TERRORISM (EXTRAORDINARY POWERS) AMENDMENT BILL 2015

Consideration in Detail

Resumed from an earlier stage of the sitting.

Clause 11: Section 22 amended —

Debate was interrupted after the clause had been partly considered.

Mrs M.H. ROBERTS: Before we were interrupted by question time, the minister was giving an answer to a question about clause 11, which refers to commonwealth offences set out in 23(2)(b) or (c) of the Criminal Code Act 1995. I asked the minister what those offences are, and she was in the middle of responding to my question.

Mrs L.M. HARVEY: Section 80.2C "Advocating terrorism" of the commonwealth Criminal Code Act 1995 stipulates —

(1) A person commits an offence if:

(a) the person advocates:

(i) the doing of a terrorist act; or

(ii) the commission of a terrorism offence referred to in subsection (2); and

(b) the person engages in that conduct reckless as to whether another person will:

(i) engage in a terrorist act; or

(ii) commit a terrorism offence referred to in subsection (2).

There is defence in section 80.3 for acts done in good faith. Under the commonwealth legislation there is a penalty for that of imprisonment for five years. Subsection (2) states —

A terrorism offence is referred to in this subsection if:

(a) the offence is punishable on conviction by imprisonment for 5 years or more; and

(b) the offence is not:

(i) an offence against section 11.1 (attempt), 11.4 (incitement) or 11.5 (conspiracy) to the extent that it relates to a terrorism offence; or

(ii) a terrorism offence that a person is taken to have committed because of section 11.2 (complicity and common purpose), 11.2A (joint commission) or 11.3 (commission by proxy).

I will not go through the whole act, unless the member would like me to read out the rest. Section 102.3 "Membership of a terrorist organisation" is important. It states —

(1) A person commits an offence if:

(a) the person intentionally is a member of an organisation; and

(b) the organisation is a terrorist organisation; and

(c) the person knows the organisation is a terrorist organisation.

Penalty: Imprisonment for 10 years.

Subsection (2) stipulates —

Subsection (1) does not apply if the person proves that he or she took all reasonable steps to cease to be a member of the organisation as soon as practicable after the person knew that the organisation was a terrorist organisation.

Mrs M.H. ROBERTS: Can I just inquire whether this amendment has been necessitated because the commonwealth legislation has been updated in recent years—is that why this has become necessary? Has the commonwealth government amending its own legislation necessitated the state government updating its legislation to reflect changes to the commonwealth act?

Mrs L.M. HARVEY: There has been a change. Advocating terrorism is a new section.

Clause put and passed.

Clause 12: Section 23 amended —

Mrs M.H. ROBERTS: Clause 12 amends section 23(2). Proposed subsection (2) provides that the commissioner must be satisfied that there are reasonable grounds to "suspect" rather than to "believe" certain things—so we are getting back to a discussion we had earlier—when authorising a police officer to apply for a

covert search warrant. Can I just ask the minister why she believes that change is necessary with regard to this clause?

Mrs L.M. HARVEY: Under the amendments to section 23, the commissioner effectively needs to satisfy two stages. First, he must be satisfied that there are reasonable grounds to suspect one of the three things in paragraphs (a) to (c), which read —

> (a) that a terrorist act has been, is being, or is about to be, committed, whether in or outside this State; or
>
> (b) that a person has committed an offence under *The Criminal Code* section 102.3 set out in the Schedule to the *Criminal Code Act 1995* (Commonwealth); or
>
> (c) that a person has committed, or is committing, an offence under *The Criminal Code* section 80.2C set out in the Schedule to the *Criminal Code Act 1995* (Commonwealth).

The second stage is that the commissioner needs to be satisfied of at least one of those things and must believe that the two matters set out in proposed paragraphs (3A)(a) and (b) have been met, and only then can he authorise an officer to make an application for a covert search warrant. He needs to form a suspicion that there is an act of terrorism and then a belief that the covert search warrant is required to establish the suspicion.

Mrs M.H. ROBERTS: I am a little confused when I look at clause 12 of the marked-up copy of the Terrorism (Extraordinary Powers) Amendment Bill 2015. If the minister could answer by way of interjection: is clause 12 the only clause that amends section 23?

Mrs L.M. Harvey: Yes, it is.

Mrs M.H. ROBERTS: All right. When I look at the marked-up copy of section 23, on page 18 there is the red section, which is the section being deleted. It refers to section 23(2)(a) being deleted. Proposed section 23(2)(a) reads —

> that a terrorist act has been, is being, or is about to be, committed, whether in or outside this State; or

As I understand it, the original paragraph is being replaced by the paragraph above, which has only a renamed (a) and (b), which provides for the commission's reasonable grounds to believe that entry to and search of a place or vehicle in this state will substantially assist in preventing an act, or that the entry and search needs to be carried out without the knowledge of the occupier of the place. Those two paragraphs that are now called (a) and (b) as an insertion were, in fact, what existed in the act as (b) and (c) and have just been renamed (a) and (b). Effectively, it would appear that the minister has just deleted 23(2)(a), which reads —

> that a terrorist act has been, is being, or is about to be, committed, whether in or outside this State; or

When I actually look at the bill as presented, that paragraph appears to remain there at proposed section 23(2)(a). Can the minister clarify whether the marked-up copy is correct or whether I am somehow misreading it?

