

BAIL AMENDMENT (PERSONS LINKED TO TERRORISM) BILL 2018

Assembly's Message

Message from the Assembly notifying that it had agreed to amendment 2 made by the Council, and had disagreed to amendment 1 and had proposed a substitute in its place, now considered.

Committee

The Deputy Chair of Committees (Hon Martin Aldridge) in the chair; Hon Sue Ellery (Leader of the House) in charge of the bill.

The Assembly's substitute amendment in place of the Council's amendment 1 was as follows —

Clause 11, page 8, after line 6 — To insert —

66D. Annual report to include information about application of s. 66C

(1) In this section —

accountable authority means the accountable authority, as defined in the *Financial Management Act 2006* section 3, of the department of the Public Service principally assisting in the administration of this Act;

protected information means information the disclosure of which would contravene a written law or an order of a court;

sensitive information means information the disclosure of which could reasonably be expected —

- (a) to prejudice national security; or
 - (b) to endanger a person's life or physical safety; or
 - (c) to threaten significant damage to infrastructure or property; or
 - (d) to prejudice a criminal investigation; or
 - (e) to reveal intelligence-gathering methodologies, investigative techniques or technologies or covert practices; or
 - (f) to enable the discovery of the existence or identity of a confidential source of information relevant to law enforcement.
- (2) Subject to subsections (7) and (8), the accountable authority must, in each annual report submitted under the *Financial Management Act 2006* Part 5 Division 2, 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 (***reportable information***).
- (3) Reportable information must, without disclosing terrorist intelligence information, specify —
- (a) the number of proceedings in which action was taken under section 66C(1); and
 - (b) in each of those proceedings whether the accused had access to the terrorist intelligence information received by the judicial officer and whether —
 - (i) evidence by or on behalf of the accused was received; and
 - (ii) argument by or on behalf of the accused was heard.
- (4) Prior to submitting an annual report, the accountable authority must give a copy of the reportable information they propose to include in the annual report to the Attorney General and the Commissioner of Police.
- (5) The Commissioner of Police must advise the Attorney General whether any of the reportable information, in the Commissioner's opinion, is or is likely to be sensitive information.
- (6) A judicial officer may advise the Attorney General of any reportable information that, in the judicial officer's opinion, is or is likely to be protected information.
- (7) If the Attorney General is, on advice provided under subsection (5) or (6), satisfied that some or all of the reportable information is sensitive information or protected information, the Attorney General must direct the accountable authority to —
- (a) exclude the information from the annual report; and

(b) insert a statement in the annual report to the effect that information has been excluded from the report under this section.

(8) The accountable authority must comply with a direction under subsection (7).

Hon SUE ELLERY — without notice: I move —

That the Council does not insist on its amendment 1, and agrees to Legislative Assembly substitute amendment 1.

Hon AARON STONEHOUSE: I have not had any conversations behind the Chair on this substitute amendment, so I hope the Leader of the House can give us a quick explanation of the difference between what the Legislative Council agreed to in Committee of the Whole House, and what the Legislative Assembly has sent us.

Hon SUE ELLERY: Members will recall that the last time this bill was before the Council, it was agreed to amend clause 11 to insert new section 66D. This created a reporting requirement, providing that the accountable authority—in this case, the Department of Justice—in its annual report is to specify, without disclosing terrorist intelligence information, 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 evidence by or on behalf of the accused was received, and argument by or on behalf of the accused was heard.

The amendment made by the Assembly retains the reporting requirement in its entirety, and will implement a procedure to safeguard against the inappropriate disclosure of sensitive and protected information. It will do that by implementing the following procedure: There will be no change to the type of information that the Department of Justice is required to report—that is, the reportable information. The courts will need to decide on a case-by-case basis how to provide the reportable information to the department in compliance with section 66C protection orders. The Department of Justice must give a copy of the reportable information proposed to be included in the annual report to the Attorney General and the Commissioner of Police. The Commissioner of Police must advise the Attorney General whether, in the commissioner’s opinion, any of the reportable information is, or is likely to be, sensitive information—for example, publication of the information would prejudice national security. A judicial officer may advise the Attorney General of any reportable information which, in the judicial officer’s opinion is, or is likely to be, protected information. “Protected information” is defined to mean information the disclosure of which would contravene a written law or an order of the court. An example of information subject to a protection of a written law includes information that may be within scope of section 35 of the Children’s Court of Western Australia Act 1988, which prohibits the publication of any information that is likely to lead to the identification of a child who is involved in proceedings in the Children’s Court. Information protected by an order of the court would include suppression orders, and orders made under various acts that provide the court with a power to make orders prohibiting the publication of certain matters. If the Attorney General is satisfied that some or all of the reportable information is sensitive information or protected information, the Attorney General must direct the Department of Justice to exclude the information from the annual report, and insert a statement to the effect that information has been excluded. So, everybody will know. This amendment is modelled on section 38 of the Criminal Investigation (Covert Powers) Act 2012, which provides for information about controlled operations to be excluded from reporting when the minister is advised that the information, if made public, could reasonably be expected to endanger a person’s safety, prejudice an investigation or prosecution, or compromise any law enforcement agency’s operation, activities or methodologies. It aims to achieve the policy objectives of transparency and accountability, while recognising the need to ensure that there can be an appropriate assessment of the risks associated with reporting information regarding the use of section 66C and ensuring that it is possible to exclude information from publication in appropriate circumstances.

