PROHIBITED BEHAVIOUR ORDERS BILL 2010

Consideration in Detail

Resumed from an earlier stage of the sitting.

Clause 3: Terms used —

Debate was adjourned after the clause had been partly considered.

The SPEAKER: Members, we are entering consideration in detail, so I ask that you give some consideration to that process. If you are in the chamber for the consideration in detail stage, I ask that you move to your seat as soon as possible. Attorney General, are your advisers here, or are you your own adviser?

Mr C.C. PORTER: I keep my own counsel, but I am sure that my advisers will arrive in due course. I will announce them when they appear.

Before question time I was asked a question by the member for Warnbro on this clause. The question was about the potential for someone who has sworn to be charged and convicted with disorderly conduct, and how that fits into the scheme of checks and balances in this legislation. The first question concerned what could constitute disorderly conduct. The member mentioned somebody swearing at a police officer and whether that would technically or legally constitute disorderly conduct. It is almost impossible for me to answer that question in the abstract without knowing the precise circumstances. There is a good deal of case law, for instance, about whether the eff word constitutes, in and of itself, disorderly conduct. I do not have all that case law with me, but I think it would be fair to summarise it by saying that it would say "it depends" and that the use of that word, simpliciter, is not necessarily going to breach the standard that would have to be proven for disorderly conduct.

I understand that the overarching point of the member's question is whether it would be possible under this legislation for someone with a very small number of small offences such as disorderly conduct, which could conceivably grow up in minor circumstances, to be eligible for a prohibited behaviour order. Again, my answer in general terms would be no. The reason I say that is, firstly, sitting behind one's first appearance in court—whether or not one is a juvenile or an adult, but let us deal with the juvenile first—is a system of cautions, into which I went in some detail in the second reading speech. We then have juvenile justice team referrals, and then a system whereby even after those types of processes are engaged in, if one turns up to court as a juvenile, there are provisions in the Young Offenders Act that provide for no punishment. A youth can be found guilty of an offence such as disorderly conduct, but the order of the judge can be that because it is a minor matter, the order would be no punishment. There are a couple of things I would say. The first is if for the first time in someone's life he or she engages in disorderly conduct with or without a swearword—perhaps the one that we intimated—the likelihood is that the person will be cautioned as a starting feature. If members look through the statistics on cautions, they will see that they are very generously applied—indeed, more generously under this government, and I read out some of those. Then the youth might be diverted after that—after several cautions—to a juvenile justice team. Then it is conceivable that the youth might be brought to court. Then the court would have to apply a standard that is not firm but would depend on all the circumstances. Let me say specifically that people are convicted as juveniles and adults for disorderly conduct. If it arguably is a very minor instance of disorderly conduct, what we would likely find is that the magistrate in the Children's Court would utilise the relevant provisions of the act that offer no punishment. If we skip forward in this bill to division 2, "Making PBOs against youths", we will see clause 17, "No PBO where court refrains from imposing punishment on youth", which reads —

> A PBO cannot be made against a youth if the related sentence involves the exercise of a power under the *Young Offenders Act 1994* Part 7 Division 2, 3 or 4.

Without opening that act up right here and now, these provisions allow for no punishment or no punishment with conditions, and so forth. Even if the youth had engaged in disorderly conduct and been cautioned a couple of times and then referred to a juvenile justice team, and then eventually came to court, and it was serious enough for the youth to be convicted, in a juvenile court at least, there is still the option to record a minor offence and for no punishment to be offered. When there is that option, that would not count as the second strike that would make him ineligible for the court to then consider his criminal behaviour and record at large. Whilst members opposite might not like the legislation, what I am pointing out is that that is another level of protection for a juvenile. They would have to do more, if members like, than simply have two what would be described as minor offences to which no punishment might attach. The second of those could not count as the second eligibility strike.

Mr J.R. QUIGLEY: For the edification of members, I will bring the house up to date with the conversation I had with the Attorney General offline about the way we will proceed this afternoon. Although we are on clause

3, the debate will be interlaced with subsequent clauses, including clause 8, and the Attorney General has indicated he does not mind if I jump around a bit as I go forward. The opposition will not be moving any amendments; we will be flagging our objections. I have said that I am going to oppose this root and branch, at divisions, but the opposition will not keep this Parliament dividing all afternoon. Mr Speaker, I will try to speed it up, but I want you to at least cut me some room, because I will be going a bit further forward than clause 3 from time to time. They are all interlaced and the Attorney is happy with that.

The last question I asked the Attorney General was about hearing notices, which are at the bottom of page 2 of the bill. My question relates to fairness, and I put to the Attorney General that when we get to proceedings or matters, for example, in clause 5, which is an application that will be brought after conviction but prior to sentence, I want to look at the reality and practicality of what happens in the arrest court. Court 37 is usually the arrest court from my memory—it might have changed now. Dozens of people are presented nearly every morning of the week, but especially early in the week, and many of them are disposed of by way of a plea of guilty. After that person stands up, if it is a second relevant offence within a three-year period, clause 5 will become active. The Attorney General would agree with that?

Mr C.C. Porter: Yes.

Mr J.R. QUIGLEY: If the person pleads guilty, first of all, a plea of mitigation is made, and prior to the sentence being struck, if I understand this bill, the prosecutor would then flag his intention to apply for a prohibited behaviour order.

Mr C.C. Porter: He would have to make the application. The flagging is the hearing notice.

Mr J.R. QUIGLEY: That is what I wanted to get to, because clause 5(1) says that a prosecutor in criminal proceedings may make an application for a PBO against the accused any time after the court has convicted the person. Does there have to be a hearing notice? I know that the court can then adjourn to another time, which would involve a hearing notice being given to the person. What I am drilling down to here is: what is to stop the prosecution, after the person has pleaded guilty and the magistrate records "convicted", and then counsel and the prosecutor will be called upon at some point during that address, at that point saying, "And, Your Honour, we are seeking a PBO as we draw to Your Honour's attention that this is the second relevant offence within a three-year period"? Is there anything to stop that?

Mr C.C. PORTER: It is part of the necessary interpretation of the clause. My understanding of the intention of the procedure is that the prosecutor may make an application at any time after the court has convicted and before the court has sentenced. There might be different permutations to that. But as the member for Mindarie pointed out, court 37 is a very busy court and there are many people convicted in that court over the course of a day. After a conviction, but part of those proceedings, the application for a PBO is the commencement of the PBO proceedings. Pursuant to the hearing notice, the court would have to write to the person specifying the date, time and place of a hearing of a PBO proceeding. I refer to the case at the point of conviction. More often than not a person in the busy court 37 is sentenced at the time that he is convicted, and the application will be made at that point of conviction on the day he is convicted. Therefore, the person who is the subject of that application would have had prior notice through a hearing notice delivered to him by the prosecution. Just as is the case to get to court 37 in the first place, at the point of conviction one must have had a summons. In these circumstances, one would have to have an additional document, which would be notification that at that point in time an application pursuant to clause 5 is made.

Mr J.R. QUIGLEY: The point I want to make is that it is not always by way of summons. A lot of these people are arrested, given overnight bail from the lockup and told to appear the next morning. They do not get any other paperwork, other than a notice under the Bail Act to appear. Often this happens at night-time. My concern is as follows. Looking at the practicality of the appearance, a person is arrested, admitted to bail—under the Bail Act that can be by a sergeant over at the watch-house—and the person appears the next morning by himself. The person pleads guilty to a relevant offence—being the second relevant offence—and the Attorney General is saying that at that point the sergeant, if he wants to make a PBO, would have then to give a hearing notice.

Mr C.C. PORTER: I am now managing the court system that sees 107 000 events in a year. I wish it were the case that there were a great number of those instances that the member for Mindarie mentioned where someone is arrested, kept in a lockup overnight and then turns up and is convicted by virtue of a plea of guilty the next day. However, that rarely happens. The overwhelming majority of them are deferred and the appearance will take some time. That is my understanding in terms of the sheer volume of persons in the system, but in the circumstances the member for Mindarie has mentioned —

Mr J.R. Quigley: Excuse me; that is not the case in remote areas. The magistrate flies into town to be given a big list of Indigenous people and he is only in town, in Halls Creek or Fitzroy Crossing, for the day. Those people have been arrested and brought before the court and we are on with the job.