Mrs L.M. HARVEY: Section 23 in the marked-up copy goes across pages 17 and 18, so we are deleting the old subsection (2), which reads —

> The Commissioner must not authorise a police officer to apply for a covert search warrant unless the Commissioner is satisfied there are reasonable grounds to believe —
>
> (a) that a terrorist act has been, is being, or is about to be, committed, whether in or outside this State;
>
> (b) that entry to and search of a place in this State will substantially assist in preventing or investigating the act; and
>
> (c) that the entry and search needs to be carried out without the knowledge of the occupier of the place.

We are replacing that with the insertion of proposed subsections (2) and (3A). The proposed amendment reads —

> (2) The Commissioner must not authorise a police officer to apply for a covert search warrant unless the Commissioner is satisfied there are reasonable grounds to suspect —
>
> (a) that a terrorist act has been, is being, or is about to be, committed, whether in or outside this State; or

If the member then looks at paragraphs (b) and (c) from the previous subsection (2), they are actually covered by the insertion of proposed subsection (3A), but we have added in subsection (2)(b) which provides —

> The Commissioner must not authorise a police officer to apply for a covert search warrant unless the Commissioner is satisfied there are reasonable grounds to suspect —
>
> …
>
> (b) that a person has committed an offence under *The Criminal Code* section 102.3 set out in the Schedule to the *Criminal Code Act 1995* (Commonwealth); or
>
> (c) that a person has committed, or is committing, an offence under *The Criminal Code* section 80.2C set out in the Schedule to the *Criminal Code Act 1995* (Commonwealth).

We then have the insertion of proposed subsection (3A), which reads —

> On being satisfied under subsection (2), the Commissioner may authorise a police officer to apply for a covert search warrant if the Commissioner is satisfied there are reasonable grounds to believe —
>
> (a) that entry to and search of a place or vehicle in this State will substantially assist in preventing an act, or investigating an act or offence; and
>
> (b) that the entry and search needs to be carried out without the knowledge of the occupier of the place or the person in charge of the vehicle.

Effectively, this creates a requirement that the commissioner cannot authorise a police officer to apply for a covert search warrant unless he is satisfied that there are reasonable grounds to suspect that a terrorist act is about to be committed somewhere, or that those aspects of the Criminal Code I have referred to have been offended against. He then needs to authorise a police officer to apply for a covert search warrant if he is satisfied that there are reasonable grounds to believe that the entry is required to substantially assist in preventing an act or investigating an act or offence, and that the entry and search needs to be carried out. The amendment separates out those two requirements and makes them more consistent with the prior drafting of the legislation.

Mr J.R. QUIGLEY: I wonder if the minister could clarify for the chamber the interaction between subsections (2) and (3A) of proposed section 23, which is of course covered in this bill under clause 12. I would specifically like the minister to help the chamber with this. Section 23 of the Terrorism (Extraordinary Powers) Act is headed, "Authorising police officers to apply for a covert search warrant".

Mrs L.M. Harvey: Yes.

Mr J.R. QUIGLEY: I will run through parts of the section. I do not think I need to deal with the whole lot. I will take the minister to section 23(1) of the act and then to proposed section 23(2)(a) and (3A) in the bill.

Section 23(1) states —

> The Commissioner may authorise a police officer to apply for a covert search warrant.

Proposed section 23(2) states —

> The Commissioner must not authorise a police officer to apply for a covert search warrant unless the Commissioner is satisfied there are reasonable grounds to suspect —

And then they are disjunctive; he can rely on any one of the three grounds. I choose only the first for the purposes —

> (a) that a terrorist act has been, is being, or is about to be, committed, whether in or outside this State; …

Until such time that the commissioner has a reasonable suspicion that there is about to be a terrorist act, he cannot authorise an officer to apply for a covert search warrant. Do I have that right?

Mrs L.M. Harvey: That is right.

Mr J.R. QUIGLEY: The wording in the act as it currently stands is "reasonable grounds to believe". On page 16 of the act, section 23(2) currently states —

> The Commissioner must not authorise a police officer to apply for a covert search warrant unless the Commissioner is satisfied there are reasonable grounds to believe —

The minister explained earlier that that is a higher bar, and now we are bringing it down to "reasonable grounds to suspect". Is that correct?

Mrs L.M. Harvey: I need to hear all of your question in context.

