BAIL AMENDMENT (PERSONS LINKED TO TERRORISM) BILL 2018

Committee

Resumed from 19 March. The Chair of Committees (Hon Simon O'Brien) in the chair; Hon Sue Ellery (Leader of the House) in charge of the bill.

Clause 11: Section 66C inserted —

Progress was reported after the clause had been partly considered.

The CHAIR: The last time we were dealing with this bill, we were considering the question that clause 11, "Section 66C inserted", do stand as printed. We dealt with the first amendment standing in the name of Hon Alison Xamon on a previous sitting day. I now offer the call to Hon Alison Xamon if she wishes to move her next amendment.

Hon ALISON XAMON: Thank you, Mr Chair. I do wish to move the second amendment that is standing in my name. Would you like me to read that out?

Hon Sue Ellery interjected.

The CHAIR: One moment. If Hon Alison Xamon wishes the call in respect of her amendment, I will give it to her. If she indicates that she does not wish to proceed with it, that is fine, too.

Hon ALISON XAMON: Thank you, Mr Chair. I indicate that there were two amendments, with one being dependent on the other. Amendment 1/11 has been defeated. Amendment 2/11 obviously flows from that. Clearly, I am not pursuing that particular amendment.

The CHAIR: With respect, member, it is not clear. It is on the supplementary notice paper. It is up to you to move it if you wish. If passed, the amendment can coexist with what is already there, even though others might have the view that it would not fit very well. There is no law that says that anything that comes out of this place has to make sense, although that is our preferred option. I take it that Hon Alison Xamon is telling me that, no, she is not going to move amendment 2/11.

Hon ALISON XAMON: Thank you, Mr Chair, for seeking clarification on that. You are absolutely correct; I am not seeking to move the amendment listed on the supplementary notice paper as amendment 2/11, but I am seeking to move the next amendment, which is amendment 3/11. I am happy to read that out if that is required. I move —

> Page 8, after line 6 — To insert —
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> **66D. Annual report to include information about application of s. 66C**
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> (1) The accountable authority, as defined in the *Financial Management Act 2006*, of the department of the Public Service principally assisting in the administration of this Act must, in each annual report submitted under the *Financial Management Act 2006* Part 5, include information relating to action taken under section 66C(1) in proceedings on a case for bail in the financial year to which the annual report relates.
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> (2) The information referred to in subsection (1) must, without disclosing terrorist intelligence information, specify —
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> (a) the number of proceedings in which action was taken under section 66C(1); and
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> (b) in each of those proceedings whether the accused had access to the terrorist intelligence information received by the judicial officer and whether, and to what extent —
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> (i) evidence by or on behalf of the accused was received; and
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> (ii) argument by or on behalf of the accused was heard.

I have moved this amendment because it is part of the suite of concerns I have about ensuring that the effect of this bill, which is of course to deny the rule of law to a particular class of suspect, can at least have some minimal degree of oversight or accountability in terms of how it is applied. Under this amendment, information about the use of the secret evidence provisions, but not the content of the terrorist intelligence information, is made available to Parliament and, therefore, public. The term used is whether the accused was given access to the information. I queried this with the drafter as I think it is unlikely that the accused would ever get the full information, but sometimes the defence lawyer would get some. My understanding of the reply that I received is that this was considered during drafting, and the term "accused" is necessary because that is the term used in the bill. As the amendment is drafted, it would also cover information going to the accused's lawyer but being withheld from the accused, if the lawyer was willing to give such an undertaking to the court. This proposed amendment does not change the policy intent of the bill; all it does is to ensure that Parliament can monitor how the competition between national security and ensuring that people receive a fair trial is being resolved on a case-by-case basis. It is not

uncommon for Parliament to be able to receive these sorts of broad bits of information in terms of how particular provisions are being exercised. I think it is an important provision to be considered. I do not accept that the sort of information being proffered would compromise national security, which is of course the concern that people would legitimately have, but I think it would ensure some degree of transparency, albeit minimal, around how these provisions are operating in practice.

Hon SUE ELLERY: The government will not be supporting this amendment. I understand the honourable member's motivation in the last comment that she made about seeking to put in place some transparency. That is at odds with the nature of what we are dealing with. The reasons that the government will not be supporting this amendment are not dissimilar to the reasons we did not support the previous amendment. They go to protecting information and ensuring that those agencies that share information are confident about how we will manage the risk.

