BAIL AMENDMENT (PERSONS LINKED TO TERRORISM) BILL 2018

Committee

Resumed from 20 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 on the following amendment moved by Hon Alison Xamon —

Page 8, after line 6 — To insert —

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

(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.

(2) The information referred to in subsection (1) 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, and to what extent —

(i) evidence by or on behalf of the accused was received; and

(ii) argument by or on behalf of the accused was heard.

Hon SUE ELLERY: The last time we were debating this bill in committee, we were debating the detail on the top of page 2 of issue 4 of supplementary notice paper 112; that is, proposed subsection (2) of Hon Alison Xamon's amendment. I reiterate that the government remains opposed to the amendment, but I have some further information for the chamber in response to where the debate was going when we last debated this matter.

Proposed section 66C will be available to protect terrorist intelligence information in all bail proceedings, not just those that involve the presumption against bail. In other words, the use of section 66C will not be restricted to those accused who are subject to the presumption against bail due to a current terrorism charge, conviction or relevant control order. In cases when individuals are under surveillance or suspected of terrorist activity and are not persons with links to terrorism as defined by the bill, section 66C may be invoked without their knowledge so as to not risk compromising ongoing covert investigations. This means that section 66C may be applied to any accused when the prosecution is of the view that there is relevant terrorist intelligence information. This includes both state and commonwealth prosecutions. In this regard, I draw the attention of the house to the definition of "prosecutor" in section 3 of the Bail Act, which includes the commonwealth.

Proposed section 66C is consistent with the application of public interest immunity by the courts, which is a principle developed through the common law, with the result that information may be subject to privilege or some other protection and, if so, may not be disclosed to the accused person or broader public. Because section 66C could apply to persons who are unaware that they are under surveillance by law enforcement and intelligence agencies, the court may decide to allow special procedures such as an ex parte hearing by way of a confidential affidavit, with the effect that the accused and all other persons who would ordinarily attend the bail proceeding will not know and must not know that very sensitive information related to national security is being considered by the court. As I mentioned when we were last debating this measure, the content of any special procedures and the extent to which they are implemented will be a matter for the courts to determine. Hon Chief Justice Peter Quinlan has advised that, following the passage of the bill, internal procedures will be developed to ensure that the court complies with the confidentiality requirements of proposed section 66C. Similar procedures will need to be considered by other courts.

Hon Michael Mischin's point about the court's processes implies that the accused and their legal representative will know or will be able to infer when proposed section 66 has been invoked in their case for bail. With respect, we say this is factually incorrect. In an exceptionally sensitive matter it will be inconceivable that the prosecution or the judicial officer would take any action or in any way indicate those issues in the presence of an open court. The consequences of doing so are significant, such as to potentially alert an individual to their surveillance and thereby compromise the identity and safety of a confidential source. It is the case currently that courts from time to time in exceptional cases receive information by way of confidential affidavit, with the person who is the subject of the information and their legal representative being unaware of the ex parte procedure. Proposed section 66C

simply clarifies when those special processes must apply, providing a clear guarantee to law enforcement and intelligence agencies that the highly confidential terrorist intelligence information will be protected. This is intended to facilitate the sharing of sensitive information critical to the judicial officer's assessment of the accused person's risk to the community if they are granted bail. This is also intended to clarify the circumstances in which terrorist intelligence information is to be protected in bail proceedings, which by their very nature should be concluded relatively quickly. It is in light of this background that proposed section 66D, contained in Hon Alison Xamon's amendment at 3/11, is not supported.

I have made some comments about annual reporting, but I reiterate them. Annual reporting is also not supported. The government is concerned that because the number of cases will be small, even aggregated data may be enough to identify the subject of the proceedings. There is a risk of identifying the proceedings because the data relates to a specific cohort, being Western Australian bail proceedings with very short reporting periods. The government is concerned that by simply reporting the number of cases that come within proposed section 66C in a financial year, that may inadvertently indicate to such individuals and any of their associates that their activities have been detected by authorities. This may cause those individuals to change their behaviour in a way that adversely impacts ongoing investigations and risks public safety.

The proposed annual reporting is particularly problematic because a sufficient amount of time may not elapse to finalise the court matter or the suspected terrorism investigations. Should an individual be able to discern what case those protections are related to, it would present not only a national security risk but also a risk of prejudice to an accused's potential trial should that terrorism-related matter be made public. As I have indicated, in practice, there may be circumstances in which an accused will not know that they are the subject of terrorist intelligence information in bail proceedings. The government is particularly concerned about the risk to national security in those cases should any person draw a connection to the annual reporting on the number of proceedings in which action is taken under proposed section 66C. Therefore, I reiterate that the government will not be supporting the amendment.

The CHAIR: As I give the call to Hon Michael Mischin, it may appear that some microphones are not working in the chamber, so if we could keep any peripheral noise down, it would be appreciated by Hansard and others involved in debate.

Hon MICHAEL MISCHIN: By happenstance, I think that my microphone is working.

I thank the minister for that advice, but it raises a number of questions. The minister mentioned that currently there are cases in which judicial officers receive confidential information without either an accused or the accused's counsel knowing it is being received, let alone that it is being considered in respect of their applications. Can the minister give an example of those sorts of cases—are they bail cases or are they other matters?—so that we can get a flavour of what sorts of cases the Leader of the House is referring to and see whether they are analogous?

Hon SUE ELLERY: I am not able to give specific examples of cases because we would not know, but I can say that the advice I have been given is that it could be at any point in any of the proceedings before the court. Therefore, it might be about bail or it might be at any other point in the proceedings related to a specific matter. I am not able to give the member any more information than I have given today and that I gave extensively when we last debated this.

Hon MICHAEL MISCHIN: The minister may not be able to give an example from a specific case, but is she telling us that currently in, for example, criminal trials before a single judicial officer, a judicial officer may receive information that the accused and their counsel is unaware of that may influence the outcome of that case without anyone knowing that it is happening, other than the prosecution and the judge?

Hon SUE ELLERY: I am advised that does happen from time to time. I cannot give the member specific examples, but, in relation to phone taps and covert operatives, from time to time, that does occur.

Hon MICHAEL MISCHIN: This is very serious, because part of the fundamentals of our system of criminal justice is that the prosecution is required to make out its case beyond reasonable doubt and is subject to rules of disclosure to the accused about the case against them. The minister is saying that there may be cases in which single judicial officers, who are dealing with questions of whether someone is guilty of an offence and charged by the prosecution, receive information to influence their decision and the accused is not able to answer that evidence. Is that what the minister is saying? The minister may not be able to give me any examples of when that might occur, but can she give me some legislative support for that being a legitimate process?

Hon SUE ELLERY: As I have said already, because proposed section 66C could apply to persons who are unaware that they are under surveillance by law enforcement and intelligence agencies, the court may decide to allow special procedures, such as an ex parte hearing by way of a confidential affidavit, with the effect that the accused and all other persons who would ordinarily attend the bail proceedings will not know and must not know that there is very sensitive information related to national security being considered by the court. In addition, a number of statutory schemes require that certain information not be disclosed to an accused person and not be published outside a courtroom. For example, section 171 of the Criminal Procedure Act provides that all court

proceedings are to be in open court. However, on application by a party to the case, or on its own initiative, if satisfied that it is in the interests of justice to do so, the court may order all persons or any class of persons to be excluded from the courtroom during proceedings and make an order that prohibits the publication outside the courtroom of the proceedings or any aspect of the proceedings.