Hon ALISON XAMON: I rise to indicate that I support the proposed amendment. I note that this is a slight rewrite of the intent of the original amendment I moved, which was agreed to by the chamber. I note that at the time I moved the amendment, the government responded that it could not possibly be accommodated, but of course it could. It is pleasing to see that the government has now realised this. I am quite comfortable with the way it has been re-drafted, noting that my original amendment had also been drafted by parliamentary counsel. Because the intent has not been altered, I am quite happy to support this.

Hon MICHAEL MISCHIN: Given my understanding of the manner in which the amendment is to work, fortified by the acquiescence or approval, as it were, of Hon Alison Xamon, who was the initiator of the amendment in its original form, which the chamber supported, I indicate that the Liberal Party will also support the message from the Assembly and what is proposed.

I want to say something about the rather tortuous process that has been involved in this. This bill was first introduced into the Assembly on 28 November last year. At the conclusion of the debate on the bill in that house on 19 February, it was transmitted to this place. It was introduced into this place on 20 February and the second reading speech was presented by the Leader of the House. At that stage, there was one supplementary notice paper

before the house. Debate resumed on the bill on 13 March, when I delivered my contribution, and I expected my contribution would continue the next day, 14 March, but it did not. In fact, debate resumed on 19 March, when Hon Alison Xamon, Hon Rick Mazza and Hon Aaron Stonehouse made their contributions. The second reading of the bill was passed on that date and the bill went into Committee of the Whole House. There were two major issues to be addressed. One of them was the question of a review clause, which, after some turmoil, eventually went through. But the sticking point primarily appears to have been the insertion of this proposed section 66D in its original form. The debate continued over to 20 March and then resumed on 2 April—by that stage we had reached supplementary notice paper 4 on this bill—and it was passed on that date.

Throughout all of that, the government consistently resisted this initiative. As I recall, Hon Alison Xamon and I—there could have been other members as well—urged the government to give some consideration to a form of annual reporting clause. I recall moving an amendment to Hon Alison Xamon’s original proposal to remove objectionable bits that might compromise the government’s position and national security. Even that did not satisfy the government and it repeatedly insisted to us that this could not be done without compromising public safety and national security. I am pleased that the chamber regarded the need to have accountability to the public in some form, albeit a very, very limited form—simply to know that these applications are being brought; just a number—on this quite significant measure of secrecy in this legislation. This chamber insisted on that. As it happens, the government found a way. It accepted the review clause in the other place. The Attorney General woke up and decided he would finally turn his mind to the problem, with the message dealt with in the Assembly on 9 May—bearing in mind that we had passed this on 2 April, so over a month had passed. By the time the Attorney General got around to dealing with the bill down there, he had come up with a form of words that would address all the issues that were of concern to this place and in a manner that the government seems to be comfortable to abide by. I have to wonder why it took so long. This important measure has now come up for debate on 27 June. Over two and a half months or something like that have passed since the chamber last dealt with this bill, and in that time the government finally found a way. This could have all been resolved back in early April with a little bit of application, lateral thinking, consultation and thought.

Our Attorney General loves to posture in front of the media and preen about what a great man of action he is—look at the number of bills he has introduced!—but when it comes to thinking them through, he has a problem. When it comes to addressing legitimate issues, he is absent—not interested. In that regard, I draw our attention to February, which was the last time we saw a most significant measure—the Corruption, Crime and Misconduct Amendment Bill 2017. We were told at the end of 2017 that this bill was being held up by the nasty Liberals and Nationals in the upper house and the Assembly because we wanted to protect members of Parliament from corruption investigations. What happened to that? I think the last time we saw that bill debated was in February. I thought Hon Martin Aldridge, Hon Alison Xamon and others were involved in discussions with the Attorney General about how to get that one tightened up. That was the last we saw of it. I do know what is going on with this government.

Having said that, I am pleased that the government saw sense. It took a long time, as it always seems to. The Liberal opposition will support the amendment, given that we do not see a significant problem with it as presently advised. If it has satisfied the concerns of Hon Alison Xamon and Hon Aaron Stonehouse, who hold particular interest in this level of accountability, especially the former, who put forward this proposal in the first place, we are happy to support it. Hopefully this important measure can now be finalised and proceeded with.

Hon AARON STONEHOUSE: I thank the Leader of the House for the explanation. I appreciate it. I am happy to see this message and the subsequent amendment adopted. Ensuring some level of transparency is an absolute must here. We are extending really extraordinary powers. To be able to hold someone on remand, deny them bail and have secret hearings with secret evidence undermines the adversarial system of justice that we have here and the presumption of innocence. I understand that there may be times when extraordinary powers are needed, when there are great threats to security, but when that is the case, there needs to be transparency. Therefore, I am happy to support this amendment, although I echo some of the comments made by Hon Michael Mischin. It was a bit of a struggle to get to this eventual point. When we finally arrive at a form of words that everyone can agree to, I do not know why it was painful to get there in the end. When we have measures such as this from a Labor government, I wonder whatever happened to the anti-Iraq War security powers that we had in the early 2000s; they seem to be missing. Instead, we end up with these rather draconian measures of shoot on sight, denial of bail and the preventive detention orders that were just announced the other day.

Hon Alison Xamon: What is the world coming to?

Hon AARON STONEHOUSE: What is the world coming to when the Liberal Party, the Greens and the Liberal Democrats have to band together to ensure that civil liberties are protected in this state? I do not want to hold up everybody. We all want to get out of here, so I am happy to endorse this message and this amendment.

Question put and passed; the Assembly’s substitute amendment agreed to.

Extract from *Hansard*

[COUNCIL — Thursday, 27 June 2019]

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Hon Sue Ellery; Hon Aaron Stonehouse; Hon Alison Xamon; Hon Michael Mischin

Report

Resolution reported, the report adopted, and a message accordingly returned to the Assembly.