The proposed amendment would require the Department of Justice to report on bail proceedings when section 66C is engaged. It would require the department, without disclosing terrorist intelligence information, to specify the number of proceedings in which the non-disclosure protections were applied under section 66C(1) and, for each of those proceedings, information about whether the accused had access to the terrorist intelligence information, and whether and to what extent evidence by or on behalf of the accused was received and argument by or on behalf of the accused was heard. The only way such material can be collected means this amendment must assume that the department's staff have access to the court transcripts of such proceedings for the purposes of making these reports. Permitting this access is not appropriate as it would require the staff to review confidential information related to covert investigations and national security. Increasing the number of people who have access to the information would risk exposing the information to other sources. This disclosure could compromise the integrity of ongoing investigations, the safety of personnel involved in these investigations, and national security.

The proposal to report on the number of bail proceedings that engage section 66C is also not supported by the government. By the very nature of this legislation, there will be very few bail proceedings in which section 66 is raised. The public reporting of any information, including aggregate data, may risk inadvertently compromising the secrecy of covert terrorist investigations in particular cases by alerting individuals who are the subject of those bail proceedings to their potential surveillance. If this information becomes publicly available, it will become easier for individuals and the public, including the media, to find ways of discerning who those people are. If that were to occur, it may compromise covert investigations and national security. Due to these significant risks, this amendment may have the undesirable result that the terrorist intelligence information is not presented to the court in bail proceedings. For those reasons, the government will not be supporting this amendment.

Hon MICHAEL MISCHIN: I indicated during the course of my second reading contribution that we had some sympathy for the amendment moved by Hon Alison Xamon for a variety of reasons, but, essentially because of the particular nature of what is proposed and its unusual nature. We support the idea that sensitive information that may have an impact on national security ought to be kept confidential. Because of the nature of the proceedings and the extraordinary requirement that certain information will be privy to only the judicial officer who will decide whether it has some national security impact, and, if it does, may consider it without the accused person—bearing in mind the presumption of innocence and the threshold that that person has to overcome in order to seek bail—and may use it in a way that is prejudicial to the accused's interests, it is the case that at the moment, the way the legislation stands, no monitoring can take place. The only people who would know that this sort of an exercise had taken place would be the prosecutor, who would be the police officer who is named on the prosecution notice in the case of a summary matter, or the state of Western Australia if the state is prosecuting on an indictment. If I am getting this wrong, I urge the minister to interject and correct me, but it is my understanding that this is the case. That means that at least the prosecutor in court at the time, whether it is a Director of Public Prosecutions officer or someone briefed by the DPP, would know. A particular judicial officer would know. The accused would have some inkling because they find that they have applied for bail but the court has gone into closed session and made a decision without them knowing what has gone on. The accused's lawyer would have an idea because they, too, would have been told to leave the room. It is not going to be a secret that this has happened. All that the amendment proposes, it seems to me, is that the department reveal that it has happened on X number of occasions in the last 12 months. To me, that does not appear to be unreasonable.

It is not unknown for there to be reporting of confidential proceedings. I confess I do not have the material to hand under the legislation, but the Gender Reassignment Board reports on the number of applications that it has received and considered and in ways that do not reveal information that allows people to know who the individuals may be, in order to protect their confidentiality. This does not seem to go even as far as requiring any details of the sorts of cases involved. Under the homosexual convictions expungement legislation, as I recall, we had a requirement that there be a report on how many applications are made and the like. I would not have thought that that would reveal any information that would allow identification of individuals. In fact, it is prohibited under the legislation that there be any identification of the individuals concerned, as I recall, to protect their sensitivity. It seems to me not unreasonable that there be at least a figure disclosed, particularly if, as expected and as we all hope, there will be no occasions on which this legislation or this particular set of provisions will need to be used in the course of a year.