Without proposed section 66C, the question of whether terrorism intelligence will be protected from being disseminated to the accused or to the general public will be at the discretion of a decision-maker in line with various common law and statutory mechanisms that may apply in any given case. This uncertainty may pose risks to the integrity of ongoing terrorist intelligence investigations and the safety of persons involved in those investigations. In addition—I have made this point before—in the absence of proposed section 66C, the uncertainty about whether terrorism intelligence will be protected may have the result that other agencies and jurisdictions choose not to share that intelligence with Western Australian law enforcement agencies.

Hon ALISON XAMON: Following the explanation that has just been given by the minister, if anything, I am even more concerned about these provisions than I was when I proposed this amendment. This emphasises more than anything how critical it is that if we are to have such a strong deviation from the rule of law and the right of anyone to be subject to fair judicial process, at the very least, there needs to be some level of information given to Parliament, admittedly de-identified. That is exactly the purpose of this amendment.

It has already been the will of this place not to allow any sort of information to be made available to the Attorney General. That has been debated and not agreed to by the house. That leaves us with only one mechanism by which we can have any sort of oversight. I must admit that I have not been persuaded by the arguments put forward by the government about the level of alleged risk in allowing such de-identified information to be made available. The concern here is that we are talking about small numbers of people. We are indeed talking about small numbers of people, as evidenced by other terrorism-related acts that this chamber also receives regular data on, such as the Terrorism (Preventative Detention) Act 2006. If the concern is that we are talking about very small numbers of people, I would point out that these people will not have any indication at all that this data may apply to them.

One of the things that I hope has become quite apparent to people in this place is that there is no particular cohort of the community that we can single out as being solely responsible for terrorism-related activity. A narrative has been propagated in the past that this activity has been the responsibility of members of the Muslim community, but we know that it is far broader than that. Recent events have highlighted that in the most tragic of ways.

This issue of oversight is one that I think this chamber needs to take extraordinarily seriously. What we have just heard is a proposal within new proposed section 66C that has overwhelming implications for people who may be innocent and subject to these proceedings. I draw members' attention to a highly significant report, which has been tabled while we have been debating this particular provision: the fifth report of the Community Development and Justice Standing Committee, "No Time for Complacency". That report undertook an inquiry into the protection of crowded places in Western Australia from terrorist attacks. There are some very important recommendations which this chamber needs to be mindful of that have come out of this inquiry, which I think are deeply pertinent to the amendment in front of us today. Finding 22 reads —

> Existing oversight measures fall short when it comes to holding agencies across government in Western Australia to account for the administration of counterterrorism policies, particularly in relation to state police preparedness.

The report refers to the link between terrorism and the need to ensure that we have appropriate oversight. In chapter 3, page 61, there is a very important finding. It says —

> **There are limits to Parliament's ability to oversee this area**
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> It is a central role of the WA Parliament to hold the executive arm of the government to account for the administration of its policies. This includes how effectively and efficiently WA Police is managing preparedness for terrorist acts, particularly as it relates to the state emergency management framework. Parliaments, including WA, have a number of mechanisms to fulfil this role such as Question Time, debates, statutory agencies that report directly to parliament and carry out integrity functions (such as the Ombudsman and Auditor General), and parliamentary committees like the Community Development and Justice Standing Committee.
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> In practice, many of these mechanisms are inadequate in the face of a sensitive policy area like counter-terrorism.

It goes on to discuss some of the factors that are limiting parliamentary oversight, which were uncovered in the course of the inquiry. The general thrust of the findings is that this is a problem. We need to have parliamentary oversight of what is happening around these areas and what is happening in terms of our response. It is a huge concern to me that, on the one hand, we have parliamentary inquiries that are starting to look at this issue and are lamenting the lack of parliamentary oversight, when at the same time we are including what are extraordinary

measures within our courts and preventing the most basic of de-identified information from being available to this Parliament in terms of how it is being implemented. I point out recommendation 15, which states —

> That the Premier, as a matter of urgency, investigates ways to rectify the current lack of independent oversight in relation to the state's preparedness for a terrorist attack.

That refers to ensuring that people are looking at ways to respond to this, but also that Parliament is effectively being kept in the dark when it comes to these provisions. This bill has significant implications for individuals who will be subject to its provisions. We are hearing that there could be court proceedings in which a couple of people are in the know, but nobody else will have a clue that they are subject to these provisions—not even the defence lawyer. One would have thought that at the very, very least, as a bare minimum, Parliament is entitled—in fact, needs—to be receiving this basic information in order to have an understanding of how this is being practised.

I am aware that there is a proposed amendment to my amendment that has been circulated around the chamber, which is yet to be formally introduced. I note that the amendment, as I understand it, is in response to concerns that were raised by the government the last time we were discussing this—that the scope of what I had proposed was too broad. I indicated at that point that I was prepared to contemplate an amendment to my amendment to limit the scope, if that was a genuine concern. However, I want to express again my deep concern that we are introducing extraordinary measures, and I cannot see that there is any oversight anywhere.

Hon SUE ELLERY: We are back where we were when this matter was last debated, and I made the point then that I understand entirely Hon Alison Xamon's motivations. She is interested in putting in place an additional layer of oversight and transparency. I understand that completely. In respect of the risk of terrorism and maximising this state's capacity to have the benefit of shared information from intelligence organisations around Australia and, indeed, beyond, our position is that if the choice is between increased transparency and a risk to public safety, we are going to err on the side of public safety. That is the position we have taken. It is not a case of not understanding the argument, because this is where we were when we last debated this matter. I understand it completely, but the house has a choice. The government's best advice is that these are the measures we need to put in place in the context of terrorism and ensuring that we get access to the best information being shared between the respective intelligence and counterterrorism organisations. It is the court, independent of the executive, that will determine whether the information is terrorist intelligence information or not. I do not have another way of describing the government's position, other than to say that when the choice is between putting in place additional transparency measures and running the risk of limiting our capacity to deal with terrorism intelligence, we are going to err on the side of limiting that oversight and transparency in the interests of public safety.

Hon MICHAEL MISCHIN: Before we get onto that, I would just like to get a bit more information about what the minister says is current practice in the courts. She talked about cases in which a court may exclude an accused—being a party to criminal proceedings—from even being aware that the judicial officer is receiving evidence that is prejudicial to the accused. From the information that the minister has provided, is that limited at the moment to terrorism cases or does it apply to other cases as well? What sorts of cases are we talking about in which a judicial officer receives evidence that is prejudicial to an accused, does not let the accused know that he or she is considering that evidence against the accused, and comes to a decision that may be contrary to the accused's interests and involves a deprivation of the accused's liberty?

