(2) Given that the Child Death Review Committee clearly showed that, of the cases referred to it, 90 per cent of the children - that is, nine out of 10 children - who died had a parent/parents with a history of using substances and/or drugs, what are the department's criteria for a monitoring regime?

Hon KATE DOUST replied:

I thank the honourable member for some notice of this question. The Minister for Community Development has provided the following response -

(1) A monitoring regime outlines certain requirements to be met within a specified period and maintained over a specified time. This generally refers as a minimum to a requirement for urinalysis. The person may be required to provide a sample to a pathology centre on a regular basis; for example, every third day or as requested. If it is "as requested", on any given day the caseworker may ring and require the person to attend the clinic and provide a sample for analysis. The clinic provides a breakdown of all the substances detected in the urine. In addition, clients are usually required to attend specialist counselling on their substance use. These counsellors are able to assess on a non-clinical level whether persons present as substance affected. In a given situation, the requirement for urinalysis and substance-use counselling may be set - recommended - by the Children's Court or required as part of a criminal court order.

(2) Following an assessment and when decisions need to be made about where a child should reside, parents may be advised of the minimum requirements on them either to prevent a child being removed from their care or for consideration of a child being returned to their care. A monitoring regime may be required to provide information about the drug use to assess the impact of this on the parents' capacity to provide a safe environment for the child. Regular assessment of the parents' capacity over time is then made.

PAPERS TABLED

Questions on Notice

Papers relating to answers to questions on notice were tabled by **Hon Ljiljanna Ravlich (Minister for Education and Training)**, **Hon Jon Ford (Minister for Local Government and Regional Development)**, **Hon Adele Farina (Parliamentary Secretary)** and **Hon Sue Ellery (Parliamentary Secretary)**.

TERRORISM (PREVENTATIVE DETENTION) BILL 2005

Second Reading

Resumed from an earlier stage of the sitting.

HON GIZ WATSON (North Metropolitan) [5.14 pm]: On behalf of the Greens (WA), I flag our intention to oppose this bill. This bill has been around for quite a while. It was first introduced in November 2005. For a matter that was considered urgent, it took a while to come to this place for debate. When I wrote my notes for the debate on this bill in February 2006, I made the note that United Nations Secretary General Kofi Annan had observed that liberties are being sacrificed in the name of security, weakening rather than strengthening common security. He said that internationally there was an increasing misuse of what he called the "T-word" - terrorism - to demonise opponents, throttle freedom of speech and the press and de-legitimise political grievances. He said that the collateral damage of the war against terrorism is to individual bodies; values, including the presumption of innocence; precious human rights; the rule of law; and the very fabric of democratic governance.

One of the fundamental safeguards against innocent people being wrongly detained is the requirement that the state can remove a person's liberty only if he or she is suspected of committing, or has been found by a court to have committed, a crime. That is why our Constitution allows courts to impose criminal detention on a person only after hearing reasons both for and against that detention in a trial. Despite those principles, the Labor state government has introduced this bill that will allow detention without charge for up to 14 days.

As we all know, the introduction of the bill is a result of an agreement struck by the state and territory Premiers and Chief Ministers at the meeting of the Council of Australian Governments on 27 September 2005. Furthermore, they agreed to enact these provisions specifically to get around any provisions in the commonwealth Constitution that may prevent the commonwealth from enacting such a provision or presumably having it struck down by the courts! In particular, the involvement of the judiciary as issuing authorities for preventative detention orders brings into question the constitutional separation of powers between the executive and the judiciary that prevents the executive from imposing sanctions without trial or convictions by the courts. Another constitutional impediment is the likelihood of contravention of the International Covenant on Civil and Political Rights, to which Australia is a signatory.

On 1 December last year, the government introduced this bill into the Legislative Assembly. The bill proposes powers including 14 days of preventative detention in circumstances related to preventing a terrorism act that is

expected to occur within 14 days or to preserving evidence no longer than 28 days after a terrorist act, as well as contact limitations for people detained under the legislation.

The Greens will oppose this bill and will also seek to move a number of amendments when the bill is debated in the committee stage. We will oppose the bill because preventative detention allows the detention of people when there is insufficient evidence to lay charges. That is a breach of recognised common law principles and international human rights obligations. The breaches include a breach of the right to liberty and a violation of the guarantee to be free from arbitrary detention under article 9 of the International Covenant on Civil and Political Rights. Other principles that will be breached by this legislation are the presumption of innocence and the separation of powers - punitive sanctions should be made by only the judiciary, not the executive. There is also insufficient right of access to a court for judicial review of the merits of a case, as is required by article 9.4 of the ICCPR. We also oppose the bill for a range of privacy reasons. The bill includes restrictions on contact with other people, with the exception of a lawyer; detailed lists of who can be contacted by the detainee; limitations on what the contact with a lawyer can be about; the monitoring of all contacts; and limitations on what can be disclosed.

One of the underlying philosophical arguments that we need this legislation is that the world has changed, a view that I believe is debatable. Terrorism and acts of unannounced violence have been with us for a very long time. I can perhaps accept the argument that some of the technology that we have today makes some of those actions more easily executed and harder to detect. However, there is nothing new about acts of horrific violence, whether they are carried out with state sanction or by organisations or individuals who do not have state sanction. There is nothing new about acts of terror.

Another argument that has been put in support of this legislation is that Australia is under an elevated level of threat. Members must be aware that that is not the case. I refer to a letter that was written by the Australian Capital Territory Human Rights Office to the Chief Minister of the ACT, Mr Jon Stanhope, about the ACT's legislation. Page 2 of the letter reads -

> Governments have a positive obligation to take measures necessary within their jurisdiction to protect individual lives against terrorist acts . . .

Nobody is disagreeing with that. That sentiment is article 6 of the International Covenant on Civil and Political Rights. The letter continues -

> However, I am not satisfied that existing laws are inadequate to provide this protection against the current and actual level of risk, which according to the National Counter-Terrorism Alert Level has continued to be 'medium' since 11 September 2001 . . .

Despite more recent terrorist acts that have been perpetrated against Australian citizens overseas, the alert level has not changed since September 2001. The letter continues -

> Both the preventative detention and control orders are based on the UK model, but these provisions were already in place when terrorist bombs were exploded in London in 2005 and do not appear to have been particularly effective. In practice the *Terrorism Act 2000* enabled 894 people to be arrested under a variety of provisions, but 496 were released without charge. I understand that some of our existing laws have not yet been necessary to use, for example ASIO detaining people for up to seven days who are not terrorist suspects for the purpose of questioning.

I attended an event not long ago at which a number of people spoke about the argument that we are living in different times and that people are developing a culture of fear or a fear response as a result of international events. One of the contributions that evening was made by Carmen Lawrence, who has looked in some detail at the elevated creation of fear as a political tool. She quoted some US research that was carried out post 9/11 that confirms that people are at greater risk of drowning in their baths than they are of being killed in a terrorist attack. I am not for a moment suggesting that there is anything funny or light-hearted about terrorist attacks or those who die in terrorist attacks. That is why I referred to Lebanon.

Hon Simon O'Brien: Or people drowning in their baths.

Hon GIZ WATSON: That is not funny either. People do not have a fear of drowning in their baths. People have developed what I argue is an unreasonable elevated fear about potential acts of terrorism. I acknowledge, of course, that Australians have lost their lives in terrorist attacks in Indonesia and other places that have been the target of terrorist activity. However, this legislation will do nothing to prevent those sorts of attacks from happening. In fact, if Australians face any risk, it will be when they are overseas and not in Australia. If the level of risk has changed, it is interesting that the national counterterrorism alert level has not.

As legislators we were not privy to the briefing provided at the Council of Australian Governments meeting. My understanding is that those who attended that meeting - it was decided at that very meeting to pass state and territory legislation that provides for the 14 days' detention - were briefed by representatives of the Office of

National Assessments and ASIO. I have asked to be given a copy of the information that was provided at that COAG meeting. As members of Parliament, we should be provided with the information that is supposedly driving the need for such powerful legislation. Needless to say, that information has not been provided to me - I am sure it would not be provided to any member of Parliament - and I am unable to judge the case of risk that was made to the Premiers and Chief Ministers, which resulted in their agreeing to similar legislation to override the commonwealth's constitutional problems and provide for 14 days' detention. I refer again to the comments made by the ACT Human Rights Office. The first page of its letter to Mr Stanhope reads -

> In all instances the central question is whether the means suggested are proportionate to the legitimate objective of protecting the Australian community from the risk of terrorism, which is difficult to assess without specific briefing on national security issues.

All members of this Parliament would find themselves in the same circumstances; namely, we are expected to accept the necessity for legislation such as this without having seen the information that deems it necessary. Legislation such as this is likely to impact on our civil liberties. I will quote some comments by Professor George Williams at the National Press Club of Australia in January 2003, when he referred to Robert Menzies introducing the National Security Act 1939 -

> Whatever may be the extent of the power that may be taken to govern, to direct and to control by regulation, there must be as little interference with individual rights as is consistent with concerted national effort . . . the greatest tragedy that could overcome a country would be for it to fight a successful war in defence of liberty and to lose its own liberty in the process.

