PROHIBITED BEHAVIOUR ORDERS BILL 2010

Consideration in Detail

Resumed from an earlier stage of the sitting.

Clause 7: Hearing of PBO proceedings —

Debate was interrupted after the clause had been partly considered.

Mr W.J. JOHNSTON: I would like to know from the Attorney General whether a person who received a document leaked by a minister against the laws of this state would be covered by the matters that we are dealing with now. The reason I am interested is that, as the Attorney General knows, we heard during question time that a minister provided information to a backbench member of Parliament in contravention of the laws of the state and that information was then used to frame a question. I would like to know whether the matters covered by clause 7 would relate to a member of Parliament who improperly and illegally received material leaked from a minister's office, which of course could quite easily be the subject of a Corruption and Crime Commission investigation or a police inquiry. As members will remember from the federal election campaign, there was quite a great deal made by the federal Leader of the Opposition, Mr Tony Abbott, about a leak that Mr Abbott alleged came from either the federal Treasurer's office or the federal Treasury. In question time today, the member for Swan Hills was in the same position whereby he quoted from material leaked to him from the office of the Minister for Police in contravention of the laws of this state. I wonder whether the provisions of this clause would apply to the member for Swan Hills and the Minister for Police in the illegal conduct that they engaged in by providing that information to the member for Swan Hills for use for a political purpose in this chamber.

Mr C.C. PORTER: I have previously lectured law students and I have found that often first-year law students ask questions of the type: "What if person X did this? Would that mean Z?" Those questions are near impossible to deal with in abstract. I invite the member for Cannington, if he wants a serious response to that question, to tell me —

Mr W.J. Johnston: I am happy to have a serious response, but you haven't started off in that way. You treat people without respect. Why should I treat you with respect?

Mr C.C. PORTER: I am putting to the member how he might phrase the question so that I can give him an answer.

Mr W.J. Johnston: I have phrased the question. There was illegal conduct. Would that be covered by the provision? It is a yes or no answer.

Mr C.C. PORTER: If the member can state for me who he says has acted illegally and what acts they have breached that represent a criminal offence, I can give him some vague assessment about whether that meets the requirement here. Does the member have the courage to tell me who did what and what provision of the Criminal Code they breached?

Mr W.J. Johnston: If you are not prepared to answer the question, that's up to you.

The SPEAKER: Attorney General and other members in this place, if you are going to make accusations about members in this place who have behaved in what you might consider to be an illegal manner, the only way that can be done in this place is by substantive motion; otherwise the whole exercise becomes a theoretical one. I am not hearing a substantive motion in this place at this time. We are dealing with the consideration in detail of clause 7.

Mr J.R. QUIGLEY: As I recall, the Attorney General was favouring us with an explanation of clause 33, and my concern was driven by clause 7(3), which reads —

> If a party is given the hearing notice but does not attend …

This is to do with personal service and other matters that can result in imprisonment. I am very concerned to hear the Attorney's comments on servicing because in his explanation earlier this morning he said that PBOs will put a person not on a certain track to imprisonment, but a higher probability track to imprisonment. I am concerned that some of these notices might not be by way of personal service.

Mr C.C. PORTER: I can certainly try to explain to the member how the service is meant to operate, because this process sits across several clauses. Indeed, I am joined in this place by one of the drafters of the legislation who might give me some assistance if I go wrong.

If we start with clause 6, which we have already discussed, the member will see that at subclause (4), the court must not make a PBO against a person unless the certain conditions stipulated in the clause apply. Over the page, clause 6(4)(d) stipulates two conditions: the court must not make a PBO unless 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.

I understand that to mean that someone must be present, but that the court proceedings can continue ex parte against the person if the person not present was personally served. Otherwise, there is provision for postal service that requires 14 days' notice being given. In circumstances in which someone has been given postal service, the person must also be present when the order is made. The only circumstances in which the order can be made ex parte is if the person has been personally served and has chosen not to turn up.

Mr J.R. Quigley: I am trying to follow the reasoning that the person has to be present if it has been —

Mr C.C. PORTER: I think it is the disjunctive "or"; therefore, a PBO must not be issued unless, according to clause 6(4)(d)(i), the person is present and has been given an opportunity to be heard or has personally been given a hearing notice with at least seven days' notice. The court can proceed ex parte if the person has been personally served but has chosen not to attend. Otherwise, if served by post, the person must be there and must be given the opportunity to be heard.

Other matters also bear on this —

Mr J.R. Quigley: Can I interrupt the Attorney?

Mr C.C. PORTER: Yes.

Mr J.R. QUIGLEY: We were at this point previously before we rose for the two-week break; that is, the disjunctive —

…; or

(ii) has personally been given a hearing notice at least 7 days before the PBO proceedings.

Clause 33, "Giving of documents", states —

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

(a) given to the person personally…

Therefore, clause 33 relates to clause 6(4)(d)(ii), does it not?

Mr C.C. PORTER: In part; but it relates to the part that envisages the person who has been served by post 14 days prior and who must then attend for a PBO to be given.

Mr J.R. QUIGLEY: Clause 33(1) states, and I refer to the disjunctive "or" again, that it must be —

(a) given to the person personally; or

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

I am less than clear at the moment about whether it is required to be delivered by personal service "or" sent by ordinary pre-paid post.