Hon SUE ELLERY: My recollection is that I have answered that question twice, and possibly three times. It could be any matter and at any point within that matter. I have no further information to give in respect of the question that has just been put.

Hon MICHAEL MISCHIN: All right, so it could be bail matters in any criminal proceedings under our code, or the Misuse of Drugs Act—anything of that nature?

Hon Sue Ellery: I've nothing further to add.

Hon MICHAEL MISCHIN: Okay, so do I take it that the minister does not cavil against that being a possibility?

Hon Sue Ellery: I've answered the question three times.

Hon MICHAEL MISCHIN: So it could in fact be a trial of a person before a magistrate in which they are charged with assault. The police come along and say, "Here's some good stuff, but we don't want the accused to know about it", to show that he is guilty. Could that be one of those sorts of cases? The minister is shaking her head, so I presume she is not going to argue against that possibility. This is great! This is fascinating. I had not realised that our criminal justice system had got to the point of secret hearings, but we will explore that on a later occasion with the Attorney General. Certainly I was never aware of the prospect of a person being charged with an offence and tried on evidence that they never get to know. I understood the Director of Public Prosecutions to have very strict guidelines on disclosure, as do the police. Do I have this all wrong, minister, or is that the way it works in

Western Australia? No answer, came the stern reply. It does not seem as though we need these provisions in the Bail Act; magistrates seem to do it all the time, and can do it whenever they wish. Would that be right? No response.

The CHAIR: Order! Members, we are considering the question that the words proposed to be inserted be inserted. There has been an allusion to a possible proposed amendment to that amendment, but that is out there in the ether and I have nothing before me at this stage. In due course we will consider the entirety of clause 11 again, but right now we are restricted to our contemplation of the question that the words to be inserted be inserted.

Hon MICHAEL MISCHIN: I have a few questions around that before I move my amendment. One of the things being sought under proposed section 66D(2) is the number of proceedings each year in which action was taken under section 66C(1). Is there any prohibition upon that information being made public if someone happens to be, say, an avid court-watcher and counts up the number of cases that they become aware of? Is it against the law for that bare information—the number of proceedings—to be disclosed to the public?

Hon SUE ELLERY: The answer to the question is that there is no prohibition. Whether a person sitting in a court is able to gather any more information than what is publicly available in the court is the next logical question. I am not sure how much further that gets us in consideration of this matter. But, no, there is no prohibition on someone releasing information that is publicly available.

Hon MICHAEL MISCHIN: Proposed section 66D(2)(b) contemplates whether an accused has access to terrorist intelligence information received by a judicial officer. Is there anything in the Bail Amendment (Persons Linked to Terrorism) Bill 2018 or the current legislation to prohibit that information being made public, if someone happened to come across it—just the fact of it; not the nature of the information and not the disclosure of its content, but the fact of it? Is there anything that prohibits that information being made public?

Hon SUE ELLERY: My answer remains the same: there is no prohibition on publishing material that is publicly available in respect of this. If the information is publicly available, there is no prohibition.

Hon MICHAEL MISCHIN: Second lastly, is there any prohibition on it being made public that evidence by or on behalf of the accused has been received by the judicial officer—just the bare fact of it, not the content of the evidence?

Hon SUE ELLERY: I am not sure how to say this in any other way: if the information is public, there is no prohibition.

Hon MICHAEL MISCHIN: I presume the same applies to the fact of argument by or on behalf of the accused being heard—would that be right?

Hon Sue Ellery: I can't answer it in another way. The information is public; it's publicly available.

Hon MICHAEL MISCHIN: There is nothing preventing that information being public?

Hon Sue Ellery: I've answered your question three times.

Hon MICHAEL MISCHIN: So there is not. What, then, would imperil national security by putting that bare information in an annual report once every year?

Hon SUE ELLERY: I have put the argument already. I think the honourable member is trying to suggest that what I am proposing applies to publicly available information. Clearly, what I am talking about is not publicly available information. That is the difference. I have nothing further to add.

Hon MICHAEL MISCHIN: I take the minister to section 30 of the Terrorism (Extraordinary Powers) Act 2005. There is a requirement in that —

Hon Sue Ellery: We do not have it in front of us. Can you wait until we get it on the screen?

Hon MICHAEL MISCHIN: Sure. Rather than hold up proceedings, I will read it out so members are aware of what it says. It is headed "Annual report about covert search warrants". These are covert search warrants, not public information. It states —

(1) The Commissioner —

To wit, the Commissioner of Police —

> must, by 31 August in each year, give the Minister a report containing this information for the previous financial year —
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> (a) how many applications for covert search warrants were made, refused and granted;
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> (b) how many of those applications were made, refused or granted by remote communication under section 25;
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> (c) how many covert search warrants were executed;
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> (d) how many places and vehicles were entered under covert search warrants;

(e) on how many occasions things connected with terrorist acts or Commonwealth terrorist offences were seized;

(f) on how many occasions any thing was replaced with a substitute for it;

(g) on how many occasions a place or vehicle was re-entered to return or retrieve any thing;

(h) on how many occasions electronic equipment was operated under covert search warrants;

(i) any other information that the Minister requests the Commissioner to include in relation to covert search warrants.

(2) The report may form part of the annual report submitted to the Minister under the *Financial Management Act 2006*.

(3) If the report does not form part of that annual report, the Minister must, within 30 days after receiving it, cause it to be tabled before each House of Parliament.

That is under the Terrorism (Extraordinary Powers) Act 2005, with one of the focuses being terrorism, yet the minister is telling us that we cannot know how many bail applications excited the attention of proposed section 66C in a year because it will imperil or may imperil national security or cooperation with other intelligence forces. It seems to me that that act—as I recall, passed by the Gallop Labor government—went a whole lot further, requiring disclosure in annual reports or otherwise on the use of covert information. I do not know what the last annual report says on that. Perhaps the minister knows how much detail was entered into, but it seems to be an awful lot more than simply telling us that in the last 12 months, zero applications required proposed section 66C, or there was one, and the accused was or was not able to address that information before the magistrate. I fail to see it, but perhaps the minister can explain how one piece of legislation requires all that detail and the other does not.

I take the minister to section 54 of the Terrorism (Preventative Detention) Act 2006 headed "Quarterly report about preventative detention orders". Section 54(2) states —

> The Minister must, by 31 January, 30 April, 31 July and 31 October in each year, cause a report to be prepared about the operation of this Act during the previous quarter.

That is far more substantial, and the minister has to do it every quarter, not just once every three years. Subsection (3) states —

> Without limiting subsection (2), a report relating to a financial year must include the following information —
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> (a) the number of preventative detention orders made under section 13 during the quarter;
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> (b) whether a person was taken into custody, or kept in custody, under each of those orders and, if so, how long the person was in detention for;
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> (c) the number of reviews conducted under Part 3 during the quarter and the outcome of them;
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> (d) the number of prohibited contact orders made under sections 17 and 18 during the quarter.
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> (4) The Minister must cause the report to be tabled before each House of the Parliament within 14 sitting days of that House after the report is completed.

