee on the Corruption and Crime Commission, of which I was the chair at the time. That submission, which I have a copy of here, is a public document. It is dated 18 November 2011 and is signed by me and was sent to the chair of the uniform legislation committee, who at the time was Hon Adele Farina. It was the view of the Joint Standing Committee on the Corruption and Crime Commission that the oversight and monitoring powers in the covert powers bill would be better entrusted to the Corruption and Crime Commission rather than the Parliamentary Commissioner for Administrative Investigations—that is, the Ombudsman. The reasons given for that view, which are relevant to the current bill, are set out in the submission dated 18 November 2011. I encourage members to be familiar with that submission. I quote briefly three of the reasons that were provided for that. Firstly —

> The Commission's —

That is, the CCC —

> main purpose is *"to improve continuously the integrity of, and to reduce the incidence of misconduct in, the public sector"* (*Corruption And Crime Commission Act 2003*, section 7A(b)). In exercising the oversight and monitoring powers provided by the Bill the Commission, by its nature, is more likely to pay close attention to, take note of and respond appropriately to responsible misuses of the controlled operations powers of law enforcement agencies;

The second reason that was provided is —

> The Ombudsman's mission is to *"improve the standard of public administration"*. The focus of the Ombudsman is more likely to be on record keeping and efficient administration than on possible misconduct.

The third reason that is given is —

> The Ombudsman already has a very broad range of responsibilities across the whole range of public administration, as well as some very important specific functions such as reviewing certain child deaths. With limited resources the Ombudsman necessarily needs to decide how to deploy these resources most effectively. It may be difficult for the Ombudsman to give sufficient attention and resources to the new tasks of oversight and monitoring that the bill would impose.

Those submissions were made at the end of 2011. Nothing has changed, and the McGowan government has already told the people of Western Australia, "We won't be giving the Ombudsman any more money to undertake these tasks."

Members should note that the New South Wales Ombudsman 2016 report, which I have referred to previously—another weighty document that I encourage members, particularly the Leader of the House, to read—notes that at the time the New South Wales consorting offence was introduced into Parliament, potential risks associated with the breadth of the new consorting offence provisions and the consequent extent of the discretion afforded to police officers were acknowledged. Hon John Ajaka, MLC, is quoted in the 2016 report at page 111 as saying —

> The Government is not oblivious to the fact that consorting laws have been misused in the past and that some people fear they might be used to target marginal groups.

That comment was made on 7 March 2012. That the laws were subject to misuse by New South Wales police was borne out in the evidence presented to the New South Wales Ombudsman in the 2016 review. Given the concern, rightly based on the New South Wales experience, that this new unlawful consorting offence has the potential to be misused by the Western Australia Police Force, coupled with the fact that the government has confirmed that the Parliamentary Commissioner for Administrative Investigations will not be supported by extra funding for this crucial oversight role, it would be prudent to follow the amendments made in this place to part 2 of the covert powers bill and similarly amend part 3 of this Criminal Law (Unlawful Consorting) Bill to substitute the parliamentary commissioner with the Corruption and Crime Commission. I call on the government and all members to support my amendments on the supplementary notice paper, which would give effect to that. The minister claims that Western Australia could soon have the toughest anti-consorting laws in the country. However, I suggest to the government that the toughest anti-consorting laws in the country should be accompanied by proper oversight if protection against misuse is to be ensured.

In summary, I indicated at the very start of my remarks yesterday that notwithstanding this government's disregard for the rule of law and for orders made by the Legislative Council, there is a place for these consorting laws in Western Australia. I nevertheless find it a matter of ongoing interest that the government does not particularly think this is a great priority, given some of the matters that we have been dealing with in recent times, including the apparently super, super important and super prioritised wheel-clamping legislation, that was considered by the McGowan government to be more important than this bill, which seeks to disrupt and restrict a convicted offender's ability to associate and communicate with other convicted offenders. Why would that be the case? Why would wheel clamping be more important than something like this, according to this government? Might it be because once again there are some red faces in the government concerning the special treatment of unions in this bill? Once again, it sets off a red flag and this is becoming something of a theme with respect to this government. There are too many red faces in this government and too many red flags going off. That is why I am asking members to give serious consideration to a proper oversight regime when we are looking to implement laws of this significance. With all due respect to members and whatever they think about wheel clamping, let us be serious here: on the spectrum of seriousness, wheel clamping is towards the bottom. Here we are talking about laws that will dictate whether people can associate and communicate with one another. That is a serious impingement on people's liberties and freedoms. It is the type of law whereby Legislative Councillors need to be alert and awake. At the end of the day, if somebody has their wheels clamped, with all due respect, it is not the end of the world. Once Parliament empowers WA police to tell people who they can and cannot associate or communicate with, with a special, special defence for unions, members of this place need to be alert about this type of law. Therefore, I am saying that the most powerful oversight agency in Western Australia, the Corruption and Crime Commission, should have the responsibility of making sure that these important laws are not misused.

It is no frivolous matter to be talking about police officers misusing these laws, because that is the experience in New South Wales. The McGowan government has brought to our attention the New South Wales review by the NSW Ombudsman and said to us that this is the basis upon which Western Australia should do this. The Leader of the House will be pleased to know that some of us have read the document and, on reading the document, we have discovered that there is an issue with police misuse of these powers and, therefore, there is a need for a very robust oversight regime. We cannot get more robust than the Corruption and Crime Commission overseeing WA police's use of these things when the Corruption and Crime Commission itself is subject to dual oversight by the Parliamentary Inspector of the Corruption and Crime Commission and the Joint Standing Committee on the Corruption and Crime Commission. That is as robust as it gets and that is appropriate for something like these consorting laws.

Once again, as I conclude my remarks, I call on the government to support my amendments on the supplementary notice paper. If the government is arrogant, as it has chosen to be in the past—hopefully, not on this occasion—I will call on other members of the chamber to give serious consideration to this matter. This is a bill that warrants the closest of scrutiny. Once again, thank goodness in Western Australia we have a Legislative Council that can fulfil this role.

HON SUE ELLERY (South Metropolitan — Leader of the House) [11.26 am] — in reply: I thank members for their support of the Criminal Law (Unlawful Consorting) Bill. I begin with the comments by Hon Michael Mischin, and I thank him for his support of the bill. I note his advice to the house that he, too, was pursuing similar legislation when he was the Attorney General.

I turn to some of the issues that were raised in the course of the second reading debate. Hon Michael Mischin and Hon Nick Goiran asked: why is the defence at clause 9(2)(a)(viii) required? This deals with activities undertaken by members of an organisation of employees registered under part II, division 4 of the Industrial Relations Act or the commonwealth Fair Work (Registered Organisations) Act for the purposes of the business of the organisation. The defences in clause 9(2)(a) are intended to provide for a range of circumstances that allow a person to go about their normal daily life without being unduly restricted by an unlawful consorting notice. It is important to provide these defences as it is the expectation that persons the subject of an unlawful consorting notice conduct themselves as contributing members of society. It is evident that a range of defences in the bill recognise that consorting may be necessary when a person is engaged in an activity such as their lawful occupation or in a particular circumstance, such as when a person is dependent on an accused for care or support. Members of our community may well find themselves in other situations, such as needing to get legal advice to comply with a lawful direction or court order when in custody. The government has also provided provisions that take account of the systemic discrimination that Aboriginal and Torres Strait Islander people face and the fact that members of the Aboriginal and Torres Strait Islander community are over-represented in our justice system. The bill recognises the need for Aboriginal and Torres Strait Islander people to comply with cultural practices, obligations, customary law or traditions and does not criminalise consorting that is necessary for these purposes. I will talk about that a bit further in a moment.

This legislation does not give convicted offenders an invitation to use these defences as a cover if the purpose of the consorting is to avoid the operation of an unlawful consorting notice or relates to criminal activity, and that is provided for in clause 9(3) of the bill. It is important to note that the defences in clause 9(2) will apply only if two conditions are met: firstly, that one of the circumstances listed in clause 9(2)(a)(i) to (ix) applies; and, secondly, under clause 9(2)(b), that the consorting was necessary in the circumstances. Therefore, a person charged with the offence of unlawful consorting has the onus of proving that those two conditions were met in order to enliven the defence provision. Engaging in a lawful occupation, trade or profession is also a defence, which is provided in clause 9(2)(a)(i), and the defence at clause 9(2)(a)(viii) is inextricably linked to employment. This defence is about ensuring that people are able to communicate for the purpose of protecting their employment and workplace rights, but it is a narrow defence. I will come back to that in a minute. There is no suggestion, as suggested by Hon Nick Goiran, that the government is of the view that somehow members of trade unions are more likely to be convicted of unlawful consorting or are likely to be engaged in some sort of criminal activity. But from time to time in our country and in this state, governments have had ideological issues with the trade union movement and have used criminal laws to pursue industrial matters. Unfortunately, the state has historically used those sorts of criminal law provisions to impede the work of unions and has relied on similar provisions to disrupt and interfere with the legitimate work of trade unions and their members pursuing their industrial rights. Some members in this chamber will be old enough to remember some of the notoriety that was attached to the old 54B provisions around gatherings of people, for example. But it is the case that from time to time the state, in pursuit of a particular agenda about industrial relations, has used criminal laws to try to disrupt the lawful activity of trade unions.

As I said, this is a narrow defence. The accused will have to prove, firstly—this element has two components—that both the accused and the person with whom they were consorting were members of an organisation of employees and that that organisation is registered under the relevant state or commonwealth workplace relations law. Both people have to be members of an organisation. Secondly, the accused will have to prove that the consorting occurred in the course of activities undertaken for the purpose of the business of the organisation. Thirdly, they will have to prove that the consorting was necessary in the circumstances. The business of an organisation could include, for example, providing information and advice about making an application to an industrial tribunal or assisting in negotiations.

Another question that was raised was why there is a defence for an Indigenous person fulfilling a cultural practice or obligation but no reference to other religious beliefs. Significant concern was raised during consultation about the potential to criminalise an Aboriginal person who is fulfilling a cultural practice or obligation. The risk of the consorting scheme adversely, disproportionately and unintentionally impacting Aboriginal people was also borne out of the New South Wales Ombudsman's report on that state's consorting scheme. It is well known that Aboriginal people are over-represented in our criminal justice system, and that means there is the potential for the scheme to disproportionately capture Aboriginal people. This bill has been drafted accordingly to include safeguards against this outcome. The nature of relationships and family connections in Aboriginal communities and their over-representation in our criminal justice system mean that Aboriginal people, because of cultural practice or obligation, are more likely to communicate with other Aboriginal people who are convicted offenders as defined by this bill. This defence is acknowledgement of that and recognises the importance of Aboriginal culture within a history of systemic discrimination and alienation.

Hon Michael Mischin asked whether the government would consider a rolling statutory review clause rather than a one-off. Members may be aware of the most recent supplementary notice paper, which includes an amendment in my name to give effect to the suggestion from Hon Michael Mischin. I thank him for that suggestion.

I turn to the comments and contribution made by Hon Alison Xamon. The member asked whether the defences relating to a health or social welfare service for oneself or a dependant at clause 9(2)(a)(iii) and (iv) include necessary consorting whilst undertaking rehabilitation. The bill defines "health service" in broad terms by referring to the definition in the Health Services Act 2016. The meaning of "health service" in that act includes services for maintaining, improving, restoring or managing people's physical and mental health and wellbeing, and this includes rehabilitation. The member also sought confirmation that the defence of "complying with a written law, an order made by a court or tribunal, or other order, direction or requirement made under a written law" includes necessary consorting while complying with terms of a sentence or parole or case plans, for example, to attend counselling or rehabilitation. I can confirm for the honourable member that, yes, consorting that occurs while complying with the terms of sentence or parole or with case plans such as attending counselling or rehabilitation would fall within the defence at clause 9(2)(vii). I note that, as required for all the defences at clause 9(2), the consorting must have been necessary in the circumstances as outlined at clause 9(3).

The honourable member also asked whether clause 15 will enable a person to be added to the notice or only deleted. Clause 15 provides that an unlawful consorting notice may be corrected by a prescribed officer if there is a clerical mistake, a mistake arising from an accidental slip or omission or a material mistake in the description of any person, thing or matter referred to in the notice. An example of a material mistake covered by the provision is a situation in which the unlawful consorting notice was mistakenly issued with a named person who did not have a conviction as defined in clause 3 of the bill. Although a named person can be deleted from a notice, a person cannot be added to a notice. If WA police determine that an additional person should be added to a notice, they will need to consider whether the requirements in clause 10(2) are met and issue a new notice.

The honourable member also asked me to confirm that a move-on direction must be in writing as required by the Criminal Investigation Act. I am advised by the Western Australia Police Force that when issuing a move-on order under the bill, WA police will automatically comply with the Criminal Investigation Act and issue a move-on order in writing in accordance with section 27 of that act. The Western Australia Police Force advises that it will amend the form for a move-on order under section 27 of the Criminal Investigation Act to include the consorting element.