Mr J.R. QUIGLEY: All right—that is fair. Once the commissioner has reasonable grounds to suspect that a terrorist act is being or is about to be committed, he can authorise the officer to apply for a covert search warrant.

Mrs L.M. Harvey: If he is satisfied under proposed subsection (3A) that he has reasonable grounds to believe —

Mr J.R. QUIGLEY: Hang on, that is for the execution of the warrant, as I believe, and was explained to us during the briefing. If I can just go to the authorisation —

Mrs L.M. Harvey: No, that is not correct. It is not for the execution of it. This is authorising police officers to apply for a covert search warrant; it is not the execution of it.

Mr J.R. QUIGLEY: Once the commissioner has reasonable grounds to suspect that there is being or is about to be a terrorist act, he can authorise an officer to apply for a covert search warrant under section 23(1) and (2).

The ACTING SPEAKER (Mr P. Abetz): Member, please resume your seat. If you are asking a question, the minister can answer it.

Mrs L.M. HARVEY: Under the act, section 23(1) establishes the authority of the commissioner to authorise a police officer to apply for a covert search warrant. Proposed subsection (2) is a prohibition on the ability of the commissioner to authorise a police officer to apply for a covert search warrant.

Mr J.R. Quigley: He is not allowed to do it unless he suspects that there is a terrorist act.

Mrs L.M. HARVEY: No. First of all, he has to establish that there are reasonable grounds to suspect that there may be a terrorist act being or about to be committed, regardless of where it is. He also needs to satisfy proposed subsection (3A), which states —

> On being satisfied under subsection (2) …

Therefore, he has to establish reasonable grounds to believe that an act is about to be committed or is being committed and on being satisfied with the reasonable grounds of suspicion that that is occurring, he then needs to establish under proposed subsection (3A) —

> … there are reasonable grounds to believe —

That the covert search warrant is required and —

> (a) that entry to and search of a place or vehicle in this State will substantially assist in preventing an act, or investigating an act or offence; and
>
> (b) that the entry and search needs to be carried out without the knowledge of the occupier of the place or the person in charge of the vehicle.

Proposed subsection (2) is a restriction on the ability of the commissioner to authorise a police officer to apply for a covert search warrant under the belief established under proposed subsection (3A).

Mr J.R. QUIGLEY: The difficulty I have in the construction is that if, under proposed subsection (2)(a), the commissioner only ever gets to the stage of having a reasonable suspicion—and earlier this afternoon the minister explained the difference referring to Kitto's judgement—sorry, the other judgement of —

Mrs L.M. Harvey: It was George v Rockett.

Mr J.R. QUIGLEY: Yes, it is the difference between belief and suspicion. If the state of the intelligence takes in only proposed subsection (2), the commissioner, being satisfied that there are reasonable grounds to suspect that a terrorist act is being or is about to be committed, gets to the stage of saying, "I can authorise the officer to apply for a warrant." How does he then get to reasonably believing that an entry and a search of the place in the state will substantially assist in preventing or investigating an act, whereas in the first place he only ever had a reasonable suspicion that such an act may occur? In other words, there is a step up. If the state of the intelligence takes him only to reasonable suspicion in the process of authorising the application for the warrant, how does he then somehow ramp it up to a positive belief that the execution of that warrant or the entry of that warrant will assist in the preventing of an act, when in the first place he only ever had a reasonable suspicion? That is the difficulty I have. In the first place, in the process of authorising an officer to apply for the warrant, the state of the intelligence was sufficient for him to have a reasonable suspicion but not a positive belief, so he says, "I have got a reasonable suspicion but I am not positively seized of it as a belief. But on the basis of the reasonable suspicion, I shall authorise you to apply for a covert warrant." How then does his state of mind ramp up under proposed subsection (3A) to being seized of a positive belief that the execution of that entry will assist in preventing an act when he only ever had in the first place a suspicion that such an act was about to occur?

Mrs L.M. HARVEY: Different facts would need to be established. Different facts give rise to the formation of a reasonable suspicion under proposed subsection (2) as opposed to the reasonable grounds or reasonable belief in

proposed subsection (3A). It would not necessarily be a consideration of the same facts in forming a reasonable suspicion that a terrorist act is being or about to be committed, as opposed to the facts that would need to be established under proposed subsection (3A) that there are reasonable grounds to believe that the entry to and search of a place or vehicle in this state would substantially assist in preventing that act. There would be a different set of facts to establish the reasonable suspicion under proposed subsection (2) as opposed to the reasonable belief in proposed subsection (3A).