Mr C.C. PORTER: I think that that serves to illustrate the point perfectly. Yes, a magistrate will go, for instance, out to that small courthouse in Roebourne, but he will not be there all the time. People who have been arrested are given notice to come back in four days or 10 days when the magistrate will be there. The circumstance the member is speaking to whereby someone is arrested on a Tuesday and appears in court on a Wednesday, pleads guilty and is convicted on that day is, I put to the member, very rare. However, to the extent that that does, from time to time, occur, it would nevertheless be incumbent on the prosecution to give notice specifying in writing the date, time and place of the hearing of the PBO proceeding. Therefore, if they are to make that application right then and there, they must have given notice.

Mr J.R. QUIGLEY: I remind you, Mr Speaker, that this interchange clearly follows from the definition of "hearing notice" in clause 3.

I have said that I am not going to move amendments and hold up the house for the whole of the afternoon, because come an amendment, a division will go on party lines. However, I am going to invite the government to consider including after the words in clause 5(1) of the bill "after the court has convicted the person; and" the words "after a hearing notice has been served". That one extra line, for the purpose of natural justice, will take it beyond the court's interpretation and will deliver the court a piece of legislation—I know it has to be made in accordance with the rules of the court—that will make it abundantly clear that the PBO proceeding will happen after conviction and after service of the notice.

Mr C.C. PORTER: I think I now better understand the member's point; namely, is it not impossible on a strained interpretation of these provisions, that a person, on the day of conviction, may get notice four or five minutes before that this will be the time, date and place of the prohibited behaviour order process?

Mr J.R. Quigley: That could happen at the bar table.

Mr C.C. PORTER: I understand the member's point.

Mr J.R. Quigley: And I do not think it strained.

Mr C.C. PORTER: Well, I perhaps disagree somewhat with that. In any event, I take on board the member's suggestion. I appreciate his overwhelming objection to all the provisions in this bill and I appreciate his suggestion for amendment. It seems to me that if this were a problem, it would be well and truly cured by the regulations and court forms that the court would apply in these circumstances. However, if I am not satisfied that the situation the member has indicated could not be obviated or avoided by the regulations and court processes, I will give some consideration—perhaps when the bill is in the other place—to having an amendment of the type the member has indicated moved in the other place. As I have said, I will give this more thought. Certainly, the intention is that someone be given notice before the time of conviction of the fact that at that time an application for a PBO will be made. I appreciate the point the member is making, but I think it is a strained interpretation, albeit perhaps not absolutely impossible. However, any interpretation would always be taken to the benefit of the person against whom the notice would be brought. I think it would be cured by the forms, procedures and regulations of the court processes, but if that is not the case, and I am wrong, I will look to have it amended in the other place.

Mr J.R. QUIGLEY: I thank the Attorney General for that. Having been in the courts long enough to see how these things are interpreted, I do not think it is a strained interpretation. I do not think that this Parliament should be leaving the courts to come up with a new set of rules and regulations to cover what I see as, perhaps, a deficiency in the process. However, if I can move on —

Mr C.C. Porter: They would be regulations pursuant to the act.

Mr J.R. QUIGLEY: To clause 39.

Mr C.C. Porter: Yes—my regulations.

Mr J.R. QUIGLEY: That brings me back to the definition of "hearing notice". Many of these people will be unrepresented because when they go to Legal Aid Western Australia they will not get aid in all cases. They will get aid sometimes for an early plea by way of duty counsel. I understand from clause 10(2) that this legislation is designed to restrain people from what would otherwise be a lawful activity.

Mr C.C. Porter: Yes.

Mr J.R. QUIGLEY: Which lawful activity the court or the prosecution would be saying is predictive of further unlawful conduct.

Mr C.C. Porter: Predictive, precursory —

Mr J.R. QUIGLEY: Yes, yes; okay. Given that "hearing notice" means a notice that specifies the date, time and place of the PBO proceedings, the shortfall, as far as the Labor opposition is concerned, is that there is no requirement in the hearing notice to give notice of the constraints that will be sought. For example, if a person went to the Legal Aid Commission seeking aid for representation on a PBO, the commission, when assessing the application, would be blind as to the seriousness or otherwise of the constraints being sought. I have in mind the constraints that can be sought under clause 10(5), which indicates that a PBO may constrain a person from entering premises that the restrained person has a legal or equitable right to enter. That is a fairly significant delimitation of a person's rights in a democracy. In other words, the act that he is about to undertake is lawful and the lawful act that he is about to undertake, or wants to undertake, is to enter premises that he has a legal or equitable right to enter. I am putting this forward only as an example of why the person is not getting natural justice or due process as the Attorney General referred to prior to the luncheon adjournment. If the hearing notice does not include the particulars of the constraints sought, the person still could come along to court and be taken by surprise.

I am also asking the Attorney General to amend clause 3(1) and the definition of "hearing notice" to include a specification of the date, time and place of the PBO proceedings, and the constraint and the nature of the constraints to be sought, because that is the information a person needs to take to Legal Aid or to another lawyer.

Mr R.H. Cook interjected.

Mr J.R. Quigley: Or to decide whether he wants representation at all or even to contest the PBO. He might not want to contest it.

The ACTING SPEAKER (Mr J.M. Francis): Thank you, member for Mindarie. I need the Attorney General to respond because you took your seat.

Mr C.C. PORTER: I understand the member's point. I can understand why it might be desirable for the hearing notice to stipulate the type of order that will be sought. But is it not the case that the problem the member is seeking to cure is dealt with by clause 7(1); that is —

> (1) A court considering the question of whether to make a PBO against a person may —
>
> (a) proceed to hear the question after passing the related sentence; or
>
> (b) adjourn the question to a hearing.

Even if it were the case that someone is convicted and sentenced immediately, which is sometimes the case, if there were any objection or it was a matter of such seriousness that the matter was sought to be argued, the matter could be adjourned to a hearing and legal representation sought and the case argued in a more fulsome way.

I understand what might be one of the benefits of having the hearing notice contain the precise terms of the order—such as they could be put at that stage—that would be sought. It may well be that the hearing notice, although not stipulating it, indicates that that is what is anticipated in the hearing notice. Nevertheless, the option is there for the court to adjourn a matter that is of a level of seriousness that the member said might be greater than the run-of-the-mill PBO.

Mr J.R. QUIGLEY: I can well understand the Attorney General's reply, but in a practical sense this will massively increase the court's load, will it not? Because, once again, we could have the situation in which the offender says, "I've never had notice of these terms before and I am not represented today"; therefore, it has to be put off to another day into another list, which will increase the court's workload. If the application is made after conviction in a regional court, as the Attorney General proposes to do, that matter can just be put off and it might be another month or two months before that court can come back and hear that prohibited behaviour order that it has had to unnecessarily adjourn because the person did not have notice of the constraints being sought. We plead that if a PBO application is to be made, the hearing notice should give the person—as the summons gives the person notice of the offence to be charged and always has attached to it the statement of material facts that will be read to the court—the constraints that are being sought; otherwise, we will simply double up the work of courts all over the state. For instance, say we are in Fitzroy Crossing and the Aboriginal Legal Service is not represented but the person comes up and says, "I plead guilty, boss" and then the prosecutor asks for a PBO. The person could then ask for representation because he does not know what the prosecution is seeking, so we would adjourn that. If the scheme of the legislation, as announced by the Attorney General, is to control

miscreant conduct, the person will be unrestrained for a month or two until the PBO hearing comes on. I cannot see how it would impede that scheme or unduly burden the prosecutor, who will have to make this decision anyway, to advise the person in the hearing notice what constraints are being sought.

Mr C.C. PORTER: It is a fair point. My general understanding is that in the United Kingdom the criminal-based anti-social behaviour orders are overwhelmingly dealt with without the necessity for adjournment. My understanding is that there is not a circumstance in which that is a requirement, although it is regulatory habit in the UK for the terms to be put in the notice. I have no difficulty moving an amendment to the definition of "hearing notice" so that a form of words would be added to that such as "and the terms of the PBO to be sought", which I think would adequately cover the situation.

Mr J.R. QUIGLEY: "The terms of the PBO" or "constraints"—whatever the Attorney's wording may be. The opposition thanks the Attorney General for that.

Mr C.C. Porter: I will need to move that amendment later.

Mr J.R. QUIGLEY: I hope the Attorney General is happy that we are going this way instead of doing amendments on the floor on the trot. We are trying to speed it up. We appreciate the Attorney General's flexibility and the undertaking that he has given Parliament.

In relation to an answer given to my learned friend, my friend the member for Warnbro, earlier on —

Mr P. Papalia interjected.