Mr C.C. PORTER: The explanation of the instruction that I have been given is that the by-post in clause 33 applies to non-personal service, and that non-personal service can be occasioned by clause 7 or clause 22, which is a standard clause. However, the effect of clause 6(4)(d)(ii) is that if a person is to have a PBO made against them but is not present, the PBO can only be given if the person was personally served.

Mr J.R. QUIGLEY: I still do not understand, despite that explanation, why the Attorney says clause 33(1) is limited to those instances in which personal service is not required, given the predicating words in clause 33(1) are —

If under this Act a document must be given to a person, …

That is personal service —

… the document must be —

(a) given to the person personally …

And then an alternative to personal service is provided; namely —

(b) sent by ordinary prepaid post to the person …

Without referring to *Hansard*, I recollect that the Attorney commented on the last occasion this bill was debated that the nature of delivery by personal service or pre-paid post was one of the concerns raised by the Chief Magistrate when he conferred with the Attorney or his department. The matter has not been addressed.

Mr C.C. PORTER: I understand the member for Mindarie would say that there is at least a potential for inconsistency, if I can put it that way, because clause 33(1)(a) and (b) refer to a document required to be given to a person that can, under this legislation, be given to the person personally or sent by ordinary pre-paid post. I am informed by the drafters that that very standard clause about documents is in legislation of this type, including the restraining orders act. However, if it were a matter of judicial interpretation, the inconsistency would not arise because in drafting clause 6(d) the principles are such that the specific nature of that clause, which applies to the initial application, will always take precedence over the provision in question. The member might view that as inelegant drafting, but I am told that that is how drafters go about that situation.

I can and will say for the record that if this were ever a matter for interpretation by a court, a person at the actual and initial application must have been served personally at least seven days before the PBO proceedings if a court were to give a PBO against that person in his or her absence.

Mr J.R. QUIGLEY: The question of service is then left to a matter of interpretation of the legislation; that is, it is not clear from its terms. I am worried because in some regions where some respondents will be Indigenous people moving through the lands, and that without personal service, those people might be exposed to proceedings that could launch them on the tram tracks to incarceration. I do not know why that is not absolutely watertight, but is left to statutory interpretation by a judicial officer sitting in a remote area with an unrepresented person.

Mr C.C. PORTER: I am instructed that it is watertight, for this reason: the meaning of clause33(1), which is something of a boilerplate clause, is that it is meant to say, and how it is consistently interpreted, is that under this legislation if a document must be given to a person, the document must be given to the person personally or —

Mr J.R. Quigley: That covers —

Mr C.C. PORTER: It is describing personal service, if the member likes.

Mr J.R. Quigley: Yes.

Mr C.C. PORTER: And then it describes how to send something outside of personal service; that is, something "sent by ordinary prepaid post to the person at the person's last known … residence or business". The member for Mindarie is reading the clause in a way different from the way it is ordinarily read.

Mr J.R. QUIGLEY: It has the disjunctive "or". It describes personal service. The Attorney General is quite correct: the legislation describes "personal service" in subclause (1)(a), but then identifies the alternative to personal service in subclause (1)(b) as —

> sent by ordinary prepaid post to the person at the person's last known … residence or business.

Mr C.C. PORTER: That would make sense if this bill were silent in other areas as to what is specifically required personal service or postal service. However, because the legislation requires in clause 6(4)(d)(ii) that the person must be personally served in certain circumstances, we look to clause 33(1)(a) to determine what it means to personally serve someone—which in itself, outside of a clause such as this, is apparently open to interpretation.

Mr J.R. Quigley: Yes.

Mr C.C. PORTER: That is, it is to be given to a person personally.

Mr J.R. Quigley: Or do to that. Under clause 6(4)(d), you could end up with the application on foot, with the prosecutor saying that he has satisfied personal service. Under clause 33(1) of this legislation, the document must be either given to a person personally or posted.

Mr C.C. PORTER: The key here is the word "given". If under the legislation a document must be given to a person, the document must be given to the person personally or sent by ordinary prepaid post to the person at the person's last known place of residence or business. When we cross-reference that to clause 6(4)(d)(ii), there is a requirement that the person has personally been given a hearing notice, so it is personal service, which is then defined under clause 33(1)(a).

Mr J.R. Quigley: But don't the words there really reflect what is provided in clause 6(4)(d)(ii)? That does not clarify it any further. It refers to a person having personally been given a hearing notice at least seven days before the PBO proceedings. We then go over to clause 33(1), which provides that under this legislation a person "must" be given the document, which reflects what is in clause 6(4)(d)(ii). When a person must be given a notice it can be either by actually giving it to him or by posting it to him.

Mr C.C. PORTER: I am instructed that they are not linked in that way. The way in which they are consistently interpreted in matters of this type is that paragraph (d)(ii) requires personal service within a certain period and in certain circumstances. Clause 33(1)(a) tells us what it means to give something to a person personally.

Mr J.R. Quigley: I take issue with that, but there's nothing we can do about it except vote against the legislation. It would have been clear if it had stated: if, under this legislation, a document other than the initial application must be given to a person, the document must be given to him personally or sent to him. My very real concern is that we have seen examples relating to people in this chamber of documents going to their last known residential address, but the government computer had not been kept up to date. I am talking about the former member for Ballajura, Mr D'Orazio; there was a Corruption and Crime Commission inquiry into it, and afterwards he was exonerated because the government mucked up the details of his last known residence. I am concerned that this whole process can start with the person not knowing that the application is on foot. That was the intention of paragraph (d)(ii), to make sure that the person had specific and personal knowledge that these proceedings were being instituted, but all we are being offered is that the interpretation will be that, and the disjunctive "or" will not apply—that is, "or" sent by ordinary prepaid post.