Admittedly, if a person is under preventive detention, they know about it, but at least there is some oversight of how that legislation operates, yet under this bill, when dealing with the mere fact of bail on an unrelated offence—not even a terrorism-related offence—we cannot be told every year how many applications have excited the use of proposed section 66C. I do not get the logic of it. Leaving that aside, there could be an answer to this that could solve the debate quite simply. Can the minister table any correspondence from one of the agencies that may be providing this terrorist intelligence information that says, "We have seen the proposed amendment, and, yes, we have a problem with it", and gives us some cogent reasons for how it might jeopardise their ability to provide terrorist intelligence information or can indicate to us that there are some things that intelligence organisations do not have a problem with and can be safely disclosed anonymously once a year as a bare figure? Does the minister have anything like that she can table and show us?

Hon SUE ELLERY: No, there is not. With respect to the points the honourable member made earlier, I think he thinks he has had some kind of gotcha moment. I am sorry to disappoint him, but he has not. The subject of a covert search warrant will not know that a warrant has been served. The subject of a bail procedure will know they have been in court and can use the annual report information to deduce whatever they so deduce. There is a difference. I understand that the honourable member thinks there is not but there is. I reiterate that I understand the debate about transparency and oversight versus risk in the context of sharing terrorist-related intelligence. The

government will not accept this amendment because it is deliberately, knowingly, choosing to err on the side of public safety in the context of terrorism and protecting and sharing terrorist-related intelligence.

Hon MICHAEL MISCHIN: The minister says she does not have anything from, presumably, the Commissioner of Police or any other potential source of terrorist intelligence information that can say that, in their view, this will imperil national security. Has such advice been sought from any of those agencies to support the proposition being put forward by the government?

Hon SUE ELLERY: The most recent information from the WA Police Force and the state security services is that the proposition in the amendment poses a risk, and they are not supportive of it.

Hon MICHAEL MISCHIN: When was that advice received and in what form?

Hon SUE ELLERY: There are no documents I can table. The advice has been provided concurrently with the debate that has been going on in the Legislative Council. Specifically, the amendment has been considered.

Hon MICHAEL MISCHIN: So the minister has nothing that she can table so that we can see whether that advice is actually related to the specifics of the proposed amendment or provides any analysis or explanation of how it might hazard national security. Is there nothing the minister can table?

Hon Sue Ellery: I have answered the question.

Hon MICHAEL MISCHIN: The minister reckons she has answered the question. The minister cannot help us any further than that. Is the minister in a position to ask the Commissioner of Police or ask the Office of State Security and Emergency Coordination to provide a written analysis that can give the chamber some comfort that the merits of this proposed amendment have been considered and weighed?

Hon SUE ELLERY: I do not know whether this is appropriate, but at the back of the chamber there are representatives of state security. The comments that I gave earlier today outlining the reasons that the government will not be supporting this amendment have been prepared based on the advice of those two agencies that I have already referred to. I do not have a document that I can table. I have already answered that. The response that I read out when this debate started about an hour ago was prepared with consideration of the elements and with consideration of the working party that has been viewing the debate during the course of the Legislative Council's consideration of this bill.

Hon MICHAEL MISCHIN: It would be helpful if we had someone prepared to put their name to that sort of advice so we knew where it came from and could examine it in due course if necessary. But I will not pursue that, because, plainly, the government is not interested in that level of assistance. What I will do, however, is remove another potentially contentious and overly broad area. I note that proposed section 66D of Hon Alison Xamon's amendment reads —

> (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 am going to move an amendment to proposed subsection (2)(b) to remove the comma after the word "whether" and the words "and to what extent". That will, again, limit the amount of information to a bare figure. I would expect that in most cases that figure would, hopefully, be zero, and that it would be in the order of zero for every year. At worst, we would at least know that there has been an existential threat, but there would be no way that that could be identified or attributed to any particular accused over the course of 12 months, bearing in mind that the report will simply be a number in each case. There would be no requirement to go beyond a court record or some means of harvesting those simple figures over a 12-month period and that being included in the annual report.

Following that, I would propose to support Hon Alison Xamon's amendment, because I have not been convinced that the information that is sought to be disclosed every 12 months goes anywhere near the sensitivity that is attributed to it. It certainly goes nowhere near what was thought to be a comprehensive accountability in the Terrorism (Extraordinary Powers) Act 2005 or the Terrorism (Preventative Detention) Act 2006. Therefore, I move the following amendment to Hon Alison Xamon's amendment —

> To delete after "whether" —

, and to what extent

I was provided with a copy of supplementary notice paper 112, issue 4, which signifies where the amendment will take place. I move that amendment to Hon Alison Xamon's proposed section 66D.

The CHAIR: Members, Hon Michael Mischin has moved to amend the amendment proposed by Hon Alison Xamon in this manner: that at proposed section 66D(2)(b), to delete after "whether" the phrase ", and to what extent".

Hon SUE ELLERY: The government will not be supporting this further amendment. As I outlined when we were debating this the last time the house was sitting, it remains problematic. I appreciate the honourable member is taking out part of the analytics by removing the words "and to what extent", but it will still require public servants to identify that evidence was received by, or on behalf of, the accused and an argument was heard by, or on behalf of, the accused. I have already outlined to the chamber the reason why we do not support the reporting of the numbers. I have already provided to the chamber, in the last sitting week, the reasons why—notwithstanding the removal of the words "and to what extent"—we still think this poses a risk. Again, it comes down to the government acting on the best possible advice provided to us by those agencies that are concerned with sharing terrorist-related intelligence and acting on the side of protecting public safety.

Hon ALISON XAMON: I rise to indicate that the Greens will be supporting the proposed amendment to my initial amendment. I am still of the view, notwithstanding the government's response, that it is very important that this bare minimum of information is provided.

Hon AARON STONEHOUSE: I rise to indicate that I will be supporting this amendment, too. I have yet to be convinced by the government that merely reporting the number of instances that secret evidence is heard by a judicial officer would in any way compromise intelligence-gathering exercises or the sharing of sensitive intelligence between intelligence-gathering agencies. It seems to me that if we are going to grant what are, in my view, extraordinary powers here to receive secret evidence during a bail hearing, there needs to be some level of oversight. The Attorney General is not going to know about it. The buck needs to stop here. At least Parliament should be aware of the total number of instances of secret evidence being heard by a judicial officer. I add that I find it a little disheartening that as we discuss oversight and transparency in matters of bail hearings, the minister is being rather tight-lipped and reluctant to answer certain questions during examination by Hon Michael Mischin. I do not think that is appropriate during this debate, when we are discussing a matter that is vitally important to justice in this state. That said, I wholeheartedly support the amendment on the amendment, and I look forward to supporting the substantive amendment when the time comes.

Hon SUE ELLERY: I appreciate Hon Aaron Stonehouse's point of view. I would invite him to read *Hansard*, because there is not a question that has been asked to which I have not provided an answer, either today or when the matter was previously debated in the chamber. I appreciate that Hon Michael Mischin might not have liked my answer, and, indeed, Hon Aaron Stonehouse might not have agreed with my answer; however, I think it is unreasonable, and I cannot let it go on the public record, to suggest that I have not provided an answer to each question that I have been asked.