I have some sympathy towards what Hon Alison Xamon proposes. We received some advice in written form from the government regarding these proposed amendments, but I confess I do not recall quite when it came to us. It outlined the argument that the minister has presented. It boils down to a couple of objections, as I understand it. One is that for the purposes of reporting in this fashion, it would require departmental staff to view confidential information related to covert investigations and national security. The question that springs to mind is: why? I would have thought that all that was necessary, if appropriate protocols were established with the prosecuting authorities and the department, would be for the Director of Public Prosecutions, at the time that the director was compiling his or her report for the annual report, to send some information to the Department of Justice for the Department of Justice's report saying, "We have had one application this year in which section 66C was invoked and information was withheld on the basis that it was 'terrorist intelligence information'" or "There has been one application this year when it was invoked and the judicial officer considered the information was not terrorist intelligence information and it was withdrawn"—end of story.

We do not have to identify who or when or the charge—although that might be helpful for the purposes of assessing the effectiveness of the legislation—or whether it was reasonable or unreasonable, or whether the person was granted bail. Certainly, there will be enough information out there of some form or another, unless there is a complete clampdown on any information regarding bail applications that can be published, because it will be in the public arena. I would have thought also that if members of the media who are assigned court duty happen to come across a case and are told, "Sorry, you can't go into this court because a hearing is being held in camera and it's a criminal matter", that would be newsworthy. If someone has been charged, it would not be a secret; it would be on the court lists. The fact that a person has an application for bail would be known. The only part that seems to be confidential about any of this is whether terrorist intelligence information is being used by the court, not the identity of an accused; not the charge the accused is facing; and not the fact that that accused has fallen within the operation of section 66C because they have in the past been convicted of a terrorist-linked activity or been subject at some stage to a control order. The secret part is the use of the information, receiving evidence and hearing the argument.

The CHAIR: The question is that the words proposed to be inserted be inserted.

Hon MICHAEL MISCHIN: I would appreciate further explanation from the minister for why it is necessary that staff of the department view information relating to covert investigations and national security as confidential. I would have thought, apart from anything else, for the court record, a judicial officer would note something, bearing in mind these records are now part of the court's management system, which is increasingly coming online. But even without that, there would be a notation on the court record to the effect that "Hearing heard in camera", "Terrorist intelligence information proffered", "Closed court decided yes or no", or "Bail refused or allowed", and sufficient reasons for why. I do not see why it necessarily follows that someone outside that process needs to look at confidential information relating to covert investigations and national security.

The second objection is that there will be very few of them. That may be right, but we will never know unless there is some reporting on how many arise. Flagged further on, a review provision is foreshadowed. However, we are told that reporting publicly of any information, including aggregate data, may risk inadvertently compromising the secrecy of covert terrorist investigations in a particular case by alerting individuals who are the subject of those bail proceedings to their potential surveillance.

If I might use you as an example, Mr Chairman; if you were the subject of a charge having been picked up on possession of cannabis, you know that in the past you have had a conviction for terrorist-linked activity or you have been discharged sometime in the past under a control order and you come to court seeking bail, but the prosecution says, "Whoa! Don't release the chairman on bail because he falls within the operation of the Bail Act and you, judicial officer, have to be satisfied on the basis of exceptional reasons, plus all the other considerations"—the onus being on you, Mr Chairman, to persuade the judicial officer that you are worthy of bail and can establish exceptional reasons. You say, "Fair enough, I'll take that on", and all of a sudden you and your lawyer are excluded from the court. I would have thought you would probably get an inkling that you are suspected. You may not know the status of the investigation or that you are under surveillance at the time, and that may never be revealed and it is not being asked to be revealed by this disclosure provision. But you would get a pretty fair idea that you are a person of interest to the authorities if you had not already worked that out. None of that is sought to be disclosed; it is just the fact of it. If you find yourself remanded in custody at the end of all that, because you have not managed to establish exceptional reasons for a relatively trivial charge, in the scheme of things, you could probably fairly quickly work out that it is because some terrorist intelligence information has been used without you knowing about it. As I understand it, there is nothing stopping you going to the media and complaining about that if you think it is in your interest or newsworthy.