Mr J.R. QUIGLEY: My concern is that perhaps the minister is setting the bar too high in proposed subsection (3A) because the act we are talking about, surely, is an act of terrorism. Proposed subsection (3A)(a) states —

> … will substantially assist in preventing an act, or investigating an act or offence …

In proposed subsection (3A)(a), is the "preventing an act" not preventing an act of terrorism? If it is preventing an act of terrorism, which is my reading of that paragraph, then I hark back to proposed subsection (2) in which it was an act of terrorism that the commissioner only ever had a suspicion that may or may not be occurring at the time of authorisation. That is the inconsistency I see. It used to be a reasonable belief in both provisions and, given the events in Australia, I can understand why it has come down to reasonable suspicion. Are we not making it more difficult for the commissioner because, to authorise an officer to obtain a covert warrant, he has to consider whether he has a reasonable suspicion that a terrorist act is about to occur. He will say, "I have a reasonable suspicion of that. I will authorise it." However, on being satisfied under proposed subsection (2), the commissioner then has to be satisfied that there are reasonable grounds to believe that the entry and search to premises in this state—I realise it is conjunctive, and has to be without the need of the person's knowledge, but that is irrelevant for the purpose of this argument—will substantially assist in preventing an act. The act that is substantially prevented has to be an act of terrorism. The commissioner only ever had in the first place a suspicion that the act of terrorism was going to occur. I see that as conflicting and difficult for the commissioner.

Mrs L.M. HARVEY: They are completely different criteria. Proposed subsection (3A)(a) states —

> that entry to and search of a place or vehicle in this State will substantially assist —

Mr J.R. Quigley interjected.

Mrs L.M. HARVEY: Let me finish. Proposed subsection (3A) states that there are reasonable grounds to believe —

> (a) that entry to and search of a place or vehicle in this State will substantially assist in preventing an act, or investigating an act or offence; and
>
> (b) that the entry and search needs to be carried out without the knowledge of the occupier of the place or the person in charge of the vehicle.

This provision exists in the current act, under section 23(2).

Mr J.R. Quigley: We have gotten rid of that, so it's irrelevant.

Mrs L.M. HARVEY: This bill will delete it in the format it currently is in, but we will take from subsection (2)(b) and (c) of the act and enhance them in proposed subsection (3A)(a) and (b). We will take out subsection (2)(a) from the act and insert a new subsection (2)(a), (b) and (c) referring to the new commonwealth legislation. The bill also pulls out that the commissioner needs to be satisfied that there are reasonable grounds to suspect that a terrorist act has been, is being, or is about to be committed. Then the belief needs to be established that a search warrant is required to be covert and to substantially assist in preventing an act or investigating an act or offence. We have clarified and put a restrictive test on the provision, but we will now have the threshold of "reasonable grounds to suspect" that a terrorism act has been, is being, or is about to be committed, whether in or outside this state, which is taken from the current test for having a reasonable grounds to believe. I think it is important to not only separate those provisions out and include the new raft of changes to the commonwealth legislation, but also know that the caveat is there that, once the suspicion is established, we need to establish a belief that the covert search warrant is required in the context that we have prescribed under clause 12 of the bill.

Mr J.R. QUIGLEY: I follow the mechanics of the drafting and the minister's reference to the commonwealth and what was there before. However, what we are left with and what will be enacted after the vote—or after passage through both houses—is what is before us here in the consolidated, marked-up act. I am still left with this: if we go back to proposed subsection (3A), it states, "On being satisfied under subsection (2)", so proposed subsections (2) and (3A) are interlinked. What does the commissioner have to get across the threshold of being satisfied under proposed subsection (2)? To be satisfied under proposed subsection (2), he has to have reasonable grounds for suspicion of a terrorist act. Proposed subsection (3A) states that if the commissioner has reasonable grounds for suspicion of a terrorist act, he may then authorise an officer to apply for a covert search warrant if there are "reasonable grounds to believe". For the life of me, I still do not understand the reason for those two tests. The minister is saying that proposed subsection (3A) states, "On being satisfied under subsection (2)", but

what is proposed subsection (2) all about? It is all about authorising the officer to apply for a covert search warrant. He has to go down to the judge and apply for it. The commissioner has to say that he is satisfied on reasonable grounds to suspect the terrorism act. If the commissioner is satisfied on reasonable grounds—if I can interpolate—to merely suspect, he then may authorise a police officer to actually apply if there are reasonable grounds to believe that the usage of the search warrant will stop the act. I do not know why we are ramping up that provision. I have wrestled with this proposed subsection in my mind as to why we are ramping it up. They are clearly interlinked subsections, because proposed subsection (2) is predicated on the commissioner having a reasonable suspicion that there is going to be a terrorist act, so the officer is authorised to apply for a covert search warrant. Proposed subsection (3A) states that the commissioner may authorise the officer to apply for a covert search warrant if there are reasonable grounds to believe. I cannot reconcile that inconsistency, given that the two proposed subsections are interlinked in the way they are. Should proposed subsection (3A) not also have "suspect"?