Without wishing to overdramatise things, that is where we are heading with this type of legislation. He went on to say -

> Terrorism, like the communist threat before it, does not pose a conventional threat to our security, but one that is hard to pin down and equally difficult to meet.
>
> . . .
>
> National security is not an end in itself to be met at any cost, but should be pursued to the extent that it protects our democratic freedoms and ways of life.

He concluded by saying -

> The Government's response to September 11 has produced some of the most important and controversial legislation ever introduced into the federal Parliament. Unfortunately, insufficient regard has been given to basic Australian values such as the rule of law and our accepted democratic rights. Menzies got it wrong with his anti-communist legislation. So has the Government today with its ASIO Bill.

That was the context in which he was presenting to the National Press Club. He continues -

> It is unfortunate that Australia is contemplating a new law that exceeds even the stringent measures enacted in the United States. One reason for this is that we, unlike the United States, the United Kingdom and every other western nation, lack a Bill of Rights. We also lack the mechanisms, judicial or otherwise, for determining when rights and the community values they express have been unduly undermined by national security laws.
>
> The result is that in Australia the question 'how far should we go in enacting new anti-terrorism laws' is purely political. The power to override the freedoms we take for granted is dependent upon the goodwill and good sense of our politicians. This leaves us uniquely vulnerable to bad laws made in a haste at times of community fear and national grief. The danger is that at such times the contours of debate will match the populist pressures of political life. This is no longer regarded as acceptable in other like nations. It should not be here. If our rights and values are important, we should do more to protect them. If we do not, we may in the War against Terrorism do long term damage to the principles and values upon which our democracy depends.

Hon Simon O'Brien: Whom are you quoting?

Hon GIZ WATSON: Professor George Williams.

The second reading speech claims that the bill will place our state police in a position to prevent an act of terrorism. I contest that. We know that the legislation that we are dealing with today is supposedly based on United Kingdom legislation. I will talk a little more later about how it differs from the UK model, because it is not entirely similar. In fact, it goes considerably further. We know that anti-terrorism legislation and preventative detention legislation have been in place in the UK for a considerable time, and it did nothing to stop the bombings that occurred in London. In addition, there have been other examples in the UK that are equally

disturbing, such as the shooting of a suspected terrorist in the London Underground, who later, of course, was proved to be no terrorist at all. This is basically what I would call pre-emptive strike legislation.

I will talk about arbitrary detention, which is basically what we would argue we are about to enact if we pass this bill. It is worth going back a little to remind members how historic and valued the right to freedom of movement is. We can go back as far as the Magna Carta, of course, in 1215. I will reiterate what the Magna Carta states. It was written in Latin, but when translated it states, according to the notes that I have -

> No free man shall be seized or imprisoned . . . or outlawed or exiled except by the lawful judgment of his peers or by the law of the land.

Hon Simon O'Brien: So this is consistent with the Magna Carta.

Hon GIZ WATSON: No, it is not. It is inconsistent with the Magna Carta.

Hon Simon O'Brien: It is if it becomes the law of the land.

Hon GIZ WATSON: Yes, but the issue is also about the right to be tried by one's peers.

I will also quote from a letter provided to the Australian Capital Territory Chief Minister. As we know, the ACT Chief Minister took quite a strong stance in ensuring that the legislation that was passed through the ACT Parliament did at least contain more significant protections of civil liberties. In fact, the amendments that I will move in the committee stage are largely based on the ACT legislation. I argue that if the ACT could move within the Council of Australian Governments agreement to amend its legislation and still meet the terms of that COAG agreement, we can do the same in Western Australia. The correspondence is from Hilary Charlesworth, and she states -

> **a. The preventative detention order regime breaches the human rights to be free from arbitrary detention and to due process and cannot be said to be subject to an effective procedure of judicial review that provides adequate safeguards against violations of the human rights of the persons affected.**
>
> **b. The control order regime breaches the rights to be free from arbitrary detention, to a fair trial, to freedom of movement, to privacy and family life, and to the presumption of innocence.**

The Senate Legal and Constitutional Committee looked at these issues also. I will refer to some of the comments that were made to that committee. The Law Council of Australia made a submission to the committee when it inquired into the federal Anti-Terrorism Bill (No. 2), which, in essence, deals with the same matters. In its submission, the Law Council of Australia concluded -

> The Law Council of Australia urges the government to abandon proposals to introduce preventative detention orders and control orders. Persons not charged with or found guilty of a criminal offence should not be subjected by the State to imprisonment without trial or to restrictions on their liberty that impair their fundamental freedoms and human rights.

The International Commission of Jurists also made a number of comments about this issue. In a media release in October 2005, it said the following -

> President of ICJ. . . Mr John Dowd AO QC, said today, "Much of this legislation abandons the most fundamental principles one would expect to be inviolable in a liberal democratic society. The protection of individual liberty, the freedom of thought and speech, the absence of guilt by association, and the right to quiet enjoyment of life are the keystones of our democracy."
>
> . . . "These are not just exaggerated civil libertarian platitudes being trotted out for the sake of dissent. These laws create imminent potential for abuse, and have such wide application that they will inevitably ensnare innocents in their net. Let there be no mistake. The Australian people are facing a critical fork in the road, and our Federal and State governments are about to take us down the wrong path from which there may be no return."
>
> . . . "The indecent haste with which the government seeks to pass these laws through Parliament's systems of review, including the Senate, also strikes at the heart of our Westminster system of democracy. What does the government have to fear from community consultation? Surely that is what democracy is all about. Our complaints are not just about minor drafting issues. They are serious objections to substantive policy matters."

The argument has been put by the government in its second reading speech on this bill, and by the opposition, that this bill strikes the correct balance, and that there are adequate safeguards within it to ensure that personal liberties will not be impinged upon. I refer again to the Senate inquiry, which I mentioned just before, into the Anti-Terrorism Bill (No. 2) in the federal Parliament. Chapter 3 of the Senate inquiry report is headed "Preventative Detention". At page 24, a section deals specifically with the effectiveness of procedural safeguards, and states -

> 3.33 It is apparent from submissions received by the committee that . . . the Bill raises significant concerns with respect to the presumption of innocence, freedom from unlawful and arbitrary detention and the right to fair trial. Numerous submissions and witnesses argued that the procedures for Commonwealth orders envisaged by the Bill are not a sufficient protection against unjustified infringement on these fundamental principles.

I reiterate to members that the reason I am referring to a Senate inquiry is that we are, in effect, enacting the same provisions but extending them over 14 days, rather than the two days that the commonwealth has limited itself to. The report goes on to state -

> Australia's formal criminal justice system embraces critically important guarantees and safeguards, including the right of an accused to a fair trial, rules of evidence which are fair, the presumption of innocence and the requirement that guilt be established beyond reasonable doubt. These safeguards and minimum guarantees have been in place for centuries to try and punish those who can be convicted beyond reasonable doubt. It is unheard of in Australian law to have people held or detained for long periods under very strict conditions unless we follow these legal safeguards.

> 3.34 Similarly, the ACT Human Rights Commissioner said:
>
> Preventative detention without charge or trial is inherently problematic in respecting the human rights of individuals given the fundamental significance of the right to liberty in a democracy.
>
> It should only be used in the most exceptional circumstances and in strict accordance with the principles of international human rights law. General Comments of the Human Rights Committee, which monitors compliance with the ICCPR, have clarified that use of preventive detention for public security reasons must still comply with the right to liberty in article 9; it must not be arbitrary, it must be based on grounds and procedures established by law (that is, sufficiently circumscribed by law and specifically authorised), information on the reasons must be given, and court control of the detention must be available.

> 3.35 HREOC -

That is the Human Rights and Equal Opportunities Commission -

> echoed the same view. Its President, Mr John Van Doussa QC, stressed that, if preventative detention is to be adopted on national security grounds, it must be according to law, must not be arbitrary (in the sense of being unjust, unreasonable or disproportionate, taking into account the facts of each case) and must represent the least restrictive means of achieving the purpose.

The other significant issue with this bill, over and above the issues to do with human rights and deprivation of liberty, is that judges will be required to act in a personal capacity. The Chief Minister of the ACT, Mr Jon Stanhope, is referred to in an article in the *New Matilda* publication dated 19 October 2005 that reads -

> The Magistrate or Judge is to act in a personal capacity and not as a Court officer. Thus no Court and, therefore, no appeal.
>
> Why is the Government proposing that a Court not be involved? The answer is that the procedure to obtain preventative detention orders is regarded as an administrative function not a judicial one and the Australian Constitution forbids a Court from performing non-judicial functions. Why? To ensure the separation of powers between the Executive (the government) and the Judiciary.
>
> A potential problem for the Government will be that the High Court said recently that a federal Court or even a federal Judge in a private capacity cannot perform any functions which are incompatible with the holding of judicial office.
>
> When you are talking about detention without charge and punishment without trial . . . these provisions may be open to constitutional challenge simply on that basis.
>
> Howard is clearly not confident that the Parliament has the constitutional power to enact a preventative detention process allowing detention beyond 48 hours. As a result, to get around the Constitution, he is asking the State Parliaments to pass legislation to extend preventative detention to up to 14 days.