Leaving all those considerations aside, all that is being asked for in the annual report is a disclosure saying there has been one such case in the last 12 months. I need to be persuaded that there is something of national security import in what is being proposed that, firstly, requires departmental staff to view confidential information related to covert investigations and national security rather than just a court record and a notation on that, which will be

known to the prosecution and the accused, apart from anyone else; and that, somehow, that data will risk inadvertently compromising the secrecy of covert terrorist investigations in a particular case by alerting the offender or someone else who is the subject of those bail proceedings to their potential surveillance. I do not see it; it is simply a notation on a court record. Perhaps there is some further information that can persuade me otherwise, but I am inclined at the moment to support the amendment proposed by Hon Alison Xamon.

Hon SUE ELLERY: I stand by the reasons I have already given, but I am happy to add some further information. Regarding the difference between this kind of statistical report and other statistical reports provided to Parliament, certain statutory provisions require summary statistical reports to be tabled in both houses of Parliament; for example, section 43 of the Surveillance Devices Act requires annual statistical reporting on the use of warrants, extensions to warrants and emergency authorisations for covert surveillance activities. The contemplated cohort that that reporting relates to is very large—for example, suspected criminal activity in Western Australia—so the risk of alerting individuals to the surveillance is low. Section 54 of the Terrorism (Preventative Detention) Act requires quarterly reporting on preventive detention orders. Individuals are aware that they are subject to the provisions of that act, so there is no risk of alerting those individuals to intelligence and surveillance activities that would compromise national security. The critical difference in this sense is that the protections under section 66C relate to a very small number of bail proceedings, which, if reported, may risk compromising national security.

In addition, the point that Hon Michael Mischin made may well be accepted by members if proposed subsection (2) ended at paragraph (a), but it does not. It goes on to paragraph (b). The honourable member made the point that if all that is required is the number, why should we have a problem with that? That is not all the amendment moved by Hon Alison Xamon requires. It goes on to require that the information must specify —

> (b) in each of those proceedings whether the accused had access to the terrorist intelligence information received by the judicial officer and whether, and to what extent —
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> (i) evidence by or on behalf of the accused was received; and
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> (ii) argument by or on behalf of the accused was heard.

It is not just a number. Someone would have to determine to what extent evidence was received and heard. To discern that, more people would be required to go through the information to determine whether and to what extent evidence received by or on behalf of the accused was received, and argument by or on behalf of the accused was heard. What was evidence and what was argument would need to be separated, as would to what extent it was received and to what extent it was heard. The government still relies on the initial reasons that I gave. We cannot support the amendment because it poses a risk.

Hon ALISON XAMON: I want to respond to a couple of the comments that were made. I want to confirm with the minister that if proposed subsection (2)(b) were to be removed from the amendment, I am still assuming that the government would not be prepared to support the amendment. Can I confirm that, please?

Hon SUE ELLERY: Yes. I said at the outset of my comments in response to Hon Michael Mischin that I still rely on the first arguments that I gave. We will not be supporting this amendment. We believe it poses a risk. In pointing out proposed subsection (2)(b), I was trying to draw Hon Michael Mischin's attention to the fact that the amendment went further than he was suggesting.

Hon ALISON XAMON: I wanted to confirm that because I wanted to make it very clear that the government is not prepared to contemplate any part of this amendment. I also look at the Terrorism (Preventative Detention) Act 2006 quarterly reports that are tabled in this place. I take a keen interest in them. The sort of detail that would be required in these reports is a little bit more than simple sheer numbers. We already have that. They include the number of preventive detention orders made, but go on to detail the number of persons taken into custody, the number of persons kept in custody, how long each person was in detention and other information. This information is already provided to Parliament, as is appropriate. If part of the argument is that we are talking about large numbers, I have been monitoring this since I came back into this place and have been receiving the quarterly reports. I can advise members that in every instance it has been zero. We are clearly not talking about huge numbers of people pertaining to this. Because that act concerns extraordinary measures to deal with terrorist activity, Parliament at the time saw fit—I think, appropriately—to require some level of accountability coming back to Parliament about how it was being used.