The member asked me to confirm that "reasonable excuse" includes these two circumstances that are referred to in section 27 of the Criminal Investigation Act: a person who is accessing a place they usually reside, shop or work, or accessing transport, health, education or other essential services—some but not all of these are in the list of defences—and a person who is taking reasonable steps to comply and move out of the area. The honourable member asked whether "reasonable excuse" includes the circumstances that I just outlined. Section 27(3) of the Criminal Investigation Act states —

> When giving a person an order under subsection (1) —

That is, a move-on order —

> a police officer must take into account the likely effect of the order on the person, including but not limited to the effect on the person's access to the places where he or she usually resides, shops and works, and to transport, health, education or other essential services.

This may have an impact on the scope of the order given by the police officer. Section 27(3) does not provide a defence to breach of a move-on notice. Clause 18(7) acts as a restriction on the issue of an order by a police officer under clause 18(6) in that an officer cannot use the powers under clause 18(6) if there is a possible defence that would apply to a charge of consorting. This will mean that if the person is suspected of consorting for the purposes of, for example, their employment or education, or delivery of other essential services, a police officer will not exercise the powers in clause 18(6) for a person to move on.

If a person is charged with breach of a requirement under clause 18(6), the prosecution will be required to prove beyond a reasonable doubt that the person did not have a reasonable excuse for failing to comply with the requirement. This reasonable excuse defence is likely to include both the examples outlined by the member, such as employment or education, or delivery of other essential services, or taking steps to move out of the area. I also note that the defences in chapter V of the Criminal Code apply to all persons charged with any offence against the statute law of Western Australia.

The member also asked me to confirm that all relevant police and Department of Justice records will record whether the restricted person is Aboriginal or Torres Strait Islander, unless the person themselves chooses not to say. I can confirm that all relevant records contained in the Western Australia Police Force incident management system will capture whether a restricted person is Aboriginal or Torres Strait Islander if the person wishes to disclose such

information, and the relevant records will be transferred to the Department of Justice integrated court management system if the person is charged with the offence of unlawful consorting.

The member also asked me to confirm that the Ombudsman's scrutiny under clause 21(1) will capture relevant information obtained by the Ombudsman from other sources—for example, via a complaint made to the Ombudsman by a restricted person, or by the Aboriginal Legal Service or other organisation. That is because clause 27(3) permits the Ombudsman's annual report to the minister to include a review of the act's operation on a particular group in the community only if it came to the Ombudsman's attention via section 21(1). The annual report of the parliamentary commissioner may include any observations that the parliamentary commissioner considers appropriate to make, as set out in clause 27(2)(a). This permits a broad-ranging review and would include scope to consider all the matters that the member raised. Nothing in the bill will prevent the parliamentary commissioner from receiving information from sources such as reports or complaints via the Aboriginal Legal Service and incorporating associated findings in the annual report.

The honourable member also asked me to confirm that when a police officer serves a notice and explains it to a person, they refer to the people named in the notice, rather than saying their names, which could be overheard by bystanders. The WA Police Force advises that it will be incorporated into police training and policy that a person is not to be served a notice orally in a way that could reveal to the general public the names of the persons subject to the notice.

The member also asked me to confirm for the record that clause 24 authorises the use or disclosure of information in the following circumstances: responding to a freedom of information application; providing information to Parliament, including its committees; and providing information to the Auditor General in the exercise of the Auditor General's functions pursuant to section 82 of the Financial Management Act. Clause 24 authorises the disclosure or use of information in good faith under another written law. I can advise that clause 24 means that in relation to the disclosure information under the act, the usual principles will apply to a freedom of information application, to a parliamentary committee and to the Auditor General's function concerning a notice under section 82.

The honourable member also asked me to confirm that when the minister tables the Ombudsman's annual report, the names of convicted offenders will be redacted from the tabled version. I can confirm that the names of convicted offenders contained in the report prepared by the Ombudsman and tabled in Parliament will be redacted.

I turn to the comments made by Hon Nick Goiran. The honourable member raised the issue about how effective the bill will be with regard to new technology that is available and used by organised crime syndicates. I am advised that given the sensitivities of the matter, it is probably not appropriate for me to comment in detail on investigative practices used by the WA Police Force, but I can advise that the WA Police Force is aware of the new cyber technology being used by organised criminal groups.

I canvassed the issue about unions in my response to the comments of Hon Michael Mischin. Hon Nick Goiran then turned to the issue of oversight being provided by either the Office of the Ombudsman, as is proposed in the bill, or the Corruption and Crime Commission. I am advised that the view expressed by the honourable member is a view that he has held for some time, and I respect his conviction on this matter. During the drafting of the bill, the government did consider which oversight body, either the Corruption and Crime Commission or the parliamentary commissioner, would be best placed to undertake the monitoring function. The government is of the view that the parliamentary commissioner is the more appropriate oversight body. The monitoring role is set out in part 3 of the bill. The primary function of the parliamentary commissioner is to scrutinise the powers conferred on police under the unlawful consorting scheme. In carrying out this role, the parliamentary commissioner must scrutinise police records, may make recommendations to the Commissioner of Police to revoke or vary consorting notices, and must prepare an annual report for the minister. The annual report may include any observations that the parliamentary commissioner considers appropriate to make about the operation of the act, and it may include a review of the impact of the scheme on a particular group if such an impact has come to the attention of the parliamentary commissioner. The annual reporting function ensures rigorous consideration of whether the policy objectives of the unlawful consorting scheme are being met, and the exercise of the powers and the administrative and procedural processes employed under the act.

As outlined in part 3 of the bill, the role of the parliamentary commissioner is a broad scrutiny oversight and reporting role. The monitoring comes in the context of a proposed consorting regime that is transparent and that contains a number of statutory safeguards and checks and balances. The broad monitoring role can be compared with the parliamentary commissioner's existing role under the Telecommunications (Interception and Access) Western Australia Act 1996. Under this regime, the parliamentary commissioner has a monitoring role to examine compliance with telecommunications interception legislation through inspections and the preparation of reports to the relevant minister. The record-keeping obligations found under part 2 of the telecommunications act ensure that the parliamentary commissioner is able to effectively scrutinise the operations of the act. Similarly, clause 26 of the bill provides exclusive record-keeping obligations for the Commissioner of Police to ensure that the

information in the register is provided to the parliamentary commissioner for examination. A similar function is also conferred on the parliamentary commissioner under the Criminal Organisations Control Act 2012, which includes monitoring and reporting on the exercise of powers conferred on the Commissioner of Police and police officers under that act.

In considering the appropriate body for the statutory monitoring role, regard was had to the Corruption and Crime Commission's statutory role under the Criminal Investigation (Covert Powers) Act 2012. Under that act, police officers are excused from criminal responsibility for certain behaviour. In the context of that regime, the Corruption and Crime Commission's role includes oversight of the exercise of undercover and otherwise potentially criminal activities of police. The powers conferred on police under the unlawful consorting scheme can be distinguished from the covert powers conferred on police under the Criminal Investigation (Covert Powers) Act. The processes under the bill are transparent, subject to review and fit within the usual operational functions of police and criminal procedure generally. Accordingly, although the monitoring role of the parliamentary commissioner involves the review of police powers, the purpose of the scrutiny function is far broader and will include annual reporting on policy, administrative and procedural matters associated with the operation of the regime.

It is worth noting that the parliamentary commissioner has an obligation under section 28 of the CCC act to report to the Corruption and Crime Commission any matter that the commissioner suspects on reasonable grounds concerns, or may concern, serious misconduct. This ensures that any information that raises a concern in relation to misconduct revealed by the exercise of the parliamentary commissioner's monitoring functions will be reported to the Corruption and Crime Commission. In considering all these issues, the government formed the view that the parliamentary commissioner is the more appropriate body for the particular compliance role outlined in the bill.

Hon Nick Goiran also asked: does the bill address all the elements of recommendation 15 of the New South Wales Ombudsman's report into the New South Wales regime? I note that recommendation 15 goes to the matter of police policy, and the WA Police Force has advised that all these matters will be taken into account as it develops its policy.

Finally, the honourable member also raised the issue of resources. I am advised that the Ombudsman is currently working with Treasury on the appropriate resourcing for the new role, so this matter is live within the government now.

Mr Deputy President, I have just been handed a note and I will add this: Hon Alison Xamon has foreshadowed amendments to the objects clause and the defence clause to protect advocacy, protest or dissent. I advise that the government is not able to support these amendments. The bill's object is accurately stated at clause 6 as it stands. It states —

> … to disrupt and restrict the capacity of convicted offenders to organise, plan, support or encourage the carrying out of criminal activity.

Consorting by a person, the subject of an unlawful consorting notice, with another person named in that notice is prohibited to achieve that object, and not for the object of diminishing the freedom of persons to engage in advocacy, protest or dissent. Although the prohibition on consorting may incidentally affect the capacity of a person, the subject of the notice, that is not the object of the prohibition. Further, the proposed amendment to clause 6 and the proposed amendment to clause 9, which the government will also oppose, would undermine the object of the bill by creating a potentially wide exception to the prohibition on consorting, which could be exploited by convicted offenders named in an unlawful consorting notice to allow them to organise, plan, support or encourage the carrying out of criminal activity under a pretext. The bill already provides appropriate exceptions, in a narrow form, in clause 9, which recognises that in some cases it will be necessary or reasonable for a person who is the subject of an unlawful consorting notice to consort with others named in the notice.

With that, Mr Deputy President, I again thank members for their contributions and support. I commend the bill to the house.

Question put and passed.

Bill read a second time.

Committee

The Chair of Committees (Hon Simon O'Brien) in the chair; Hon Sue Ellery (Leader of the House) in charge of the bill.

Clause 1: Short title —

Hon MICHAEL MISCHIN: I appreciate that we have voted on the policy of the bill and its broad scheme, but the question I ask has relevance to some of the matters that are likely to be raised later about the regime that is being proposed and its monitoring and the like, and some of the issues that the minister has raised about supporting the defences that have been prescribed. Given that this is a preventive measure—it is a measure to control people who

have committed offences in the past and now controlling their behaviour in the future—why was a court-based regime for granting non-consorting provisions not implemented? I understand that provisions of a similar character already exist in the Criminal Code, but surely a greater level of, shall we say, independence, accountability and scrutiny is available, as well as perhaps more confidence in the manner that these provisions are used and the less likelihood for abuse by the police. It could be done in the same manner as prohibited behaviour orders, for example, or the imposition of conditions by way of sentencing ancillary to a sentence and the like. I am not suggesting that we go down that particular regime and limit it to sentencing, but why was an executive decision by the police, rather than the police making a properly supported application to a court of competent jurisdiction, not an avenue that was adopted in this case?

Hon SUE ELLERY: I thank the member for the question. The member would be familiar with the review of the Criminal Organisations Control Act 2012. That act relies on the court-based regime rather than the executive function of the police. I am advised that the review, which was tabled in this place in December last year, essentially found that that provision was unworkable. The review confirmed that no organisations have been declared criminal organisations under part 2 of the act for reasons including that the current application process to declare an organisation as criminal is difficult and the preparation of an application is a lengthy and resource-intensive process, complicated by the fact that the membership of criminal organisations is constantly changing. The majority of stakeholders agreed that the current model was cumbersome. The Department of Justice worked with the Western Australia Police Force, looked at other jurisdictions and worked on checks and balances—safeguards—to ensure that a practically effective regime could be implemented using police.

Hon MICHAEL MISCHIN: I thank the minister. I am fully aware of the limitations of the Criminal Organisations Control Act, which is disappointing. There are two factors to take into account there. It was a unique proposal for Western Australia that built on experience in other jurisdictions and a number of cases. A very conservative approach was taken in light of many concerns. In fact, there were some pretty absurd ones such as that local chess clubs and political parties could be declared criminal organisations and the like. Since then, I think the law has moved on and a much more efficient means of declaring organisations may be available. But we will leave that aside. We are not talking here about organisations; we are talking about individuals, in the same way as prohibitive behaviour orders. It would be put up to a court, "This person has been convicted of an indictable offence or a child sex offence and his or her known associates are A, B, C and D." Clause 10(2) requires that the person is over the age of 18 years, a convicted offender, has or is or is likely to be consorting with a number of people—A, B, C and D—and it is appropriate for the court to issue a notice to disrupt or restrict the capacity of the convicted offender to engage in conduct constituting an indictable offence. The court would be told, "On the basis of their history, these are the sorts of indictable offences that they are likely to engage in."

That process is much easier than for an organisation and it eliminates the need for the Ombudsman to look at how it is done. There is a court decision, an order, that can be enforced as in the case of any other order. We have seen that restraining orders can be issued on an interim basis pending a court decision and going through the evidence and assessing them. We have seen how prohibitive behaviour orders can be obtained. Surely, having unlawful consorting orders made by a court would be a more transparent process. It can be expedited if it is necessary, but also it would be less susceptible to abuse and can be judicially reviewed. We would not end up with the problems that have been experienced in New South Wales and so forth. I do not know why it was not explored rather more.

Hon SUE ELLERY: I am advised—I am sure the honourable member is aware of this—prohibitive behaviour orders are issued at sentencing. The policy intent of the bill before us is to enable police to have a tool that can interrupt and restrict communication about criminal activity before or as it is occurring. The policy notion, I guess, behind the legislation is to provide a far more nimble, if I can use that expression, tool for police to be able to interrupt this kind of activity, rather than the, appropriately so, much more—I do not want to say cumbersome—formal and lengthy court process. That is the reasoning behind it. Having done that, and made that policy decision, the test is whether we accept that the checks and balances are appropriate.