Mrs L.M. HARVEY: No, member, it is not an inconsistency; in fact, this goes some way to addressing an anomaly that existed between what we require of the commissioner in being satisfied to authorise a police officer to apply for a warrant and what we expect of the judiciary when considering to issue the warrant. Further on in consideration in detail we will see that the burdens of reasonable suspicion and reasonable belief are also established in the decision-making process of the judiciary in issuing the warrant, but proposed subsection (2) acts as a prohibition on the authorisation of an application. This is around the commissioner authorising a police officer to apply for a covert search warrant. Proposed subsection (2) acts as a prohibition on the authorisation of an application. Once that hurdle has been overcome, the commissioner then has to be satisfied that, essentially, the covert search warrant has some utility. Just because a terrorist act is about to be committed, or there is a suspicion that one is about to be, it does not necessarily follow that a covert search warrant is required or will be useful in establishing or preventing that act. That is why there is the tension between proposed subsections (2) and (3A).

Mr J.R. QUIGLEY: At the minister's prompting, when the minister said "but further on, when the judiciary consider the matter", I understood the minister to be referring to the proposed amendment to section 26 of the legislation, which deals with the issue of those warrants.

Mrs L.M. Harvey: Yes.

Mr J.R. QUIGLEY: The test for the judge is that on the application being made, the judge may issue a covert search warrant if he is satisfied that in respect of each of the matters the applicant —

> suspects or believes, there are reasonable grounds for the applicant to have those suspicions and beliefs; …

So it is not definitive that the judge has to conclude that the officer has a belief, it is that the officer —

> suspects or believes, there are reasonable grounds for the applicant to have those suspicions and beliefs; …

That is the ground upon which the judge decides whether to issue the warrant. The judge has to conclude that the officer giving the sworn evidence has reasonable grounds to suspect or believe. It is putting it in the alternative. Proposed subsection (3A) does not read "reasonable grounds to suspect or believe"; we are putting a higher bar there than the judge is faced with. I am troubled that that may be subsequently challengeable. It should be the same test as the judiciary has to apply in proposed section 26 of the legislation, by way of which the judge just has to have reasonable grounds to suspect. The officer giving the sworn evidence will be the officer, by the way, authorised by the commissioner to apply for a covert search warrant under the proposed amendment to section 23. I agree with the government's amendment to the current section 23(2) that will bring it down to "reasonable grounds to suspect", but then leaving it as "belief" in proposed subsection (3A) is a higher bar than faces the judge in deciding whether to issue the warrant. Should it not be, if we are making the legislation consistent, that the commissioner should have the same test as the judiciary? Might not we be putting an unwarranted constraint on the commissioner, given the minister's explanation of the difference between the proposed subsections? As I said at the start of my second reading contribution, I never envisaged a day when I would stand in the Legislative Assembly and seek to broaden the powers of the commissioner for covert search warrants in these matters. Should we not put the same test before the commissioner as we put before the judiciary? That is the explanation I seek. Why can the judiciary issue the warrant if the judiciary —

The ACTING SPEAKER: Your time has expired. Member for Midland.

Mrs M.H. ROBERTS: I would like —

Ms M.M. QUIRK: Mr Speaker, I am interested in what the member for Butler —

The ACTING SPEAKER: I gave the call to the member for Midland.

Ms M.M. Quirk: Why? I got up first.

The ACTING SPEAKER: I gave the call to the member for Midland.

Mrs M.H. ROBERTS: It is whoever the Acting Speaker, or whoever is acting in that position, sees first. I am absolutely fascinated by the line of argument that the member for Butler is taking, and I would like to hear it in full.

Mr J.R. QUIGLEY: Amended section 26(1)(a) will read —

> that, in respect of each of the matters in section 24(3) that the applicant suspects or believes, there are reasonable grounds for the applicant to have those suspicions and beliefs; …

A subsequent amendment will strike out the extraneous repetitive words. It is not conjunctive, it is disjunctive—suspicion or belief—so His Honour can say, "I am satisfied that the officer has reasonable grounds to suspect those matters", but the poor old officer can never get before the judge to do that because the commissioner was constrained by saying, "I can only do it if I believe it is a positive fact." Should not the government be amending proposed subsection (3A) by including, in front of the word "believe", the same considerations for the commissioner as for the judiciary by putting in "suspects or believes"?

Mr J.R. Mrs L.M. HARVEY: The difficulty in amending the legislation is that we have skipped a step. Before we get to section 26 in which the judiciary is looking at the issuance of a covert search warrant, we need to also have an application for a covert search warrant. Under proposed section 24(3)(d) and (ea)—does the member have the marked up copy of the bill?

Quigley: I do.

Mrs L.M. HARVEY: Proposed section 24(3)(d) will read —

> An application for a covert search warrant must —
>
> …
>
> (d) state the grounds on which the applicant suspects that a terrorist act or Commonwealth terrorist offence has been, is being, or is about to be, committed, whether in or outside this State; and
>
> (ea) state the grounds on which the applicant believes —
>
> (i) that entry to and search of the target place or target vehicle will substantially assist in preventing or investigating the act or offence; and
>
> (ii) that the entry and search needs to be carried out without the knowledge of the occupier of the target place or person in charge of the target vehicle; …

From there we move through to the judge considering whether in respect of the matters in proposed section 24(3) the applicant suspects or believes there are reasonable grounds for the applicant to have those suspicions and beliefs.