I want to pick up on at least a couple of points made in the minister's initial response to my amendment. By collating this information and increasing the number of persons who have access to the information, the minister expressed a concern that that would risk exposing the information to other sources and that disclosure could compromise the integrity of ongoing investigations. We are used to having a number of people who are security cleared and authorised to receive a lot of deeply sensitive high-level information. I do not think it would be beyond the wit of the Department of Justice to ensure that whoever is responsible for compiling that information has the appropriate security clearances. If they did not do that, I think it would be negligent on their part. I am not

convinced that that is a particularly compelling argument. I am sure that we are not talking about sending an inexperienced intern across to access such sensitive information. I would think that anyone dealing in this realm would have the appropriate security clearances. I remind members that we are talking about the most minimal amount of information being made available to Parliament so we can at least be aware of what is going on. It is true that we are contemplating potentially having a review clause included. But should such an amendment be passed, after the review has been completed, there will be no capacity for Parliament to receive any sort of ongoing data. That is assuming that the review clause will be passed.

I believe that this is a minimum and important safeguard. As I indicated in an earlier debate, I would also have liked our senior law officer, the Attorney General, to receive minimal information. That has not been the will of the chamber. At the very least, I would consider that this amendment could and should be contemplated. Having said that, I am also prepared, subject to discussion, to look at dropping proposed subsection (2)(b) if that would make the amendment more palatable to other members in this place. I believe that if proposed section 66D(1) and 66D(2)(a) were passed, they would at least provide some degree of information. It would not be the full extent of information that I think Parliament is entitled to and should seek, but it would provide some comfort that at least the base level of information is being made available.

Hon MICHAEL MISCHIN: I fail to be persuaded that there is a problem with the disclosure of at least a minimum amount of information that is provided for in other legislation. I take it that the concern is with respect to proposed subsection (2)(b). I will pick that apart a little. It states —

> The information referred to in subsection (1) —

That is, the information that has been disclosed —

> must, without disclosing terrorist intelligence information, specify —
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> (a) the number of proceedings in which action was taken under section 66C(1);

Can the minister tell me why there is a security concern and a security risk just from that?

Hon SUE ELLERY: I set out the reasons when I first stood to oppose the amendment. We are talking about a narrow cohort. The proposition in Hon Alison Xamon's amendment would widen the cohort of people that would be needed to provide the information required in the report. Although the honourable member referred to not disclosing the information, that means not disclosing the information in the report. In order to meet the requirements of the proposed amendment and gather the information, a wider group of people would be required to engage in the process, which would increase the risk. This bill deals with a smaller cohort of people than the provisions of the other two acts I referred to. This would increase the risk because it applies to a narrower cohort. Operationalising this amendment would require a broader number of people to be exposed to the information in order to provide the information to be put into the report.

Hon MICHAEL MISCHIN: Again, I do not understand why that is the case. Let us say I am attending one of these things on behalf of the state of Western Australia as a prosecutor and am alerted by the appropriate authorities that so-and-so has a control order against them or has been convicted of an offence that falls within the scope of section 66C and the presumption against being released on bail applies—which is the sort of thing that the magistrate in Mr Monis's case was not of aware of. I would then duly say, "Yes, Your Honour, this is a case that falls within the scope of section 66C. I have some information here; I simply rely on that, the fact that it is, but I am also being urged by the authorities to provide you with some terrorist intelligence information in order to assist you with being able to balance that against the exceptional reasons that might be put up, and the other considerations. Because although this is a very low level charge, we are talking about a pretty dangerous egg here that needs to be dealt with and kept in custody on remand." The judge will say, "Yes, fair enough", take it and have a look at it, and whatever the outcome of the proceedings, I will have to report them, come back to the office and say to the Director of Public Prosecutions, "In accordance with my brief, I dealt with it and I appeared before magistrate so-and-so, and I was provided with terrorist information. I don't want to tell you what it is, director, unless you insist, but I raised the objection to bail and I presented the magistrate with the information. The magistrate accepted that, considered it in camera, and after doing so and hearing submissions from me, rejected the application for bail and remanded this accused in custody." End of story. It will appear on the court record; it is available to anyone doing research at the Magistrates Court, yet the Department of Justice could not be told that an application for bail was refused on the basis of terrorist information being presented to the magistrate, full stop. Worse still, I could not tell the Department of Justice that there was one such application in the past 12 months. I find that difficult to accept. There are no additional people who need to know anything other than a number. I, as a prosecutor, the police officers advising me, the witnesses, the Australian Security Intelligence Organisation agents and the magistrate know, and the court record says so. All that is required is a number. We will forget about proposed subparagraph (b) for the moment, but all that is required under subparagraph (a) is the number and the minister is telling me that that somehow creates a risk. I find that difficult to accept. I would appreciate an explanation of how finding out the number and how the

director writing to the department once a year saying, "We had one such application", or the Commissioner of Police writing to the department once a year saying, "We have had one such application", or none, is a risk.