Hon MICHAEL MISCHIN: I am not going to pursue this much further, but this is an important issue that covers the supervision and monitoring regime that is to come—who should do it, how it ought to be done and the like. I take the point that police would like to make sure that certain people who come under their notice for one reason or another who are convicts and may be associating with like elements need to be dealt with expeditiously. That could also be done in the same way as a violence restraining order—an application to a court or an interim notice. I can understand that one may not anticipate the problems at the time of sentencing and have particular orders placed by a court at that time. There is no bar to making a separate application under this legislation, as in a criminal organisation–type declaration unconnected with those criminal proceedings that the offender has come to court for at some later date or when it is found necessary.

I am all for police being able to do their job effectively, efficiently and expeditiously, but it seems to me that there was another path that would not be susceptible to potential constitutional challenges that may not have been anticipated at the time that this bill was settled or may arise in the future, and would give comfort to those who are

concerned about civil liberties and the like, and the metes and bounds of people being able to consort in a way that is not going to be ineffective, but would require an onus on police to make their case to some level. My last question on this point is: was consideration given at any stage to a court-based regime in which an application, at the appropriate time, as thought fit by the police, supported by sufficient evidence to establish the elements outlined in the bill that are the foundation for a notice be made to a court and have the support of a judicial decision, and whatever reviews the government thinks fit ought to take place as a consequence of that?

Hon SUE ELLERY: I am advised that, yes, it was considered, and rejected for the reasons I have already given. In addition to those reasons—the honourable member may or may not agree that this is worthwhile; it is for him to make the judgement—the view of the police was that they wanted the capacity to disrupt and prevent before it happened. So the person has already been convicted, but this might be another level, another avenue, of potential criminal activity that was not considered before the courts and was not anticipated when the original conviction occurred. The answer to the question is yes, it was considered; but, no, it was not adopted for the reasons I have already outlined.

Hon COLIN TINCKNELL: I have a question that is based on my work with Indigenous people over the past 25 or 26 years. I have worked in victim support and I have been a mentor in many court cases before magistrates, especially in the north west and central desert. I worry that we may have an unintended consequence with clause 5, which refers to family members and customary law. Customary law and whitefella law do not often work well together. I have seen consequences of that and I am a bit worried, particularly after the New South Wales experience; I understand they are trying to do something about it. We have way too many Aboriginal people in jail and I am happy that we are making an attempt to right that wrong. However, I am worried that we may be setting up Aboriginal people who through their kinship may be related to a person who has offended before and giving family members less protection. Maybe police officers will be reticent to act because they are not too sure about it or how to go about it. Has the government looked into that? This is a difficult issue. I am concerned that we may be setting up some young Aboriginal people for a fall because they were not protected from their own relation, whether it be an uncle or aunty, for example.

Hon SUE ELLERY: I thank the member for the question; it is a very good point to make. We want to put in place measures that address the historical wrongs and the unconscious bias that exists, but we do not want to create a situation in which the police overcompensate and say that they had better not go near that issue because they could be stepping into cultural practices et cetera. I understand that and it is right to get balance. The important thing to note is that in the provisions of this bill, unlike in some other jurisdictions, both the named person and the restricted person have to have convictions, so that illegal background already exists. The member put the proposition, reasonably so, that an innocent young Aboriginal person could unwittingly be set on a path of crime because the state said it would overcompensate and not step in when perhaps it should. However, I think the fact that both the named person and the restricted person already have to have convictions sets a different bar than has been set in some other jurisdictions.

Hon COLIN TINCKNELL: Obviously if I knew the answer, I would move some amendments. I do not know the answer. I know it is difficult for the government to structure a legal bill around this.

Hon MICHAEL MISCHIN: I appreciate the minister's explanation earlier about whether the court-based option had been considered. I was not entirely convinced by the reason. I am not going to pursue that, but it seems to me that, as in the manner of restraining orders, the possibility exists of someone coming to the notice of police who needs to have their activities restrained, making an application, ticking the boxes, providing enough reason to persuade a court that it is necessary and the court making the orders that are covered by the notice. There is also no question that the person who is the subject of the order understands what the order is about, the consequences and the like, even if the police issue an interim notice of their own accord, that then is perfected by a court at a later time. But we will leave all of that aside. Of course, from the way the Attorney General spoke about this in the other place, we are theoretically talking about a very small number of people being the subject of these sorts of constraints and for very high level risk of serious criminal activity, although that is not the way the bill is framed. How many anti-consorting notices are in existence under the existing legislation? How many have ever been the subject of enforcement action for having been breached and what were the consequences of those?

Hon SUE ELLERY: I am advised that six people have active warnings under section 557J(2) of the Criminal Code, which refers to "declared drug trafficker". Currently under section 557K(4) of the code, it is an offence for a child sex offender to habitually consort with another child sex offender. Around 620 consorting notices for a child sex offender have been issued under section 557K(4). The Western Australia Police Force advises that a transitional period of 12 months is required to deal with notices issued under section 557K(4) of the code, and we will refer to those as former notices. During this transitional period, the Western Australia Police Force will issue and serve new notices under the terms of the bill. When such notices are issued and served, former notices will cease to have effect, as outlined in the transitional provisions in clause 39. Regarding consorting prosecutions commenced under the current provisions in the code, I am advised that no prosecutions have commenced under section 557J of the Criminal Code. Police advise there have been nine charges for consorting by child sex offenders under section 557K(4)

of the code over the period 2015 to 2019. If the breakdown of these is helpful to the member, two of those were in 2015, three in 2018 and four in 2019.

Hon MICHAEL MISCHIN: The minister said there were nine charges over that four-year period. What has been the outcome of those charges? Have they resulted in convictions, and what sort of penalties are we looking at?

Hon SUE ELLERY: I am advised we have actually sought that advice; I think it was asked perhaps in the briefings. Police are trying to get that information. I can give the member an undertaking that I can give that to him when it is available, it just might not be during the course of this debate.

Hon MICHAEL MISCHIN: I am happy with that and I would appreciate that, minister.

More generally, what consultation has taken place, and with whom, in the crafting of the bill?

Hon SUE ELLERY: I am advised that consultation has taken place with the WA Police Force, the State Solicitor's Office, the Solicitor-General, Parliamentary Counsel's Office, the Office of the Director of Public Prosecutions WA, the Office of the DPP New South Wales, the parliamentary commissioner, the Department of the Premier and Cabinet, the Aboriginal Legal Service of Western Australia, Legal Aid Western Australia and the heads of jurisdiction. I am advised that this consultation occurred throughout drafting over an extended period. There were up to two years of policy and drafting work with input from stakeholders throughout, with a combination of face-to-face and telephone et cetera communication. A significant amount of feedback was received over that period and incorporated into the policy decisions and iterative drafts. Consultation was also undertaken with a view to the findings of the report of the New South Wales Ombudsman on the operation of its consorting legislation. It is not possible to distil this consultation into a few key points, although it has been focused throughout on ensuring a balance between the objects of the legislation and the need for appropriate safeguards to protect vulnerable members of the community.

Hon MICHAEL MISCHIN: I take it there was no consultation outside government, other than perhaps with the Aboriginal Legal Service. Was there none with the Law Society? Was the Law Society or the Criminal Lawyers' Association approached; and, if so, did they respond and provide any contribution to the process?

Hon SUE ELLERY: I am advised that in respect of those two organisations that the member named, the Law Society and the Criminal Lawyers' Association, no.

Hon MICHAEL MISCHIN: Lastly, given that there are some specific defences prescribed in clause 9(2), was there any consultation with, or submissions or representations received from, any employer or employee organisations, such as trade unions or professional organisations?

Hon SUE ELLERY: I am advised no, not in the drafting.

Hon MICHAEL MISCHIN: Was there any before the drafting, in respect of policy and the limitations—that sort of thing?

Hon SUE ELLERY: My answer was not accurate enough. There was no consultation in preparation, but after the bill had been brought to Parliament.

Hon NICK GOIRAN: A couple of matters arise from the second reading debate. One of the questions I asked was: how will Western Australian police be resourced to fight criminal network operations in the technologically advanced environment that we live in today? I wonder whether the minister could respond to that.

Hon SUE ELLERY: I did refer to that in broad and, I will acknowledge, oblique terms. I am not in a position to give the member any more operational information about resourcing and the like. Police advise that it is not in anybody's interest for me to reveal those things. I am not in a position to give the member any more detail about that.

Hon NICK GOIRAN: I listened carefully to the minister's response during the second reading reply. She had understood my question to be about whether the laws would be effective in the technologically advanced environment that we live in today. In response to that, the minister indicated that it would not be in the best interests of our community for her to reveal any operational sensitivities, which I fully concur with. But the minister did indicate that Western Australian police were aware of the new technologies. That is all excellent, but that is not my question. My question is: how will Western Australian police be resourced to find this? It is a different area of inquiry.

Hon SUE ELLERY: The member is right. I provided an answer to a different question. I am sorry; I did not do that deliberately. The member would be aware that the government recently announced a significant increase in resourcing to police, with the announcement of new police numbers, but I am also advised that the issue of resourcing for police with respect to this bill is a live matter, and the WA Police Force, I understand, is going through the normal processes with Treasury to determine what it will request. It can then go through the normal budgetary process.

Hon NICK GOIRAN: On the assumption that it would not be too operationally sensitive to reveal this information, is there a specific division within the Western Australian police that will have responsibility for proceeding with these unlawful consorting laws?

Hon SUE ELLERY: I can advise that it is the state crime unit within the WA Police Force. It will provide for an investigative framework and capability to the response and management of serious criminal activity.

Hon NICK GOIRAN: Does the state crime unit within the WA Police Force currently deal with notices issued under sections 557K and 557J of the Criminal Code?

Hon SUE ELLERY: I am advised that it is the sex crimes division within that state crime portfolio.

Hon NICK GOIRAN: The Leader of the House had an interchange with my learned friend Hon Michael Mischin about the transitional provisions, so is it the case that the sex crime division underneath the state crime unit in the Western Australia Police Force will no longer need to issue those notices under sections 557K and 557J of the Criminal Code?

Hon SUE ELLERY: Yes. I am advised that that is correct.

Hon NICK GOIRAN: I understand that section 557J of the Criminal Code is for declared drug traffickers. Are we sure that that is all being done by the sex crime division?

Hon SUE ELLERY: The reason I referred to sex crimes is that the current consorting provisions are only used in respect of section 557K of the Criminal Code—that is, sex crimes—and not section 557J of the Criminal Code, which is the serious and organised crime division under which drug offenders are captured, literally and figuratively.

Hon NICK GOIRAN: Notices under section 557K of the Criminal Code for child sex offenders are dealt with by the sex crime division under the state crime unit in the Western Australia Police Force, and in due course, because of this bill, it will no longer need to do that. But will officers within the sex crime division in the state crime unit of the WA Police Force now be involved in the operational effectiveness of the unlawful consorting bill?

Hon SUE ELLERY: I am advised that yes, they will.

Hon NICK GOIRAN: Do we have an assessment of the workload of those officers in the sex crime division as it is at the moment with respect to section 557K of the Criminal Code and the extent to which that will change when they have to fulfil their duties under this unlawful consorting law?

Hon SUE ELLERY: As I indicated in answer to a question about resources, it is a live issue that the relevant agencies are working through with Treasury now. I can give the member some information about staffing for the transitional period. I am advised that two full-time equivalent sworn police officers—that is, two detective constables—will be allocated to the sex crime division. That will enable the division to have two officers present when serving unlawful consorting notices on convicted child sex offenders. That aligns with WA police standards surrounding officer safety for frontline policing. That is required for the transitional period, with the approximately 620—which is the number I referred to earlier—consorting notices that have been issued to child sex offenders under section 557K(4) of the Criminal Code. They will be assessed by police and transitioned to the regime under the bill.

Hon NICK GOIRAN: Is it the case at the moment that the section 557K consorting notices that the Leader of the House referred to, which total something in the realm of 620, are being handled by the same two full-time equivalent police officers that the Leader of the House referred to who will now be involved in the transitional arrangements?

Hon SUE ELLERY: Maybe I did not explain it very well. The two officers to whom I just referred will be additional to the current component—that is, additional for the purposes of managing the transition.

Hon NICK GOIRAN: That is helpful, because at the heart of my question, which was the genesis of this dialogue, is how Western Australian police will be resourced to fight these criminal networks that are operating in the advanced technological environment in which we live today. At least I am hearing that, as a transitional measure, the government is intending to provide two additional full-time equivalent police officers. Of course, it is a matter for the police to work out whether that is sufficient, but I am pleased to see that there will at least be some additional resourcing.

Just to round out this topic, and to compare and contrast the notices under sections 557K and 557J, I note that it was stated in the second reading speech that under the WAPF advice —

> … the bill provides for a transitional period to accommodate the significant number of notices issued to child sex offenders, but not for declared drug traffickers.