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

Division

Amendment put and a division taken, the Chair (Hon Simon O'Brien) casting his vote with the ayes, with the following result —

Ayes (20)

Hon Martin Aldridge	Hon Colin de Grussa	Hon Rick Mazza	Hon Aaron Stonehouse
Hon Jacqui Boydell	Hon Diane Evers	Hon Michael Mischin	Hon Dr Steve Thomas
Hon Robin Chapple	Hon Donna Faragher	Hon Simon O'Brien	Hon Colin Tincknell
Hon Tim Clifford	Hon Nick Goiran	Hon Robin Scott	Hon Alison Xamon
Hon Peter Collier	Hon Colin Holt	Hon Charles Smith	Hon Ken Baston *(Teller)*

Noes (11)

Hon Alanna Clohesy	Hon Adele Farina	Hon Martin Pritchard	Hon Darren West
Hon Stephen Dawson	Hon Alannah MacTiernan	Hon Samantha Rowe	Hon Pierre Yang *(Teller)*
Hon Sue Ellery	Hon Kyle McGinn	Hon Dr Sally Talbot	

Pairs

Hon Tjorn Sibma	Hon Laurie Graham

Hon Jim Chown	Hon Matthew Swinbourn

Amendment on the amendment thus passed.

The CHAIR: We now return to the proposed amendment, as amended. The question once again is that the words proposed to be inserted be inserted.

Division

Amendment put and a division taken, the Chair (Hon Simon O'Brien) casting his vote with the ayes, with the following result —

Ayes (20)

Hon Martin Aldridge	Hon Colin de Grussa	Hon Rick Mazza	Hon Aaron Stonehouse
Hon Jacqui Boydell	Hon Diane Evers	Hon Michael Mischin	Hon Dr Steve Thomas
Hon Robin Chapple	Hon Donna Faragher	Hon Simon O'Brien	Hon Colin Tincknell
Hon Tim Clifford	Hon Nick Goiran	Hon Robin Scott	Hon Alison Xamon
Hon Peter Collier	Hon Colin Holt	Hon Charles Smith	Hon Ken Baston *(Teller)*

Noes (11)

Hon Alanna Clohesy	Hon Adele Farina	Hon Martin Pritchard	Hon Darren West
Hon Stephen Dawson	Hon Alannah MacTiernan	Hon Samantha Rowe	Hon Pierre Yang *(Teller)*
Hon Sue Ellery	Hon Kyle McGinn	Hon Dr Sally Talbot	

Pairs

Hon Tjorn Sibma	Hon Laurie Graham
Hon Jim Chown	Hon Matthew Swinbourn

Amendment, as amended, thus passed.

Clause, as amended, put and passed.

New clause 11A —

Hon SUE ELLERY: If it assists the committee, issue 4 of the supplementary notice paper is different from issue 3 in that the amendment at 7/NC11A in the name of Hon Alison Xamon is different. The amendment currently on the supplementary notice paper in my name was an alternative review provision. Her original provision was for a five-year review, but the government preferred three years. Hon Alison Xamon has now, on supplementary notice paper 112, issue 4, amended her proposed review provisions, effectively so that a report on the review is tabled as soon as practicable after the third anniversary of the day that the bill comes into effect, and after that at intervals of not more than three years. It has the same effect as the government's amendment, so I will choose not to move my amendment, and the government will support the new version of Hon Alison Xamon's review clause.

The CHAIR: Thank you for that, minister. We will not contemplate the amendment shown at 6/NC11A on our supplementary notice paper. Instead, I will move down the supplementary notice paper to give the call to Hon Alison Xamon, if she wishes to move the amendment standing in her name.

Hon ALISON XAMON: I move —

Page 8, after line 7 — To insert —

11A. Section 67A inserted

After section 67 insert:

67A. Review of amendments made by *Bail Amendment (Persons Linked to Terrorism) Act 2019*

(1) The Minister must review the operation and effectiveness of the amendments made to this Act by the *Bail Amendment (Persons Linked to Terrorism) Act 2019* and prepare a report based on the review —

(a) as soon as practicable after the 3rd anniversary of the day on which the *Bail Amendment (Persons Linked to Terrorism) Act 2019* section 11A comes into operation; and

(b) after that, at intervals of not more than 3 years.

(2) The Minister must cause the report to be laid before each House of Parliament as soon as practicable after it is prepared, but not later than 90 days after the 3rd anniversary or the expiry of the period of 3 years, as the case may be.

Hon MICHAEL MISCHIN: I can indicate that the opposition supports Hon Alison Xamon's proposed review clause, but I have one question about it. It is certainly superior to the earlier version in a couple of respects, firstly because it requires periodic three-year reviews. That is consistent with the review provisions in the other terrorism-related legislation that I have referred to already and that we have had some cause to look at; namely, the Terrorism (Extraordinary Powers) Act 2005. The review provision at section 34 of that act requires a review on the first anniversary of the commencement of that section, and every three years after that, but it also requires the preparation of a report and its tabling no later than 90 days after the completion of the review. The other act is the Terrorism (Preventative Detention) Act 2006, which is in similar terms, but requires the review to be tabled as soon as practicable after it has been prepared. There seems to be no reason why a review of the bill ought not to take place now before the committee. However, my only reservation is that proposed section 67A(1)(a) refers to —

> … the 3rd anniversary of the day on which the *Bail Amendment (Persons Linked to Terrorism) Act 2019* section 11A comes into operation;

This proposed section is proposed to be introduced into the Bail Act by clause 11A of this bill, when it becomes an act. It is always possible, having regard to the commencement clause that we have dealt with, in clause 2 of this bill —

Hon Sue Ellery: It should read "67A".

Hon MICHAEL MISCHIN: Yes, there is that element. The minister has just interjected to assist me, but since the rest of the bill, including this new clause, will come into effect on a day to be fixed by proclamation, it is always open to the government not to fix a proclamation date for it. I suggest that it ought to be geared to come into effect with the amendment to schedule 1, which is actually the operative provision creating the presumption against bail. Perhaps the minister might be able to consider this, and inform us whether she would contemplate an amendment to the effect that proposed section 67A(1)(a) ought to refer to the date on which schedule 1, part C, clause 3E comes into operation. We are looking forward now to clause 12 of the bill, and subclause (3) of clause 12 is the provision that sets up a new clause in the schedule—clause 3E—that is the presumption provision. Without that coming into effect, the whole point of the bill is lost, rather than proposed section 11A, which may never be proclaimed. Perhaps the minister could consider that. It is a minor amendment that turns on replacing the reference to section 11A with a reference to the date on which schedule 1, part C, clause 3E comes into operation. It would be directly referable, in any event, to the Bail Act, rather than to the bill before committee.

Hon SUE ELLERY: It is not my amendment, so I am suggesting that Hon Alison Xamon change it, but we have checked it, and the correct reference should be schedule 1, part C, clause 3E.