Mr C.C. PORTER: Again, the disjunctive applies to clause 33. Outside a specific provision such as clause 33, the two practical possibilities are to service personally or non-personally by post in effect. Clause 33 provides that if a document must be given to someone —

Mr J.R. Quigley: Which is what paragraph (d)(ii) says it must be.

Mr C.C. PORTER: No, paragraph (d)(ii) specifies "has personally been given"; it overrides clause 33. Clause 33 provides the court —

Mr P. PAPALIA: Mr Deputy Speaker, I would like to hear more from the Attorney General.

Mr C.C. PORTER: Clause 33 provides information to the court about what it means to personally serve someone and what it means to serve by post; otherwise, "serving by post" could mean sending it to an address associated with the person or a business address, rather than being specifically sent by ordinary prepaid post to the person at the person's last known place of residence or business, which is very specific. It is meant to alleviate the problem that the member identified with the former member for Ballajura, but I am instructed that paragraph (d)(ii) is specific and overrides the general, and it unequivocally requires that personal service must be given at least seven days prior, for someone to have had a PBO given against him in his absence. I can understand the point that the member is making. All I can say to him is that the drafters disagree with his interpretation, and I must say that I disagree also; I think it is quite clear.

Mr J.R. QUIGLEY: I am going to clause 7(4) now. It states —

> A court hearing PBO proceedings adjourned under this section is not required to be constituted in the same manner as the court that imposed the related sentence.

I can understand that if we are talking about the discrete PBO proceeding as opposed to the trial of the substantive issue or the plea. Does this clause not leave it open to a situation in which, if a PBO proceeding is adjourned part heard for whatever reason—it happens from time to time—when it comes back, the part-heard matter can be heard by a different magistrate? This is unheard of. In a trial, if a matter has been part heard, it has to come back before the hearing magistrate. Should this not read, "A court hearing PBO proceedings adjourned under this section, other than a part-heard matter"?

Mr C.C. PORTER: Again, this is a standard clause. As the member will be aware, it is irregular, if not highly irregular, for a trial that has been adjourned for whatever reason to be presided over by a different judge or magistrate. This is meant to relate to a situation in which a PBO application was made at the sentence but not substantively proceeded with. The Magistrates Court, for example, could adjourn it, and it could be heard by another magistrate; I understand. I am simply informed that there is no such specific provision in relevant legislation to stop an adjourned trial from being heard by a different judge or a different magistrate. That is simply a matter of court practice and procedure, and it is a practice that courts quite sensibly do not engage in. I am trying to think of instances in which there is a possibility of —

Mr J.R. Quigley: I am trying to think of a case in which the judge has died and they brought it back on part heard.

Mr C.C. PORTER: Indeed; and I do not think that that is outside the realms of possibility, although I cannot think of a situation in which it has occurred. I have certainly seen prosecutors substituted during trials.

Mr J.R. Quigley: That's different; we're dispensable, but the judicial officer has to retain an impression of witnesses.

Mr C.C. PORTER: Indeed. The prohibition of the situation that the member says should be prohibited occurs through the courts controlling their own processes in their inherent jurisdiction, rather than through any specific clause like this, which goes into the minutiae of adjourned or part-heard hearings.

Clause put and passed.

Clause 8: Grounds for PBO —

Mr P. PAPALIA: I refer to clause 8(2) and "grounds for making a PBO exist". I note that it provides that the person must have committed and was convicted of a relevant offence, and during the period of three years after that conviction again committed, and was convicted of, a relevant offence. Effectively, that means two convictions. Every time I hear the Attorney General talk about this legislation in the public domain, he refers to people who have committed 50 offences. Every time I hear the Premier refer to the legislation, he does the same thing. I have not once heard the Attorney General publicly acknowledge that the legislation refers to two convictions. If that is not correct, I would like to hear from the Attorney General why it is, when he talks about his legislation, that he talks about extreme cases of offenders; he talks about the worst possible individuals that could possibly be caught by this legislation. He must acknowledge that there are a lot of other people who could conceivably be caught by this legislation and who are at the lower end of the offending spectrum. I would like to hear the Attorney General discuss that here so that I can hear a justification for why he talks only about the absolute extremes when he is talking to the media, and whether he believes that people at the other end of the spectrum might be caught by this legislation.

Mr C.C. PORTER: I do not believe that that latter situation will occur. The reason I talk about the extremis and the people that we have identified as that cohort is that that is precisely who we are targeting with this legislation. The point is that clause 8(2)(a) is a necessary but not sufficient condition. A number of other things must flow and be proven after that point in time before a PBO is issued, and those things directly relate to a person's proclivity for offending, criminal record and previous behaviour. It is a necessary but not sufficient condition. My characterisation of this as legislation designed to target multiple repeat offenders based on a necessary condition of two in a three-year period, but with other things also being required, is a completely fair analysis of the legislation.