The Leader of the House has already explained that the "significant number of notices" is approximately 620. The Leader of the House also indicated in answer to an earlier question that I asked that the consorting laws do not seem to be being used for declared drug traffickers—at least that is how I understand it. Does that mean that there are actually zero section 557J notices and approximately 620 section 557K notices?

Hon SUE ELLERY: Perhaps in an answer to a question by Hon Michael Mischin, significantly earlier in the debate, I referred to six for drug traffickers. The advice I have is that the consorting measures for drug trafficking are not being used particularly effectively. That is probably a better characterisation of that.

Hon MICHAEL MISCHIN: The current regime simply requires a warning from a police officer, whether it is for a sex offender or a drug trafficker, and then for habitual consorting after that warning. It seems that the sex offences unit has been very active in trying to deal with any potential collusion or communication between sex offenders and the like, but communication does not seem to be the problem, if only nine charges have been laid in the last four years. I would have thought there would be a raft of declared drug traffickers around town, including in the outlaw motorcycle gang demographic. I understood the Attorney General was targeting those gangs with this, and that this means of breaking up the opportunity to plot crimes is in the code but it has not been utilised for some reason, if only six warnings have been given in the last however many years and no action taken. I am a little surprised at that and, if that is the case, for something that requires none of the formalities of issuing notices, wonder how we are going to deal with that element and why this provision has not been exploited.

I can see the potential for the difficulties in meeting the "habitually" element of that offence. However, if we are dealing with guys who are members of the same bikie gang or are seen by police officers hanging around together on more than one occasion over time, I would have thought that that would satisfy, prima facie, the element of "habitually consorting", especially if we happen to find evidence of communication between two or more of them, by way of emails, telephone, intercepts or letters—if anyone sends letters nowadays—and all that sort of thing. I am rather surprised and concerned that the police have not used this weapon in its arsenal, especially in respect of drug traffickers, although I entirely accept that this will cover more than drug traffickers. It will deal with any indictable offence, so it could be just possession of drugs or the like. Can the minister please give us some information about why there has been reluctance to use this mechanism provided by Parliament to the police to enable them to deal with a problem they are now saying they need it for?

Hon SUE ELLERY: I think it is a good question. I asked the police adviser at the table: what has he been doing? I am advised of the following; it is a combination of things.

Hon Michael Mischin: I will not blame him personally!

Hon SUE ELLERY: For the purposes of *Hansard*, I was being flippant. I am in awe of police every day.

Hon Michael Mischin: Especially when they come knocking on the door.

Hon SUE ELLERY: They do not. I do not know what happens at Hon Michael Mischin's door, but I have never had them knocking at my door.

The DEPUTY CHAIR (Hon Dr Steve Thomas): Order, members! I think we will stick to the debate at hand.

Hon SUE ELLERY: The question of establishing "habitually" is a big part of the problem. "Habitual" is not defined. Police feedback during the consultation around this was that the current consorting scheme is limited and ambiguous and provides no guidance on how to administer and enforce. The rationale for this standalone legislation is that the new scheme will contain all aspects of the unlawful consorting regime and the scheme will be easier to apply and understand, including a definition of the term "consort". This is important, as the current scheme in the code, as I said, sets the threshold as "habitually consorts"—a term that is not defined and is, therefore, problematic.

The unlawful consorting notice is valid for three years. Currently, the consorting scheme in the code does not specify a time frame for the life of a consorting notice, providing a range of targeted defences—strategic, I guess—that cover an acceptable range of most day-to-day law-abiding activities where it is necessary or reasonable to consort. This addresses the deficiency in the current scheme, which provides only one defence in relation to family relationships. There are detailed parameters in the bill before us for issuing a notice and the subsequent service of a notice, and the oversight and monitoring provisions, which we have put in place, whereas the current scheme contains no such provision.

Hon MICHAEL MISCHIN: Thank you for that. It does not seem to have inhibited the sex offender division of the police; it seems to have been able to issue 620 warnings and has laid nine charges. Nevertheless, let us hope that this will be more effective.

Lastly, this ties into some of the monitoring and review provisions later with the Ombudsman. Should the Commissioner of Police or a commander and above issue an anti-consorting notice, whether or not the Ombudsman recommends that it be varied or revoked, is there any scope for judicial review of that decision by the police; and, if so, how would that be undertaken?

Hon SUE ELLERY: I am advised yes, there is.

Hon MICHAEL MISCHIN: How would one go about it? Let us say the police commissioner or a commander issues a notice against me. I do not like it; I think it is unfair and unreasonable in its terms or in the fact that it has been issued. How would I go about challenging it judicially?

Hon SUE ELLERY: I am advised that, in the first instance, the person could seek a revocation from the Commissioner of Police. If that was unsuccessful, they could apply to the Supreme Court.

Hon NICK GOIRAN: I have a question that I think will assist when we get to the other clauses. I refer to the types of syndicates or groups that this legislation is intended to target. There has been a lot of discussion, including in my own second reading contribution, about outlaw motorcycle gangs. They are often cited as the target of these type of laws. The minister will appreciate that outlaw motorcycle gangs are only one manifestation of organised crime in Western Australia. Are there any other identifiable syndicates or groups the activities of which the government is particularly concerned about that it intends to direct these laws towards?

Hon SUE ELLERY: The member asked whether there are identifiable syndicates or other groups. I am told that there is a project referred to as WARPOT, or Western Australian regional priority organisation target, which identifies high-level organised crime networks. The hard bit is identifying them as a network; they do not wear leather jackets with colours on them, so that is a much more complex piece of work. But, yes, there are targets.

Hon NICK GOIRAN: I take it that one of the syndicates or targets would include those syndicates or groups—how would we describe them—such as the group of people that I think was referred to as the Evil 8, who committed child sex offences. Those types of groups are not outlaw motorcycle gangs, but I take it we are looking to target these laws towards those types of individuals as well?

Hon SUE ELLERY: I am advised the answer is yes.

Hon MICHAEL MISCHIN: The minister mentioned that there is the prospect of judicial review from the Supreme Court. Can the minister outline the process by which that will take place? There is no process of judicial review within the bill. How would one go about it? Would it be by issuing a writ or an originating notice? What would be the basis of the action to have the police set aside the notice? Indeed, who would be party to the notice? Would it be the Commissioner of Police or the commander who has issued the notice? How does one go about challenging it at first instance, because they think that the commissioner should not have issued it, or if the commissioner has knocked back a request for it to be revoked or varied, or even if the Ombudsman's recommendation has been rejected? At any stage, if I am the subject of one of these notices and I think it is wrong and I want to challenge it in the Supreme Court, how do I do that?

Hon SUE ELLERY: I think we will start with this. As the honourable member will be well aware, an individual can seek judicial review of an administrative decision unless the particular legislation precludes it. This legislation does not preclude it, so it is the same mechanism that is available generally for someone to seek judicial review of an administrative decision.

Hon NICK GOIRAN: Further to that, the minister will see later in part 3 of the bill that there is a process by which the parliamentary commissioner—that is, the Ombudsman—can recommend revocation or a variation of a consorting notice. That is found at clause 25, but it is preceded by the prerequisite that it be as a result of an inspection under this part. Without getting bogged down in part 3 and the questions that I will otherwise ask at that point, my question on this matter of judicial review is: will it be a requirement that an applicant must go to the parliamentary commissioner before they are able to seek judicial review of a notice issued by the Commissioner of Police?

Hon SUE ELLERY: I am advised that the individual would be seeking a judicial review of an administrative decision made by the Commissioner of Police, so they could pursue that through the court without necessarily going to the Ombudsman first. That is the advice I have.

Hon NICK GOIRAN: I understand that. What I am not clear about is whether there is an implication, as a result of the structure of this bill, in this scheme that will then insert the parliamentary commissioner having the power to recommend revocation or variation. Will it be a necessary implication of the scheme that if someone wants to go for judicial review, they must go to the parliamentary commissioner first, or, alternatively, that their application for judicial review might be stayed until such time as they have done this? The reason I ask is that it is not clear. I do not particularly mind which way the government wants to go on this, but I do think it needs to be clear.

The DEPUTY CHAIR: Minister, given that you are taking some advice, we might come to that answer after the break. Honourable members, noting the time, I shall leave the Chair until the ringing of the bells.

Sitting suspended from 1.00 to 2.00 pm

Hon SUE ELLERY: Before the chamber suspended for lunch, I was asked to provide advice on the capacity for a judicial review and the process by which that might be undertaken. I can advise that if a restricted person is of the view that the grounds for issuing a consorting notice are not met or that the circumstances have changed, such that the grounds are not met, that person can apply to the Commissioner of Police for revocation of the unlawful consorting notice and make a complaint to the Ombudsman. If a restricted person remains dissatisfied with the Commissioner of Police's decision, there is no express right of appeal in the bill. Such a right of appeal has not been included in the bill for several reasons, including because of the natural oversight that the court will provide should a charge of unlawful consorting be brought. There would be significant challenges for the conduct of any hearing before the State Administrative Tribunal, given the confidential and sensitive state intelligence information and covert police methodology relied upon to issue notices. Confidence in the oversight by the Ombudsman, as

proposed in the bill, includes the power of the Ombudsman to recommend revocation or variation of a notice irrespective of whether the restricted person has made a complaint. The significant resources of members of outlaw motorcycle gangs is such that they have the ability to exploit every path of review, occupying court and specialised police resources in the absence of any valid ground for review. Under the current consorting provisions in the Criminal Code, there is no provision for review by the Commissioner of Police or oversight by the Ombudsman. That said, the bill has not attempted to exclude judicial review. Therefore, a person aggrieved by the decision of the Commissioner of Police may apply to the Supreme Court for a review of the decision. A judicial review is a common law right to apply to a higher court to decide whether a decision of a government officer or of a lower court or tribunal breached the law in one of several ways. Judicial review is also known as the supervisory jurisdiction of the superior courts because the superior courts take it upon themselves to ensure that the actions of the executive government and lower courts are correct according to law.

So far as it relates to the bill, a person may apply for a judicial review of the Commissioner of Police's decision to not revoke a notice to determine if the commissioner complied with the provisions in clause 16 of the bill, which refer back, in turn, to clause 10. In addition, nothing in the bill precludes a person making a complaint to the Ombudsman under the provisions of the Parliamentary Commissioner Act 1971, and this is in addition to the Ombudsman's monitoring and compliance functions contained in part 3.

During the break, Hon Michael Mischin asked us to consider and advise whether consideration had been given to, for example, including reference to SAT. That was considered, but for the reasons that I have just outlined, it was rejected.

Hon NICK GOIRAN: I have one final question on clause 1. I note that this is a bar 2 bill; it is 161–2. What necessitated the amendments in the other place, and were all the amendments from the government?

Hon SUE ELLERY: I would like to think that it was because I have spoken to various ministerial colleagues and suggested that every bill that needs a government amendment should be dealt with in the other place and not in here. I would like to think that was the reason, but the official advice that I have been given is that the bill currently provides the Commissioner of Police the ability to correct minor errors contained in an unlawful consorting notice, under clause 15, or to revoke a notice, under clause 16. Prior to the bill being debated in the Legislative Assembly, the government identified that, as then drafted, different scenarios could arise that would force the commissioner to revoke the notice in situations in which the unlawful consorting notice was validly issued under clause 10 of the bill but the requirements for issuing the notice were no longer met due to a change in the circumstances. This would be undesirable because the risk with revoking the notice is that any previous occasions of consorting associated with the revoked notice would be lost and a prosecution for a charge of unlawful consorting may fail. Even if a new notice was to be issued, there would be no instances of consorting associated with that notice, even though there may have been instances of consorting against the previous notice. To resolve the situation, the amendment moved and passed in the Legislative Assembly provides the Commissioner of Police with the power to vary a notice upon the receipt of an application from the restricted person or on the commissioner's own initiative in such a way that it avoids the risk of the notice being invalid or having to be revoked. This would apply in circumstances in which the unlawful consorting notice was validly issued under clause 10 of the bill, but subsequent to the notice being issued, a named person on the unlawful consorting notice was no longer a convicted offender for the purpose of the bill. A typical example of that is when a convicted offender has their conviction spent or the convicted offender appeals against a conviction and has it overturned, in which case, as opposed to revoking the notice under clause 16, the Commissioner of Police would vary the notice to remove the name of that person without otherwise affecting the notice. The amendment preserves the status of the notice and ensures that a prosecution may commence once the offence has been committed.

Hon NICK GOIRAN: Were clauses 15 and 16 that are currently in the bill before us not in the bill before the other place, or were those two clauses amended? The reason I ask is partly administrative on my part because I wanted to ask some questions about clause 38, and I now realise that it is clause 39, so something has changed.

Hon SUE ELLERY: I can explain the change in numbering. A new clause was added, which is now clause 17. That is why the member can see a different set of numbering.

Hon NICK GOIRAN: Clause 17 is the variation of the consorting notice, which the minister has just explained. At the start of the explanation, the minister said that minor errors can be corrected, which is dealt with by clause 15. The minister also mentioned revocation, which is at clause 16. Just to be clear, is it the case that clauses 15 and 16 were amended and a new clause was inserted, which is clause 17?