Mr J.R. QUIGLEY: I am sorry I insulted the member and did not say "my very learned colleague"!

Mirth aside, to cut to the chase, Attorney, I will come back to the definition of "prescribed" in a moment. I will look at the definition of "prosecutor" because in the answer given to my friend the member for Warnbro, the Attorney said that at the end of the criminal proceedings an application will be made after conviction. It is to the term "criminal proceedings" that I now wish to take the Attorney. The orders themselves of course are specified in the legislation as being civil in nature. However, the provision in the bill for an application for a PBO, clause 5(1), states —

> A prosecutor in criminal proceedings may make an application for a PBO …

As we know, the term "criminal proceedings" is not defined in the Prohibited Behaviour Orders Bill, the Criminal Code, the Interpretation Act or the Criminal Procedure Act. There is no definition of a criminal proceeding. Therefore, the closest I can get to understanding the term "criminal proceeding" is a proceeding that requires the criminal standard of proof beyond reasonable doubt. Do I understand that? Is it like the charging of an offence that requires proof beyond reasonable doubt?

Mr C.C. Porter: Not all criminal proceedings require that.

Mr J.R. QUIGLEY: Do they not? Which ones?

Mr C.C. PORTER: There are some offences in the Prostitution Act whereby there has been a statutory modification to the general rule of beyond reasonable doubt. Off the top of my head, I do not know whether I would be able to nominate the sections. However, there are certain proceedings that could be defined as criminal in which there has been a statutory modification of beyond reasonable doubt to a civil standard; that is, it reverses the onus of proof or some elements of the offence can be proved to a different standard. It is a bit more complicated than the member is putting, I think.

Mr J.R. QUIGLEY: I understand that, but the High Court said that at the end of the day the court has to be satisfied, even in those reverse proof cases, of guilt beyond a reasonable doubt. Putting aside whether proof beyond reasonable doubt is the prescriber of what is a criminal proceeding, I come back to the definitions listed in clause 3—if I am not confusing the Attorney General by chopping around too much—which states —

> ***prosecutor***, in relation to PBO proceedings, means —
>
> (a) if the related prosecution was in the Supreme Court or the District Court …

We know from the Criminal Procedure Act what that will entail because there is only one agency that is authorised under the Criminal Procedure Act to commence a prosecution. However, the definition continues —

> (b) if the related prosecution —

What I understand by "related prosecution" is that it is the prosecution for a relevant offence —

> was in a court of summary jurisdiction — the authorised person (as defined in the *Criminal Procedure Act 2004* section 20) who commenced the prosecution or another such authorised person;

The Attorney General's adviser is probably trying to anticipate where all this is going. Section 20 of the Criminal Procedure Act deals with who can commence a prosecution. That directly relates to the definition of "prosecutor" in clause 3 of the bill. Section 20(1) states, in part —

> (a) if under another written law a person or class of person is authorised to commence a prosecution for the offence, that person or a person of that class; or
>
> (b) in any other case, a person —
>
> (i) who is a public authority or an employee of a public authority …

"Prosecution" for definition purposes includes prosecutors who are prosecuting offences other than criminal offences as commonly known; in other words, a prosecution for an offence against the Local Government Act or the Dog Act would be included, would it not? To prosecute an offence under the Dog Act, the prosecutor is a person authorised by a public authority—that is, the local government authority—to commence the prosecution. The term "prosecutor" as defined in clause 3 of the bill with its reference to section 20 of the Criminal Procedure Act will include local government prosecutors et cetera. I could go further. A person cannot start a prosecution under the Road Traffic Act unless he is an authorised person under that act, so my bottom line is that the bill will include the prosecution of a lot of people for offences under other legislation that does not involve police prosecutors or the Director of Public Prosecutions. Is that correct, Attorney; and, if not, why not?

Mr C.C. PORTER: We can both agree that because the definition of "prosecutor" is in relation to PBO proceedings in the Supreme or District Court, they would have to be what we would generally consider to be criminal matters.

Mr J.R. Quigley: Correct. That is for indictable offences.

Mr C.C. PORTER: For related prosecutions in a court of summary jurisdiction, a prosecutor is the authorised person defined in section 20 of the Criminal Procedure Act. I will have a look at that in a moment.

Mr J.R. Quigley: I have it right here, if you would like it.

Mr C.C. PORTER: I will leave the member with his technology; I will grab a hard copy.

I think a great deal turns on what is a prohibition—so what is unlawful. If we look down, there are serious criminal matters, criminal matters and matters that are unlawful in a general sense, and I think that much turns on the member's view of what is or is not a criminal proceeding.

Mr J.R. Quigley: It is not defined.

Mr C.C. PORTER: It is not defined in the Prohibited Behaviour Orders Bill 2010, but there is a meaning to it. I do not believe that it extends as far as to the Dog Act, for instance, or to local government ordinances, but I believe it may extend as far as some proceedings under, obviously, the Road Traffic Act, the Public Transport Authority Act and acts such as that. But I do not think that a criminal proceeding extends as far as to the Local Government Act.

Mr J.R. QUIGLEY: I have been searching all the relevant legislation, and I have been unable to find the definition of "criminal proceeding" in any of the legislation, and it is not in this act.

Mr C.C. Porter: Because I do not think there is one.

Mr J.R. QUIGLEY: No, that is right.

Mr C.C. Porter: I think it is act by act.

Mr J.R. QUIGLEY: The acts do not describe whether this is a criminal proceeding or that is a criminal proceeding, and my wrap-up point of this whole thing is that when we go back to the tripping point for the enabling—I forget what the Attorney General used as his economic term yesterday—or precipitating event, if the Attorney General likes, that can launch the prosecution, according to line 29, page 3 of the Prohibited Behaviour Orders Bill 2010, a relevant offence means —

> … an offence involving anti-social behaviour;

As to what antisocial behaviour involves, the Attorney General was very helpful this morning when he said that that is anything that causes alarm or distress. If a relevant offence is anything that causes alarm or distress, there is nothing in this bill that delimits "relevant offence" to an offence stemming or being rooted in a particular ordinance or piece of legislation. If a person, for example, takes a dog to the park and lets the dog off the leash and permits, or fails to—I forget what the actual Dog Act offence is—control the dog and it goes and bites someone, or starts baying or woofing, or whatever they do, at kids in the playground area of Clarkson Reserve and causes alarm —

Mr C.C. PORTER: Can I just stop the member there? I understand the point, but I am just getting a copy of the Criminal Procedure Act. The member has it in front of him; what is the member's interpretation of section 20? What does the member say is the import of section 20?

Mr J.R. QUIGLEY: According to this bill, at line 18, page 3 of the bill, under "prosecutor" it is stated —

> if the related prosecution was in a court of summary jurisdiction — the authorised person (as defined in the *Criminal Procedure Act 2004* section 20) who commenced the prosecution or another such authorised person;

But just to bring this back into focus, a prosecutor can make an application under section 5 of the act. Section 20 of the Criminal Procedure Act defines who the prosecutor is, and a prosecutor is a person who, under a written law, is authorised to commence a prosecution.

Then we go to section 3, the definitions section, of the Criminal Procedure Act—I know this is a bit technical and I am taking a bit of time, Mr Acting Speaker, but the classes of offences that this applies to are important. "Prosecutor" means —

> in a prosecution in a court of summary jurisdiction, the person who commenced the prosecution or a person who in court represents that person;

That then takes us through to who is authorised under this legislation to commence the prosecution, which takes us to section 20 of that legislation, which states that a person authorised to commence that prosecution —

> … is a public authority or an employee of a public authority;

That could be a ranger, as I understand the Criminal Procedure Act. If I have that wrong, why have I got that wrong?

Mr C.C. Porter: I do not think that is a conviction.

Mr J.R. QUIGLEY: It is most certainly an offence.

Mr C.C. PORTER: Many things are offences—it is an offence to park in the wrong spot—but the grounds for a prohibited behaviour order are —

> (1) In this section —
>
> ***conviction*** —
>
> (a) includes a finding or admission of guilt despite the fact that a conviction is not recorded under the *Young Offenders Act 1994* section 55; and
>
> (b) does not include a conviction that has been set aside or quashed.

That would have to appear on a person's criminal record, and the things the member is mentioning now would not so appear.