Hon MICHAEL MISCHIN: In that case, I might move an amendment. Perhaps Hon Alison Xamon could consider this. I propose, in amendment 7/NC11A, proposed section 67A(1)(a), to delete the words "Bail Amendment (Persons Linked to Terrorism) Act 2019 section 11A" and replace them with the words "schedule 1, part C, clause 3E".

Hon ALISON XAMON: This is an issue that I raised directly with parliamentary counsel when I asked it to draft the amendment before us now. I asked parliamentary counsel why it had been tied to the commencement of the review clause itself rather than to the commencement of clause 12, which is the presumption clause. The response that I received from parliamentary counsel at the time was that there is no difference. Because clause 2 provides for sections 1 and 2 to commence at royal assent and all the other clauses to commence on a day fixed by proclamation, they effectively read that as meaning that it was starting at the same time. The other information that was given to me by parliamentary counsel at the time was that it has stopped drafting that different clauses can be proclaimed and commenced at different times because it was causing too much confusion. Even if it was not the case, parliamentary counsel also ties commencement of the time running for review to commencement of the review clause itself, otherwise the time in which to carry out the review could be foreshortened so much as to make it impracticable to do so. It said that, at worst, it would be impossible to do if the entire time for review had already run and the report had fallen due at the time that the review clause had commenced.

Effectively, based on that information, which was given to me at the time by parliamentary counsel, I was satisfied that the amendment that it drafted was fit for purpose. I share the concerns that have been raised by Hon Michael Mischin. I was satisfied that parliamentary counsel had taken that into account through the review clause, which is currently in front of us and being discussed.

Hon MICHAEL MISCHIN: I want to consider a matter that the minister and I discussed that is pertinent to this amendment.

Hon SUE ELLERY: We have been trying to come up with a way to meet the drafting requirements set out by the Parliamentary Counsel's Office. The proposal that I have is closer to the wording in Hon Alison Xamon's amendment but it takes account of the issue raised by Hon Michael Mischin to change the words. Forgive me if I do not have it written out just yet. The reference in proposed new section 67A(1)(a) is to section 12 of the Bail Amendment (Persons Linked to Terrorism) Act 2019. That is drafted in a way that meets the requirements of parliamentary

counsel and addresses the potential issue raised by Hon Michael Mischin. The easiest and neatest way of dealing with it is for Hon Alison Xamon to change "11A" to "12". At the bottom of page 2 of the supplementary notice paper is proposed new section 67A(1)(a), which will now state —

> as soon as practicable after the 3rd anniversary of the day on which the *Bail Amendment (Persons Linked to Terrorism) Act 2019* section 12 comes into operation; and

That addresses both concerns.

The CHAIR: The question before the Chair on new clause 11A is that the words proposed to be inserted be inserted. At this stage, Hon Michael Mischin has hinted very strongly that he has an amendment he might wish to move, but I have not seen anything in writing. Hon Michael Mischin, do you have anything you want to move?

Hon MICHAEL MISCHIN: By happy coincidence, I do. I have listened with interest and I appreciate the exchange that I have been able to have with the minister on this. I can see that much of it may be a convention and approach that parliamentary counsel has taken. I think that the best way of dealing with it, as the minister has suggested, is that instead of the amendment that I had posited, we delete the reference to "section 11A" and replace it with a reference to "section 12". In that way, when the operative part of the bill, which introduces the schedule and without which there is no point to the bill, comes into operation, so will the review clause.

I move —

> To delete "11A" and substitute —
>
> 12

Hon ALISON XAMON: I indicate my willingness to support the amendment to my amendment. I was happy to move it, as suggested by the government; however, I was struggling to get hold of a clean copy in time.

Amendment on the amendment put and passed.

Amendment, as amended, put and passed.

New clause, as amended, put and passed.

Clause 12: Schedule 1 Part C amended —

Hon ALISON XAMON: I move —

> Page 9, lines 22 to 25 — to delete the lines and substitute —
>
> (d) in the case of a child —
>
> (i) consider the *Young Offenders Act 1994* section 6(d) as an objective of this Act with the safety of the community being an overriding objective; and
>
> (ii) observe the *Young Offenders Act 1994* section 7(h) as a general principle with the safety of the community being an overriding principle.

During my contribution to the second reading debate I raised a number of concerns about the provisions of this legislation. One concern in particular was about the impact this legislation will have on children, not because I fail to acknowledge that children can engage and indeed have engaged in terrorist activity in Australia—much to my extraordinary sadness—but because, when it comes to acts of extremism, children can be particularly vulnerable and are easily indoctrinated. However, they are also likely to grow out of this when they are older. As has been discussed in the policy of this bill, the provisions of this legislation can effectively follow people for their entire lives. If a child is involved in suspected extremist activity when they are young and they are subsequently arrested for a completely unrelated matter as adults many years later, the provisions of this bill can still apply. That is a very serious matter. I am also concerned about the impact detention has on children. I remind members that this is precisely why we have the Young Offenders Act, which recognises that special considerations must be given to children who offend or who are accused of offending.

The amendment will retain the current provision for matters that the court must consider when the accused is a child, but it adds a new matter to be observed; that is, the principle contained in the Young Offenders Act—detaining a young person in custody before or after conviction should only be used as a last resort and, if required, for only as short a time as necessary. Like the other provision, the safety of the community will continue to be the overriding principle. In that sense, it does not weaken the provision, if that is indeed the concern. The provision is there because community safety is still the principal regard. However, it seeks to emphasise the special needs of children.

Members may be in receipt, as I am, of a letter from the Commissioner for Children and Young People about this bill. As the provisions relate specifically to the amendment I have proposed, it is important that I read what the Commissioner for Children and Young People has said. Then I will seek to table his letter. The Commissioner for Children and Young People said —