Hon SUE ELLERY: We amended what is now clause 15 and inserted a new clause 16A, which is now called clause 17.

Hon Nick Goiran: So no amendment to clause 16, which was the revocation clause?

Hon SUE ELLERY: I am advised no. Correct.

Clause put and passed.

Clause 2: Commencement —

Hon MICHAEL MISCHIN: I move —

Page 2, after line 10 — To insert —

(2) However, if no day is fixed under subsection (1)(c) before the end of the period of 10 years beginning on the day on which this Act receives the Royal Assent, this Act is repealed on the day after that period ends.

This amendment is to the effect that if the legislation does not come into operation within 10 years of receiving royal assent, it will be automatically repealed. That ties in with the current clause 2, which provides that the legislation comes into operation in three stages. Part 1 comes into operation on the day on which the legislation received royal assent, proposed section 39 comes into operation on the day after the period of 12 months beginning on the date the rest of the legislation comes into operation and the rest of the legislation comes into operation on a day fixed by proclamation. This amendment is to cover off things if the legislation is not proclaimed, so that it will disappear from the statute book within 10 years.

Hon SUE ELLERY: For the record, the government considers this amendment to be unnecessary, but we will not oppose it.

Hon NICK GOIRAN: It will not surprise the minister to know that this amendment has my full support, and I note her advice to the chamber that the government will not oppose it. The question that remains is: when will all this come into operation? The very important and appropriate amendment before us will ensure that everything falls away if nothing has occurred within 10 years. Clause 2(b) provides that proposed section 39 will come into operation within a very specific time frame—that is, 12 months after the proclamation date set out under clause 2(c). That means that we will not know when proposed section 39 will come into effect until we know when the rest of the legislation will come into effect. Perhaps the minister can answer that question first, and I will then take matters further.

Hon SUE ELLERY: The honourable member correctly points out that proposed section 39 will come into operation 12 months after the proclamation of the rest of the legislation. That is to allow for the transitional period that is set out under clause 39 to take effect. The Western Australia Police Force has advised that the transitional period of 12 months is required to deal with the 620 consorting notices issued to child sex offenders that were referred to earlier in the debate. WA police advises that a significant amount of work will need to be done to prepare to implement the bill, and that can commence only after the bill has been passed. For example, enhancements are required to the WA Police Force incident management system to capture all relevant information under the unlawful consorting regime. That will be a very high priority but, as I am advised, it is still expected to take up to six months, and then regulations will be required as well.

Hon NICK GOIRAN: That sounds like a two-phase process—six months to do the preliminary work and then the regulation work—or will it all be done concurrently within the six-month time frame?

Hon SUE ELLERY: It is anticipated that it will be done concurrently.

Hon NICK GOIRAN: At this point, realising that we cannot be precise about this, we can anticipate that proposed section 39 will begin in approximately 18 months' time. For the reasons the minister has just outlined, we will need to allow six months for the proclamation to occur and then the mandatory 12-month period set out under clause 2(b). Why are we being so prescriptive at clause 2(b)? I accept that the minister has received advice from the Western Australia Police Force that it needs further time to deal with matters pertaining to section 557K of the Criminal Code. However, the minister has just indicated to the chamber that there will be a six-month time frame and that certain work will be done concurrently. Might it be the case that the preliminary section 557K work could also be done concurrently during that first six months, respecting the fact that the police might need further time, so that the entire period might be 12 months rather than 18 months? Has any consideration been given to that? My concern is that we are just saying, "Well, regardless of whether you're ready or not, you actually cannot start until 12 months after proclamation."

Hon SUE ELLERY: It is erring on the side of safety. As soon as a new order is issued under these provisions, the old one is cancelled. We do not want to be in a position in which there is the possibility of something being missed or there is not enough time to do everything properly. It is erring on the side of safety. It may well be that it takes less than 12 months, but that period was built in to err on the side of being quite conservative.

The DEPUTY CHAIR (Hon Martin Aldridge): Before I give the call to Hon Nick Goiran, I remind the chamber that we are dealing with the amendment moved by Hon Michael Mischin, and that the question is that the words to be inserted, be inserted.

Hon NICK GOIRAN: Yes, thanks Mr Deputy Chair. Given that advice, I might hold back on my further questioning to deal with clause 2, hopefully as amended. As I say, the amendment before the chamber has my support.

Amendment put and passed.

Hon NICK GOIRAN: If we look at clause 2 as it is now amended, what will now read as clause 2(1)(b) deals with the commencement period of proposed section 39. It is quite common for a commencement clause along the lines of what will now be clause 2(1)(c) to appear in bills, but it is also very common for different days to be allowed for proclamation.

That could have been an approach taken with this bill, which would have enabled proposed section 39 to come in on any date the government decided might be appropriate, including a period sooner than 12 months. This is extremely prescriptive and I am not sure that it is desirable. The traditional or customary drafting would be better. That said, I do not necessarily have an objection if the government is adamant that there should be a very specific period of 12 months, a fixed period, before proposed section 39 comes into effect. I am just curious about why it would be so prescriptive. In actual fact, normally the argument is put forward that we love to have maximum flexibility, but we are doing the exact opposite here. That said, not a substantial amount turns on this.

I have a question about the 12-month period. Does the government consider it safe to impose a 12-month period after proclamation to allow for the review of the current notices? In particular, I am concerned that there might be a risk that any current notice will lapse after the period of 12 months after proclamation has passed without a new notice being issued in accordance with this bill. What mechanisms are in place to ensure that that would not occur?

Hon SUE ELLERY: In respect of the safety issue, I am advised that a reporting cycle for offenders already exists, and the maximum of that is once a year. By putting in place that one-year period, the 12 months, we avoid imposing an artificial, separate, new intervention in the reporting cycle. This way, we know we will capture everybody. I am also advised that many have a much shorter reporting cycle, but the maximum reporting cycle is 12 months. This is a safety measure, if you like, to ensure they are not lost in the transition between creating a new cycle just for this purpose and the managing the system in a safe way.

Hon NICK GOIRAN: As I understand it, in about six months the government will proclaim the operative parts of this bill, with the exception of clause 39. That will come into effect in approximately 18 months or exactly 12 months after the rest of the matters are proclaimed. Is it anticipated that in in six months there will still be approximately 620 notices? We know there are 620 notices at the moment. Is there capacity for further notices to be made over the six-month period, in which case there will be more at that stage? Perhaps the minister could answer that to start with.

Hon SUE ELLERY: We would assume yes, because until these new provisions are in place, it is the existing provisions and they will continue to capture people.

Hon NICK GOIRAN: It is then reasonable for us to assume that in six months there will be at least 620 of these notices in place. To paraphrase the second reading speech, the reason that has been provided for the 12-month period set out in what will be section 2(1)(b) is to allow for the review of current notices and subsequent issuing of notices in accordance with this bill, which I support. What is the time frame that an officer needs to review and issue one notice in accordance with this bill? I am asking whether it is hours or days. Is it done routinely, almost like a tick-and-flick process that takes a few minutes, does it take many hours or does it take many days? How long are we talking?

Hon SUE ELLERY: I am not sure whether I can give the member of anything prescriptive. I am advised that a quite detailed new application is being devised, and included within it will be a number of new tests, if you like. It will depend on the complexity of the circumstances. There is an approximate calculation of about five days, but we would not want to rely on that absolutely.

Hon NICK GOIRAN: That is entirely fair. The fact that it is approximately five days helps unpack this a little bit. The government has said it will provide two additional full-time workers to assist in this process. We know that at least 620 of these notices will need to be reviewed and it takes approximately five days for one person. That is a lot of hours for two full-time equivalents. That is my concern.

Hon SUE ELLERY: I am advised that some of the work is already being done in the existing process. It is important to remember that the two staff are additional to what is already there. As a member of the Expenditure Review Committee and cabinet, I am reasonably confident that police would have ensured they had done their calculations such that they covered the FTEs they needed to process this. I am also advised that it does not take five consecutive days of work by one person, but the way the system will work is that some of the elements will be checked by group X or person Y and—I do not know whether I am describing this accurately—the rest of it may well be passed on to other people. I do not think we can get too precise and say that it is five consecutive days multiplied by 620, which gets X.

Hon NICK GOIRAN: I will leave that line of questioning as it is. It sounds a bit risky to me, but it is up to the government. If the government is keen on clause 2(1)(b) remaining in the very prescriptive way that it is, that is the government's choice. I do not oppose that. I would want greater flexibility than what is there at the moment for exactly the reasons we have just unpacked, because we are not just talking about some rudimentary, routine thing here. We are talking about notices given to child sex offenders. Irrespective of which party we are a part of, I am sure none of us want anyone to slip through an unintended gap in the system. Nevertheless, I will leave it with the government. If it is happy with clause 2 as it is at the moment or would prefer to amend it to what I referred to earlier, I leave that with the Leader of the House.

I move on to a different line of inquiry pertaining to this issue, and that is to again compare and contrast the treatment of section 557K of the Criminal Code with section 557J, which deals with declared drug traffickers. The Leader of the House helpfully provided in answers to questions under clause 1 information that there are approximately 620 of these notices for child sex offenders under section 557K and approximately six for declared drug traffickers under section 557J. A very different approach has been taken in this bill, because notices will cease to have effect under section 557J, while notices issued to child sex offenders under section 557K will remain in force for another 12 months. The Leader of the House has adequately explained, and we have had a useful dialogue about, why section 557K has a 12-month transition period. What is not abundantly clear to me at this point is why we would want those six notices under section 557J to cease immediately. Why is there different treatment?

Hon SUE ELLERY: I am advised that given that it is such a small cohort, police have already assessed them and have determined whether they need to issue new notices or what needs to be done about them.

Hon NICK GOIRAN: No; that is understandable. The Leader of the House is quite right; there are only six of them, according to the information that was provided. To round this out, is it the case that further section 557J notices are anticipated to be made over the next six months before the proclamation period commences?

Hon SUE ELLERY: It is possible, but it is not anticipated, bearing in mind the earlier discussion we had about the police view that it is ineffective in any event.

Clause, as amended, put and passed.

Clause 3: Terms used —

Hon MICHAEL MISCHIN: I have a couple of questions about some of the definitions. The definition of "convicted offender" on page 3 of the bill states —

> (a) a person against whom a conviction has been recorded for 1 or more of the following —
>
> (i) an indictable offence;

That can be anything from stealing, fraud, assaults causing bodily harm, other offences of violence and sex offences to murder, manslaughter and the like. There is also an alternative, which is in paragraph (b), which states —

> a person who is declared to be a drug trafficker under the *Misuse of Drugs Act 1981* section 32A(1)(c);

Firstly, can someone be a declared drug trafficker and not be convicted of an indictable offence?

Hon SUE ELLERY: In order to meet the objective of capturing everything in sections 557J and 557K, the view was that we needed to make sure and check whether there was anything other than the offences listed at subparagraphs (i) to (v), and I am advised that yes, we needed to include section 32A(1)(c) of the Misuse of Drugs Act 1981 because there is provision in there for a person to be a convicted drug trafficker but not for an indictable offence.

Hon MICHAEL MISCHIN: Under what circumstances can that occur? Currently, section 557J defines a declared drug trafficker as a person who is declared to be a drug trafficker under section 32A(1) of the Misuse of Drugs Act 1981. This is limited to section 32A(1)(c) of the Misuse of Drugs Act. Under what circumstances can a person be declared to be a drug trafficker under the Misuse of Drugs Act without having been convicted of an indictable offence, and why would they need to be captured by this paragraph and not otherwise be captured by paragraph (a) of the definition?

Hon SUE ELLERY: I will give this a crack while my advisers are writing up the specific language for me. The reference to section 32A(1)(c) is to ensure that members of declared criminal organisations are also captured. I will get the more precise language, but that, essentially, is it. If we did not include section 32A(1)(c), we would miss that category of people. In specifically referring to 32A(1)(c), we make sure that we capture those people who are already captured under section 557J. I will make sure that I do not have to add anything to that.

Section 32A(1)(c) captures people who are members of a declared criminal organisation and have committed a relevant drug offence. I understand that a relevant drug offence can include a simple offence.

Hon MICHAEL MISCHIN: There are a variety of simple offences—one of them being keeping premises for the purpose of selling drugs or something like that.

I possibly should have raised this in the course of debate on clause 1. As I understand it, one of the reasons this legislation is needed is the practical difficulties with the Criminal Organisations Control Act. The minister is acknowledging that.

Hon Sue Ellery: Yes.

Hon MICHAEL MISCHIN: In a sense, targeting individuals rather than organisations is a different way of approaching the problem. If that is the case, and the Criminal Organisations Control Act cannot be used in the manner intended, why has the government not taken the opportunity to repeal that act as part of this bill replacing that legislation? Paragraph (b), which deals with the drug trafficker element of "convicted offender", can operate

only if there is a declared criminal organisation under the Criminal Organisations Control Act. If there are none of those, paragraph (b) cannot be utilised.