Mr J.R. Quigley: Exactly.

Mrs L.M. HARVEY: It needs to all occur in context.

Mr J.R. QUIGLEY: With respect, that merely reinforces my concerns. Proposed section 24(3)(d) states —

> state the grounds on which the applicant suspects that a terrorist act or Commonwealth terrorist offence has been, is being, or is about to be, committed;

That sets forth the requirement in the application, which is set out in proposed section 23(2). The commissioner must suspect that a terrorist act or a commonwealth offence is occurring or is about to occur. Proposed section 24(3)(d) reflects proposed section 23(2). Proposed paragraph (ea) requires to be set out in the application those matters set out in proposed section 23(3)(ea). Proposed section 24(3)(ea) requires to be set out those matters that the commissioner considered in proposed section 23(3A). The words are the same. If the minister looks at proposed paragraph (ea) on page 19 of the marked-up copy, she can see that they are the same words as those in proposed section 23(3A) on page 18. Does the minister see what I am saying? What is set out as the requirement in proposed paragraph (ea) is that which is found in proposed section 23(3A) on the page before. They are exactly the same, are they not?

Mrs L.M. HARVEY: The member also needs to go to proposed section 26(1)(a) to read proposed section 24(3) in context.

Mr J.R. QUIGLEY: That is right. That is where I was before. It states "suspects or believes" in proposed section 26(1)(a). In other words, it states —

> On an application made under section 24, a judge may issue a covert search warrant … each of the matters in section 24(3) that the applicant suspects or believes, …

That is what I am saying. When the initial explanation was given for why two different levels are in proposed section 23—that is, when the initial explanation was given in answer to questions by me on this clause this afternoon about why the commissioner needs to be seized of a reasonable suspicion under proposed section 23(2) but has to have a positive belief under proposed subsection (3A)—the comment was, "Because that makes it consistent with what the judicial test is later in the legislation." When I read further into the legislation, with respect, I found that that was not the case. Later in the legislation the words are "suspect or believe". That is disjunctive.

Ms L.L. BAKER: I am fascinated to hear a continuation of the member for Butler's question, if that might be possible.

Mr J.R. QUIGLEY: When we look at the test for the judge, we can see that the judge does not have to believe. Later, under proposed section 26, in respect of an application, the judge can say, "I suspect there are reasonable grounds for the applicant to have those suspicions." The test for the judge can be one of reasonable suspicion. I am concerned that the commissioner is being unreasonably constrained by not having the same words applicable to him—or her, we hope one day—in proposed section 23(3A). I invite the government to amend (3A) to include the same test for the commissioner as applies to the Supreme Court judge—suspicion or belief. If the government wants to constrain the commissioner more harshly, that is up to the government but I hope it does not cause a problem down the track. It is quite clear from proposed section 26, which the minister has so kindly taken the chamber to, that we are talking about the Supreme Court judge being able to activate on the application if he or she suspects there are reasonable grounds. Why should there be greater constraint on the commissioner? I invite the minister to relax that a little for the commissioner. I never thought in my living days I would be making this argument, but there we are. I am sure that in these trying times we all trust that he will act cautiously on a reasonable suspicion.

Mrs L.M. HARVEY: They are not different threshold tests. The member needs to read proposed section 26(1)(a) in the context of and with reference to proposed section 24(3). The test for the commissioner and the test that the Supreme Court judge will apply is not a higher threshold for the commissioner than for the judge in that consideration. The judge will consider an application for a covert search warrant under proposed section 23 in the context of the application for that covert search warrant under proposed section 24. With respect to all those matters, the judge needs to satisfy themselves that the applicant suspects or believes there are reasonable grounds. In respect of each of the matters in proposed section 24(3), the applicant must suspect or believe they have reasonable grounds to have those suspicions and beliefs.

So it is not a higher threshold test for the commissioner than for the judiciary. It is consistent. It has to be cross-referenced, because in applying for a covert search warrant, proposed section 24(3) will provide that they need to —

> (d) state the grounds on which the applicant suspects that a terrorist act or Commonwealth terrorist offence has been, is being, or is about to be, committed, whether in or outside this State; and
>
> (ea) state the grounds on which the applicant believes —
>
> (i) that entry to and search of the target place or target vehicle will substantially assist in preventing or investigating the act or offence; and
>
> (ii) that the entry and search needs to be carried out without the knowledge of the occupier of the target place or person in charge of the target vehicle;

The Supreme Court judge will be considering the issuing of the warrant in the context of the applicant's suspicions or beliefs.

Clause put and passed.