Ms M.M. QUIRK: I refer to clause 8(2)(b) and the grounds for making a PBO. The court must satisfy itself that —

> unless constrained from certain otherwise lawful activities and behaviour, the person is likely to commit another relevant offence …

Determining whether people are likely to commit another offence is an inexact science. What sort of evidence does the Attorney General envisage will be needed in those cases and who does he expect will seek it and acquire it?

Mr C.C. PORTER: We have attempted to give the courts guidance by virtue of clause 9(1), (2) and (3) on the sorts of matters to which they might have regard when determining whether a person is likely to reoffend. Obviously that is not an exclusive list. As we go through the system that the legislation seeks to establish, primacy is given to the desirability of protecting persons and property, but key consideration has to be given to the degree of hardship that may be caused to a person. Subclause (3) refers to the other matters that we recommend be considered. In addressing the point made by the member for Warnbro, clause 9(3) reads in part —

(a) other current legal proceedings involving the person;

(b) any criminal record of the person;

(c) any sentence to which the person is subject;

(d) any order, made under a written law, that applies to the person or, if the person is a youth, a person responsible for the care, welfare or development of the person;

(e) any previous behaviour of the person that is similar to the behaviour in relation to which the PBO is being considered by the court;

(f) the extent to which the person complied with any previous PBO;

(g) other matters the court considers relevant.

Many of those matters will be relatively easily established by virtue of the evidentiary provision that allows one to put into evidence transcripts and criminal records. Some other matters may require further proof, such as any previous behaviour of the person that is similar. It may be behaviour that has not necessarily resulted in a criminal conviction, but could be proved to the civil standard in these proceedings. It will be a matter for

commonsense and what will no doubt be the sensible application of the courts by their discretion having consideration to all the matters surrounding the offender, which is not at all dissimilar from the sentencing process itself. Because so much of the information will already be available and put before the court as part of the sentencing process, there will not be a huge draw-down in resources.

Mr J.R. QUIGLEY: I have some concerns about that last answer. I refer to previous conduct that might not have resulted in a conviction. Can a court take into account evidence that was led in a previous trial against a person if the person was acquitted on the basis of reasonable doubt? It is not a related offence, but nonetheless it then leads on a PBO proceeding as previous conduct now tested to the balance of probabilities.

Mr C.C. PORTER: That is possible, but not merely because it led into the trial previously where there was a failure to prove guilt of a head offence beyond reasonable doubt, but because the court in these circumstances in considering what was alleged in that matter considered on the balance of probability that the behaviour alleged occurred. That is a possibility; indeed it could also be behaviour which never made it to a court, but which the prosecutor could be bothered to bring evidence of in these proceedings. That could also be part of the case that is used to buttress the argument put to the judge or magistrate that the person, if not restrained, is likely to reoffend. Yes, that is a possibility, but as a matter of practice that would be the secondary evidence which would be brought and which would be quite hard to find and prove.

Mr J.R. QUIGLEY: On the question of buttressing things, when we both gave an interview on radio 720, the Attorney General cited the example of the police in Northbridge observing a person carrying a spray can. The Attorney General referred to the police having knowledge—either at the time they saw him or as soon as they looked up their computer—that he had a previous conviction for graffiti. The police are powerless to do anything, but that would constitute a prima facie case of carrying a graffiti item with intent. Would there not be a strong prima facie case against that person?

Mr C.C. PORTER: No, because that offence requires proof of intent. Previous conduct, as the member for Mindarie well knows, would be unable to be brought in evidence in criminal proceedings.

Mr J.R. Quigley: Why do you say that?

Mr C.C. PORTER: Because if a person is tried on a matter before the court and one of the elements of the offence that has to be proved is intent, just as if it were a sexual offence, neither record would be able to be brought before the trial of a jury or magistrate, as the member well knows, as a means of proving intention. That cannot be done, except with certain limitations under the Evidence Act with joint and severally heard trials for sexual offenders.

Mr J.R. Quigley: What about section 36A?

Mr C.C. PORTER: That is what I am talking about.

Mr P. PAPALIA: I have been thinking about the Attorney General's justification for why he talks only about extreme examples. I would like to investigate that issue a little more. Is it possible that people other than those who represent extreme cases will be caught by this legislation? Is the Attorney General confident that the other factors will always eliminate those who are on the other end of the spectrum of offending?

Mr C.C. PORTER: I am highly confident. From my observation of the courts—I have said this publicly—the problem that could be faced in making this legislation an effective tool to tackle the cohort of offenders that we are looking at is not that there will be too many PBOs, but that there will be too few. I have absolute confidence that it would be next to impossible to prove what needs to be proved to have a PBO issued against those people whom the member describes as being on the margins; that is, people who have twice been convicted of a potentially antisocial behaviour offence and who have nothing else on their record and no other bad behaviour.

Mr P. Papalia: When the Attorney General talks to the media, he refers to an individual who has committed 50 offences. At what point along the spectrum do you anticipate that this legislation will kick in? Will it catch people when they have committed 10 or 15 offences?