Hon SUE ELLERY: The honourable member is right. That is a clause 1 type of question; nevertheless, I am happy to entertain it. Given what the review has found about the Criminal Organisations Control Act, I think there was a recommendation that we consider the type of legislation that we are dealing with now. As I understand it, the policy decision that has been made is that, effectively, we do not want to consider repealing the Criminal Organisations Control Act until we have seen how these provisions work. It may well be that at some point in the future a decision will be made that that act should be repealed.

Hon MICHAEL MISCHIN: I suppose that gives the government the opportunity to update that act and correct some of its unforeseen and undesirable shortcomings.

I now turn to the definition of "prescribed officer" on page 4 of the bill. It means a police officer who is or is acting as a commander or an officer of a rank more senior than a commander. That is the threshold rank for the issuance of an anti-consorting notice. How many commanders or more senior officers are in the police force at this time, either of substantive rank or acting?

Hon SUE ELLERY: There are eight in total and two of those are in the state crime unit.

Hon MICHAEL MISCHIN: Does that include those who are acting commanders?

Hon Sue Ellery: Rather than swap advisers again I am getting a text message. We just have to wait.

Hon MICHAEL MISCHIN: That is fine. What I am after is the number of commanders, acting commanders or more senior officers, such as commissioner, acting commissioner or assistant commissioner.

Hon Sue Ellery: By way of interjection, I am advised there are eight substantive officers. We are trying to see whether we can find out how many acting officers there are.

The DEPUTY CHAIR: Minister.

Hon SUE ELLERY: I am not sure whether this will take us much further. I can give the member a number for a point in time and tell him how many acting officers there are today, but at some point in the future, the number will be different.

Hon MICHAEL MISCHIN: The reason I ask is to get some idea of the number of officers who would be competent to issue an unlawful consorting notice. This point in time is as good as any to get an idea of roughly how many there could be. That is why I asked about commanders, acting commanders—I do not know the rank above that—assistant commissioner, deputy commissioner, commissioner, and so forth. Roughly how many people would be competent at this time, if this legislation were in place, to issue an unlawful consorting notice?

Hon SUE ELLERY: In the state crime unit, three people will be able to issue the notices: two commanders and an assistant commissioner.

Hon MICHAEL MISCHIN: Okay, but how many prescribed officers are there today? I refer to not only the commanders and acting or assistant commanders, but also anyone in the police force who can be a prescribed officer as of today?

Hon SUE ELLERY: There are 19.

Hon NICK GOIRAN: On the supplementary notice paper, there are some amendments to clause 3 that stand in my name. I just flag with the minister my suggestion that this be postponed until later, because these amendments are consequential to other amendments. That being said, I do have some questions about clause 3, in any event. These questions relate to three definitions—namely, "consort", "convicted offender" and "family member". I will deal with the offender definition first.

Hon Sue Ellery: Sorry, honourable member, can I just respond to your first suggestion that we postpone it?

Hon NICK GOIRAN: Yes.

Hon SUE ELLERY: A range of amendments go to the same issue. The honourable member is quite right: this is the first time that they appear, but I would like to have the debate only once. I do not want to have the debate further on and then have to come back and deal with a clause that has been deferred. If the member agrees, I think that we are sophisticated enough to understand the crux of the issue with this first amendment, which, as the member said, is necessary if we accept the policy position that he is putting. But I want to have that debate only once. I would like to have it now, understanding that this is not where the member's policy begins and ends.

Hon MICHAEL MISCHIN: I will make one observation. The thrust of what Hon Nick Goiran is dealing with is to replace the parliamentary commissioner with the Corruption and Crime Commission, which is dealt with as a discrete body of clauses within the bill under part 3, "Monitoring", and other related bits. To the extent that the member's debate may involve the consideration of specific elements of that monitoring regime, he may have to go forward and refer to those clauses and question elements around the way they are structured and their effect in

order to fully develop his thesis that a different body ought to be doing it. I do not much mind how we go about it, but it needs to be understood that Hon Nick Goiran may be asking questions about, for example, how clause 27 might operate, how it ought to operate and why it ought to be given to another authority to carry out that function. He should not be constrained from doing that in order to develop his argument and point out the difficulties, as long as the minister is prepared to jump around, in a sense, throughout the bill in order to consider that amendment to the definition in clause 3. Otherwise, it seems that if the regime is changed, the rest of the amendments can be dealt with arguably en bloc to reflect that, but how we do that is up to the minister.

Hon SUE ELLERY: I will seek some clarification. If the member is seeking to defer his amendment, I do not mind doing that. We have a substantive argument about the policy position elsewhere in the act. The member is not seeking to defer the clause, but I think that he would have to.

Hon Nick Goiran: I think you would have to.

Hon SUE ELLERY: That is what I do not want to do. Can we ask the Chair for some leeway to canvass all the issues captured in the CCC versus Ombudsman debate? I am happy to have that debate now.

The DEPUTY CHAIR (Hon Martin Aldridge): I will help to assist progress of this clause. We have dealt with this issue before in other bills that have related amendments right through the supplementary notice paper and the bill. If it is the will of the chamber and there is no objection, I can provide latitude from the Chair to debate the substantive matter at clause 3, which effectively inserts a definition of the CCC, and then whether that amendment succeeds or fails will determine the outcome of the further amendments on the supplementary notice paper.

Hon NICK GOIRAN: I am entirely relaxed about that process and I thank members for their contributions on the way forward. Before we get to that issue and debate whether the oversight should be provided by the CCC or the Ombudsman, I have some questions in any event about some of the definitions found in clause 3. My first question is: under the definition of "convicted offender", why is the provision at paragraph (a)(iv) needed in light of paragraph (a)(ii)?

Hon SUE ELLERY: I am advised that capturing commonwealth offences under subparagraph (iv) ensures that for certain offences where there is no state equivalent, an offender is eligible to be served with an unlawful consorting notice.

Hon NICK GOIRAN: I would agree with the minister, except that clause 4 of the bill defines "child sex offence", and the minister can see that that definition includes schedule 1. If the minister turns to schedule 1 of the bill, in particular clause 5, it seems to capture exactly those provisions. Again, it is not apparent why the definition of "convicted offender" needs the provision at paragraph (a)(iv), in light of paragraph (a)(ii), which is read as clause 4 of the bill and, with respect to this issue in particular, schedule 1, clause 5.

Hon SUE ELLERY: It is intended to capture the broadest range of offences and to ensure the greatest likelihood of success of a conviction. It will ensure that no-one slips through the gaps, if you like. If we start with the provisions set out in clause 3, the definitions clause, "convicted offender" means a person against whom a conviction has been recorded for an offence against a law of the commonwealth that if committed in the state would constitute a child sex offence. It is committed somewhere else, but if it had been committed here, it would be considered a child sex offence. If the member looks at clause 4, which the member took us to, and then to schedule 1, he will see that clause 5 contains a list of provisions and that paragraph (c) states —

> Division 474 Subdivision D — Offences relating to use of carriage service for child abuse material;

It may refer to the possession of such material, for example. A state provision captures that. If the prosecutor had a choice of using either the state or commonwealth provisions, there is a view that arguably they are more likely to be successful if they rely on the commonwealth provisions because it goes to the use of a carriage service. The policy position, if you like, is which scope of provisions give us the greatest capacity to capture someone who has committed one of these crimes. The member is right in a sense if his proposition was that there may well be areas of overlap, because there may be. It might be arguable that the matter could be pursued under either a state or commonwealth provision, but the prosecutor might decide that they have a greater likelihood of success if they use the commonwealth provision. In some areas that overlap, if you like—to the extent that there may be some on the margins—may be arguable, but we read them altogether in the interest of capturing the greatest number of offenders of this kind of offence. It is not the case that it is one of those elements. It is not the case that the one in the definitions clause or the one in clause 4 and schedule 1 is redundant; rather, I am advised that it is a deliberate decision to give us the broadest capacity.

Hon NICK GOIRAN: Under clause 5 of schedule 1, the four commonwealth offences to which the minister referred all meet the definition of a "child sex offence". Clause 3, defines a "convicted offender" as a person against whom a conviction has been recorded for one or more offences, including a child sex offence. Those commonwealth

provisions are already captured by the words "a child sex offence". It seems entirely redundant to have at subparagraph (iv) —

> an offence against a law of the Commonwealth that, if committed in this State, would constitute a child sex offence;

We are saying exactly the same thing twice, but the first one is broader. We already have this huge umbrella term called a child sex offence. How do we define that umbrella term? We would look at clause 4 of the bill and, in part, at schedule 1. Everything that is captured by paragraph (a)(iv), "an offence against the commonwealth that, if committed in this State, would constitute a child sex offence", must surely be in clause 5 of schedule 1. If that is not the case, schedule 1 is incomplete and we need to add other commonwealth offences.

Hon SUE ELLERY: I am advised that the position put by the member is arguable. One may be redundant. It is a risk that I am not prepared to take at this point. I am the representative minister. I am not going to agree that we should take out one of the provisions because it is redundant. I would rather err on the side of it being overkill on this matter, frankly; I am okay with that. Additionally, I am advised that one of the frustrations experienced when the commonwealth changes its legislation is that we have to play catch-up. The provisions in subparagraph (iv) of the definition of "convicted offender" will capture that. The original point that the honourable member made may well be right, but I think we are safer if we try not to reduce the net.

Hon NICK GOIRAN: I move to the definition of "family member" in clause 3. It is inextricably linked with what is contained in clause 5. Why is the definition of "family member" in this bill different from the definition of "family member" that the government wants us to agree to in the Children and Community Services Amendment Bill 2019?

Hon SUE ELLERY: The honourable member asked why this definition is different from that in another bill that is on the list of bills for us to deal with. By coincidence, I am the representative minister for that bill as well. However, I do not have the advisers with me —

Hon Nick Goiran: You are an expert on both bills.

Hon SUE ELLERY: Yes, one would think.

I do not have the advisers here for that bill and I do not have the opportunity to go away and undertake a comparison for the member. I have been provided advice about why we have changed the definition in this bill, which goes to the recognition. I addressed some of those issues in my second reading reply around recognising a broader Aboriginal cultural kinship notion. I can provide an answer about that. As I understood the member's question, it was why has the government taken a different policy position in respect of the definition of "family" in both those bills. I am sorry; I am not in a position to give an answer.

Hon NICK GOIRAN: I know that the minister is not enthusiastic about the idea of deferring clause 3 to get that advice. The minister mentioned that she has not had an opportunity to do a reconciliation of the two bills, but I am pleased to indicate that I have. There is a significant difference. What happens in both these policy positions, as the minister describes them, under the Criminal Law (Unlawful Consorting) Bill 2020 and the Children and Community Services Amendment Bill 2019 is that we separate our definitions specific to people who are, if you like, not Aboriginal or Torres Strait Islander and then deal separately with the situation with respect to Aboriginal and Torres Strait Islanders.

I will deal with the non-Aboriginal or Torres Strait Islander situation first. Clause 5(1) of the bill before us sets out the different categories of persons or classes of persons that would be described as a "family member". In the Children and Community Services Amendment Bill, this is found at clause 4(2)(a). There are some obvious differences that will interest the minister. Firstly, in clause 5(1)(a) of the bill before us, there is reference to "a spouse or de facto partner of the person". That is identical to the situation in the Children and Community Services Amendment Bill 2019. However, at clause 5(1)(c) of this bill there is reference to "a parent or step-parent". Although those two categories have been captured in the Children and Community Services Amendment Bill 2019, what has not been captured in this bill is the concept of "other ancestor".

By way of explanation, the Children and Community Services Amendment Bill 2019 refers to "parent, grandparent or other ancestor". In the bill before us, there is reference to a parent and a grandparent, but there is no reference to "other ancestor". What "other ancestor" might that refer to? The first obvious example is a great-grandparent. That said, there is reference in the Children and Community Services Amendment Bill 2019 to a step-parent, which is also captured in the bill before us; there is reference to a sibling, which is also captured in the bill before us; but in the Children and Community Services Amendment Bill 2019 there is reference to "an uncle or aunt", but there is no reference to that in the bill before us. There is also reference to a cousin, but there is no reference to that in the bill before us. That deals with the situation of non-Aboriginal families.

When we turn to Aboriginal families, there is an interesting difference. The definition of "family" at clause 4(2) of the Children and Community Services Amendment Bill states —

> (b) for an Aboriginal child — each person regarded under the customary law or tradition of the child's community as the equivalent of a person mentioned in paragraph (a) …

Paragraph (a) has those groups that I mentioned earlier.

Clause 5(2) of the bill before us states —

> … a person is a ***family member*** of another person who is an Aboriginal person or a Torres Strait Islander … if, under the customary law and culture of the Indigenous person's community, the person is regarded as a member of the extended family or kinship group of the Indigenous person.

It seems to me that the definition in the Children and Community Services Amendment Bill 2019 in respect of Aboriginal families is in fact narrower than what is in the Criminal Law (Unlawful Consorting) Bill. If anything, I would have thought it would be the other way around. How it relates in the other bill is with regard to consultancy and the placement of children; this bill is referring to whether people effectively have an excuse to consort, notwithstanding the fact that they have been convicted of some serious crimes.