Mr J.R. QUIGLEY: I have difficulty accepting that, given the definition of "convict" under section 3 of the Criminal Procedure Act, which states —

> ***convict***, in relation to a charge, has the meaning given by subsection (2)(a)

That requires us to then go to subsection (2)(a) of the definitions section, which states —

> (2) For the purposes of this Act —
>
> (a) a person is convicted of a charge if a court under section 147(1) enters a judgment of conviction of the offence charged in respect of the person;

That most certainly happens. That the police do not bother to record that on a sheet does not change the definition of what a conviction is. A conviction is being convicted of a charge under the Criminal Procedure Act. All I can afford is a one-room extension for the baby, so if I go beyond my setbacks I might be charged and convicted of not having got the building licence, but that would hardly then be an antisocial offence because it does not cause alarm, distress or fear. I have not got a bull terrier, but if someone takes a bull terrier or a Doberman to a park and lets it off the leash and lets it harass kiddies in the playground, causing fear or alarm to mum, which happens regularly, and that person is charged with an offence under the Dog Act and the charge is proved and those offences are to the standard of proof in the courts—beyond reasonable doubt—and the person is convicted, the conviction will fall within the definition of "convict" under section 3 of the Criminal Procedure Act. My concern is that, as presently before the Parliament, the relevant offence could include offences that are not even in the mind's eye of the Attorney General this afternoon in Parliament.

Just before I resume my seat to enable the Attorney General to respond, I will move away from the Dog Act because I am sure that he does not want to include offences under the Dog Act in this scheme of things. I do not say this as a matter of pride because it just shows my age, but after 26 years at the bar table, I have seen some pretty whacky things happen, including stretched interpretations of the law, even as recently as the last case I was involved in—the Mallard case. I can see arguments that an offence under, for example, the Dog Act could be an antisocial offence—a relevant offence that could be deemed to be antisocial. Before I resume my seat so that the Attorney General can address both issues, leaving aside the amendments to the Liquor Licensing Act that have been put forward, why would an offence under the Liquor Licensing Act not be a relevant offence? If a person is told to leave the premises immediately and he refuses to leave and an officer is called and arrests him for refusing to leave, why would that not be a relevant offence? Stepping one away from the Criminal Code would be the liquor licensing laws, but I need convincing that this would not include local government prosecutions when the offence involves antisocial behaviour.

Mr C.C. PORTER: I still maintain that the fact of having to be convicted of a charge, which is something that will appear on a person's criminal record, will not apply to some of the situations that the member has referred to. Matters that might appear in a person's criminal record do not come simply from the Criminal Code. Some of the matters in the ubiquitous Dog Act, for instance, are very serious offences and others are very minor offences. But the way in which this bill seeks to cure the problem that the member has raised, which is to not encapsulate minor offences in what might colloquially be called non-criminal pieces of legislation, is that someone has to be charged and convicted, and that is a matter of criminal record.

Mr J.R. QUIGLEY: I do not know what the Attorney General means by "criminal record". That is an elliptical submission. There is no definition of a criminal offence. The Attorney General is saying that it is a criminal record. He has conceded that some of the offences under the Dog Act are serious offences. We have seen recently the tragic outcome of some of that conduct, with dogs mauling young children and inflicting far more extensive and grievous harm than, say, a glassing, which I am not playing down as something that does not cause serious injury. If someone were to go to a park and habitually let her dog cause harassment, why would the prosecution not seek a prohibited behaviour order if the Attorney General is right that the PBO will modify the person's behaviour?

Mr C.C. PORTER: I agree that obviously what we are arguing about is where the line should be drawn. It may be that some serious offences are not caught by this legislation because of the way in which it is drawn. But the best I can say to the member is that the intention is that these are matters that are proven by criminal record. A person needs to be convicted of a charge in criminal proceedings and that has to appear on the person's record.

Mr J.R. QUIGLEY: I will wrap up on this matter, but this is another reason why I said earlier that we will oppose this at the vote, root and branch. What I am putting to the Attorney General is that he simply does not know. He has said that it is what is on a person's criminal charge sheet. If the police put on the charge sheet that the person has allowed her dog to cause grievous bodily harm, that is covered as a relevant offence; but, if the police do not put it on the person's charge sheet, it is not a relevant offence. That is my understanding.

Mr C.C. Porter: That is my interpretation of the bill.

Mr J.R. QUIGLEY: That then goes to whether a woman goes to the park and habitually lets her dangerous dog off the leash. I use the term "dangerous dog" deliberately because there is a definition of "dangerous dog" in the act. The Acting Speaker nods because I think he owns a dangerous dog.

The ACTING SPEAKER (Mr J.M. Francis): It is a friendly dog. I do not know what the definition is.

Mr J.R. QUIGLEY: It is a friendly dangerous dog! If the Acting Speaker's wife were to go to the park —

The ACTING SPEAKER: Are you calling my wife a dog, member?

Mr J.R. QUIGLEY: The Acting Speaker's dog is probably a licker, not a biter; I understand. To get the mirth out of this debate and return to the point, if a woman went to the park —

Mr M. McGowan: There is another sort!

The ACTING SPEAKER: I am just trying to work out whether the member is referring to my wife as a dangerous dog!

Mr J.R. QUIGLEY: No, no, no, Mr Acting Speaker! It is that Alsatian that you get photographed with.

The ACTING SPEAKER: They are very friendly, member.

Mr J.R. QUIGLEY: That is what I said—a licker; a friendly dangerous dog! Under the act, nonetheless, I think Alsatians are defined as dangerous dogs. Leaving that aside, I bring the focus back for the Attorney General. If a

person went to the park and habitually let a dangerous dog off the leash and it either damaged or continually harassed someone, that would be as big an offence as someone threatening a person; it is just that it is being done by an animal rather than a person waving a stick around.

Mr C.C. Porter: I agree.

Mr J.R. QUIGLEY: I am just checking the stretch or reach of this legislation. It could reach as far as a woman going to the park and habitually letting off the leash a dog that harasses children in the park.

Mr C.C. Porter: If that resulted in a criminal record, yes.

Mr J.R. QUIGLEY: The determiner is what the Commissioner of Police puts on the record sheet rather than the nature of the charge.

Mr C.C. PORTER: What goes on a criminal record is not a matter of sheer discretion. I cannot give the member an answer right here and now as to exactly the rules that apply to what does and does not go on a criminal record. I understand the point the member is making. The point is that a person who is able to commence a prosecution will vary from act to act. Instead of going through and nominating which people nominated in which acts are able to commence the prosecution, let us come at it from the other angle—that is, requiring the trigger to be a charge for which there is a conviction.

Mr J.R. QUIGLEY: That is right. I think we have gone as far as we can with this, because conviction is defined. The reason that Labor opposes this legislation root and branch comes from the Attorney General's own mouth—he does not know. He cannot tell Parliament, by reference to lines and words in this legislation, where the boundary of this legislation is. It could be as wide or as narrow as any particular prosecutor wanted to cast it. That is one of the reasons we say that not only is this legislation crude in its application, but also it is uncertain in its prescription. I shall move on because the Attorney General has already made the point.

I now move to the definition of "wellbeing" at line 31 on page 3 of the bill. It refers to the definition of "wellbeing" in section 3 of the Children and Community Services Act 2004. Section 3 of the Children and Community Services Act 2004 defines "wellbeing" as including —

Mr C.C. Porter: You're in a race with the attendant for the hard copy.

Mr J.R. QUIGLEY: This iPad is more than a gimmick. The Attorney General is racing an old man; he is half my age. I have got it; I have beaten the Attorney, who is getting the hard copy! The definition in that act states —

> *wellbeing* of a child includes the care, development, health and safety of the child;

I am getting ahead of myself. I hope we do not get guillotined in this debate, because I want to come back to that at a later stage when we talk about how the court has to take into account the wellbeing of the child. That is the definition of "wellbeing" in the Children and Community Services Act. The definition of "wellbeing" in this bill states in part that "wellbeing has the meaning". Is it any wider than that? I will not labour that point now, Attorney, but the Attorney may want to keep his copy of that act, because I will need to come back to this when we get to a subsequent clause. However, I flag that this is another reason why we will be opposing this legislation root and branch. We believe that if we take into account the wellbeing of the child, there will never be a case in which it will be in the child's interests—that is, in the care, development, health and safety of the child—to post the child's details on the internet. So that is another reason why we are opposing the legislation. But I will come to that in due course.

I take the Attorney now to subclause (2) of clause 3, which is found in line 3 on page 4. It says —

> A prescribed offence is to be taken to involve anti-social behaviour in the absence of proof to the contrary.