That is exactly why we are dealing with this bill today. The Howard government has a problem in terms of the separation of powers, but this state government clearly does not think that is a principle that needs to be upheld. This *New Matilda* article is interesting, because it suggests some alternatives in dealing with a terrorist threat. It reads -

> Essentially we are talking here about serious crime, conspiracy to murder and murder itself. These are matters for the police of course, supplemented by hard intelligence from the security services. But why are extravagant new police powers necessary?
>
> . . . Over the last 20 years, technology has delivered police unprecedented aids - DNA testing, advanced chemical analysis, satellite photography and tracking, the internet, directional microphones and voice and face recognition, just to name a few.
>
> The real deficiency here is not with powers but with stretched police resources.

The article concludes -

> How much is John Howard proposing to spend to implement his package? Very little on police, and a lot on his secret spy force, ASIO. This is potentially dangerous - until his ASIO statement last Sunday, we could assume his anti-terror measures would be rarely used, through lack of resources. Now we know that these measures will have the muscle of greatly increased ASIO intelligence secret and untestable.

That is a very important point. In this debate the argument seems to be that these powers need to be provided to the state police. However, ASIO already has extensive powers. ASIO can already question and detain persons who are not accused of any crime and who may simply have information about an event. Again, the Senate inquiry made comment in this regard. The Law Council submission to the Senate inquiry reads -

> 14. No fewer than thirty-one Commonwealth Acts have provisions which provide for the prevention and prosecution of terrorist acts. Under the existing laws a joint task force of federal and state police with ASIO arrested and charged 17 people with terrorist related offences. The operation required the execution of 22 search warrants.
>
> 15. In a joint media release Australian Federal Police (AFP) Deputy Commissioner John Lawler said about the raid:
>
> > "By working collaboratively Australia's law enforcement and intelligence agencies have managed to disrupt the alleged activities of this group and therefore protect the Australian community from a potential terrorist threat."
>
> 16. Before the government "strengthens" the existing laws by removing vital protections for human rights, there should be an assessment of whether the proposed measures are proportionate to the threats that the Government seeks to counter. This must include an explanation of how important is the right affected, how serious is the interference with it and, if it is a right that can be limited, how strong is the justification for the interference, how many people are likely to be affected by it, and how vulnerable they are.
>
> 17. In May 2005, Dennis Richardson, former head of the Australian Security Intelligence Organization, in his opening address before a parliamentary all-party committee reviewing ASIO's questioning and detention powers, said:
>
> > "I would note [the legislation] has worked very smoothly so far. To be frank, there was a concern [it] would be unduly complex and difficult to administer. [What] was initially introduced into the Parliament, with our support and advice, was much simpler and, of course, tougher.
> >
> > We debated among ourselves whether the compromises [forced on the Government by a hostile Senate] would make it unduly complex. Our concerns were misplaced. We were wrong on worrying about it. The balance has so far been very workable . . . "

As far as ASIO is concerned, it has plenty of powers to deal with these matters. The submission goes on to say -

> 18. Further, no serious case has been made out, by reference to existing or reasonably foreseeable circumstances, to show why these laws are necessary. As Commissioner Moroney (NSW Police) noted on 8 November 2005 at a press conference, the lessons the law enforcement authorities learned from Bali, Madrid and London were lessons of coordination, cooperation and organisation in policing. Government effort should be concentrated on ensuring our law enforcement and intelligence authorities are properly resourced and organised to deal with any perceived threats.

That comment was by the New South Wales Commissioner of Police. The Law Council also stated in its submission -

- Before the government strengthens existing laws by removing vital protections for human rights, it should review the adequacy of these law;

. . .

- The current ASIO powers to detain and question suspects up to 7 days have not been used to date.

We argue that there are adequate laws to deal with all the offences that comprise terrorism. I have a number of questions on this bill that I will ask the minister to respond to more generally over and above the questions that I want answered during the committee stage. My first question is: will the sunset clause in this bill apply to the whole bill or part of the bill? That is not clear to me. My second question: will the review be after five years; and, if so, will that apply to the whole bill or just to parts of it? Will the judicial review be limited only to questions of legality, or will a judicial officer be able to make a determination on the merits of the case?

Although this legislation and similar legislation around Australia supposedly has been based on United Kingdom laws, and I have spoken about the inadequacy of those laws to prevent acts of violence in the UK, it significantly departs from the UK model. The UK model allows for the detention of terrorist suspects for up to 14 days only in exceptional circumstances. It does not include any powers of preventative detention, and it certainly does not include any powers to detain non-suspects. That is a significant difference between this and the UK legislation. This bill allows for the detention of people who are non-suspects.

A number of issues will be raised in the committee debate. I will summarise the key changes that the Greens (WA) will seek to make to this bill. I refer to a submission by the Law Society of Western Australia on the Terrorism (Preventative Detention) Bill, because it refers to a number of issues on which we agree. At page 2 of its submission, the Law Society states -

> Police officers authorised by the Commissioner can apply for a preventative detention order (PDO) in relation to a person who is reasonably believed to be "going to engage in a terrorist act", possessing a thing that is connected with preparation/engagement in a terrorist act or has done an act in preparation for a terrorist act and making a PDO would assist in prevention of the act. The terrorist act must be imminent and expected to occur within the next 14 days . . .

The Greens will oppose the fundamental concept of detention of 14 days, as an unreasonable deprivation of liberty. The Law Society makes the point that I made earlier about the issuing authority being either a judge or retired judge, and the separation of powers issue that arises.

I conclude my remarks by pointing to a recent development, again in the UK, that, despite the significant laws in that country, are open to challenge in the court system. A recent article in *The Times* of London dated 2 August reads -

> The Government's anti-terrorism laws were dealt a devastating blow yesterday when the Court of Appeal ruled that holding suspects in conditions amounting to house arrest broke human rights laws.
>
> The Lord Chief Justice and two of his senior colleagues exacerbated the long-running struggle between the judiciary and ministers by fatally undermining a key part of the government's counter-terrorism legislation.
>
> . . .
>
> The three judges upheld . . . decision that the control orders forcing the men to remain at home for 18 hours a day were so draconian that they amounted to a "deprivation of liberty".
>
> The orders were contrary to Article 5 of the European Convention on Human Rights, which prevents indefinite detention without trial.
>
> The three appeal court judges said: "We agree that the facts of this case fall clearly on the wrong side of the dividing line. The orders amounted to a deprivation of liberty contrary to Article 5.

This case involved six suspects who were detained in the UK under quite recent orders. The UK Court of Appeal has in this case clearly come down with the decision that house arrest of 18 hours a day - it is not in the league of 14 days without charge - is in breach of Article 5 of the European Convention on Human Rights. I look forward to the day when Australia has a human rights act. We will then be in a position to challenge legislation such as this that unnecessarily tramples on human rights. Until we have that legislation in place, the Greens will continue to argue that legislation such as this transgresses fundamental principles, and it is unlikely to resolve the issues that it hopes to resolve in preventing terrorist acts, because we have seen clearly that similar legislation in other countries has failed to achieve that.

If we were to fold and allow this impact upon the rights of Australian citizens in the hope that it would have some effect on international terrorists, sadly, we would be kidding ourselves and in that process we would be undermining long-held and hard fought for civil rights that are of significant value to many Australians. The

Greens are not alone in their opposition to this trend in legislation, and it is deeply disappointing that Labor governments around the country see fit to follow a Howard line of rhetoric on how to tackle terrorism. It is time that we had a healthier and full debate on the root cause of the politics and events that cause people to turn to terrible acts, irrespective of whether it is Israel bombing Lebanon, state terrorism or other kinds of terrorism. We need to have a more mature debate rather than seek to demolish tenets of law. It is a shameful day to see a bill such as this before the Legislative Council.

Sitting suspended from 6.00 to 7.30 pm

HON JON FORD (Mining and Pastoral - Minister for Local Government and Regional Development) [7.30 pm]: I thank Hon Simon O'Brien, Hon Giz Watson and Hon Donna Faragher for their contributions. I thank the Liberal Party for its indication of support for this bill. I will attempt to answer some of the questions that have been raised. Those I do not answer in my response could be addressed during the committee stage. As Hon Simon O'Brien said in his contribution, this is an extraordinary bill that is designed to deal with extraordinary times. I do not think at any stage during history, certainly not in this and the last century, that we have witnessed - outside all-out war - anything like the recent events that occurred. I remember switching on the television and seeing one of the two World Trade Center towers on fire and wondering what sort of television show it was. As I realised it was a newscast, I saw an aircraft hit the other tower. At that point, I telephoned a friend of mine and told him to switch his television on because I seemed to be witnessing the start of World War III. In that single attack on those two towers thousands of people were killed. A number of other extraordinary events occurred at the same time. The Pentagon was attacked and an unsuccessful attempt was made to fly an aircraft into the White House.