After all that, I realise that the minister has indicated she is not in a position to assist us in this regard, but I express my concern that there are some obvious material differences between the unlawful consorting bill and the very next bill that the government would like us to pass, the Children and Community Services Amendment Bill 2019. To assist the efficient passage of this bill, I am going to assume that there is probably nothing further the minister can add to that issue, so I will not seek a response. The point has been made and I would encourage the government to take a look at that. If there is an opportunity to move a more appropriate definition of "family member", I invite the government to do so.

Hon Sue Ellery: I am anticipating a question in the next bill along similar lines, so I will make sure I am better informed.

Hon NICK GOIRAN: It is fair enough; the minister is right to take that as a question on notice for the next bill. My concern is that if there is a more restrictive "family member" definition in the other bill, we would want to apply it in this bill, because here we are talking about people being able to consort. We are far more concerned about the types of activities people would be getting up to under the Criminal Law (Unlawful Consorting) Bill than under the Children and Community Services Amendment Bill, which is about consulting with family members about the placement of a child.

That said, I move to the next line of inquiry. I refer to the definition of "consort" found on page 2 of the bill, which states —

> ***consort***, with another person —
>
> (a) means —
>
> (i) to seek, or to accept, the company of the other person; or
>
> (ii) to be in the company of the other person; or
>
> (iii) to communicate directly or indirectly with the other person by any means …

It goes on to refer to further matters. My question relates to the second of those three categories. If a convicted offender has received a notice, they then know the name of the people they are not supposed to be consorting with. It is quite right, then, that they should not be seeking or accepting the company of another person. It is also quite appropriate that they should not communicate directly or indirectly with the other person. My question relates to being "in the company of the other person". Sometimes we do not have any choice about the company that we have to keep. I am concerned that the definition of "consort" at clause 3(a)(ii) of this bill might be, regrettably, too onerous, albeit I have very little sympathy for any of these convicted offenders. Nevertheless, if they have served their time, they are entitled to the large majority of their ordinary freedoms and liberties. It seems potentially unreasonable for them to be prosecuted because they happen to be in the company of another person, albeit they did not seek it and they did not accept it; in fact, they might even have said to the other person, "Get away from me. I don't want to be anywhere near you. I don't seek your company. I don't accept your company. I am regrettably communicating directly with you at the moment to tell you to go away." If so, they could be caught by this definition. Was that issue considered during consultation on this bill?

Hon SUE ELLERY: The example I have been given that might assist the member is of two people attending a funeral at the same venue. That would not necessarily fulfil the definition of "consort", even though at face value, if they are in the company of another person, one might think that that is the case. In the case of Johanson v Dixon, the court established —

> … "consorts" means "associates" or "keeps company" and it denotes some seeking or acceptance of the association on the part of the defendant …

That need not to occur for any unlawful intention or criminal purpose. The scope of the expression "in company", as provided within the term "consort" requires more than just the mere physical presence of two persons. There must be both physical presence and a common purpose. It is an expectation that if two convicted offenders do not want to risk being charged with unlawful consorting, they reject each other's company, refuse to be in proximity of one another and do not communicate in any way. The police officer will then exercise the judgement they need to in determining whether to pursue the matter.

Hon NICK GOIRAN: To be clear, in order for the prosecution to prove "consort" under clause 3(a)(ii), they would need to be able to demonstrate clause 3(a)(i)?

Hon SUE ELLERY: That is correct, with common purpose.

Hon MICHAEL MISCHIN: Now I have been inspired to consider this a little more. The definition the minister quoted from Johanson v Dixon referred to someone who "keeps company" with another person. That suggests someone finding themselves in the company of another person and maintaining that company. Under clause 3(a)(ii) just "to be in the company of the other person" renders one a consorter, whether it is advertent or not. I might find myself sitting down next to someone in a theatre because it is the last seat available and finding out that it is someone that I am not supposed to be with.

Hon Sue Ellery: Do you reckon they go to the theatre?

Hon MICHAEL MISCHIN: Not the sort of theatres I go to, I hope. I am using an argument. It might be a plane or whatever it happens to be. Someone might not even realise that they are about to be put into the company of someone that they are not supposed to be consorting with until they find themselves there. For them to be in that company and to not disassociate themselves is one thing that may render them to be keeping company, but that is a different nuance from being in company. That is the first issue—how closely this definition has been based on that particular judgement. The breadth of some of these exemptions and defences tends to render the purpose of the legislation hopeless. We will get to those in a moment, but perhaps the minister can clarify whether there is a distinction to be drawn between what was said in the case of Johanson v Dixon and what is being prescribed in this legislation.

Hon SUE ELLERY: The scope of the expression "in company" in Johanson v Dixon, as provided within the term "consort", requires more than the physical presence. It is not just that they accidentally sit next to each other at the theatre. There must be both physical presence and a common purpose. That has been, if you like, inserted into the definition of "consort" in the bill before us. "Consort" with another person means to seek or to accept the company of the other person, or to be in the company of the other person—bearing in mind that we have determined that there needs to be a common purpose—or to communicate directly or indirectly with the other person by any means, as set out in clause 3(a)(iii). The honourable member is still looking puzzled, so I will see if I can find a better way to explain it to him.

Hon MICHAEL MISCHIN: The definition of "consort" with another person says nothing about there being a common purpose. It seems to deal with activities, and a certain state of mind in some cases. It refers to someone seeking the company—that is, the physical presence, presumably—and companionship of another person, accepting that company, or just being in the company of the other person. I suppose the question is: what does it mean to be in the company of another person? The minister says it is more than just the physical presence of another person and that it requires some common purpose and state of mind. I do not understand what that state of mind might have to be. To give an example, is Hon Adele Farina as Deputy Chair "in company" with the clerks, in some fashion? I suppose she is, but what state of mind does she have to have in order to be "in company" with them, rather than happening to be there in their physical presence?

Hon SUE ELLERY: The best advice I can get about the thinking of the drafters is that clause 3(a)(i) is about initiating company, so seeking or accepting an invitation. Clause 3(a)(ii) is about being in the company of the other person. That is the best explanation I am able to provide the honourable member, and I have probably just tested the limits of my relationship with the advisers at the table trying to get the member a better explanation. That is the best advice I am able to provide.

Hon MICHAEL MISCHIN: The ordinary meaning of being in company with another person or the fact of being with another person or associating with another person suggests a physical presence at the very least and some awareness of the presence of the other person. Clause 3(a)(i) suggests a person would also have the state of mind of seeking out that other person's physical presence—we will leave it to the physical for the moment rather than communication—or being aware of that other person's physical presence and accepting it. Clause 3(a)(ii) goes a little bit further and says even to be in a person's physical presence and being aware of it would be the threshold. Perhaps the minister's advisers can indicate whether I am on the wrong track or reading this too broadly, but I do not see any further element of common purpose in it because, as I understand it, nothing in the offence-creating

provision, clause 3(a)(iii), requires the prosecution to prove that the consorting occurred for any particular purpose, let alone a common purpose. This is a very broad provision indeed, even if we limit it in that respect.

The minister mentioned the decision of Johanson v Dixon, which had the wording "keeping company", which suggests knowing of the physical presence and remaining in it rather than someone disassociating themselves. I can understand why that would be undesirable, but just to be in the physical presence of someone else, being aware of it and of it being fleeting or inadvertent seems to be what the definition embraces. If that is the way the government wants it, so be it, but I would not like it thought that there was any question of a common purpose in that unless the legislation said so and identified that state of mind.

Hon NICK GOIRAN: Now is probably a timely opportunity for us to progress the amendment to clause 3 standing in my name. Before I move it and provide some explanation to members, I indicate that if this amendment were to pass, I have been provided with a useful motion that could be moved without notice to enable the Committee of the Whole House to proceed with all the remaining amendments in my name on the supplementary notice paper to be dealt with as one question. But far be it for me to put the cart before the horse. First of all, we need to see what everybody thinks about this issue of oversight. To facilitate that, I move —

> Page 2, after line 12 — To insert —
>
> > ***CCC*** means the Corruption and Crime Commission established under the *Corruption, Crime and Misconduct Act 2003* section 8(1);

I do not propose to take too much time on this amendment, in part because I spent some time explaining the necessity for it in my second reading contribution. I am conscious of the fact that members are away on urgent parliamentary business from time to time and may not have had the opportunity to hear me make those remarks earlier this afternoon, so I will provide a brief summary now. I also indicate to those members who were away from the chamber on urgent parliamentary business that the Leader of the House also outlined the government's position on this matter in her second reading reply, which is that the government maintains the existing regime. We have a choice here. Either the oversight is provided by the Ombudsman or it is provided by the Corruption and Crime Commission. They are the two choices. It is a binary decision; it is one or the other. The extent that the government and opposition are of one mind is that there should be some form of oversight; there is no question about that. These are extraordinary measures. These laws will allow Western Australian police to decide whether a person can associate with, communicate with or be in the company of another person. They are extraordinary powers that we are entrusting Western Australian police with.

Why are we taking this extreme measure? It is because, unfortunately, some people in Western Australia consistently go out of their way to organise their criminal activities, notwithstanding the fact that they ought to have already learnt their lesson when they spent some time incarcerated for their original crimes. They have learnt nothing and they continue to thumb their noses at the law of the land, so these types of extreme laws are necessary, and we are going to give these extreme powers to Western Australian police. That is the policy position that members agreed to in the second reading debate. The question is: what type of oversight should be provided for these extreme powers to WA police? Some members may say that we do not need to worry about that because we just trust the police. I draw to members' attention that the government told us in the lead-in to the debate on this matter that in 2016 the New South Wales Ombudsman prepared a report that identified that misuse of these powers by police is an issue. Although the vast majority of Western Australian police officers can be trusted to use these types of laws, regrettably, the lived experience in other jurisdictions is that sometimes police misuse these powers, so somebody needs to police the police. The question members need to ask themselves is: should that be the Ombudsman, who deals with administrative matters, or should it be the CCC, whose very reason for existing is corruption in the police force? The whole reason the Corruption and Crime Commission exists is the Kennedy royal commission into corruption in the police force. That is why we have a CCC.

The Corruption and Crime Commission has responsibility for all the public sector, with special emphasis on serious misconduct, but it has complete jurisdiction over the police force. The CCC can be engaged to deal with a public servant who is not in the police force only if there has been serious misconduct. If it is minor misconduct, it is dealt with by the Public Sector Commissioner, but not if it is by a police officer. At the very hint of any wrongdoing by a police officer, the Corruption and Crime Commission comes down on them, as it should; that is its role. My question to members is: if we are going to give these types of extraordinary powers to the police, who would be the best fit—the Ombudsman or the CCC, which specialises in this area?

I should add for the benefit of members that the CCC already oversees the police's use of extraordinary powers, because back in 2012, this chamber made a similar decision not to get the Ombudsman to oversee the covert powers regime, but to get the CCC to do it. This type of thing is already part of the existing oversight and monitoring role of the CCC. It has the personnel and the systems in place; it is routine business for the CCC. Whether it is doing a good job of that is a different question, and that is why we have a Joint Standing Committee on the Corruption and

Crime Commission—to make sure that the CCC is doing the job it is supposed to be doing. Interestingly, we do not have a special committee dedicated in the same fashion for the Ombudsman, but we do for the CCC, and that gives me extra confidence that this is the right model. It seems to be working well for the covert powers, so I see no reason why it could not also work extremely well for these consorting laws.

The final point I will make is that the CCC not only oversees the police's misconduct and use of extraordinary powers, but also has the opportunity to use some of the extraordinary powers under the CCC legislation. There is a ready-made system of oversight and monitoring in place, with additional checks and balances in the form of the joint standing committee on the CCC and the Parliamentary Inspector of the Corruption and Crime Commission. It is, with respect, a far more robust system than what would exist if we were to leave it simply to the Ombudsman.

I do not know that there is much more I can add. I simply seek the support of members in this chamber to do the consistent thing and do what we agreed in 2012 in accordance with a submission made by the Joint Standing Committee on the Corruption and Crime Commission to the Standing Committee on Uniform Legislation and Statutes Review, chaired by Hon Adele Farina at the time. I ask us to apply a consistent approach to this very serious and significant matter.

Hon SUE ELLERY: I set out in my second reading reply the reasons why the government will not support this amendment, but I will briefly go over those. As we know, the chamber has agreed that we will have a broad-ranging debate about the function of oversight and whether it should be the CCC or the Ombudsman on an amendment that simply seeks to insert a definition of the CCC. This is the first of a series of amendments, but we have agreed informally that we will have the debate all in one.

During the drafting of the bill, the government considered whether it should be the CCC or the Parliamentary Commissioner for Administrative Investigations and was of the view that the parliamentary commissioner is the more appropriate oversight body. Some of the particular monitoring functions that will be exercised by the parliamentary commissioner are set out in part 3 of the bill. The primary function of the parliamentary commissioner will be to scrutinise the powers conferred on police under the unlawful consorting scheme. In doing this, the parliamentary commissioner must scrutinise police records, may make recommendations to the Commissioner of Police to revoke or vary consorting notices, and must prepare an annual report for the minister. The annual report may include any observations that the parliamentary commissioner considers appropriate to make about the operation of the act and must include a review of the impact of the scheme on any particular group. The annual reporting function will ensure rigorous consideration of whether the policy objectives of the scheme are being met, the exercise of powers and the administrative and procedural processes employed under the act.