Mr C.C. PORTER: I cannot answer that because this legislation leaves that decision largely to the discretion of the courts. What I can say is that, based on the experiences we have seen in the United Kingdom and the way in which this legislation has been drafted so that it requires even more stepping stones to the grant of a PBO order based on a conviction than existed in the United Kingdom, and given the numbers that occur against the size of its population, I am convinced that unless our judiciary is completely different from the United Kingdom judiciary—that is the closest reasonable comparative example—which I do not think is the case, we will not have thousands of PBOs a year. It would be in that situation that we would be capturing only the person who has committed two, three or four offences. Based on the experience of the way the United Kingdom judiciary has exercised its discretion, we will have a much narrower number. Our best estimates, based on rates of offending in the United Kingdom, the type of legislation that it has in its criminal anti-social behaviour order system and

the number of orders it gives every year, are that we would expect maybe 70 a year—maybe. I think that is an optimistic assessment.

Mr P. PAPALIA: I have a slightly related matter, which may be appropriate to deal with later in considering the legislation, but is again related to the manner in which the Attorney General has discussed this legislation when talking to the media. I may have got the wrong impression, so the Attorney may be able to correct me, but when it has been suggested that 16-year-olds might receive PBOs and be caught up in this situation whereby they are labelled for the rest of their lives as a result of the naming and shaming component of this legislation, the Attorney has dismissed that as unlikely because they would not fit within the three-year time frame—they may not achieve the threshold, I guess, that the Attorney is talking about. Or is it that the Attorney is quite comfortable that 16-year-olds could easily be caught by this legislation and be named and shamed?

Mr C.C. PORTER: The Prohibited Behaviour Orders Bill states that a PBO must not be given to a person under 16, but the legislation contemplates that a person as a juvenile from the age of his sixteenth birthday up to his eighteenth birthday could receive a prohibited behaviour order. I do not think that I have ever said that that was not the case. However, in those circumstances publication is at the discretion of the court. Publication is for a reason; we simply disagree on whether it is worth the cost of publication. As the member points out, there is a cost of publication. The benefit of publication for the types of offenders that we seek to target is that we consider, first of all, community protection, community involvement in its own protection and the ability, hopefully, to prevent people from going on to commit a large series of offences that cause property and personal damage.

Mr P. PAPALIA: That is okay; I must have misheard, but clearly we will not agree about the value of publication.

Mr J.R. QUIGLEY: I want to return for a moment to what the Attorney General was saying. I misled the Attorney and said it was section 36A of the Evidence Act; in fact, it is section 31A, which deals with propensity evidence and why it would be inadmissible. Section 31A(2)(b) states —

> that the probative value of the evidence compared to the degree of risk of an unfair trial, —

In front of a magistrate, there would not be much risk of an unfair trial —

> is such that fair-minded people would think that the public interest in adducing all relevant evidence of guilt must have priority over the risk of an unfair trial.

If a person has been convicted three times of spray-painting a building in Beaufort Street and is caught holding a spray can by the police turning into Beaufort Street on foot, why not?

Mr C.C. PORTER: Sections 31A and 36 are basically a statutory setting out of His Honour Justice McHugh's minority judgement in the case of Pfennig whereby he said that it was a matter of some lack of commonsense, but in very serious offences where there has been a history or pattern of offending of a very similar type that that evidence, as the common law of evidence applies, could not be let in to a trial. Of course, there are famous matters such as the brides in the bath case in the United Kingdom and so forth that the member would be aware of. I referred to sections 31A and 36. Section 36A refers to sexual offences —

Mr J.R. Quigley: I am sorry; I misled the Attorney by mistake.

Mr C.C. PORTER: Section 31A(2) establishes the possibility of similar-fact evidence being let in other matters based on a court making a determination —

> (a) that the evidence would, either by itself or having regard to other evidence adduced or to be adduced, have significant probative value; and
>
> (b) that the probative value of the evidence compared to the degree of risk of an unfair trial, is such that fair-minded people would think that the public interest in adducing all relevant evidence of guilt must have priority over the risk of an unfair trial.

Obviously, the courts have, as a matter of statistical fact when we look at the number of applications that have been made under that section, treated that with an enormous degree of caution, quite properly, because admitting someone's criminal record in a trial to prove things, particularly in minor criminal matters, is one of those situations whereby I would argue, and I think the courts would definitely agree, that the risk of an unfair trial outweighs the probative value of the evidence. If the member can show me an instance in which it has been successfully argued pursuant to section 31A that someone's criminal history of being in possession of a graffiti implement under section 57 has been allowed to be admitted into evidence in proof of an offence whereby the offender was caught with a spray can but without other evidence that was suggestive of his intent, I will look at that. However, I guarantee that that has never happened.

Mr J.R. QUIGLEY: The Attorney General would agree that—this is from all the criminal lawyers' conferences that I have attended over the past several years since section 31A was introduced by the former Attorney General in 2004—this has been the source of much angst at the criminal bar as the prosecution has broadened its application, whilst the original intent was, as the Attorney says, to open up the possibility of section 36 and those things, to a whole range of offences. It is hard to imagine in Magistrates Court when one is not litigating in front of a jury that a magistrate would say, "This is going to so corrupt my mind or corrupt the process that I must exclude the evidence even though the application's made before the magistrate." It is simply that the prosecution happens to have not been making the applications, if what the Attorney is saying is right, or there have not been occasions on which recidivist graffiti people have been caught with a spray can—one or the other. Certainly, the Attorney could not dispute that a strong prima facie case exists for a person who was carrying a spray can who has a history of convictions.