> As Commissioner for Children and Young People in Western Australia I have a statutory responsibility under the *Commissioner for Children and Young People Act 2006* (WA) to monitor and review draft laws affecting the wellbeing of children and young people under the age of 18 years. In undertaking these responsibilities, I must give priority to Aboriginal and Torres Strait Islander children and young people and those who are vulnerable or disadvantaged for any reason. I must also have regard for the United Nations Convention on the Rights of the Child (the UNCRC). It is within the context of my role as an independent, statutory office and the functions outlined above that I provide the following comments in relation to the Bail Amendment (Persons Linked to Terrorism) Bill 2018 (the Bill).
>
> I note the decision made by the Council of Australian Governments at its 9 June 2017 meeting for jurisdictions to implement legislation ensuring a national presumption against bail for people who have links to terrorism. I am supportive of efforts by the Western Australian Parliament to protect children and young people, and the community more broadly, from the effects of terrorism and the risks posed by terrorists.
>
> Western Australia's obligations under Article 37 the UNCRC requires the State Government to ensure the detention or imprisonment of children or young people is only used as a measure of last resort and for the shortest appropriate period of time. This requirement has been given effect under Western Australian law through section 7(h) of the *Young Offenders Act 1994*. Article 40 of the UNCRC goes on to require the recognition of the right of every child or young person accused of, or recognised as having committed, an offence to be treated in a manner that takes into account their age and the desirability of promoting their reintegration into a constructive role within society.
>
> As you will be aware, Clause 12 of the Bill proposes to insert a presumption against the granting of bail into the *Bail Act* where the accused is linked to terrorism. Under section 3 of the *Bail Act*, the term 'accused' does not differentiate between an accused child or young person and an accused adult. As a result, the proposed presumption against bail would also apply to persons under the age of 18 if enacted in its current form. I am concerned the effect of this would be to remove the discretion necessary for judicial officers to act in accordance with the UNCRC and the *Young Offenders Act* when determining the outcome of a bail application for a child or young person linked to terrorism, regardless of their alleged offence or their best interests.
>
> Regarding this issue, I wish to draw your attention to submissions made by the Law Council of Australia, the Australian Human Rights Commission, the Victorian Commissioner for Children and Young People, Legal Aid New South Wales and the Queensland Bar Association to the Review of the Prosecution and Sentencing of Children for Commonwealth Terrorist Offences conducted by the Independent National Security Legislation Monitor during 2018. In response to concerns similar to those described above, each of these bodies recommended the Commonwealth Government exclude children and young people from the presumption against bail currently contained within section 15AA of the *Crimes Act 1914* (Cth).
>
> It is my view that the Bill should be amended to exclude children and young people from the proposed presumption against bail and require judicial officers to consider section 7(h) of the *Young Offenders Act* when bail is sought in the circumstances envisioned by the Bill. This will provide judicial officers with the discretion to grant or deny bail applications for children and young people based on what is in the best interests of the child as well as what is necessary to protect the community from the risk of terrorism.
>
> I ask that you consider these matters as you deliberate the content of the Bill. I would be happy to discuss any aspects of my comments with you in further detail if required.
>
> Yours sincerely,
>
> COLIN PETTIT
> Commissioner for Children and Young People WA

By commenting on this, our children's commissioner is doing exactly what he is statutorily supposed to do. I note that the commissioner has recommended going further than I propose; although, to be very clear, the Greens and I absolutely agree with the comments that he has made. In putting forward this amendment I wanted to at least make the point that we need to remember that we have the Young Offenders Act and that children need to be treated differently under the law when this bill in front of us fails to do that. I have not gone as far as the commissioner recommends, although I think that that would not be a bad idea.

I also point out that we received a subsequent communication from the Commissioner for Children and Young People. It was tabled today, Tuesday, 2 April, and states —

> Dear Honourable Member
>
> A number of members have sought clarification about the intent of the letter I sent last week regarding the Bail Amendment (Persons Linked to Terrorism) Bill 2018. I acknowledge the proposed section 3E(4)

> states the judicial officer is not limited to considering the matters listed in subclause (3) when determining a bail application.
>
> The intent of my letter was to ensure that section 7(h) of the Young Offenders Act is able to be a specific consideration of judicial officers regarding children and young people to strengthen the intent of this bill.

That is exactly what the amendment in front of us intends to do. It is just to try to ensure that it is given additional prominence so that when all things are considered, we remember that children and young people should be treated as the young people they are when facing the courts.

Hon SUE ELLERY: I indicate that the government will not be supporting this amendment. A matter raised by Hon Alison Xamon needs to be corrected. There are in fact two references to the Young Offenders Act in the Bail Amendment (Persons Linked to Terrorism) Bill 2018. The bill takes account of the fact that some of those captured by its provisions may be underage. I note the Commissioner for Children and Young People's letter, which I, as a member of the Legislative Council, also received by email late last week. I contacted his office and asked him to provide me with a briefing. I had that briefing this morning. I asked him to give me his point of view, which he did. I shared with him the fact that the bill does in fact include provisions that recognise the special status of children, consistent with the requirements of articles 3 and 7 of the UN Convention on the Rights of the Child. Clause 12 of the bill inserts proposed new clause 3E into schedule 1, part C of the act, which requires judicial officers to consider section 6(d) of the Young Offenders Act and does not limit the matters that the judicial officer may take into account in applying presumption against bail. The second reference is to section 19(2) of the Young Offenders Act, which itself goes on to refer to section 40 and makes provision for the things that have to be taken into account when dealing with young people and bail is refused.

The bill already includes a reference to section 6(d) of the Young Offenders Act; the difference is that the amendment before us also adds a reference to section 7(h) of that act. This would require a judicial officer to observe the general principle in juvenile justice that the detention of young persons should be used as a last resort. This amendment is not supported, as it raises a significant legal issue: it would require a judicial officer to apply the presumption against bail while also considering the principle that detention should be used as a last resort. It is doubtful that these competing requirements would work in practice. The current drafting of the bill appropriately facilitates diversion from remand by requiring judicial officers to have regard to a number of things, including the nature and seriousness of the offence, and considerations relating to the conduct of the accused. In the case of a child, while the overriding consideration is the safety of the community, a judicial officer is to have regard to the objectives of juvenile justice, recognising the role of a responsible adult, families and the community in the punishment, management and rehabilitation of a young person, and in minimising further incidents of crime. This is to direct the bail decision-maker to the capacity of the community to provide appropriate support, having regard to the needs of the young person. Other jurisdictions that have enacted this legislation for a presumption against bail have all applied those presumptions to children without special consideration.

We think the bill takes appropriate account of the Young Offenders Act; there are two references to particular provisions. The difference between us on this amendment is in relation to section 7(h) of the Young Offenders Act, and we say that the amendment is not compatible with the objectives of the bill before us today. I expressed that point of view to the Commissioner for Children and Young People and I thanked him for his ongoing work in this area. He got back to me via text and the email he sent around later today. I appreciate his role and responsibilities, but there is reference in the bill before us to treating children differently—there are references to the Young Offenders Act—and we say that the balance is appropriately achieved.

Hon ALISON XAMON: As with many of the other provisions in this bill, this is going to be an area on which the government and the Greens will just have to agree to disagree. I am still strongly of the view that it is important to respect the provisions of the Young Offenders Act, and that it be given higher prominence. In any event, I seek leave to table the two documents I previously made reference to—the letter circulated by the Commissioner for Children and Young People and the subsequent email, also circulated today, 2 April 2019.

Leave granted. [See paper 2545.]

Hon MICHAEL MISCHIN: I have listened with interest to the reasons Hon Alison Xamon advanced for the amendment she has proposed, and also to the government's response. A few questions arise out of that. At the moment, the bill—particularly proposed clause 3E of schedule 1, part C—makes reference to the Young Offenders Act; that is true, but the question is whether it really makes much of a material difference to what the government proposes. Currently, under schedule 1, part C of the Bail Act, children have a qualified right to bail. That arises, in part, through the objectives of the Young Offenders Act and the general principles of juvenile justice, to which Hon Alison Xamon made reference. The bill proposes to recognise, under proposed clause 3E(2) of schedule 1, part C, that where the proposed clause applies, the judicial officer in whom jurisdiction is vested must refuse to grant bail for the offence, unless the judicial officer is satisfied —

> (a) there are exceptional reasons why the accused should not be kept in custody; …

That is quite a threshold; we will leave aside for the moment the question of access to terrorist intelligence information, because that will just complicate things. The judicial officer also has to be satisfied —

> (b) bail may properly be granted having regard to the provisions of clauses 1 and 3 or, in the case of a child, clauses 2 and 3.