Hon SUE ELLERY: The honourable member is missing a point. I think he is assuming that this is a bail application for a charge related to terrorism. This could be any matter that appears before the court. The point that the honourable member made earlier—that those in the court for that matter would know what necessarily was arising—is not necessarily the case, because people may have no idea that surveillance is being conducted in relation —

Hon Michael Mischin: I'm not talking about surveillance, I'm sorry.

Hon SUE ELLERY: But I am.

Hon Michael Mischin: No; that is not what we are interested in.

Hon SUE ELLERY: Honourable member, I am giving the answer.

Hon Michael Mischin: You are, but you're missing the question.

The CHAIR: Order! Let us listen to the minister, please.

Hon SUE ELLERY: I am giving the answer. I sit and listen to the honourable member quietly when he takes 10 minutes to say something that others might say in three, so he can listen to me give the answer.

For the reasons that we have outlined already, this is a narrower cohort of people, and the collation of the information required in the amendment before us now—even if we took out proposed subparagraph (b), which makes it far more extensive—creates an increase in risk. We are not talking about just revealing information that a person may already know about because they are in the court; we are talking about information that might be brought to the attention of the judicial officer, without the person who is there for the bail application even knowing what that information is about.

I go back to the points that I originally made. We are talking about people who have already had either an interim or a control order made against them, or have been subject to one of these orders in the last 10 years. I withdraw that bit, but the original argument that I put remains the case. The proposition that is before us is unashamedly about shining a light—there is no question about that—and greater transparency. The government's position is that when it comes to these matters of terrorist-related intelligence and the narrow cohort of people we are dealing with, the greater the information that is required to be prepared and reported on, the higher the risk that it may be compromised at some point. That is the point that we are making.

Hon ALISON XAMON: I hear the government's grave concerns about the compilation of this particular data. I need to refer to a foreshadowed amendment in order to make my point. I had originally put on the supplementary notice paper a review period after five years for this bill, and the government came back with a suggested review clause after three years. I have subsequently withdrawn my amendment because I am quite comfortable to go with the government's proposed amendment instead. It begs the question though: would this not be the exact data that would need to be compiled in order to conduct that review? If not, what on earth would the review have the opportunity to look at? It would appear that should that amendment for a review be supported—if the government chooses to withdraw it, I will put mine straight back on the supplementary notice paper—that data will have to be compiled. My amendment basically says that that data needs to be made available to Parliament in the same way that we do with the Terrorism (Preventative Detention) Act 2006 provisions pertaining to section 54(2). I suppose that is my question. If the government is not going to compile it for any proposed review, what on earth would be in the review?

Hon MICHAEL MISCHIN: I am sorry that I am boring the minister and that I take 10 minutes to explain something that could be explained in three minutes, but I am trying to tease out an understanding of the problem, and the minister is not telling me. She keeps going back to "risk" and "small cohorts". Please explain for me how a bail application would be dealt with. Assume that I am the accused. I have been arrested. I have been brought to a magistrate and I am applying for bail. I have had a control order in the past that has been discharged within the last 10 years, and the minister is the prosecutor. How will it be dealt with? I am in the court. A whole raft of other people are standing there waiting for their turn, minister, so where is it? How will it be done? Then we might be able to understand which bits are secret and require national security—we would have to kill everyone in the courtroom, or lock them up—and which bits can be made public.

Hon SUE ELLERY: Three elements, I think, were raised in the most recent exchanges. I will start with Hon Alison Xamon. She is jumping ahead to the review provisions, but I think she is trying to make the point that surely this information would be included in the review, and, therefore why, would we not agree to this amendment if we were happy to support a review? The point is that the numbers and the other information sought in the amendment may not be published in the review, and the advice that I have been given is that, in the environment we are in now, they would not be included in the review. I do not think it can be assumed that support for a review is somehow contradictory to opposition to releasing the numbers.