We are not talking about terrorist events that could be compared with others in any other context. My early political awareness of terrorist acts arose from people being taken hostage or an aircraft being hijacked with a view to negotiating with the lives of the people on board. The recent terrorist attacks were not about attempting to negotiate with people's lives; they were aimed at murdering as many people as possible in order to terrorise people, and they had that effect. Somebody recounted to me the other day that after a couple of people of Asian appearance boarded a plane, there was some hysteria which led to them being taken off the plane. They were innocent people. That shows the fright and uncertainty that people are feeling. When people are frightened, they do ridiculous and unpredictable things. The government has a role in taking action to reassure people and let people know that it is on the job. My view, the government's view and that of many other governments is that if we fail to address these problems, we are putting people's lives at risk. We have the primary responsibility of protecting citizens. We are lucky to be in a place like this where we can debate civil liberties. We have heard a lot about the civil liberties of people of interest, but society as a whole has civil liberties. We are social beings which, whether we are religious or not, is recognised by the prayers we say at the beginning of each sitting of Parliament. We also have a responsibility to consider individual's rights as opposed to society's rights. In this case Labor governments and conservative governments have taken the view that they need to act to protect their citizens. We are now correctly having a debate on weighing an individual's rights against the collective rights of society. Such a debate will occur for years and years to come, but I would rather be in the situation of planning and of making a guesstimate about where we might be and what we might do to protect society than examining after the event what we might have done. Therefore, I support this legislation but, as is every other member of the chamber, I am concerned about the liberties of individuals. The question is confronting. I am sure that no member enjoys the fact that we are debating this legislation. No-one to whom I have spoken finds anything tasteful about the need to pass this kind of legislation. However, that is the burden governments face when taking responsibility and showing leadership. I will read from the explanatory memorandum because its explanation is much more succinct than my explanation would be -

> The object of the Bill is to give effect in Western Australia to the decision of 27 September 2005 of the Council of Australian Governments that States and Territories introduce legislation on preventative detention of persons for up to 14 days to prevent terrorist acts or preserve evidence following a terrorist act. It was recognised at COAG that there was a clear case to strengthen Australia's counter-terrorism laws because the nature of the terrorist threat means that police may need to intervene earlier to prevent a terrorist act with less knowledge than they would have using traditional policing methods.

That illustrates a clear case to strengthen Australia's counter-terrorism laws against the extraordinary tactics now used by terrorists worldwide, which are unlike anything we have experienced. It used to be the realm of governments in war to lead people against other governments and countries. Now we are dealing with much smaller groups and operatives. The ability for very small groups to cause mass violations against people has increased. We have witnessed what happens if we do not take extraordinary steps - many people die. We can argue about how effective this legislation will be and claim categorically that it will not stop a terrorist act. No doubt there are some terrorist acts that it will not stop. However, we cannot pretend that the threat does not exist. Anyone who says that no real threat exists is dreaming.

Hon Simon O'Brien and Hon Giz Watson referred to the present police powers to arrest people who offend. WA police have the power to arrest a person who is preparing to commit an offence. Specific offences are covered under commonwealth law and relate to matters such as membership of terrorist organisations, receiving terrorist training, etc. The nature of offences that occur in a terrorist act is generally that of mass murder, mass bodily harm and criminal damage, all of which are offences under state law. Clearly, if police have sufficient information that a person is planning, conspiring or about to commit such an offence, the police will arrest the person and charge him with the relevant offence. However, that will depend on whether the evidence is sufficient to substantiate the elements of the offence in question. In the context of a potential terrorist act and the potential for significant loss of life, bodily harm, etc, it has been determined that preventative measures are also needed in addition to existing police powers.

From the public explanation about the recent raids in Britain, the police were clearly acting to gather that evidence and to gather intelligence. The information they obtained indicated that an attack was imminent and they moved very quickly to prevent that alleged act from occurring. We will be interested in how the events surrounding that scenario progress. Governments around the world will be watching carefully to analyse the effectiveness of that operation. I dare say that some time in the future we will again be in this chamber trying to ensure that our laws are effective against the threat of terrorism.

Hon Giz Watson asked whether the sunset clause applies to the whole bill. Prohibitive contact orders and preventative detention orders cease to apply in 10 years and cannot be applied for thereafter. However, personal rights to seek compensation will be sustained. A charge of an offence will also apply under a different act. Hon Giz Watson also referred to the judicial review. As we know, the Commissioner of Police must apply for a detention order, which must then be issued by an issuing authority. The issuing authority will be either a retired Supreme Court Judge or, if a retired Supreme Court Judge is not available, another judge acting in the position as a citizen. Once that order has been enacted, at the most appropriate time and as soon as possible, that person must be taken before a judicial review. The judicial review will consider merit as well as the capacity to issue the order.

The age of 16 as a minimum age was determined to be consistent with our international treaty obligations. I am advised that both federal and state governments are embarking on a number of programs to educate and discourage people from adopting extremist views. That is a challenge in itself. In an unfortunate circumstance in which the police or child protection authorities thought a child was being recruited, they could apply for a power such as a care and protection order. However, that power is not in this bill.

Much has been said about this legislation. We are in a situation that nobody would have predicted prior to September 11 five years ago. From this isolated part of the world, terrorist acts were seen as remote, less serious occurrences. Certainly, friends of mine and I have had in mind only limited areas around the trouble spots of the Middle East and occasionally Northern Ireland, Great Britain and Paris. However, now these terrorist acts have extended further afield to where they have occurred right next door in Bali. We are not a country that is isolated from the world scene. We are who we are. I agree with Hon Giz Watson that there must be some debate at a world level about how we treat our neighbours and how we create policies that assist areas that are ripe for recruiting people with extremist views. However, that debate will not help us today. Certainly it is not a solution that we will find tomorrow or in the immediate future. With those comments, I commend the bill to the house.

Question put and passed.

Bill read a second time.

Committee

The Deputy Chairman of Committees (Hon Louise Pratt) in the chair; Hon Jon Ford (Minister for Local Government and Regional Development) in charge of the bill.

Clause 1: Short title -

Hon SIMON O'BRIEN: Let us go straight to the serious matter of this bill. There is an age-old question of whether the word in the title should be "preventive" or "preventative". The minister is just bursting to explain why we have gone for the over-the-top, extra-syllabic "preventative" rather than "preventive", and I look forward to him telling us why, as the committee report asked about it.

Hon Ljiljanna Ravlich: Do they mean the same?

Hon SIMON O'BRIEN: According to the *Oxford English Dictionary*, it is "preventive", but Hon Ljiljanna Ravlich should check it on Google.

Hon Ljiljanna Ravlich: No, I'll leave that with you!

Hon SIMON O'BRIEN: There is never a 12-year-old kid around when one needs one!

The DEPUTY CHAIRMAN: Does the member not know how to google?

Hon SIMON O'BRIEN: I might google but only when it is near the time!

Hon JON FORD: I am advised that the reasons the bill uses "preventative" are that it came out of the United Kingdom, it is the word that other jurisdictions have used and it struck us as consistent. Therefore, the member's suspicion that not much thought was put into it is probably wrong.

Clause put and passed.

Clause 2 put and passed.

Clause 3: Object -

Hon GIZ WATSON: I move -

> Page 2, line 9 - To insert after "time" -
>
> as a measure of last resort

As I said in my contribution to the second reading debate, a number of amendments stand in my name on the supplementary notice paper that seek to amend this WA bill to more approximate the Australian Capital Territory act. I will explain during debate on this clause the reason for moving this amendment so that I do not need to refer to it at each point. In the view of the Greens (WA) and many people, although the ACT was bound by the same Council of Australian Governments' agreement, the ACT government sought to insert significantly more checks and balances in its act, the Terrorism (Extraordinary Temporary Powers) Act 2006. My amendment seeks to insert after "time" the words "as a measure of last resort" so that the clause will read in part -

> The object of this Act is to allow a person to be taken into custody and detained for a short period of time as a measure of last resort in order to -

My proposed amendment is a direct lift from division 2.1, section 8 of the ACT legislation, which states in part -

> The purpose of this part is to allow a person to be taken into custody and detained for up to 14 days as a measure of last resort -

The purpose of moving the amendment is to make it clear that the power to detain somebody must be used only as a measure of last resort. Members who have contributed to this debate have acknowledged that the measures in the bill are all very serious measures and should be taken only in extreme exceptional circumstances; one could perhaps argue in emergency circumstances. If it is the intent of this chamber that the bill reflect that this sort of preventative detention should be used only in these circumstances, it is appropriate to make it clear that the Parliament is saying that this is a measure of last resort and that the only option is to take somebody into preventative detention to either prevent a potential terrorist act or to preserve the evidence of a terrorist act. If that is what the Parliament is saying it wants the bill to do, why not make it clear by adding the words "as a measure of last resort"? I would have thought that the government would support this measure. I do not believe the amendment would change the intention of the bill, but making it explicit will make clear the seriousness with which the Parliament takes these measures.

Hon JON FORD: The government does not support this amendment. The effect of the amendment will be to introduce a significantly higher threshold test for applying for a preventative detention order. Such a high threshold test, in which the police and issuing court would have to be satisfied that the preventative detention would be applied only as a measure of last resort, is open to broad interpretation, lacks the certainty necessary for preventing or investigating terrorist attacks, and leaves open for argument whether other measures may or may not prevent an attack. This would result in delays while such matters were argued, and it could be difficult for police or courts to be satisfied that detention was the only effective way, even though such preventative detention was appropriate in the circumstances. Clause 9 makes it clear that a preventative detention order can be applied only if it would substantially assist in preventing a terrorist attack occurring or to preserve evidence relating to a terrorist attack. The criteria appropriately balance the need for sufficient safeguards to prevent the abuse of power and to protect rights, while endeavouring to protect the public and public safety from terrorist attacks. The essence of that is to definitely lower the bar to ensure that there is no delay. This is all about acting swiftly and maintaining a balance. We know that if people must get into a debate in a judicial forum, such as a court, matters can take some time. That is what we are trying to prevent.