Clause 13: Section 24 amended —

Mr J.R. QUIGLEY: Clause 13 proposes to delete section 24(3)(c) from the Terrorism (Extraordinary Powers) Act 2005. This clause has to do with the application. We get back to the applicant now under paragraph (d).

The ACTING SPEAKER: Which paragraph is the member talking about? Is it paragraph (c) or (d)?

Mr J.R. QUIGLEY: I am referring to clause 13(1)(c), which will amend and insert paragraphs (d) and (ea). These are the paragraphs that I had trouble with before. The applicant now, for the purposes of the application, will have given authorisation. The commissioner could find that entry to the premises will substantially assist in

preventing the act, but this amendment provides that the applicant will merely have to set out that he suspects that a terrorist act or commonwealth terrorist offence "has been, is being, or is about to be, committed." But the Commissioner of Police would already have arrived at a more positive state, would he not—that is, that the interdiction would actually stop it? Why does this clause go back to suspicion, when the previous clause provided that the commissioner would already have formed the positive belief that interdiction would stop the act? Should that not now be a "belief," because under proposed section 23(3A) the commissioner would have already formed a positive belief?

Mrs L.M. HARVEY: That is not correct. I refer the member to proposed section 23(2), which states —

> The Commissioner must not authorise a police officer to apply for a covert search warrant unless the Commissioner is satisfied there are reasonable grounds to suspect —
>
> (a) that a terrorist act has been, is being, or is about to be, committed, whether in or outside this State;

Then there is reference to paragraphs (b) and (c) in the legislation. However, if the member then goes to proposed section 24(3)(d), the applicant will need to —

> state the grounds on which the applicant suspects that a terrorist act or Commonwealth terrorist offence has been, is being, or is about to be, committed, whether in or outside this State;

Then we go back to proposed section 23(3A), which states —

> On being satisfied under subsection (2), the Commissioner may authorise a police officer to apply for a covert search warrant if the Commissioner is satisfied there are reasonable grounds to believe —
>
> (a) that entry to and search of a place or vehicle in this State will substantially assist in preventing an act, or investigating an act or offence; and
>
> (b) that the entry and search needs to be carried out without the knowledge of the occupier of the place or the person in charge of the vehicle.

I refer the member then to proposed section 24(3)(ea), which states that in applying for the covert search warrant the applicant must —

> state the grounds on which the applicant believes —
>
> (i) that entry to and search of the target place or target vehicle will substantially assist in preventing or investigating the act or offence; and
>
> (ii) that the entry and search needs to be carried out without the knowledge of the occupier of the target place or person in charge of the target vehicle;

It is the same.

Mr J.R. QUIGLEY: Yes, but something has occurred between proposed section 23(2) and proposed section 24(3)(d), and the something that has occurred is that in the meantime the commissioner has formed a positive belief. Given that the commissioner has formed a positive belief that interdiction by way of the covert search warrant will assist in preventing the terrorist act, why is it that the applicant now only has to revert to suspecting that a terrorist act has been or is about to be committed? After the commissioner has already formed a positive belief, why does the applicant get away with a lower test? It was the minister's higher test that she wanted in proposed section 23(3A); it was not ours. I suggested a lower test, but the government wanted that.

Mrs L.M. Harvey: That is not correct. It is not a lower test.

Mr J.R. QUIGLEY: It is. The minister has already said that this afternoon. She has said that "suspect" is a lower test than "belief". We have gone through that. The minister explained to the shadow minister that "suspect" is a lower threshold than that of "belief". Why is it that now that the commissioner, according to proposed section 23(3A), will have got to the stage of positive belief—that is the higher test—that the applicant in his application will be able to revert to the lower test of mere suspicion?

Mrs L.M. HARVEY: I already re-read where I believe the consistency lies. Under section 23, the officer needs to satisfy the commissioner with respect to the authority to apply for a covert search warrant. Under section 24, the applicant, who is the authorised police officer, then needs to satisfy the court with respect to applying for the covert search warrant that the commissioner has authorised him or her to apply for.

Mr J.R. QUIGLEY: The commissioner has authorised him to apply for the covert search warrant on the basis of a positive belief, and now we have the officer just going along to court on mere suspicion. Does the member for Midland follow that?

Mrs M.H. Roberts: Absolutely. It does appear to be inconsistent.

Mrs L.M. HARVEY: It is incorrect. The member is mixing up different things. There needs to be a suspicion. Under proposed section 23(2), the commissioner must be satisfied there are reasonable grounds to suspect that an act of terrorism is about to be committed or has been or is being committed and then needs to form a belief that the warrant is required. The commissioner needs reasonable grounds to believe that the covert search warrant is required. Once he has authorised the officer, who has satisfied the commissioner of the suspicion that an act of terrorism has been, is being or is about to be committed, he then needs to determine that there are reasonable grounds to believe that the covert search warrant is required. Once he has authorised the police officer to apply for the warrant under section 24, in applying for the warrant, the applicant then needs to present the same information to the court to make a determination about the application for the covert search warrant.