The second point I want to make goes to a point that Hon Michael Mischin made a while ago. He was working on the premise of why would we try to not report this information when, essentially, we were not really adding additional numbers of people who would have to know things, because clearly those in the court would know? There may well be cases in which, before the accused even appears for the bail hearing, issues relating to the terrorist intelligence information will have already been dealt with, and the accused will not know that.

I know that the honourable member does not want to accept this, and I am sorry about that, but I make the point again that we are dealing with a very small cohort of people engaged in the terrorism business in Western Australia. If we are to start reporting, even on just the numbers, there is a risk that those engaged in that area, if they know it is not them or want to assume it is not them, will start to make guesses or try to investigate. Indeed, the media might try to investigate and dig further into that information.

In the same way that Hon Alison Xamon is openly saying that, from her point of view, this is about greater transparency, on behalf of the government, in the name of putting in place the most considered measures to address terrorism, we say, quite unashamedly, that this information should not be published and should not be reported. Members have a choice to make, and it is that stark. If members accept that they want to put in place provisions that make this kind of information transparent, they will support Hon Alison Xamon's amendment. The government takes the view that this information should not be revealed, because of the very nature of terrorism. Unashamedly, it should not be transparent, and if that is the position members support, they will not support the amendment.

Hon MICHAEL MISCHIN: It may be because we do not understand how these proceedings will be conducted. There is nothing in the bill before us that prescribes a particular means by which these bail proceedings are to be dealt with that is different from any other bail application and any other accused coming before the court, or who is in custody and is eligible for bail. The only provision that seems to govern how these proceedings are to be conducted is proposed section 66C. Perhaps there is a misunderstanding on my part of how these proceedings will work. Perhaps the minister can explain, when someone falling within proposed section 66C comes to court on a non–terrorism related charge, how the proceedings will be conducted. How will the judicial officer know that there is terrorist intelligence information? Talk us through, step-by-step, how this bail proceedings will go.

Hon SUE ELLERY: I am not able to do that. In answer to a question about commencement asked by the member earlier in the proceedings, I said that the reason we needed the time was that the courts needed to establish those proceedings. I am not able to tell the member the process that the courts will take. However, I am reminded of a question that the member asked me yesterday, on which I had asked for further information. I have now got it, and this might help members as well. Hon Michael Mischin asked me to provide further information about other jurisdictions that have passed similar legislation to this, to protect sensitive terrorist intelligence information in bail proceedings. He specifically asked whether there was a requirement for them to share that information with the executive. We dealt with that issue in the first amendment that came before the house. I have been provided with that information today, and it includes information on whether the three jurisdictions we were talking about that had similar provisions to ours were required to report on this. I can say that, with respect to all three, the answer is no. In South Australia, there is no provision to require a court to report on or disclose information. None of the three that have similar provisions protecting information—South Australia, Victoria or Tasmania—are required to report in the terms that would be imposed in Western Australia, if we were to accept this amendment.

Hon MICHAEL MISCHIN: The minister is now saying that regulations will be published dealing with those sorts of accused in a special way. Is that right?

Hon SUE ELLERY: I am advised that the courts may or may not prepare regulations to assist them. They want the time to work out how they can incorporate these provisions into their existing operational methods and processes. They may or may not be able to incorporate these into their existing processes and, if not, they will then develop their own alternative or additional processes to ensure that they can deal with these in an efficient way.

Hon MICHAEL MISCHIN: The minister has told us that there was consultation with the heads of jurisdiction in the course of the development of the bill. What did they indicate may be necessary to ensure the confidentiality of terrorist intelligence information that would depart from the usual way in which bail applications and hearings are conducted?

Hon SUE ELLERY: I am advised that in the course of the consultation, the courts did not raise any issues about whether they would be able come up with processes to deal with this. I will check whether they were asked or whether they offered. I am advised that during the course of the consultation, the courts indicated that they would develop a process if necessary to accommodate this. They did not indicate that they thought they definitely need a new process. There may be a new process and there may be an additional process or they may use the existing processes.