Proposed clause 3E(2) of schedule 1, part C provides for the child's qualified right to bail. There is still tension between the objectives of the bill, which is to have a presumption against bail, and the principles of juvenile justice and the qualified right to bail under clause 2 of schedule 1, part C of the Bail Act. Added to that is proposed clause 3E(3), which states —

> The judicial officer must, in making any decision for the purposes of subclause (2)(a) —

Of proposed clause 3E, amongst other considerations —

> (a) have regard to the nature and seriousness of the offence —

Et cetera. It continues, further along —

> (d) in the case of a child, consider the *Young Offenders Act 1994* section 6(d) as an objective of this Act —

That is, the Bail Act 1982 —

> with the safety of the community being an overriding objective.

That reference to section 6(d) under the main objectives of the Young Offenders Act 1994 states, amongst other things, that it is —

> to enhance and reinforce the roles of responsible adults, families, and communities in —
>
> (i) minimising the incidence of juvenile crime; and
>
> (ii) punishing and managing young persons who have committed offences; and
>
> (iii) rehabilitating young persons who have committed offences towards the goal of their becoming responsible citizens;

There is a tension in the proposed legislation between the established principles of juvenile justice and the theoretical threat that a juvenile charged with a non-terrorism related offence, who has some kind of history or link to terrorism in the past, is a continuing existential threat to the community. Hon Alison Xamon proposes to maintain the reference to section 6(d), which is an overall objective of the Young Offenders Act, but also add the reference to a general principle of juvenile justice; in particular, section 7(h) of that act. Section 7 states —

> The general principles that are to be observed in performing functions under this Act are that —

Among other things —

> (h) detaining a young person in custody for an offence, whether before or after the person is found to have committed the offence, should only be used as a last resort and, if required, is only to be for as short a time as is necessary.

Plainly, proposed clause 3E is contrary to those principles, and that is what gives rise to, I think, irreconcilable considerations to which a judicial officer will have to have regard. I find it surprising that a party that was very enthusiastic, messianic and crusader-like in championing the principles of juvenile justice in opposition should now go to the extent of saying that there ought to be a presumption against bail for a juvenile for an offence that has nothing to do with terrorism necessarily, and without any further analysis. I find that very, very surprising. I would have thought there would be some means of trying to reconcile those two principles through a proper risk analysis by a judicial officer in the case of juveniles, but that has not been undertaken.

I am prepared to accept that Hon Alison Xamon's proposal will create an impossible situation for a judicial officer, having regard to the scheme of the act as proposed. However, I would like to know whether a presumption against bail in this form has been enacted in any other jurisdiction in accordance with the Council of Australian Governments agreement that founds this particular proposal, and how it may differ from what is being proposed in Western Australia.

Hon Sue Ellery: Do you mean has any other jurisdiction given a section 7(h)–type reference?

Hon MICHAEL MISCHIN: Bear in mind that, in Western Australia, we have heard a lot of talk about and criticism of the idea that if a juvenile does bodily harm to a police officer on duty, they ought not necessarily be detained as a punishment. Yet under this bill, if a juvenile is charged with a non-terrorism related offence but had some link to terrorism in the past—presumably they would have been punished and satisfied the penalty for that, and having regard to the presumption of innocence and the like—a presumption against bail would apply for what might be an offence for which they would ordinarily be given bail. I want to know whether any other jurisdiction

has enacted legislation of this character, in which there is a presumption against bail for juveniles; and, if so, what form that has taken, and how those jurisdictions have dealt with the question of juvenile justice principles.

Hon SUE ELLERY: I provided an answer to that when I gave my answer and my reasons for not supporting Hon Alison Xamon's amendment. Other jurisdictions that have enacted legislation for a presumption against bail for persons with links to terrorism have all applied those presumptions to children and without special considerations. Western Australia's provision, in fact, goes slightly beyond other jurisdictions. No other jurisdiction has put in place special considerations for children.

Hon MICHAEL MISCHIN: I take it when the minister says "special provisions for children", she means ameliorating the effect on children?

Hon Sue Ellery: Correct.

Hon MICHAEL MISCHIN: I have concerns about it. I repeat my surprise that there seems to be such a ready acceptance of this abrogation of what was an article of faith for the Labor Party when it was in opposition. Nevertheless, I think Hon Alison Xamon's amendment will create a legal impossibility for a judicial officer. We therefore cannot support her proposal, but we have significant reservations about the way the bill is crafted at the moment. However, I will take the government on faith in this matter.

Amendment put and negatived.

Hon ALISON XAMON: I have a question about proposed clause 3E(2)(a) at line 31 on page 8, where it refers to "exceptional reasons". I note that the federal legislation describes what those exceptional reasons are, but this Bail Amendment (Persons Linked to Terrorism) Bill does not. I want to get on the record, please, what would be considered to be exceptional reasons for why an accused might not be kept in custody.

Hon SUE ELLERY: I do not have a prescriptive list; I will not give one; one does not exist. In the case of people with links to terrorism, judicial officers will have the discretion to determine the exceptional reasons. This discretion is important, so that any number of factors may be taken into account that are relevant to the unique circumstances of the accused. The bill provides that the exceptional reasons test is guided by specific considerations. It requires that a judicial officer must have regard to the nature and seriousness of the offence or offences; the probable method of dealing with the accused if convicted; the conduct of the accused since being charged with or convicted of a terrorism offence, or made the subject of a relevant control order; and whether it is appropriate to refuse bail and make a hospital order under the Criminal Law (Mentally Impaired Accused) Act 1996. In the case of a child, as we have just debated, a judicial officer must also have regard to section 6(d) of the Young Offenders Act. This guidance modifies the strict bail test so that matters that would generally not be considered unusual or out of the ordinary may be treated as exceptional reasons. For example, it ensures that judicial officers retain appropriate discretion to have regard to the seriousness of the current charge, that imprisonment is not a likely outcome, to appropriately assess the risk related to the terrorism links, and factors related to a child's supports in the community. How courts will give weight to each particular factor is at the discretion of the court and will depend on the individual case.

Hon ALISON XAMON: My concern is that none of those reasons strike me as being particularly exceptional. They would be the reasons that would normally apply when consideration of bail is being given. I think it is concerning that this chamber is unable to give any particular guidance to anyone who is attempting to interpret this at some point in the future. As I mentioned, these issues are not exceptional; these are the sorts of issues that a court will take into account in the course of considering bail anyway.

Clause put and passed.

Title put and passed.

Report

Bill reported, with amendments, and, by leave, the report adopted.

As to Third Reading — Standing Orders Suspension — Motion

On motion without notice by **Hon Sue Ellery (Leader of the House)**, resolved with an absolute majority —

That so much of standing orders be suspended so as to enable the bill to be read a third time forthwith.

Third Reading

Bill read a third time, on motion by **Hon Sue Ellery (Leader of the House)**, and returned to the Assembly with amendments.