I take it that those prescriptions can be made under the regulations?

Mr C.C. Porter: Yes.

Mr J.R. QUIGLEY: I take it also that it will be open to the government to bring to this Parliament from time to time regulations, and that those regulations may include offences that do not fit within the definition of "antisocial behaviour" but are just deemed to be antisocial?

Mr C.C. PORTER: If it were to be proved that an offence was not an antisocial behaviour offence, then for the purpose of the court and the act it would not be an antisocial behaviour offence. To the extent that there will be prescription by regulations, these will be as a matter of evidentiary assistance. For instance, if a person was caught doing graffiti on a piece of public property, there could be a great deal of argument as to whether or not

that was an offence that is likely to cause harassment, alarm, distress, fear or intimidation; or damage to property.

Mr J.R. Quigley: Yes—or damage to property.

Mr C.C. PORTER: That is correct. The member is quite right. That is not a good example. Disorderly behaviour is a good example. That would be a key example for prescription.

Mr J.R. Quigley: That is the one I want to get to.

Mr C.C. PORTER: That is a good example, because it may be the case in those circumstance that there is no actual damage to property. Nevertheless, we would assume that, generally speaking, disorderly conduct is conduct that causes or is likely to cause harassment, alarm, distress, fear or intimidation. The regulations are to assist in the putting of evidence and the proving of the matter. It is obviously a matter of making the system more efficient.

Mr J.R. Quigley: Is that right? I always get worried in criminal proceedings when things are done to make the proceedings more efficient! It usually means something less —

Ms M.M. Quirk: Cutting corners!

Mr J.R. QUIGLEY: Yes. I am sorry, Attorney, but I do not follow that, so I ask the house to be a bit patient with me. The Attorney said, "if it involves disorderly conduct". To be a relevant offence, that disorderly conduct has to be conduct that causes or is likely to cause—we went through this at the start—harassment, alarm, distress, fear or intimidation. So, the Attorney would not be prescribing an offence that causes any of that, would he?

Mr C.C. PORTER: What we intend to prescribe is the offences that seem to most obviously fit that definition. If the member looks at, say, the definition of "disorderly behaviour in public", it includes the use of insulting, offensive or threatening language, and behaving in an insulting, offensive or threatening manner. One would think that a person who was convicted of disorderly behaviour in public would almost always fall into the category of behaviour that meets the definition of "antisocial behaviour"; that is, behaviour that causes or is likely to cause harassment, alarm, distress, fear or intimidation. What we are saying is that there will be a requirement that that be accepted. That is, if there was a peculiar instance in which there had been the use of insulting, offensive or threatening language, and an argument could be made on the balance of probabilities—obviously to be made by the subject of the PBO application—that that nevertheless did not cause or was not likely to cause harassment, alarm, distress or fear, the argument could be put that in effect that type of offence would be presumed.

Mr J.R. Quigley: A reverse onus.

Mr C.C. PORTER: Yes.

Mr J.R. QUIGLEY: So, when the Attorney said, in answer to the member for Warnbro, that the f-word may or may not constitute disorderly conduct —

Mr C.C. Porter: As a matter of convicting someone.

Mr J.R. QUIGLEY: Yes. That is correct. The person has to be convicted to make the relevant offence.

Mr C.C. Porter: Indeed.

Mr J.R. QUIGLEY: So there can be a conviction of disorderly behaviour by the person's use of the f-word. But it does not actually cause anyone harassment, alarm, distress, fear or intimidation, and nor is it likely to. I can tell the Attorney that a lot of abuse is hurled at politicians from time to time out there in the public. But we all seem to have developed a thick hide. When people abuse us, they do not actually assault us or cause us any difficulty. We just say, "We have a healthy attitude to politicians in Australia. Everybody hates politicians, so they abuse them." We all in the system understand that and box on anyway. So, it has not caused me alarm, distress or fear, and it has not damaged my property, but, nonetheless, the Attorney could prescribe it.

Mr C.C. PORTER: Yes. To use that example—because I think it was the key example that we had in mind when we considered whether or not to prescribe certain behaviour and to rely on the presumption that it is antisocial behaviour—the reason we did that is because a person would, of course, first have to be convicted of behaving in a disorderly manner. Whether some gentle appropriate behaviour against a politician would fall into the category of disorderly conduct would be a matter for the courts before this question that we are now dealing with arises—that is, whether or not it is antisocial behaviour. But if a person is convicted of disorderly behaviour in public, the presumption is that that is an antisocial behaviour offence. The presumption is that disorderly

behaviour in public meets the criterion of behaviour that is likely to cause harassment, alarm, distress, fear or intimidation. In the circumstance—I am not saying it could not arise, but it would be very rare—that disorderly conduct did not fit within the definition of "antisocial behaviour", the onus would be on the person who is the subject of the application to argue that point.

Mr J.R. Quigley: Once you have prescribed it?

Mr C.C. PORTER: That is correct.

Mr J.R. QUIGLEY: Then having already demonstrated to the Parliament this afternoon that this bill is so worded that the Attorney cannot tell us the limits of it —

Mr C.C. Porter: I can, but you just do not accept them!

Mr J.R. QUIGLEY: The Attorney said it will be up to the police commissioner as to whether —

Mr C.C. Porter: There are firm rules about what does or does not appear on a criminal record.

Mr J.R. QUIGLEY: What are those rules?

Mr C.C. Porter: I am afraid I do not have those at hand, but I will obtain those for the member in due course.

Mr J.R. QUIGLEY: The problem with this legislation is that there is no definition of what sort of offence will constitute a relevant offence, other than it has to be characterised as involving harassment, alarm, distress or fear, plus, or in the alternative, be a prescribed offence. But, as I understand it, before this legislation is considered and finally voted on by Parliament, although the Attorney has referred to disorderly conduct, he does not intend to give the community the benefit of the list of the matters that he intends to prescribe.

Mr C.C. PORTER: That is how regulations, by virtue of acts of Parliament, of course work. What we are looking at putting on the prescribed offences list are those offences that, in the overwhelming majority of circumstances, are likely to cause harassment, alarm, distress, fear or intimidation, as a means of easing the procedural burden on the courts and the prosecution.

Mr J.R. QUIGLEY: That, once again, is circular, because the Attorney General is saying that it is going to be offences that are likely to cause harassment, alarm, distress, fear or intimidation, and that is indeed the objective test in clause 3(1)—we have agreed that earlier—so there is no need to prescribe those offences because they are already captured by the legislation. This afternoon, the Attorney General wants the power, and the community is saying, "Look, we know that serious Dog Act offences could be caught, and details of women could be put on the internet. We want to know what offences you intend to prescribe"; or is this just going to be a surprise for the community down the track? We submit that this is not satisfactory for the community.

Mr C.C. PORTER: As I said, the matters that are intended to be prescribed—the list is not settled yet—are ones in which we have identified that there is a clear and obvious correlation between harassment, alarm, distress, fear and intimidation and the elements of the offence. The purpose for doing that is simply this —

Mr J.R. Quigley: What are those matters?

Mr C.C. PORTER: I can give the member some examples, if he wishes. Disorderly behaviour in public is one. There is also being armed in or near a place of public entertainment; being armed in public company—those types of offences. The reason we are doing that is to not set up a system under which the argument in every matter is an argument about whether it is an offence that is likely to cause harassment, alarm, distress or fear, when that argument should be had in only the exceptional and rare circumstances in which there is a decent argument to be put that the elements of the offence do not meet that criterion.

Mr E.S. RIPPER: This is a question that often arises in debates on legislation in consideration in detail. Will the Attorney General commit to giving the house or the Parliament copies of the regulations before the legislation finally goes through the Parliament; or, failing that, can the Attorney General commit to giving us copies of the drafting instructions for the regulations so that we can see what offences he intends to prescribe?

Mr C.C. PORTER: I think I can do that, and I undertake to do it.