Hon SIMON O'BRIEN: While respecting and understanding and having empathy for Hon Giz Watson's motives, which I think are absolutely sincere, I am not sure that the amendment is the correct way of achieving what she wants to achieve. Sometimes, one of the problems in trying to reconstruct legislation as it appears in a bill is that there can be unforeseen consequences. I do not want to get down to semantics and I will not, because we have a great deal of work to do. I am not so sure that this would be a measure of last resort. There could be other measures of last resort. It might make the intent of Parliament less clear if we were to insert the words proposed by the member. As I said in the second reading debate, I do not see these provisions being used at all

in Western Australia. I am finding it hard to hypothesise a situation in which that might occur. However, in a situation in which an officer has reason to suspect that a terrorist act is imminent and he is trying to work out what to do with the person he is dealing with, and that terrible decision - which I described in my earlier remarks - has to be made on the spot, would he have enough evidence to charge the person? We do not want a person charged and committed to custody if there is not enough evidence to sustain a charge. Conversely, if a person suspects that someone is about to be involved in a terrorist incident, a person does not want to let him go either. In many cases it might actually be more in the interests of the person's civil liberties if he were taken into preventative detention and, in the course of further inquiries being made over a few days, he might find himself set free. That is because the detention must be reviewed by a judge. By the time it got to a judge, more information might be available. Conversely, there might be the opposite effect from what was intended. Someone might be charged with a terrorist offence, denied bail and sit in remand for a very long time. That is just one possibility. The term "as a measure of last resort" might not necessarily apply in every situation, rare though the application of the provision might be. The opposition is not inclined to support the amendment.

Hon GIZ WATSON: I seek further clarification. In rejecting this amendment, I hear that the government is making it very clear that the provisions of this bill will not be used as a measure of last resort.

Hon JON FORD: No. It is the government's intention that this would be a measure of last resort to deal with an extraordinary circumstance. That is the intention. There may be a circumstance in which that is not the case. The intention of this clause and every other clause in the bill is to protect Australians from a potential terrorist threat. As a secondary point it is to seek to preserve evidence.

Amendment put and negatived.

Clause put and passed.

Clause 4: Terms used in this Act -

Hon GIZ WATSON: The amendment numbered 3/4 seeks to delete the definition of "issuing authority". To an extent this amendment is consequential to other amendments I have listed on the supplementary notice paper. The overall intention of the package of amendments is to, again, following the Australian Capital Territory model, make the Supreme Court the authority that issues preventative detention orders. If that amendment were successful, we would not need a definition of "issuing authority" because that would be dealt with later. I seek technical advice on this. We could postpone dealing with this clause until we dealt with the substantive change. The amendment at this point does not make a lot of sense unless the rest of the amendments are accepted. I seek some advice on that.

The DEPUTY CHAIRMAN (**Hon Louise Pratt**): At this point I suggest that the committee defer consideration of the clause until after we have dealt with clause 7, as there are quite a few amendments.

Further consideration of the clause postponed until after consideration of clause 7, on motion by Hon Jon Ford (Minister for Local Government and Regional Development).

[See page 4893.]

Clause 5 put and passed.

Clause 6: Meaning of "terrorist act" -

Hon GIZ WATSON: I do not have an amendment to this clause, but I want to raise some concerns about it. It seems that this is a very broad definition of things that can be construed as terrorist acts. In my opinion, the definition is not sufficiently tight to exclude certain situations that no sensible person would consider to be terrorism. I can think of some circumstances that might come within the definition of this clause, including industrial action. For example, shutting down a hospital, or at least an emergency department, thus endangering life or creating a serious risk to the health or safety of the public, might be captured by this definition. Similarly, actions that affect electricity or sewerage systems in a way that would make them inoperative could create a serious risk to the health or safety of the public. Another example would be an action that interrupts or seriously disrupts computer systems; for example, those controlling electricity or gas supplies and transport systems. Would those actions be captured by this definition of "terrorist act", or would they be excluded?

Hon JON FORD: All the subclauses of clause 6 must be considered together. Clause 6(1) reads, in part -

> (b) the action is done or the threat is made with the intention of advancing a political, religious or ideological cause; and
>
> (c) the action is done or the threat is made with the intention of -
>
> (i) coercing, or influencing by intimidation, the government of the Commonwealth or a State, Territory or foreign country, or of part of a State, Territory or foreign country; or
>
> (ii) intimidating the public, or a section of the public.

It is fairly broad and designed to capture a broad range of activities. However, I am advised that Australian jurisdictions across the board all believe that a review of the definition is needed, and a commonwealth parliamentary review of the definition of "terrorist act" is currently under way. Once that parliamentary review is considered, and if agreement is reached across all jurisdictions, it is likely that all the legislation across Australia will be amended to reflect the new definition. However, this definition as it applies to this bill, is currently consistent with all other Australian jurisdictions.

Hon GIZ WATSON: I am afraid that that does not give me much comfort, particularly in view of the subclause to which the minister has just referred, involving an action that is done or a threat made with the intention of advancing a political, religious or ideological cause. I am thinking here particularly of industrial action. Action done or a threat made with the intention of coercing or influencing by intimidation the government of the commonwealth or a state could easily include industrial action. The action of the police in pursuing their pay claim was done with the intention of advancing a political outcome, and seeking to influence, if not intimidate, the state government. It could be argued that such actions could cause some risk to the public, which would certainly be the case with key public sector workers. Those actions appear not to have been excluded from this definition. I am not suggesting that the state government might seek to use this legislation in that way, but that does not prevent future governments from using it in that way. It is our responsibility as a Parliament to not only think about current circumstances but also anticipate possible future scenarios. If Sir Charles Court were back in power, this would be a very handy little clause to use.

Hon JON FORD: This definition would not apply in those circumstances. As is the case with all legislation, it is a trap to read just one part of a clause out of context without considering the full clause. Clause 6(1)(a) states -

> the action falls within subsection (2) and does not fall within subsection (3);

Clause 6(3) reads -

> Action falls within this subsection if it -
>
> (a) is advocacy, protest, dissent or industrial action; and
>
> (b) is not intended -
>
> (i) to cause a person's death;
>
> (ii) to cause serious physical harm to a person;
>
> (iii) to endanger a person's life, other than the life of the person doing the act;
>
> (iv) to create a serious risk to the health or safety of the public.

That excludes industrial action.

Clause put and passed.

Clause 7: Issuing authorities -

Hon GIZ WATSON: I move -

> Page 7, lines 1 to 11 - To delete the lines and insert instead -
>
> **7. Applying for preventative detention order**
>
> (1) An authorised police officer may apply to the Supreme Court for a preventative detention order for a person.
>
> (2) The Supreme Court may grant a preventative detention order after hearing.

This amendment seeks in essence to delete the existing clause 7, which presently deals with issuing authorities and provides for the Governor to appoint a judge or a retired judge to be the issuing authority for preventative detention orders. I made the point in my second reading contribution that the Greens do not support a judge acting in this capacity. This issue has been raised elsewhere around Australia. It raises questions of the separation of powers. It is hugely undesirable to have serving judges acting as issuing authorities. This means that the judge becomes part of the executive, working closely with security and police services as part of the administration. Our fallback position would be that, at the very least, this role should be limited to retired judges and not serving judges acting in a personal capacity. My amendment seeks to delete clause 7 and insert a new clause. This is not novel; this is what the Australian Capital Territory legislation does. It provides that the authority for issuing preventative detention orders will reside with the Supreme Court. That provision is now in place in the ACT, and nobody seems to have a problem with it. The sky has not fallen. It is a substantial change but we think it actually reflects a very important principle; that is, the separation of powers between the executive and the judiciary.

Hon JON FORD: That is precisely why this clause has been worded this way. The advice of the Solicitor-General is that if the issuing authority was given to the court, the separation of powers would be raised as a

constitutional validity issue. The view of the state Solicitor-General, as supported by the government, is that the way the legislation is written is more likely to be upheld against any challenge.

Hon GIZ WATSON: I take the opposite view. It is obviously a view that the ACT has taken.

Hon Jon Ford: And New South Wales.

Hon GIZ WATSON: Yes, and New South Wales. The fundamental difference is that the Supreme Court would make a decision about issuing a preventative detention order after hearing the evidence. The fundamental principle is that a person cannot be detained against his or her will unless evidence has been heard and tested in a court and then the court decides whether that person should be detained. That is what we are talking about. It is not unusual; it is actually how the system works in most cases. The ACT and New South Wales have gone down this route. The Greens argue that it is a higher safeguard than the issuing authority being a judge acting in a personal capacity or a retired judge.

Hon JON FORD: Those arguments that the member has raised are precisely the reason we have brought in the legislation. If the Supreme Court is the issuing authority and we have a judicial review, which is carried out by the Supreme Court, we would bring the review back to the Supreme Court, which is the same authority that issued the order. It would carry out a merit and capacity review of itself. That raises the separation of powers issue. The Supreme Court would be acting as the executive, which is the issue of separation of powers. Without going to a referendum and attempting to change the Constitution, the Solicitor-General's advice is that it is much better to have a retired Supreme Court judge who is no longer part of the judiciary but who is practiced in public interest decisions and is certainly up to speed on the legal issues, the capacity issues and the merit issues, to be the issuing authority. In the automatic process, that person will see its capacity and merits tested in court. The Supreme Court is certainly then an independent review body to ensure there is a proper independent judicial safeguard.