Mrs M.H. ROBERTS: I think I will move on from this clause. It leads to some confusion when in some paragraphs we have a choice of either "believe" or "suspect" and then in other circumstances, such as proposed section 23(2), we have the word "suspect", but then it is a matter of "being satisfied". I thank the minister for her explanation. I think similar issues will be contemplated in the very next clause. Perhaps we can deal with clause 13. In clause 13, we are seeking to delete paragraph (d) from section 24(3) and insert the following words —

> (d) state the grounds on which the applicant suspects that a terrorist act ... has been, is being, or is about to be, committed ...
>
> (ea) state the grounds on which the applicant believes —

I fully understand what the member for Butler is alluding to. I note that some similar issues arise in clause 14. I might leave my questions until clause 14, and we can perhaps deal with clause 13.

Clause put and passed.

Clause 14: Section 26 amended —

Mrs M.H. ROBERTS: Clause 14 amends section 26 and states —

> (1) In section 26(1):
>
> (a) after "a place" insert:
>
> or vehicle
>
> (b) in paragraph (a) delete "suspects, there are reasonable grounds for the applicant to have that suspicion;" and insert:
>
> suspects or believes, there are reasonable grounds for the applicant to have those suspicions and beliefs;

It refers to the point that I raised a moment ago and that I think has been raised by the member for Butler; that is, we have moved generally in this bill towards deleting the word "believe" and inserting the word "suspect", yet in this clause we get to this double inclusion—that is, "suspects" that an applicant has a suspicion is proposed to be changed to "suspects or believes" that an applicant has suspicions or beliefs. To the uninitiated, that would seem like overkill. Earlier today the minister suggested that one was a slightly higher test than the other; that is, "suspect" was a higher test than "believe", yet apparently there is some necessity to explain why we need to now have both the words "suspect" and "belief" in the one clause.

Mrs L.M. HARVEY: I clarified earlier that a reasonable belief is a higher test than a reasonable suspicion. In clause 14, proposed section 26(1)(a) sets out that a judge issuing a covert search warrant must be satisfied in respect of each of the matters that the applicant suspects or believes in accordance with section 24(3), which was amended by the clause we have just voted on, that there are reasonable grounds for the applicant to have those suspicions or beliefs. That is in the context of section 24(3).

Mrs M.H. Roberts: My question is: why do you need to have both "suspicions" and "beliefs"? That is the real question.

Mrs L.M. HARVEY: It is because section 24(3) will now read —

> (d) state the grounds on which the applicant suspects that a terrorist act or Commonwealth terrorist offence has been, is being, or is about to be, committed, whether in or outside this State; and
>
> (ea) state the grounds on which the applicant believes —

(i) that entry to and search of the target place or target vehicle will substantially assist in preventing or investigating the act or offence; and

(ii) that the entry and search needs to be carried out without the knowledge of the occupier of the target place or person in charge of the target vehicle;

If we go back to what I was saying, the judge issuing a covert search warrant must be satisfied in respect of each of the matters that the applicant suspects or believes in accordance with proposed paragraphs (d) and (ea) that there are reasonable grounds for the applicant to have those suspicions and beliefs. Because the initial words of the phrase refer to each of the matters, the applicant is required to either suspect or believe each matter individually. If that were to be suspects "and" believes, the applicant would have to have both a suspicion and a belief of each matter. The paragraph then continues on to refer to the overall group of suspicions and beliefs and, in that case, the suspicions and beliefs are referred to, indicating that there will be both suspicions and beliefs in the mix.

Mrs M.H. ROBERTS: What the minister read out just seems to me and most people to be a bit of legal gobbledegook. If we look at proposed section 26(1)(a), the words are "suspects or believes", not "suspects and believes" or "suspects and/or believes". When I read that, I do not think the applicant has to meet the test of both "suspect" and "belief". It would appear that it is one or the other, not one and the other and not one and/or the other, so not both. It is one or the other, presumably. The minister has said before that "suspicion" is a lower standard than "believe". Why is it not just "suspect" and "suspicion" rather than including "or believes", given that "or" is an alternative; it is not an "and/or" or an "and", which would mean that an applicant would need to meet both? In the words that the minister read out, it would appear that she would expect applicants to have both suspicion and belief.

Mrs L.M. HARVEY: I disagree. Proposed section 24(3)(d) refers to a suspicion and proposed paragraph (ea) refers to the grounds on which the applicant believes. Section 26(1)(a) of the Terrorism (Extraordinary Powers) Act 2005 states —

(a) that, in respect of each of the matters in section 24(3) that the applicant suspects, there are reasonable grounds for the applicant to have that suspicion; …

Debate interrupted, pursuant to standing orders.

[Continued on page 7773.]