Mr P. PAPALIA: Notwithstanding what my leader just asked of the Attorney General, I am very interested in discussing this a little more, because despite the fact that the Attorney General has offered to provide us with draft examples of the regulations and what they will contain, in the meantime there will be a public debate, which the Attorney General has already commenced and so has the Premier, about the introduction of this legislation. The opposition will be judged, in its response to this legislation, by what goes through this house at the moment Therefore, the Attorney General is asking us to undertake the rest of this debate in the absence of any indication of what will be in the regulations beyond those worst offences that he has just mentioned. By way

of explanation, I will go back to the Liberal Party's policy document released before the last election, which referred to the type of behaviour which may be considered antisocial in the United Kingdom and which would likely be the subject of such orders in this jurisdiction, including harassment of residents or passers-by, verbal abuse, criminal damage, vandalism, noise nuisance, graffiti, engaging in threatening behaviour in large groups, racial abuse, substance abuse, hooning, assault and vehicle vandalism. I agree that a lot of those are antisocial, but, as we discussed earlier, I think that some of them open up an incredible opportunity for people who probably should not be captured by our justice system to be captured by it because of this legislation. Even though the Attorney General has generously offered to provide those draft regulations, I am concerned that we will not get to see them. In the next week or so, the Attorney General and the Premier will be going out into the public domain and using this debate and our act of opposing the government's legislation and voting against it in a political sense in the public eye in an effort to try to engender support for their legislation, which will then have to go through the upper house and will take time to pass, in the absence of any indication from the Attorney General of what will be in the regulations beyond those worst cases that he has mentioned—those obvious antisocial behaviours. I would say that maybe this is the time when the Attorney General should reveal a little more in the way of what exactly is going to be covered in the regulations, because what we are talking about here has the potential to have a serious impact on freedoms currently enjoyed by Western Australians and, in my view, as the Attorney General has heard, has the potential to have a serious negative impact on society.

Mr C.C. PORTER: Again, I understand the point. Obviously, the member is opposing the legislation, so he is doing his bit regarding what he has said to the community he is going to do, which is oppose the legislation. I apologise if the member finds that policy document, even though expansive as far as policy documents go, inelegantly worded. However, by raising those matters, what we have meant to say, in effect, is that disorderly conduct will be one of the offences that will count as an eligibility offence for a prohibited behaviour order. The types of matters that the member read out in that list in the policy document overwhelmingly would be likely to be argued and put as a factual part of proving, and a person being convicted of, disorderly conduct, which is the offence that we have spent some time on today. I can definitely confirm to the member that disorderly conduct is one of the matters that we are seeking to prescribe.

I undertake to give the member that list when it is drafted and finally settled, but I can be more expansive here and now about some of the instructions I have given. Some of the offences that I am giving consideration to finally being on that list are: under the Bush Fires Act, section 32, offences of lighting or attempting to light fire likely to injure; the Criminal Code offences under section 68B, being armed in or near place of public entertainment; section 68C, being armed in public in company; section 68, being armed in a way that may cause fear; section 69, forcibly entering land; section 70A, trespass; section 71, fighting in public causing fear; section 74, threatening violence; section 74A, disorderly behaviour in public; section 74B, causing fear or alarm to people in conveyances and others; section 77, conduct intended to incite racial animosity or racial harassment; section 80A, conduct intended to racially harass; section 80B, conduct likely to racially harass; section 171, creating a false belief; section 172, obstructing public officers; section 202, obscene acts in public; section 203, indecent acts in public; section 204, indecent acts with intent to offend; section 204A, showing offensive material to children under 16; section 313, common assaults; section 317, assaults occasioning bodily harm; section 318, serious assaults; section 338A, threats with intent to influence; section 338B, threats; and section 338E, stalking. They are the types of offences. I will undertake to show the member the list when it is finally drafted, but he will get a flavour from that list that what we are seeking to do, as a matter of fair evidentiary procedure, which does occur in this bill, or is proposed to, and other acts, is avoid endless arguments in court, except in the circumstances in which there is a real case to be made that the offence on that list is one of the rare circumstances in which one of those types of offences has not involved antisocial behaviour. I will undertake to give the member the list, and it is in the final stages of being prepared.

Mr J.R. QUIGLEY: I am pleased that I have only two more questions and then, as far as I am concerned, we will have finished down to clause 6, so we are not going as slowly as it might appear. In relation to that answer then given, that list will not be an exclusive list.

Mr C.C. Porter: No.

Mr J.R. QUIGLEY: Because the Attorney General is not saying that he is going to sit down and think of every offence. Therefore, I do not want the community or this Parliament to think that that list is the end of the matter.

Mr C.C. PORTER: That is right, and that is a fair assessment.

Mr J.R. Quigley: In the other matters, the burden of proof will be the other way.

Mr C.C. PORTER: In the other matters, yes; the prosecution will have to prove on the balance of probabilities in every instance that the offence is one that did or was likely to cause harassment, alarm, distress, fear or intimidation. However, what I have attempted to do by virtue of having a power of prescribing by regulation—

obviously, it is a serious matter to reverse an onus—is to prescribe only those offences that, in all the ordinary circumstances, would obviously fall into the category of behaviour that is likely to cause harassment, alarm, distress, fear or intimidation. I am obviously not trying to prescribe matters in which that question would, as a matter of commonsense, be one likely to be in issue, because if it is in issue, let us have it argued. This is clearly designed to make the proceedings quicker and more efficient.

Mr J.R. QUIGLEY: That is one way of looking at it. The defence end of the bar table looks at it a different way. I wanted it clear for government members for the third reading that the matters that can be a relevant defence will not necessarily be contained in the list for the purposes of the regulations.

Mr C.C. Porter: No, that is correct.

Mr J.R. QUIGLEY: Right. I am nearly at the end of clause 6. I have a threshold question. I refer to the powers of the courts under parts 7, 9 and 10 of the Sentencing Act, which cover conditional release orders with or without a surety, community-based orders and intensive supervision orders, and all the conditions that can be imposed on an accused person. I am sure the Attorney General is well aware of these orders—I am not lecturing him; I am perhaps helping other members of the chamber. The intent of this legislation as I understand it and from what the Attorney General said yesterday and today is to give the court the capacity to make orders to delimit people from carrying on conduct that leads to antisocial offences. The court will have the power to make a prohibited behaviour order, the bottom line of which is for an offender to come back to court to face a penalty on breach of the order. Given the extra workload for the court, which there will be, what will drive a prosecutor to seek a PBO in front of a conditional release order when such an order could impose a condition such as that the person is not to carry spray tins during the course of the conditional release, and a surety is required? As I understand it, there will be no supervision for PBOs. People on PBOs will not have to report to anyone.

Mr C.C. Porter: What do you mean by supervision?

Mr J.R. QUIGLEY: They will not have to report to a community corrections officer.

Mr C.C. Porter: No.

Mr J.R. QUIGLEY: In other words, there is no reporting requirement or checking up under the terms of a PBO; it is just an order that a person has to obey. All the other orders have a supervisory capacity. Given that the other orders flow from the sentencing process without the need for a further hearing, where is the advantage in the PBO over an order made under parts 7, 9 or 10 of the Sentencing Act? Where does the Attorney General see the advantage?

Mr C.C. PORTER: Firstly, I concede that there is some degree of overlap, but I think the member overstates it. I will deal with that first. The member and I have both seen conditional release orders, community-based orders, youth supervision orders, intensive supervision orders and intensive supervision orders with conditions and so forth.

Mr J.R. Quigley: I left out, of course, suspended sentences and conditional suspended sentences.

Mr C.C. PORTER: Yes, conditional suspended sentences. There has been a high-profile case in the media over the past couple of days. I think the member's interpretation of that matter is that the conditions that can attach to a suspended sentence do not extend, specifically, as far as telling someone where he can or cannot reside.

Mr J.R. QUIGLEY: I do not agree with that.

Mr C.C. Porter: I thought that was what you said.

Mr J.R. QUIGLEY: I said that I understood the condition in that case was to not commit another offence. We can go that far in those orders to secure the person's future behaviour. The issue was the comfort of the child living next door. I did not think the conditional release could relate to the comfort of the child next door. Perhaps that could be extended, but that is a different question. There are all these issues.