Mr C.C. PORTER: No, I am not saying that it would be impossible that such an application could be brought or even approved and accepted by a court; I am not aware of any. However, I would have thought that first of all in the circumstance whereby someone is caught by a police officer with a spray can but without any other evidence that could prove beyond reasonable doubt that he had intent to use it, absent his criminal history, in that situation there is no offence.

Mr J.R. Quigley: I do not agree, but some of the circumstantial case won't be there. There could be admissions; there could still be an offence.

Mr C.C. PORTER: But as I say, if a person is caught with a spray can but there is not, in addition to the mere possession, enough evidence to establish beyond reasonable doubt, absent his criminal record, the intent to use it, there is no offence, wherever that evidence might come from. If it is not there, it is not clear. Could the prosecution possibly using section 31A have recourse to previous evidence that when the person has had a spray can in his possession he has used it for graffiti? It is not impossible. However, I would have thought that, given the common law that sits behind section 31A, although it has been used in some circumstances—some people at the criminal bar might say expansively—it has not been used in the situation that the member has described. That is not to say that it could not be. Frankly, on my reading of the section, if someone could be bothered making the argument that a person has 50 criminal convictions for graffiti and that person was found with a spray can, that could potentially be admissible as evidence of intent. It is not impossible. I have never seen it done; maybe it will be done. I have seen it done in, obviously, cases of sexual offences, very serious assaults, homicide and fraud matters, but I have not seen it done outside those types of offences.

Clause put and passed.

Clause 9: Matters to be considered by court —

The DEPUTY SPEAKER: The question is that clause 9 stand as printed. All those in favour say "aye". The member for Warnbro.

Mr P. PAPALIA: Mr Deputy Speaker, I just do not want you to rush ahead!

Clause 9(1)(b) refers to the degree of hardship that may be caused to the person if a PBO is made. I am not a lawyer, as the Attorney General knows, and am without experience of the courts, so I want to elicit from the Attorney some indication of how that degree of hardship will be ascertained, noting that the implication of these PBOs is that people's identities will be placed on the web for anyone to copy and put anywhere else forever. How will the court gauge the degree of hardship imposed on individuals that they may suffer for the entirety of their lives as a consequence of having their identity placed on the web? For instance, any future employer would be given the capacity to simply google that person's name once he has straightened himself out, after having been young and disrespectful or rebellious, and he is maturing and possibly has more responsibilities or a family to support. How will the Attorney General gauge the degree of hardship that those people will suffer throughout their entire life as a consequence of us putting their identity on the web?

Mr C.C. PORTER: We will come to the issue of publications and the things that the court must consider. Clause 9(1)(b) is about the assessment of the degree of hardship that might be occasioned to the subject during the period that the prohibited behaviour order would be in existence under the terms of the order rather than the publication. The matter of publication is a separate question.

Mr P. Papalia: I asked my question in the wrong place.

Mr C.C. PORTER: Indeed. However, the member also asked an important question about how a court will assess whether a person will suffer a degree of hardship if an order is granted over the offender and it contains X, Y or Z prohibitions. That will be a matter for the acceptance of the court by what is said from the offender himself giving evidence that the order may cause him hardship because he will not be able to do certain things or go to certain places and that that is important to the offender for various reasons. That is a matter of the court

hearing from the individual who is the subject of the order or any other person that the counsel representing the subject chooses to bring, any other documentary evidence or anything that can be put before the court. It could be the offender's mental history or a medical assessment as well as the offender giving evidence about how the order will affect his life. It will be limited only by the civil standard of the rules of evidence and what oral and documentary evidence can be put before the court. All those things will be live considerations. It will be a matter of arguing it, just as they are argued for an application for a restraining order. It will be not dissimilar to the process of putting information before a court on sentencing as to what are aggravating and mitigating factors.

Mr J.R. QUIGLEY: Clause 9 deals with one matter that differs from the clause published in the green bill. Clause 9(2) relegates "hardship" to a lesser importance. Did this result from submissions received? Where did the idea come from to introduce clause 9(2) and subjugate paragraph (b) to paragraph (a)?

Mr C.C. PORTER: There were submissions that touched upon this issue, but none of them gave a specific view that the provision should be changed from how it appeared in the green bill to how it appears in this bill. The member is quite right that clause 9(2) elevates the desirability of protecting persons and property as the primary, but not the exclusive, consideration. This was done after an analysis and a consideration of the matter by my office and I based on the United Kingdom experience and the numbers of PBOs we thought we might expect to be issued. We took the view that if we were to target a certain group of people and that provision was not in the legislation, having regard to the fact that there are fewer hurdles to reach in the UK version of this legislation than there are in ours, that without that primacy being given to the desirability of protecting other persons or property, we might end up with few or no prohibited behaviour orders.

Mr J.R. QUIGLEY: I understood from the Attorney General's explanation earlier today that the whole scheme of PBOs would not necessarily change a person's behaviour. The Attorney General has cited CROs, CBOs and other brands of orders as being less effective than PBOs because, ultimately, the offender would not be facing imprisonment as a punishment with the same high degree of probability as he would if he had breached a PBO rather than a CRO or CBO. If it is the intent—it clearly is from what the Attorney General said—to put the offender on the track of a more stringent or heavy penalty provision, how will the PBO protect property? If these offenders behave in the way they do, how will that provision protect property and why should there not be a fair weighting given to hardship and property? Why should one take primacy?