Hon MICHAEL MISCHIN: I will get back to scenario I posed earlier to try to understand how the process will work and how a bail hearing or application will be dealt with differently within the true intent of section 66C while,

at the same time, accommodating the current structure of the Bail Act—it has to—subject to some particular rules of the courts being developed. I am the prosecutor. I have someone before me in court who has been arrested by the police and who in the past had a control order against them. They are there for a trivial charge in the scheme of things, one that ordinarily would not even involve a sentence of imprisonment and for which the prosecution would concede bail ought to be permitted. The charge currently before the court is unrelated to a terrorist offence. A security agent comes to me and says, "As you've seen, so-and-so has an expired control order on their record. You need to tell the magistrate that the presumption against bail applies and that he has to be satisfied, apart from every other consideration of suitability for bail, that there are exceptional reasons." As the prosecutor, I have to tell him that. The accused is in the dock. His defence lawyer is there. I have this information and I say to the magistrate, "Your Honour, there is an issue here. You have to be satisfied to the requisite standard that there are exceptional reasons." The magistrate may ask why and I as the prosecutor tell him that it is because of the control order. The magistrate says that it is a past control order. I would not shake your head, minister; this is what the legislation requires.

Hon Sue Ellery: Sorry; I was sent a text message and that is why I was shaking my head.

Hon MICHAEL MISCHIN: This is what the legislation requires. The security officer tells me that I have to tell the magistrate that he needs to consider some secret stuff. How do I go about that without revealing the terrorist intelligence that is in my possession and without going into detail about what it is? I have been told by the security officer that the magistrate needs to know about this terrorist intelligence information. How do I do that and what happens in the court? How do I convey that to the magistrate? Do I tell him in court? Do I send him a letter or a brown package secretly and anonymously? How will it occur? How will the magistrate find out about it and why is it that the magistrate cannot note the fact that it has happened?

Hon SUE ELLERY: Chair, I have done my very best to answer the honourable member's questions. He started his most recent question by asking how things would be done differently in the court. I am not in a position to speculate on the processes that the courts will put in place to deal with this. I have answered the honourable member's question to the best of my ability. The courts will develop a process to put these measures in place. An alternative process has not been contemplated and one is not ready to go. The advice available to me is that the courts will wait for the legislation to pass before determining whether they need an alternative process or whether they can manage within the existing process. I am not able to add anything further than that.

Hon MICHAEL MISCHIN: Let me put it another way. Is there anything in the bill that requires me as the prosecutor to alert the court before the hearing takes place?

Hon SUE ELLERY: No.

Hon MICHAEL MISCHIN: Is there anything in the bill that says that on learning that this person falls within proposed clause 3E of schedule 1, the magistrate needs to immediately close the court or make any confidentiality orders?

Hon SUE ELLERY: No. I am interested to know where we are going with this. The honourable member can work backwards from the existing provision to draw some conclusion to help his argument but the point is that it is up to the courts to determine what process they will use. They may well use the existing provisions or they may decide that they need to tweak them and do something different. I am sure they will do that within the confines of the legislation. I am not sure that coming at it backwards and trying to unpick things from where the procedures sit now will take us any further in considering the amendment before us.

The CHAIR: I indicate that I will be interrupting debate very soon.

Hon MICHAEL MISCHIN: Before we resume the debate, I would appreciate a little bit more information about how this will work. As I see it, there is nothing in the bill that requires confidentiality about the fact that a particular accused falls within proposed clause 3E of the schedule. There is nothing in the bill that requires a closed court in that regard. There is nothing in the bill that requires that the terrorist intelligence information that is going to be used by the magistrate remain a secret. There is nothing in the bill that requires that the accused or his or her lawyer be denied knowledge that terrorist intelligence information is going to be proffered, only that they may not know what is in it. If all that information is going to be available to not just the magistrate, but also the prosecutor, the defence counsel and the accused, I see nothing that creates a greater risk in having the annual report refer to there being one such case in the last 12 months. I ask the government to also consider whether proposed section 66D(2)(b) can work if the words "and to what extent" were removed from the end of the introductory part of that paragraph. It seems to me that, without disclosing terrorist intelligence information, specifying whether an accused had access to the information received by the judicial officer and whether evidence was received from or argument was presented by the accused is hardly confidential. They would know about that, and so would the prosecutors, the court and anyone sitting there, and so would the court record.

Progress reported and leave granted to sit again, pursuant to standing orders.