Mr C.C. PORTER: In fact it is a very similar question. I will use that circumstance as an example. The person was released on a suspended term of imprisonment, which can have conditions attached. The section talks at large about conditions. There is some doubt, in fairness. I thought that was the point the member was trying to make. In some respects I agree; there is some doubt about whether a condition that can be attached to a term of suspended imprisonment is so large that an offender can be told that during the term of his suspended imprisonment he cannot live at whatever address he has nominated. The first point in delineating the difference between a prohibited behaviour order and the other orders and dispositions the member mentioned is that there are inherent limits on the ability of those orders to delimit or restrict someone's behaviour. Regardless of whether those limits arise in practice because no-one has tested them or it is the view of the court or, in each instance, there are statutory limits to what can occur, there are limits. Secondly, this system absolutely formalises

a system that is dedicated to limiting behaviour. Limiting behaviour is a part, with its own limits, to those orders the member mentioned. The next and very substantial difference is that when someone breaches a CBO, such as one that requires a person to do community work, the executive, through the administration of the department, will determine the criteria for a breach. That is a matter I have been grappling with inside the Department of Corrective Services. Under the previous government, the rule for community work under a CBO was that there had to be three consecutive failures to attend before a breach would be considered. I changed that rule to automatic breach after the second failure to attend. These are matters of executive administration. Under those circumstances of a breach of work requirements under a CBO, the person must return to court, and should a breach be found to have occurred, he is re-sentenced for the initial offence. Under the breach of a PBO, the person will be sentenced for the offence of breaching the civil order, which is similar to breaches of restraining orders and violence restraining orders. This enables the court to specifically say that the behaviour has become so poor that this order is necessary. The order is a very serious thing and the breach of an order is a very serious thing. The reality is that a breach of the work conditions of a CBO is viewed less seriously, because that is the legislative structure we have put before the court.

Mr J.R. QUIGLEY: I disagree with that. Of course, under all those things are a range of conditions. They are almost unlimited. A CCO could say that a person is not to associate with certain people or he will be in breach of the order. That is the truth, is it not?

Mr C.C. Porter: I have not seen too many, but it is conceivable.

Mr J.R. QUIGLEY: Under the act it is conceivable. The Attorney General was talking about questions of practice. I know he wants to make the debate political. I cannot stop him from doing that, and I do not know whether I want to. The Attorney General said that, under the previous government, they were not enforced strictly enough.

Mr C.C. Porter: I take that view, certainly with respect to community work.

Mr J.R. QUIGLEY: All right. The Attorney General has the executive capacity to make them be enforced to the letter of the law. Is that not right?

Mr C.C. PORTER: I have the executive capacity to determine the circumstances that constitute a breach.

Mr J.R. QUIGLEY: Yes. The Attorney General could say, "One move off the centre line, one failure to report and you are breached."

Mr C.C. Porter: It is conceivable, yes.

Mr J.R. QUIGLEY: I am looking only at the legislation and not predicted outcomes in the court. I am saying that all the things that can be ordered in a PBO are available in a range of —

Mr R.H. Cook: Through the Sentencing Act.

Mr J.R. QUIGLEY: Yes, through the Sentencing Act. The suite of orders available under the Sentencing Act can cover anything the Attorney General wants to do in a PBO.

Mr C.C. PORTER: I would disagree.

Mr J.R. Quigley: Technically.

Mr C.C. PORTER: I would disagree with that. What we are doing here is to formalise a system that is dedicated to restricting or delimiting the activities of individuals who have reached a certain threshold. That is the sole and only purpose of this system. To the extent that CBOs, ISOs, YSOs, CROs and suspended terms of imprisonment sometimes do contain requirements that restrict people, they are part of another scheme of sentencing that has another purpose.

Secondly, the breach of a prohibited behaviour order—that is, a breach of the restriction that is placed on an offender—is a separate offence that elevates the seriousness of the breach. That is a very important part of this system. Could perhaps another way of going about this be to say that anyone who breaches the term of a CRO, ISO, YSO or a CEO commits a separate offence? If we had gone down that path, or that was the way in which those types of breaches are now treated, I would agree there would be a great degree of similarity between those orders and this—and, of course, which we will not doubt get to, the other part of this system is publication, which allows the identification of people who breach the terms of their prohibited behaviour order. Of course, I disagree with the member for Mindarie that this does nothing new; and, certainly, one of the things that it does that is pivotal to the system is to create separate criminal offence for breaching the terms of an order for someone who has been identified pursuant to the terms of the act requiring their liberties to be restricted.

Mr J. R. QUIGLEY: The Attorney General is saying that we all must keep in mind that the order is civil in nature, but a breach of the order is not a civil breach.

Mr C.C. Porter: A breach of the order is the criminal offence, which is very different from previously.

Mr J. R. QUIGLEY: When the Attorney General said all the government has done is to formalise a different dedicated scheme for controlling people going into the future, he still did not address the issue of what order can be made as a result of this bill that cannot be made under the other suite of orders—apart from publication, which is not available in the other suite of orders that are now available.

Mr C. C. PORTER: The order that can be made here that cannot be made under the other suite of sentencing options—of which, in my view, there are too many—is an order which, if breached, results in a separate criminal conviction.

Mr J. R. QUIGLEY: I understand that, but what the Attorney is saying is that the nature of enforcement will involve a conviction. That is correct, is it not?

Mr C. C. PORTER: It depends on what the member for Mindarie means by enforcement.

Mr J. R. Quigley: A breach.

Mr C. C. PORTER: The ultimate sanction for a breach is being charged with a separate criminal offence, which is a breach of the order, as is the case with a restraining order.

Mr J. R. QUIGLEY: I understand that.

Mr C. C. Porter: I know you understand that.

Mr J. R. QUIGLEY: I am asking what particular element of constraint—because that is what these PBOs are all about —

Mr C. C. Porter: Yes.

Mr J. R. QUIGLEY: — and the constraints are set out in clause 10(3). What constraint in clause 10(3) is not available in the other suite of orders that can be made—an ISO, CSO, CBO et cetera?

Mr C. C. PORTER: I understand the question. The member for Mindarie might as well be asking what is so different about restraining orders that we need those in addition to other orders that we have on the book. One example relates to what I understand the member said recently, which is that we need to look at whether a specific power already exists under a term of spent imprisonment that allowed part of the order and the conditions put upon that person that they not reside in a certain place.

Mr J. R. Quigley: No.

Mr C. C. PORTER: I thought that is what the member said a day and a half ago.

Mr J. R. QUIGLEY: No, it was in relation to a suspended term; that is, what are the criteria for the suspended term. That was securing the person in relation to ongoing miscreant behaviour. The judge said he was satisfied that the person would not reoffend. The question then comes down to whether that person can be restrained from living in a certain place. I take the view—I am surprised that the government has not assisted the person—that the parents of the girl, who I think was nine years old, who was lured into the next-door neighbour's property where an indecent act occurred, under the current restraining orders regime would probably have a misbehaviour restraining order available to them in any event. I cannot imagine a magistrate refusing a misbehaviour restraining order in that case, which can be done anyway. I am asking, in relation to the complete suite of orders available in Western Australia at the moment, what new constraint is being introduced in this legislation that is not available elsewhere? That is all.

Mr C. C. PORTER: This legislation enables the court to make any constraint that it wishes with respect to a person on whom a PBO has been granted, subject to clauses 10(1), (2) and (3)(a) through to (f), and (4), (5) and (6). Indeed, as the member said, it is a very serious matter because it is possible to constrain someone from entering or remaining on premises to which they have a legal or equitable right. These are very broad powers that are offered to the court in terms of restricting a person's liberty. In each of the matters that the member for Mindarie has raised, there are statutory limitations on what the court can order in restricting a person's liberty. It is very difficult to answer that question with a specific example, because this bill gives a wider discretion to the courts than many of the orders that the member has described.

Mr J. R. QUIGLEY: If the Acting Speaker does not mind a small indulgence, I will flag that as another reason why, on the division at the end of this stage, Labor will oppose the clause, because the Attorney General is

unable to identify any constraint in this legislation that is not available to a court already under a suite of other orders. If the Attorney General wants to contradict that, I will sit down; otherwise, I will move on.

The only matter that the Attorney has identified as different, which I identified during debate on the second reading, are the provisions of clause 34 of the bill. For members, if my old cerebrum is up to speed, that is to do with publication. However, there is nothing at all at the moment to stop the Attorney's CEO maintaining a website of everybody's conviction for everything, is there? I am referring to adults.

Mr C. C. PORTER: We are jumping ahead here, but if the point the member is making is that at the moment there is no statutory prohibition on anything that happens in an open court being reported on in any fashion anywhere, subject to the other ordinary run of criminal law, such as incitement provisions and incitement to racial hatred, yes, that is correct. For an adult, anything can be published.

Mr J. R. QUIGLEY: When the Attorney said I am jumping ahead, with respect, this is how this whole thing is interlaced, because in response to an earlier question when I asked the Attorney what was different about these orders he did cite publication as one of the things that was different. I am saying that in relation to those other orders, the Attorney's CEO could still maintain publication on a website, if he wanted to.