Mr C.C. PORTER: The contention that simply because in our view a CRO has not been terribly effective at modifying the behaviour of the cohort that we are seeking to target does not mean that I accept that this new legislative scheme will be similarly unsuccessful. It may not be perfectly successful. I say again that it is not a silver bullet. However, we believe it is likely to be more successful because, as I quoted from the judge in the United Kingdom, if, as is the experience in the United Kingdom, half the breaches end in a jail term, that is a very serious result of a breach of an order. The result from breaches of orders such as CROs, if I might say so, is not terribly serious. This legislation, however, lifts the risk of a breach. That is more likely to have an impact on a person's behaviour than the existing comparative orders such as a CRO. I will give the member one example of that. Volume 2 of the *European Journal of Homelessness* from December 2008 states —

> **The Impact of Enforcement on the Welfare of Street Drinkers and People who Beg**
>
> 'Harder' forms of enforcement—particularly ASBOs—were central to the reduction of problematic street activities in all of the targeted areas. This is hardly surprising, given the powerful deterrent posed by the potential of lengthy prison sentences being imposed for breaches. However, what did come as more of a surprise to the research team was that, when preceded by warning stages (such as ABCs) and integrated with intensive supportive interventions, it was evident that 'harder' measures could bring about *positive benefits* for *some* street users themselves, as well as to the general public. Enforcement in these instances acted as a 'crisis point', prompting reflection and change, encouraging engagement with support services, such as alcohol and drug treatment:

Views on this will differ but there are alternative views that raising the level of consequence for a breach of an order makes an order more likely to be obeyed. Again, we are dealing with a cohort that has a history of not obeying orders.

Mr J.R. QUIGLEY: Two issues arise out of that explanation. At the briefing, the Attorney General's adviser was asked in relation to the 50 per cent of people who are imprisoned whether they were imprisoned for the breach of the ASBO or CRASBO, or for another substantive offence that led to that breach. The information we were given at the briefing was that the figures by the Home Office do not drill down that far and we could not be told whether the 50 per cent were being imprisoned or what percentage of that 50 per cent were imprisoned for breaches or for committing a further offence.

Mr C.C. PORTER: That information is not available. I understand from my advisers, and I have read the reports myself, that they do not go into that. That would be a nightmare to have to do because it would involve

individual transcripts. It is, nevertheless, not inconsequential that half the breaches result in imprisonment. I take the member's point that the breach itself might have been a criminal conduct. However, in these circumstances, as the judge I quoted recognised, what gives the PBO superior efficacy to other orders is that if the courts do treat the near breach of a PBO that may or may not involve another offence, which of itself is a very serious offence —

Mr J.R. Quigley: As I am sure they will.

Mr C.C. PORTER: I hope the courts do. That is the point of this legislation. As long as we can target that elevated consequence to the type of behaviour that is not being dealt with satisfactorily at the moment, we consider that there is a possibility that the behaviour of a hardcore cohort can be changed, or, at the very least, that we can enhance community safety.

Mr J.R. QUIGLEY: I said that two issues arose out of the Attorney General's previous explanation. The second issue is that the research paper the Attorney General referred to dealt with a population that does not have the same Indigenous problem that we have in this jurisdiction, not even with the Romani people, who, I understand, are being driven out of France, disgracefully.

We have a population, as the Attorney General knows, of impoverished and burdened youth. I refer to Indigenous youth who are burdened by things such as foetal alcohol syndrome and who are born into this world already with those mental infirmities. When the Attorney General was talking about the street offences outlined in that research paper, and stated that the harder penalties will teach them a lesson and that these people will move on from that behaviour, that will not happen in Fitzroy Crossing—more people will just be jailed.

Mr C.C. PORTER: The first contention is obviously that the United Kingdom is a different place from WA with different patterns of offending.

Mr J.R. Quigley: Sorry—without the Indigenous population.

Mr C.C. PORTER: Indeed, but the United Kingdom also has problems that we do not have, such as a lot of violent crime and other forms of offending.

Mr J.R. Quigley: Football crime.

Mr C.C. PORTER: Football crime, and crime associated with non-Indigenous ethnic minorities who live in the UK. The United Kingdom has big issues and problems that we do not have, and we have problems that it does not have. If we look at the United Kingdom rate of imprisonment per 100 000, it is lower than Western Australia's, but I think it is comparable with Australia's overall average. So the UK is not dissimilar, although I accept that in many respects it is a quite different jurisdiction. Is it the case that some of the people included in our cohort of offenders will be Indigenous offenders? Of course it is, but, also, is it not the case that in certain communities at certain points of time an enormous amount of time, resources and effort are expended on this issue? I would argue, without getting into it now, that our government has probably been more successful than the previous one in diverting, assisting, rehabilitating, and helping. If someone receives a prohibited behaviour order—keeping in mind that the court can take into account all of the things that the member has just raised—the point will have been reached at which those considerations are not as important with respect to that particular offender as the considerations of protecting the person and property of the community at large.

Mr P. PAPALIA: Attorney General, I want to explore the response that the member for Mindarie just referred to. Did the Attorney General quote from the *European Journal of Homelessness*?

Mr C.C. Porter: Yes.

Mr P. PAPALIA: The Attorney took from that publication that a jail term, or the threat of imprisonment, served the purpose of giving a hard knock, or words to that effect.

Mr C.C. Porter: I can read it again if the member would like me to.