As outlined in part 3, the parliamentary commissioner will have a broad scrutiny, oversight and reporting role. The monitoring role comes in the context of a proposed consorting regime that will be transparent and contain a number of statutory safeguards and checks and balances. This monitoring role can be compared with the role that the parliamentary commissioner already has under the Telecommunications (Interception and Access) Western Australia Act. Under that regime, the parliamentary commissioner has a monitoring role to examine compliance with telecommunications interception legislation through inspections and the preparation of reports. The record-keeping obligations under the telecommunications act ensure that the parliamentary commissioner is able to effectively scrutinise the operations of that act, and similarly clause 26 of the bill before us now seeks to provide for explicit record-keeping obligations on the Commissioner of Police to ensure that the information in the register is provided to the parliamentary commissioner for examination. The parliamentary commissioner also has a similar function under the Criminal Organisations Control Act 2012.

The powers to be conferred on police under the unlawful consorting scheme can be distinguished from the covert powers conferred on police under the Criminal Investigation (Cover Powers) Act. The processes under the bill will be transparent and subject to review and fit within the usual operational functions of police and criminal procedure generally.

Although the monitoring role of the parliamentary commissioner will involve the review of police powers, the purpose of the scrutiny function is far broader and will include annual reporting on policy, administrative and procedural matters associated with the operation of the regime. The parliamentary commissioner has an obligation under section 28 of the Corruption, Crime and Misconduct Act to report to the Corruption and Crime Commission any matter that the commissioner suspects on reasonable grounds concerns, or may concern, serious misconduct, which includes police misconduct. This ensures that any information that raises a concern about misconduct revealed by the exercise of the parliamentary commissioner's monitoring functions will be reported to the CCC.

Considering all those issues, the government formed the view that the parliamentary commissioner is the more appropriate body for the particular compliance role outlined in the bill. For those reasons, I ask that honourable members oppose the amendment.

Hon ALISON XAMON: I rise to indicate that the Greens will not support this amendment, but I want to put on the record why that is the case. The one thing that I think all members in this place are in agreement on is the need

to ensure that we have appropriate oversight of the way that this legislation will be enacted. I think there is a very big concern to ensure that that occurs. Under this bill, the Ombudsman is being given the duty and the necessary powers to monitor. I note the member's comments that whether we replace the Ombudsman with the CCC has been presented as a binary choice.

The CCC should be very carefully monitoring the intersection between the police and organised criminals anyway, because it is a corruption risk and we know that. That is already within the scope of what the Corruption and Crime Commission is able to do. It is not only able to do that, but should be doing that, because it is, effectively, the CCC's role. As Hon Nick Goiran has pointed out, the CCC should be prioritising looking at police issues because, as was laid out in the last report tabled by the Joint Standing Committee on the Corruption and Crime Commission, if the CCC is not oversighting the police, who can? The CCC has an act and powers that equip it to do that. If Hon Nick Goiran had changed the amendment to specify requiring the CCC as well as the Ombudsman to monitor for the purpose of addressing the corruption risk, I would not necessarily have an objection, but that is not the amendment that is in front of us today.

The monitoring envisaged by this bill is not aimed at preventing crime and corruption. It is, or at least should be, about the quality of the administration. As such, that is the proper role of the Ombudsman. I again note that in other jurisdictions, it is the Ombudsman who is used for scrutiny. I think it would be a mistake to simply replace the Ombudsman with the CCC. The CCC should be paying very close attention to this anyway. If the amendment had said "including the CCC", I would have had a different view, but, as presented, the Greens will not be supporting this amendment.

Hon NICK GOIRAN: I want to make one final observation. The remarks made by the government are very similar to the explanation that was provided in 2012; that is, the Ombudsman in Western Australia has oversight of telecommunications interception powers. That is true, but I have had the opportunity over the years to do a little digging into that oversight and monitoring role. As has been explained to me previously, it is very much what is described as a paper-driven tick and flick process. For the telecommunications interception issue, it checks whether all the paperwork is in order—the warrants and the like. Have all these things been done? The checklist is gone through and the boxes ticked. That is the oversight role of the Ombudsman. I am saying that for extreme powers—extraordinary powers like the covert powers legislation we dealt with earlier, or this, which will be a notice given by police to a Western Australian saying that they must not communicate or associate with a particular person—it is very different from checking whether the paperwork is in order for an interception. They are two completely different things. It has been a longstanding practice for the Ombudsman to continue to have that tick and flick role for interceptions. This is far more serious, hence I simply ask members to consider whether they want the generalist or the specialist to be the overseer. It seems abundantly clear to me that the specialist is the CCC and that that organisation should provide the monitoring of these important laws.

Division

Amendment put and a division taken, the Deputy Chair (Hon Adele Farina) casting her vote with the noes, with the following result —

Ayes (15)

Hon Jacqui Boydell	Hon Nick Goiran	Hon Simon O'Brien	Hon Dr Steve Thomas
Hon Jim Chown	Hon Colin Holt	Hon Robin Scott	Hon Colin Tincknell
Hon Peter Collier	Hon Rick Mazza	Hon Tjorn Sibma	Hon Ken Baston *(Teller)*
Hon Colin de Grussa	Hon Michael Mischin	Hon Charles Smith	

Noes (15)

Hon Robin Chapple	Hon Sue Ellery	Hon Alannah MacTiernan	Hon Darren West
Hon Tim Clifford	Hon Diane Evers	Hon Martin Pritchard	Hon Alison Xamon
Hon Alanna Clohesy	Hon Adele Farina	Hon Samantha Rowe	Hon Pierre Yang *(Teller)*
Hon Stephen Dawson	Hon Laurie Graham	Hon Dr Sally Talbot	

Pairs

Hon Martin Aldridge	Hon Kyle McGinn
Hon Donna Faragher	Hon Matthew Swinbourn

Amendment thus negatived.

The DEPUTY CHAIR: Can I get clarification of whether Hon Nick Goiran is intending to move the other amendment standing in his name?

Hon NICK GOIRAN: By way of explanation to members, the next amendment that stands in my name at 5/3 is to delete three lines found on page 4, being lines 3 to 5. That is the definition of "Parliamentary Commissioner". In light of the ultra-narrow loss of the previous amendment, it would be entirely appropriate for the definition of "Parliamentary Commissioner" to remain in the bill because, as I outlined earlier, I think there is furious agreement amongst members that there must be an oversight regime of some sort. I indicate for the ease of the passage of the bill that there are no further amendments in my name on issue 4 of supplementary notice paper 161 that I propose to move, because they are all contingent on the argument that has just been had.

The DEPUTY CHAIR: I thank the honourable member for that explanation.

Clause put and passed.

Clause 4 put and passed.

Clause 5: Meaning of family member —

Hon MICHAEL MISCHIN: I picked up on the issue raised by Hon Nick Goiran about the very broad definition of "family member" for the purposes of Indigenous persons, which is not limited to the equivalents of those relationships identified in clause 5(1) that may be regarded by a person as falling into that category of relationship, but also includes anyone regarded as a member of the extended family or kinship group of the Indigenous person. For instance, criminal A has committed crimes of such gravity and has such a reputation that a police officer suspects on reasonable grounds they are likely to be in the company of, or communicate with, another criminal, and is such a risk to make it appropriate that they be issued with a notice to disrupt or have their capacity to engage in conduct constituting an indictable offence restricted. That is the overriding purpose of the bill—public safety and prevention of criminal activity. However, how is a police officer supposed to determine whether a person regards someone as a member of their extended family? What does "extended family" mean in that context?

Hon SUE ELLERY: In considering the issuing of a notice, the police may well rely on the intelligence available to them. They may take family, including extended family, into account, but they may not have that information. However, the fact that they do not know will be no bar to them issuing the notice. The person to whom the notice has been issued will have a defence if they can prove that they meet the family connection criteria and that the consorting occurred in reasonable circumstances. Those two elements will need to be demonstrated by the person. That is how the matter would be dealt with. The police are not going to be put in a position whereby they are prevented from issuing a notice because they are not in a position to determine absolutely the kinship or cultural connection. They may well still issue the notice, and if the person takes a view that that was inappropriate on these grounds, they could use that as a defence and would need to argue and demonstrate the two points that I have made.

Hon MICHAEL MISCHIN: Why is this limited to Aboriginal people and Torres Strait Islanders?

Hon SUE ELLERY: I canvassed this in my reply to the second reading debate. This clearly, unashamedly, addresses the fact that Indigenous people are over-represented in our jails, and as a literal consequence of that, there are disproportionately more Aboriginal people with convictions. It is more likely that they are going to be captured by the consorting provisions just as a consequence of that. This is a deliberate decision, based on the work that was done in New South Wales as well, to take steps to recognise that, historically, our justice system has disproportionately disadvantaged Aboriginal people. The balance is right and recognises that if two people have a conviction and do not meet those provisions that need to be demonstrated, they will be prosecuted and held to account under the law. It recognises a historical injustice.

Hon MICHAEL MISCHIN: So whether someone is an acceptable risk of serious criminal conduct depends on historical injustices and a desire to keep Aboriginal people out of the criminal justice system once they have already been it and been convicted of serious enough offences that, in any other circumstance, would warrant an anti-consorting notice. That seems like an odd way of trying to achieve a worthy end. I would have thought that we would try to stop people from engaging in criminal conduct rather than make exceptions for them on the basis of ethnicity, particularly if we have regard to other disadvantaged groups in the community who may be disproportionately represented in our criminal justice system, such as immigrants of various ethnic backgrounds. Why are they not included? Why is their cultural customary law not taken into account in order to keep them out of the toils of the law and to recognise their potential exposure to the criminal justice system? Why is it limited to Aboriginal people and Torres Strait Islanders?

Hon SUE ELLERY: I do not want to repeat myself. It is not possible for me to give the member all the reasons and measures by which on every indicator, including mortality rates and a range of other matters, Indigenous Australians are the most disadvantaged group in Western Australia and our nation. People the world over are shocked by the imprisonment rate of Indigenous people in Western Australia. I do not want to go through all those measures other than to say that this is a deliberate measure to address two things—that is, historical consequences and the unintended consequence that might occur because people in this group that has been so disadvantaged and disproportionately represented in the justice system in Western Australia are more likely to consort with people who have a conviction. Having said that, there is always a balance in these matters and it is still the case that if a person has a conviction,

the police can and will act to issue a notice. If that notice needs to be rectified because the kinship relationship was not the reason for the consorting and was not deemed reasonable in the circumstances, or if any evidentiary material can be provided to go to the facts, then the best decision would be that the consorting notice that was issued remain in place. That will happen. If that is what needs to happen, that will happen. This takes into account and provides a defence that recognises that the broader cultural kinship and family relationships that exist in Aboriginal families do not necessarily exist for the majority of other Western Australian families.

Hon MICHAEL MISCHIN: I agree that the rates of Aboriginal incarceration are high and that that is a bad thing. I would have thought that the idea would be to discourage the commission of offences that would ordinarily warrant or demand imprisonment rather than to take these relationships into account as a factor to relieve people of the consequences of their actions and put the community at risk. The government has a different approach that is solicitous of ethnicity. That is the way the government wants to deal with it.

As a matter of interest, how many of the 620 warnings issued by the police against sex offenders involve people who are Aboriginal or Torres Strait Islander?

Hon SUE ELLERY: I do not have that information available.

Hon MICHAEL MISCHIN: The government is putting ethnicity as a separate case that needs special treatment, but the minister cannot tell us how many of the 620 warnings not to consort in the case of sexual offences involving children and the like fall within this particular demographic that the government is trying to protect. I have nothing further on that.

Clause put and passed.

Clause 6: Objects of Act —

Hon ALISON XAMON: I move —

Page 6, after line 22 — To insert —

(2) Without derogating from subsection (1), it is not the intention of Parliament that the powers in this Act be used in a manner that would diminish the freedom of persons in this State to participate in advocacy, protest or dissent that is not intended —

(a) to cause a person's death;

(b) to cause serious physical harm to a person;

(c) to endanger a person's life, other than the life of the person participating in the advocacy, protest or dissent; or

(d) to create a serious risk to the health or safety of the public.

As I indicated in my second reading contribution, there is acknowledgement that the bill explicitly protects one form of communication in governmental and political matters because it includes the defence at clause 9 that relates to the context of industrial action by members of registered unions. I am concerned that there is no defence or exclusion in the bill for other forms of advocacy, protest and dissent. I point out that ordinarily these actions, as well as industrial action, are expressly protected by WA legislation and to not have that protection in this bill is a substantial departure from what we consider to be usual.

A number of bills include this exception. The Criminal Organisations Control Act 2012 has a double protection because it specifically states that the powers in the act cannot be used in a manner that diminishes the freedom of persons to participate in advocacy, protest or dissent. It also refers to the importance of being able to continue to participate in lawful political protest and lawful industrial action. The out-of-control gathering provisions in the Criminal Code have an exclusion for gatherings that are primarily for the purposes of political advocacy, protest or industrial action.

Committee interrupted, pursuant to standing orders.

[Continued on page 7885.]

Sitting suspended from 4.15 to 4.30 pm