Mr C. C. Porter: Conceivably, yes.

Mr J. R. QUIGLEY: For adults.

Mr C. C. Porter: Yes.

Mr J. R. QUIGLEY: Therefore, the new ground that is being broken with this legislation—we will come to it when we get to clause 34—is publication of details in relation to minors, because the Attorney's CEO cannot do that at the moment, can he?

Mr C. C. Porter: No.

Mr J.R. QUIGLEY: Before we move on from discussing clause 6, I note that the PBO may be made on the application of the prosecutor or on the initiative of the court. Clause 6(4)(d) is very important and states —

> (d) the person —
>
> (i) is present when the PBO is made and has been given an opportunity to be heard on the question of whether or not the court should make the PBO; or
>
> (ii) has personally been given a hearing notice at least 7 days before the PBO proceedings.

The service of notices is dealt with in part 4, clause 33. The notice can be sent by post to the person's last known place of abode. Clause 33 states, in part —

> (1) If under this Act a document must be given to a person, the document must be —
>
> …
>
> (b) sent by ordinary prepaid post to the person at the person's last known place of residence or business.

Clause 6(4)(d) states that the order cannot be made unless the person has been personally given the notice; however, it would appear from clause 33 that no more is required than posting the notice to the person's last known place of abode. Is that not correct?

Mr C.C. PORTER: I am sorry; I do not quite understand what the member means.

Mr J.R. QUIGLEY: I am sorry; I am sure the fault is all mine in my articulation, Attorney General. On page 6 of the bill, there is a disjunctive precondition; he is present or has personally been given a notice at least seven days before the hearing. Is the Attorney with me now?

Mr C.C. Porter: Yes.

Mr J.R. QUIGLEY: The person must be given the notice personally before the hearing; however, clause 33—which is under "Part 4 — General", so it is not just for this circumstance—states —

> (1) If under this Act a document must be given to a person, the document must be —
>
> (a) given to the person personally …

Which we are addressing in clause 6(d)(ii), or, disjunctive —

> (b) sent by ordinary prepaid post to the person at the person's last known place of residence or business.

Therefore, there does not have to be personal service of the document.

Mr C.C. PORTER: I take the member's point that that does not appear to be anything other than a poor piece of drafting. It may well be that after giving some consideration to it as we go through that I will amend that to remove clause 33(2)(b).

The ACTING SPEAKER (Mr P.B. Watson): Members, the question is that clause 3 stand as printed.

Mr J.R. QUIGLEY: Sorry, Mr Acting Speaker, we have agreed to allow me to jump forward to at least clause 8 because those clauses are all interlaced. However, I have nearly finished.

The ACTING SPEAKER: I thought you had finished, member, because you were sitting there staring at me!

Mr J.R. QUIGLEY: No; I was just taking on board what the Attorney was saying because he has given an undertaking to delete a subclause. The Attorney General could see what I was concerned about; a person could be sent down the railway track to prison. In the case of Mr John D'Orazio it was shown that the licensing records were not kept up to date, the notice went to his last known place of abode but it was not, in fact, his actual place of abode. Is that not right, member?

Mr J.J.M. Bowler: Yes.

The ACTING SPEAKER: I am sure that the member for Kalgoorlie will answer next time from his seat!

Mr J.R. QUIGLEY: Anyway, if the Attorney General is going to remove clause 33(1)(b), I can move on.

Mr C.C. PORTER: A comment was made about a procedural matter by the Chief Magistrate after having considered the green bill. Originally the formulation of the bill was that there be an alternative to either hand the notice personally within a certain time or by post within another time frame. I think the Chief Magistrate made the point that it should be delivered personally. I think that in accommodating the Chief Magistrate there has been an oversight in the drafting. I will remove clause 33(2)(b) which provides an allowance for the notice to be given by post. However, clause 33(1)(b) is for a document to be delivered by post, rather than the actual hearing notice itself.

Mr J.R. QUIGLEY: I thank the Attorney. I am trying to move this debate on genuinely and efficiently; I do not want this debate to be guillotined because I am going to these points.

Mr M. McGowan: We will go on to another bill at 4.30 pm.

Mr J.R. QUIGLEY: I thank the Attorney because I am trying to make some sensible headway and not just be obstructive, even though we oppose the bill.

Mr R.H. Cook: Is the member still talking to clause 6?

Mr J.R. QUIGLEY: I have now finished talking about clause 6.

Mr R.H. Cook: I am still struggling with that particular clause.

Mr J.R. QUIGLEY: In that case I throw to the Deputy Leader of the Opposition, the next Deputy Premier of Western Australia, the member for Kwinana!

Dr K.D. Hames: I won't give up the job that easily!

Mr R.H. COOK: I want to clarify whether the purpose of clause 6 is that a prohibited behaviour order could not be assigned to people if they are not present to receive it or is it that under clause 6(4)(d)(ii) we accept that there are circumstances in which appropriate notice has been given by mail or something of that nature and, therefore, the PBO could be issued when a person is not present.

Mr C.C. PORTER: It is possible if the person is not present but there would have had to have been personal service of the fact of the hearing served on the person.

Mr R.H. Cook: Can the Attorney General just explain that concept of personal service?

Mr C.C. PORTER: A person has to be present when he is convicted and sentenced. More often than not with the way that this procedure is set up the application will be made and heard at the time of the conviction. However, there is a capacity to adjourn the application after sentence. If that is the case, so long as the person has received personal notice of the hearing of that application, it can proceed ex parte—that is, in that person's absence.

Mr R.H. COOK: Earlier we were discussing with the member for Mindarie the fact that the person, once served with a notice that a PBO hearing will take place, does not at that point know the nature of the constraints being sought.

Mr C.C. Porter: I will move an amendment to that effect.

Mr R.H. COOK: Okay. However, could we have a situation in which a PBO is issued on someone restricting him from certain behaviours if he was not at the PBO hearing and may not have actually been aware that the PBO has been issued, given that he was not there? Therefore, we may constrain behaviour that people are not even aware of. Is that a potential outcome under this legislation?

Mr C.C. PORTER: It is not outside the realms of extreme possibility, but what we have determined not to do is to have a hearing of a PBO application attributed with the same weight of the law as someone who is being convicted and sentenced. If a person does not turn up to court for his conviction or sentence, a warrant will be issued for his arrest and he will be arrested and forcibly brought into court. In those circumstances, where it is determined that we should give personal service to someone, because of the fact of them being subject to the application when there is a hearing, usually that will occur at the time of conviction or sentence, when, for other reasons, they are compelled to be there because they are under threat of arrest if they are not. In those circumstances, where it is adjourned to a further time, we determined not to go and arrest them if they fail to turn up. Therefore, what the member is saying is not impossible.

Mr J.R. QUIGLEY: Unless any of my colleagues have any other questions to put, I am happy to wrap it up. Clause 1 has been put; I am happy to have clause 2 through to clause 6 put as a bunch.

The ACTING SPEAKER (Mr P.B. Watson): We are on clause 3, member for Mindarie.

Mr J.R. QUIGLEY: Sorry?

The ACTING SPEAKER: We are on clause 3.

Mr J.R. QUIGLEY: We have actually discussed —

Mr C.C. PORTER: If I may, I think we have —

The ACTING SPEAKER: We have to put clause 3 first.

Mr C.C. PORTER: We have put clause 1 and clause 2, and, yes, we are up to clause 3. I seek to move an amendment to clause 3, and then perhaps after that amendment we could move clause 3 to clause 6 as a lot.

Ms M.M. Quirk: I have something at clause 5.

Mr C.C. PORTER: We can move clause 3 and clause 4; perhaps I could move the amendment to clause 3.

The ACTING SPEAKER: What is your amendment? Do you have it in writing?

Mr C.C. PORTER: I do not yet, no.

Mr J.R. Quigley: Do you want to do it now? We are going to adjourn in a moment.

Mr C.C. Porter: I would love to get past the definitions just for my mental health.

Mr J.R. Quigley: Don't you worry; I'll be here to drive you crazy next week as well!

Mr C.C. PORTER: I move —

Page 2, line 29 — To insert after the word "proceedings" —

and the terms of the PBO being sought

Sorry; that is a copy. I move on page 2, line 29, to insert after the final word —

and the terms of the PBO to be sought

Amendment put and passed.

Clause, as amended, put and passed.

Debate adjourned, on motion by **Mr R.F. Johnson (Leader of the House)**