Hon GIZ WATSON: I accept the argument about a retired judge but a judge acting in a personal capacity is something else again. We are actually asking the judge to step outside the role he normally plays within the court system to operate as an arm of the executive. Having this judge moving in and out of those two roles, I assume we are all acknowledging and hoping that these provisions will not be needed very often. Most of that time that judge will be fulfilling his other duties. There seems to be a potential conflict of roles. Is there other legislation that allows a judge to act in this capacity and then be a judge 99 per cent of the time?

Hon JON FORD: It boils down to a practical issue of having a judge. It is not a judge in his or her capacity as a citizen outside the judicial role. If we cannot get a retired judge, we need to have a back-up. The government's view is that it is very important to have somebody who has experience in law and in making judgments in the public interest. However, if a judge acting as a citizen becomes the issuing authority, that individual judge will be excluded from the review process when it is brought to court. I am advised that there are precedents of judges acting in a private capacity when issuing warrants. The Australian Crime Commission (Western Australia) Act has provisions for that.

Hon SIMON O'BRIEN: Let us be clear about what is happening here. Hon Giz Watson has moved some amendments and the government has disagreed with the amendments. Therefore, Hon Giz Watson wants the opposition to combine with the Greens to defeat the government to progress the amendments. In pursuit of that, she has told us that the proposal stems from people in the ACT and New South Wales, and that the argument in opposition to the bill is that Sir Charles Court would like it the way it is. Things are not looking good for the future of this amendment at this stage! But it gets worse. We recognise what the government is trying to achieve. Any one of the persons appointed as the panel may be approached when the commissioner directs or authorises a police officer to apply for a preventative detention order. The government - I think this is the sense of what the minister has just said - wants the person who will consider the police request for a PDO to be someone who is more than competent; that is, an experienced jurist. In the opposition's view, this is overkill, if anything. We would go the other way, having regard for the extraordinary circumstances that may prevail at the time that a Commissioner of Police directs a police officer to apply for a PDO for a person. I have already predicted that these sorts of circumstances will never arise in Western Australia, and both the minister and I hope that I am right. However, if a police officer has to do all this sort of mucking around on the night, I suspect that any senior police officer worth his salt would already have picked up the bloke on some other basis.

The point is that the powers need to be available to police officers in the extraordinary circumstance that they are required - while we keep our fingers crossed that the powers will never be required. With that in mind, the opposition thinks that the authors of the bill have set the bar sufficiently high - no pun intended - with a retired judge or a judge not acting in his capacity as a judge to be the person to whom the application for a PDO will be made. For those reasons, the opposition will not support the amendment.

Amendment put and negatived.

Clause put and passed.

Postponed clause 4 put and passed.

Clause 8 put and passed.

Clause 9: Basis for applying for and making preventative detention orders -

Hon GIZ WATSON: I move -

Page 8, lines 8 to 10 - To delete the lines.

My concern is that subclause (1)(a)(ii), "possesses a thing that is connected with the preparation for, or the engagement of a person in, a terrorist act", is a very broad provision. My amendment seeks to delete these lines. I envisage a number of things that could easily fall within this sort of broad provision, including computers and mobile phones. We know that nitrogen fertilisers, which are common on most farms, are often a key ingredient in explosives. They were certainly used in the home-grown terrorist act of Timothy McVeigh in the Oklahoma City bombing in the United States. Large amounts of nitrogen were used in that bomb. The amendment seeks to remove this paragraph of the clause on the ground that the provision is too broad. Perhaps the minister can indicate the sorts of things that he envisages will be covered by subclause (1)(a)(ii) and why it has been considered necessary to include such a broad provision.

Hon JON FORD: The intention is to make the provision as broad as possible. The amendment would have the effect of removing one of the criteria under which a preventative detention order can be applied for; that is, possessing a thing that is connected with the preparation for, or the engagement of a person in, a terrorist act. Removing this criterion would make the bill inconsistent with the commonwealth Anti-Terrorism Act 2005 and would limit its operational effectiveness. For example, there may be circumstances in which a person is detained under the commonwealth legislation for 48 hours for possessing a thing that is connected with the preparation for a terrorist act. If this provision were deleted from our legislation, Western Australian police would not be able to detain the person and the community could be put at risk, and the purpose of the bill is not to put the community at risk.

Although a very broad brush has been applied to the subclause, it must be considered in the context of the entire bill. For instance, a computer is a very useful tool and, by itself, it is fairly innocuous. The police might have the belief that the computer could be used for some other purpose, such as a device to trigger an explosion, or that it is not a computer, although it appears to be one. The police must present to the issuing authority evidence that a PDO is required because the computer could possibly be used as a tool in a terrorist act and detaining the person with the computer would stop the immediate threat of a terrorist act. That is why it is considered necessary that a judge be the issuing authority; judges satisfy the public interest test, and that relates to the merits of the case. If the person possessed a range of steak knives, which could be used in a terrorist act, I imagine that the issuing authority would say that they were not evidence unless they were possessed in connection with another thing. Yes, the provision is very broad. There are three checks. First, the police must convince the Commissioner of Police that the application will succeed. Secondly, if the commissioner decides that it will succeed, the police must go to the issuing authority, who will consider the application and say yes or no. Thirdly, if the issuing authority approves the application, it is tested again by the Supreme Court. After the preventative detention order has been enacted, the court must be convinced that it has been applied correctly. The bill contains sufficient checks and balances for us to feel comfortable with a broad-brush approach. The way in which terrorism is evolving means that what might seem today to be a completely innocuous object may in future become a real threat when used in conjunction with other objects.

Amendment put and negatived.

Clause put and passed.

Clause 10: Authorising police officers to apply for a preventative detention order -

Hon GIZ WATSON: I move -

Page 9, lines 17 and 18 - To delete "as soon as practicable" and insert instead -

within 24 hours

The purpose of this amendment is to ensure that an authorisation by the Commissioner of Police must be put in writing within 24 hours. The Greens (WA) have a fundamental problem with phrases such as "as soon as practicable", because such phrases are very expandable and flexible. The clause provides that an authorised officer applying for a preventative detention order must obtain one in writing, but if it is not practicable to issue an order in writing because of urgent need and it is issued orally, it is required to be put in writing "as soon as practicable" after it is issued. My argument is that there should be a fixed time. If it were within 24 hours, it would mean that it would still be done as soon as it could be done, but at least we would know that it would have to be done within 24 hours. Considering the seriousness of the issuing of a preventative detention order, it is reasonable that there should be a finite time frame, and 24 hours is reasonable.

Hon JON FORD: The government does not support this amendment. The words "as soon as practicable" carry the implication that it must be done as expeditiously as possible. Introducing a time limit, especially such a short period, by which the commissioner's authorisation must be in writing has the potential to pose practical problems and encourage arguments about whether the time limit was met and consequently to affect the validity of the authorisation. That is the crux of the matter. It could allow an argument that unintentionally impeded a valid order, remembering that in the whole of this matter time is of the essence. As another safeguard, clause 12(6) requires the applying officer to make the application to the issuing authority on oath. It is reasonable to expect, therefore, that an officer would not make an application without the certainty of having the commissioner's authority to do so. It will mean that we will not get somebody who is in such a panic that he will skip the bit about talking to the commissioner, thus ensuring that there is a process to keep him honest, as it were. It comes back to the main argument that I put in my response to the second reading debate that time is of the essence and that this is about combating unexpected and extraordinary situations. That is the intention of the clause.

Hon GIZ WATSON: It is probably worth putting on record that the reason for this amendment is that the Greens also have a fundamental concern about an application being made orally. It is quite a step to go from a process in which a form is filled out under oath to one in which an authority can be issued over the phone. I am thinking of search warrants and other warrants that provide similar, quite strong powers. Given the seriousness of the consequences for the person who is having this preventative detention order applied to him, it is not unreasonable that it be verified in a written form. Once actions are taken by phone, there are no signatures and formal applications, as there are when they are done under oath. I hear what the minister says about it perhaps being a very urgent situation. We can entertain the view that issuing an order orally in certain circumstances might be necessary, but it is not unreasonable in this day and age of faxes, e-mails and other means of transferring the written word to say that 24 hours is an adequate time for such an authorisation to be provided in a written form.

Hon JON FORD: I will try to give a practical example. Western Australia is a large state. The bill provides that the commissioner cannot delegate the power unless he is literally unavailable. If the commissioner were in Kurri Kurri when he needed to be contacted, which is not such a nonsense argument because the commissioner travels widely, it could be difficult depending on the circumstances. Who knows? An aircraft could run out of fuel or there could be adverse weather conditions or whatever and the commissioner might not be able to leave. I accept that the Greens have a problem with this provision, but there is no conspiracy. I am not trying to make light of the seriousness of issuing an order. This is about trying to manage the implementation of an operation under this bill in a practical way. Having said that, I sympathise with the member's argument.

Hon MURRAY CRIDDLE: I am very curious to know whether this provision arises in any other legislation, because I seem to remember debating this when dealing with other legislation. Is there an indication somewhere that this has happened before, so that we can get a measure of what is meant by "as soon as practicable"?

Hon JON FORD: I am advised that the provision is consistent with section 23(3) of the Terrorism (Extraordinary Powers) Act 2005, but that is not the act I seem to recall. I seem to recall a similar debate with the Emergency Management Act.