Mr P. PAPALIA: I would like to hear it again, because I found it interesting that that journal was specifically referring to homeless, addicted individuals; is that what it was referring to?

Mr C.C. Porter: Yes; generally speaking. Hansard has borrowed it; I will table it for the member.

Mr P. PAPALIA: Of the cohort we have discussed, how many of them are homeless substance addicts? The Attorney General must know who they are because he referred to them. The Attorney General has suggested that there will be a very limited number of the cohort who will be at the extreme end, and they are the ones who will be targeted and caught by this legislation.

Mr C.C. PORTER: I do not have the answer to that question. My resources for investigation and data gathering are not unlimited, and obtaining personal information about recidivist offenders is not as easy to get as the member thinks, although pre-sentence reports would have been prepared for many of these people over a number

of years. I do not have the answer to that question. The member and me take something of a different view as to the cohort of people in prison and this cohort; I do not dispute that individuals in that cohort have experienced a range of difficulties and problems in their life that have been entirely unhelpful in producing adequate, law-abiding citizens—I do not doubt that. But, equally, there are people in that cohort who behave in a fashion that simply demonstrates a lack of respect and empathy for their fellow citizens. The latter group will be looked on far less favourably by the courts than the former group, as they are in sentencing and as they will be in the prohibited behaviour order process. That is why we have left the discretion so at large.

I—as has the member for Mindarie—have witnessed the sentencing process firsthand; we have an excellent judiciary who are very fulsome in their consideration of a person's background. It can be considered. Nevertheless, again, it may be that the life experiences of a small number of people have been far from positive to the point when the PBO application is made; however, notwithstanding some great effort by the state to assist those people, their offending against the community will have reached a point at which the government considers it worthy of this extra step. By the time that step is reached, there would have been an enormous amount of assistance given to an individual along the way. More can always be done, but this is not an argument about failing or stopping assistance; it is about what can we do when that assistance appears to have significantly failed with these offenders, and our response is this legislation. As I say, it may be an imperfect response, but I think it will add something to the sentencing arsenal.

Mr P. PAPALIA: Although I share some of the concerns the member for Mindarie referred to earlier about the types of people who may inadvertently be caught in the net of this legislation, my question was about how much research, analysis and planning has gone into this legislation. The Attorney General was able to tell me that he is talking about a very small cohort of individuals who will be targeted in court, yet he does not know how many meet the criteria referred to in that journal that he suggested might be an additional justification for this legislation. How much real analysis has gone into gauging whether this legislation is the most effective next step? Do not get me wrong; I am totally in accordance with the Attorney General on the subject of there being a number of individuals in the community who lack respect and need their behaviour corrected; however, I am not convinced that this legislation will do it, and I am not convinced that the government has put adequate effort into determining, prior to introducing the legislation, which has some fairly draconian components to it, how effective it will be, whether it will be effective, or how many individuals will be meeting the criteria as identified by the *European Journal of Homelessness* as maybe benefiting from the types of penalties that this legislation will introduce.

Mr C.C. PORTER: If the question is how much research have we done, certainly, if my level of exhaustion is anything to go by, it has been an exhaustive level of research. We have engaged in criminological research, read an enormous amount of literature and articles, and there has been a range of disagreement. For instance, a recent congressional hearing on justice initiatives in the United States looked at every single initiative run in the United States and put them through an economic analysis as to their effectiveness. We researched that and we researched other things. As to this particular cohort, this is research that has never been done in this state before. No-one has actually bothered to look into this, and there are limits to which I can justifiably go into that cohort's background and detail.

Mr P. Papalia: The Attorney General is absolutely convinced that this is the right thing to do, but he is limited in his capacity to say who it will impact on and how those individuals will be affected.

Mr C.C. PORTER: But this is criminology, not nuclear physics, and there are limits.

Mr P. Papalia: But the Attorney General keeps telling me that it will not be a big number.

Mr C.C. PORTER: I do not believe it will be, but I might be wrong—that is a possibility. Our number is, at least, based on some kind of fair analysis of a comparative jurisdiction. But as to the questions the member asked about that cohort and which of them might have some sort of problems, I seem to recall that I recently answered a question on notice from the upper house along those lines. We can go to some effort with small groups of sentenced persons by looking into their sentencing history and pre-sentence reports and cross-referencing, which would not be without its work, I might say. The member asked me how much effort went into assessing whether this legislation could be potentially effective. I think more effort than that expended by any previous government has gone into this area to try to determine whether some response is, firstly, warranted, and, secondly, whether the legislation has some potential benefits. That may not have been the way the member would have gone about researching the process, but we have read and looked at every single piece of comparative analysis.

Mr P. Papalia: No previous government has proposed publishing on the web the identity of juveniles. That is why it is a significant step.

Mr C.C. PORTER: I think at one stage the member's government was looking at the idea; I do not know whether he would call that proposing to adopt the ASBO system.

Mr J.R. Quigley interjected.

Mr C.C. PORTER: Indeed; fair enough. In this circumstance, all I can say is that the research is about cross-comparative assessment of all the literature that is available in the field of criminology. It is about looking at research that has occurred not necessarily in this jurisdiction, but across the world. There is sufficient evidence to suggest that this is a fair response to an identifiable problem. Our research has been to identify the problem here.

Debate adjourned, pursuant to standing orders.