Amendment put and negatived.

Clause put and passed.

Clause 11: Application for a preventative detention order -

Hon GIZ WATSON: I had intended to seek to delete "an issuing authority" and insert "the Supreme Court". However, we have debated this issue substantially, so I will not move my amendment. I did not win over the government on the other amendment, so there is not much point pursuing this issue further.

The words I seek to have inserted in amendment 8/11 are in the Australian Capital Territory act. They will strengthen the provision to ensure that a person for whom an application for a preventative order is made is not a child. The Greens (WA) are not confident that the present wording will ensure sufficient inquiry is made about a person's age. The heading for section 11 of the ACT act is very clear and reads -

> No preventative detention orders for children.

I have simply duplicated a number of the provisions from the ACT act. The clause sets out the provisions pertaining to applications for a preventative detention order. The new paragraphs will follow clause 11(3)(c) in this bill and read -

> (d) the inquiries the applicant has made about the person's age;
>
> (e) a statement that the applicant is satisfied that the person for whom the order is sought is not a child;

(f) a statement that the applicant does not suspect that any of the facts and other grounds relied on in making the application are based on information obtained, directly or indirectly, from torture;

(g) a statement by the applicant that the application fully discloses all matters of which the applicant is aware that are, or may be, relevant to the making of a decision on the application, whether they are favourable or adverse to a decision to make the order; and

The amendment makes it very clear that sufficient inquiry must be made to ensure that the person for whom the order is sought is not under age. It must be made very clear also that an application is not based on information obtained directly or indirectly through torture. That provision is important in light of some recent interesting court cases. I do not think these amendments will cause any problem for the bill; they will simply apply some higher tests. I hope the government will support this amendment.

Hon JON FORD: The government does not support the amendment. Paragraph (c) provides for the information, if any, that the applicant has about the person's age to be set out. Clause 16 also provides that a preventative detention order cannot be applied for or made for a person under 16 years of age; therefore, a statement to that effect is unnecessary. Intelligence gathered within Australia must not be obtained through torture; torture constitutes a criminal offence. Therefore any evidence obtained in that manner would be inadmissible. However, as the member pointed out, there may be circumstances in which intelligence is provided by people from other countries, and the police officer making the application may not necessarily know the sources from which and processes by which the information was obtained. It may be impossible for an officer to have any basis upon which to form a belief, suspicion or defence and, therefore, paragraph (f) may not be able to be met, and that would obviate the objective of the legislation. Proposed paragraph (g) is unnecessary because paragraphs (a) and (b) require the officer to set out in the application the facts and other grounds on which the person should be detained. If the issuing authority is not satisfied, the order will not be made. Again, the Supreme Court or the judicial review must be convinced of the need to detain a person. As I said before, the government believes there are sufficient safeguards in the bill, given the need to apply to an issuing authority and the Supreme Court. In addition, as I mentioned, an order cannot be made against anyone under the age of 16.

Hon GIZ WATSON: I refer to the issue of whether a person is a child. The following wording makes the provision much more explicit -

(d) the inquiries the applicant has made about the person's age;

(e) a statement that the applicant is satisfied that the person for whom the order is sought is not a child;

Mistakes can be made about people's ages. The Greens consider the amendment to be an additional check. The Greens think that the inclusion of proposed paragraph (f) is a better way of avoiding any doubt about a person's age.

Information that might be obtained by torture is exactly the problem we are seeking to overcome. I understand that the WA Police could act on information they had received from overseas. I refer to the very recent court case of Mr Thomas and the treatment he received when he was interrogated overseas.

Hon Jon Ford interjected.

Hon GIZ WATSON: Yes, at the very least. Although I hear what the minister is saying about the Criminal Code, it would apply to any action in Australia. However, if the information had been gleaned overseas and was simply provided to the police in Western Australia, our Criminal Code obviously would not apply. However, if this amendment were included in the bill, it would be a very clear statement of the Western Australian Parliament's position on information obtained either directly or indirectly from torture. I would have thought that was a very proper provision to include in legislation. I heard what the minister said about it potentially resulting in the rejection of certain information because the issuing authority could not be sure of the way in which it was obtained. However, that is the point; otherwise we are, arguably, condoning the acceptance of information obtained during an interrogation that could be interpreted as torture. The Greens' view is that the bill should state it very clearly. Obviously, it was also the view of the Australian Capital Territory government. We think there is still a good argument for amending the bill to include these provisions.

Hon JON FORD: In regard to the age issue, I know from my experience with illegal fishing activities that some illegal fishers claim to be underage to avoid prosecution. This has caused such a dilemma for the authorities that it gets down to measuring wrists and doing all sorts of things to decide whether a person is underage. The commonwealth, state and Northern Territory governments are considering the establishment of a register of offenders so that when a test has been done on someone, they can look up the register and determine that person's age. There are therefore difficulties with this clause, but the commissioner or the person authorised by the commissioner must convince the issuing authority to issue a preventative detention order which, again, would be tested in court. I am harping on about that but it gets back to an extraordinary situation. The intention

is very clear to any review judge or issuing authority. The intention is that people under 16 years of age will be precluded. That is very clear. The government believes the issuing authority would have that in mind when making its decision in the circumstances, and would try to prevent that, checks and balances notwithstanding, although I understand what the member is saying.

With regard to torture, I will give a recent practical example. I can barely believe that I am standing in this place arguing this point. However, as I said before, it is because we are now considering the rights of the collective of society over the rights of an individual that I feel comfortable enough to make the argument. If we consider the scenario that has developed in Great Britain, it appears on the evidence reported in the media and from other reports we have read that mass murder has been averted because of intelligence that was gleaned from interviews of people in detention in Pakistan. Somebody could easily submit an argument that the authorities got that evidence by torture. If we had that debate right this instant, Hon Giz Watson and I could argue in circles on either side. We could imagine an argument for a process that allowed somebody to jump up and claim that there must have been torture because the evidence came from a certain jurisdiction - that argument was also made about America - and in the immediacy of that argument an aircraft took off and killed 350 people. That is the context about which we are talking. It gets back to the reason that there must be a review by a Supreme Court judge who is practised in the art of making judgments in the public interest. These are very serious matters and that is why we need that sort of expertise. That person must be convinced that it is not a valid argument and it would be clear in that argument that any evidence obtained by torture would not be included; so that would be out. However, hearsay evidence or assumptions about where the evidence came from would be considered by the issuing authority and the Supreme Court because we believe they would be in a position to weigh up the evidence against the broader public interest and make those judgments. That is what this clause seeks to do. I accept the member's argument, but the government is of the view that there is a sufficient test in this bill to protect those rights and that other legislation makes it clear that torture is not acceptable. The bill has safeguards to ensure that it should not be considered but, while saying that, it restricts the number of arguments that can be made to frustrate the procedure.

Hon GIZ WATSON: I formally move -

Page 10, after line 3 - To insert -

(d) the inquiries the applicant has made about the person's age;

(e) a statement that the applicant is satisfied that the person for whom the order is sought is not a child;

(f) a statement that the applicant does not suspect that any of the facts and other grounds relied on in making the application are based on information obtained, directly or indirectly, from torture;

(g) a statement by the applicant that the application fully discloses all matters of which the applicant is aware that are, or may be, relevant to the making of a decision on the application, whether they are favourable or adverse to a decision to make the order; and

Amendment put and negatived.

Clause put and passed.

Clause 12: Procedure for applying for preventative detention order -

Hon GIZ WATSON: The amendment standing in my name at 9/12 on the supplementary notice paper is to address the issue of remote communication. I raised this issue in debate on an earlier clause; however, the Greens (WA) have a concern that when applications are made orally, either by telephone or radio, the verification will not be as reliable as a written application.

Upon another reading, the amendment does not quite make sense. I think the amendment contains an error. I do not think I meant to draft it like that because my copy is different from this. I had intended to delete "telephone" and "radio". I will not pursue this amendment because I have submitted it incorrectly. We have already had a discussion about the difference between written and oral communications. As such, I will not formally move amendments 9/12, 10/12, 11/12, 12/12 and 13/12.

Clause put and passed.

Clause 13: Preventative detention orders -

Hon GIZ WATSON: I will not pursue amendment 14/13. Once again, it was to change "an issuing authority" to "the Supreme Court". That argument has not been won. I will also not move amendment 15/13.

Clause put and passed.

Clause 14: Duration of preventative detention orders -

Hon GIZ WATSON: I move -

Page 14, after line 22 - To insert -

(a) the end of 96 hours after the order is made if the person has not been detained under the order;

This amendment duplicates a provision in the Australian Capital Territory act. It would insert a specific time frame. The ACT has found that 96 hours is a reasonable time. We seek support for the amendment to provide for a definite number of hours.

Hon JON FORD: The government does not support the amendment of Hon Giz Watson. This position is based on practical issues. The ACT is quite small geographically. On the other hand, Western Australia is very large. The period of seven days is included from a practical sense. If somebody goes bush, it may take a couple of days to find him. A good example of that is not so long ago the police had an interest in finding Mr van Tongeren, who disappeared for some time by going bush. The police need time to find a person to be able to serve an order.

Hon GIZ WATSON: I hear the argument from the minister about the possible time it might take to chase down somebody in Western Australia. Given the significant powers that are involved with a preventative detention order, the duration of the order should be limited. The difference between us is how long we think such an order should be operational. We believe that 96 hours should be enough time.

Hon SIMON O'BRIEN: I have a query on this clause. I should also indicate that the opposition will not support the amendment. I am interested in the notes that are included in the body of the clause. They represent about five lines under clause 14(1). They are preceded by the word "Note" and are shown in a different font. They contain instructions on how the legislation is to be interpreted. There is a further two-line note at the bottom of page 14 of the bill. The notes are given reference number lines in the legislation. Do they form part of the text of the bill and are thereby part of the law or are they more of an explanatory or marginal note?

Hon JON FORD: I am so well informed that I can direct the member to clause 4(3) on page 4 of the bill, which states -

Notes in this Act are provided to assist understanding and do not form part of this Act.

Hon Simon O'Brien: Will they appear in the official version of the legislation?

Hon JON FORD: Yes, but they are not part of the legislation.

Amendment put and negatived.

Clause put and passed.

Clause 15: Multiple preventative detention orders -

Hon GIZ WATSON: I move -

Page 15, after line 21 - To insert -

(4) If -

(a) a preventative detention order, or corresponding preventative detention order, is made for a person on the basis of assisting in preventing a terrorist act happening within a particular period; and

(b) the person is detained under the order,

a preventative detention order cannot be applied for, or made, under this Act for the person on the basis of assisting in preventing a different terrorist act happening within that period unless the application, or the order, is based on information that became available only after the order mentioned in paragraph (a) was made.

As such, the amendment creates a new clause 15(4). This is copied from the Australian Capital Territory legislation. The Greens think it is a reasonable additional provision and seek the support of the committee.

Hon JON FORD: The government does not support this amendment. An issuing authority will determine whether a further detention order is necessary to assist in preventing a different terrorist act from occurring on the basis of the facts and the other grounds presented in the application by the responsible police officer. There may be a circumstance in which a person is detained under a commonwealth regime and, on the basis of an assessment undertaken by state police officers, a case is made to a judge that the person should then be detained

under state law to prevent a terrorist act occurring. This option should not be restricted on the basis of when the information is made available to the assessing officers.

Amendment put and negatived.

Clause put and passed.

Clause 16: No preventative detention order in relation to person under 16 years of age -

Hon GIZ WATSON: I move -

Page 16, lines 11 to 23 - To delete the lines and insert instead -

16. No preventative detention orders for children

(1) A preventative detention order cannot be applied for, or made, for a child.

Note. Child means an individual who is under 18 years old

(2) If a person is being detained under a preventative detention order, and the police officer detaining the person suspects, or has any grounds to suspect, that the person may be a child -

(a) the police officer must immediately make reasonable inquiries about the person's age; and

(b) if, after making the inquiries, the police officer believes, on reasonable grounds, that the person is a child, the police officer must immediately release the person from detention under the order.

(3) A police officer commits an offence if the police officer fails to comply with subsection (2)(a) or (b).

Penalty: imprisonment for 2 years.

This amendment changes the definition of "child" to mean an individual under 18 years of age, as opposed to one under 16 years of age as at present. This is a stronger provision than is currently in the bill. It also makes it very clear that the onus is on the police, and requires a high standard of checking that the police officer has made reasonable inquiries about the person's age. Again, this is copied from the ACT legislation, and we argue that it is a stronger protection against a child being subject to a preventative detention order. The particular reason I encourage the committee to support this amendment is that it is imperative that we do everything to ensure that a preventative detention order is not applied to a child. There is always the possibility that a child is assumed to be older than he or she actually is. The prospect of an adult being subject to a preventative detention order is intimidating enough, but we need to be absolutely sure that we have made every effort to guarantee that no child is subjected to such an order.

Hon JON FORD: The government does not support this amendment. As the bill is drafted, nobody under the age of 16 will be placed in preventative detention, and for those between the ages of 16 and 18 years, a number of special arrangements are provided for. For instance, such a person cannot be detained with adults, he or she has the option of having a parent or guardian present and time is allowed in detention on a daily basis for the presence of a parent or guardian. Additionally, if such a person is at school or attending a technical and further education college, the Department for Community Development is charged with ensuring that tutoring is provided to ensure continuity of education. I reiterate that persons under the age of 16 do not come within the scope of this legislation. However, I recognise the concerns of Hon Giz Watson.

Hon SIMON O'BRIEN: I do not understand the concerns of Hon Giz Watson. This is not about treating children as adults and exposing them to sanctions under criminal law and adult punishments. As we discussed during the second reading debate, this bill is about the extraordinary powers that are necessary if we are to be dinkum about equipping our public officers with the capacity to prevent a terrorist outrage from occurring. It is a prospective thing. It is a projection forward about circumstances that we must try to anticipate without knowing what they might be, or if or when circumstances arise that trigger the need for these powers. We have all said reassuring things in the chamber for the record about how we hope these powers will never be exercised. The fact of the matter is that there is an international conspiracy run by fanatics who convince young people that a way that they can positively contribute is to sacrifice their lives by strapping on some explosives and going into a bus, a shopping centre or a Coles cafeteria and detonating that device, blowing themselves and as many other people as possible to smithereens and causing varying amounts of bloody mayhem. That is a seriously misguided action. It is the sort of action that we have to contemplate at this time and is the reason that we are contemplating extraordinary measures that we all hope, and on the balance of probabilities think, will not be

needed. That is what we are all about. The typical age of many of the perpetrators of these outrages that have been attempted or committed in the past few years is quite young. It has been put to me that the typical age ranges from 17 through to the mid-20s. We occasionally hear about 14-year-olds or children even younger being raised to think that it is an appropriate thing to do.

Perhaps we can now move on to find some agreement. I asserted just now that Hon Giz Watson is mistaken if she thinks these provisions will provide for adult criminal sanctions to be applied to people who are legally children. A preventative detention order would certainly deprive someone of his or her immediate liberty, perhaps for as long as 14 days. If an officer and his team recognise a "person to whom section 9 applies" is going to engage in a terrorist act and they implement a PDO on that person, it would substantially assist in preventing a terrorist act occurring. That is the first thing we have to do. Then we have to convince the Commissioner of Police to get one of his senior officers to go to a judge as an issuing authority and all the other things that we have been discussing. If the person to whom section 9 applies is about to strap explosives to himself and perpetrate a terrorist atrocity, it is probably a good thing for a legal child, someone who is under the age of 18 but over 16, to be the subject of a PDO, picked up and put into protective custody. It is not as though such children will be picked up, convicted without trial of some crime and thrown into a dungeon. They will be picked up to stop them participating in or contributing to that act. I think that what we have in the bill is what we need.

The best thing I can say about Canberra is that the more I see of its ideas, the more I think it is good that it is about 3 000 or 4 000 kilometres away. I do not say any of that unkindly. The bit about Canberra I said unkindly; there is no question about that. In relation to the remarks I am addressing to my friend Hon Giz Watson, I support her intent and agree with it. I think that what is in the bill is a good human redeeming thing among the quite bleak subject matter that we are contemplating. It gives us a possibility to actually do something really positive for an individual and give him or her a life. I think we can go with what we have. The minister wants to report progress so I will sit. We will not support the amendment.

Amendment put and negatived.

Clause put and passed.

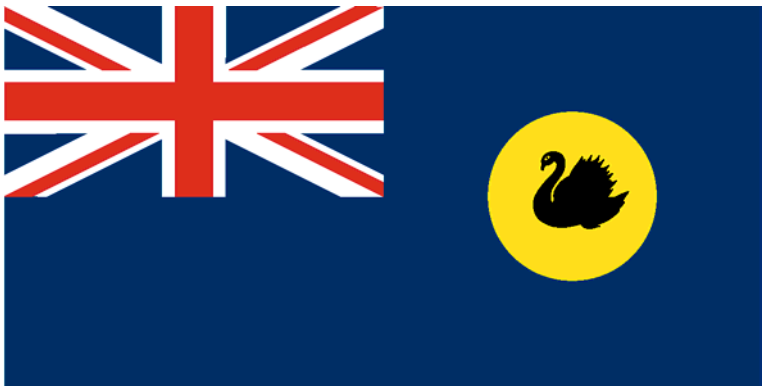
Progress reported and leave granted to sit again.

STATE FLAG BILL 2006

Assembly's Message

Message from the Assembly notifying that it had agreed that the reproduction of the flag in part 2 of the schedule to the State Flag Bill 2006 be replaced by the correct reproduction of the flag and inviting the Council to pass a similar resolution now considered.

The correct reproduction of the flag is as follows -



Motion

HON BARRY HOUSE (South West) [9.38 pm] - without notice: I move -

> That the Legislative Council, in accordance with joint standing order 12, agrees that the reproduction of the flag in part 2 of the schedule to the State Flag Bill 2006 be replaced by the correct reproduction of the flag as contained in Legislative Assembly message 161.

Very briefly, I will explain why we are doing this tonight. Members will recall that on Foundation Day we passed the State Flag Bill 2006. It turns out that the schedule attached to that bill containing a diagrammatic representation of the state flag was incorrect. This was pointed out to the promoter of the bill, Hon Colin Barnett, and me by the Australian National Flag Association. The depiction of the flag in that schedule was not