CRIMINAL CODE AMENDMENT (PREVENTION OF LAWFUL ACTIVITY) BILL 2015

Committee

Resumed from 17 February. The Deputy Chair of Committees (Hon Liz Behjat) in the chair; Hon Michael Mischin (Attorney General) in charge of the bill.

Clause4: Sections 68AA and 68AB inserted —

Progress was reported after the clause had been partly considered.

Hon MARTIN PRITCHARD: In the Attorney General's answer last night to my question about what, other than a personal locking device, would constitute a physical barrier, he raised, as I remember, three general concepts. On the first example of a protester up a pole, I agree with the Attorney General that this activity is caught by proposed section 68AA, but I cannot see that this is a physical barrier except in the most abstract form.

The Attorney General also suggested fire. However, I agree with the Attorney General that that is probably caught more properly by arson. The Attorney General talked about the possibility of a locked car if it was left in such a way as to be impossible to move. It would help me enormously to understand the need for this bill if the Attorney General was able to give me a better example of a physical barrier, particularly as to how it might interact with proposed section 68AB, because I believe it would be ridiculous to suggest that a person might be caught up in this proposed legislation for possessing a car.

Again, I suggest to the Attorney General that this bill would make more sense if proposed section 68AA(1)(c) referred to a "personal locking device" instead of a "physical barrier"; and similarly if those words were used in proposed section 68AB(1) instead of a "thing". I ask again: can the Attorney General give me examples of what constitutes a physical barrier so that I and the public, and, more importantly, the police officers charged with enforcing this legislation, if it is not amended, will have a clear understanding of what the Attorney General is proposing as a physical barrier?

Hon MICHAEL MISCHIN: The honourable member asked me for examples other than the ones I have already provided. He has now turned the question around and says he is not satisfied with those other possibilities, and asks for examples to be given. I have already given examples of what this bill is aimed at. If the member does not like those examples, that is a matter for him, but those are the sorts of things that we are aiming at.

Hon MARTIN PRITCHARD: I am struggling to believe that this legislation will have any real impact or effect outside of protestors who are using personal locking devices. If this legislation is directed at what seems to be the concern as this bill has gone through the different stages—namely, that people may lock themselves on during a protest in a way that makes it dangerous or hard to remove them, and that may impact on the ability of people to carry out their lawful activity—I would have some sympathy for that. I have indicated that I have some sympathy for that and I understand that. However, I cannot understand how the breadth of wording that is used in this legislation will be able to deal with that issue. Therefore, I ask again: can the Attorney General give me a better example, outside of personal locking devices, of what a physical barrier is? I suggest that if the Attorney General is having difficulty giving me easy examples, how can he expect police in the field to understand what his intent is, because I do not, outside of personal locking devices? If the Attorney General is talking about personal locking devices, let the legislation reflect that. If the Attorney General is struggling to give examples outside of personal locking devices, I suggest that I am also having difficulty, and I suggest the public is having difficulty, and that is why the government is getting so much pushback on this bill. I suggest police officers will also have a lot of difficulty. If the Attorney General could assist me, I would very much appreciate it.

Hon SIMON O'BRIEN: Madam Deputy Chair —

The DEPUTY CHAIR (Hon Liz Behjat): Is that on a point of order?

Hon SIMON O'BRIEN: No.

The DEPUTY CHAIR: Okay.

Hon SIMON O'BRIEN: It is on the question that clause 4 be agreed to. I would be in favour of that, and I want to say so.

In respect of the matter that Hon Martin Pritchard has raised, I have to compliment him. I hope I do not get Hon Martin Pritchard offside with his colleagues, but on many occasions he has been the only member on that side of the house who has seriously applied himself to thinking how we can make better whatever the issue is that is before us. However, on this occasion, I think Hon Martin Pritchard is missing the mark. I do not know that we really need to pursue this much further, but perhaps I can tell the member why there is nothing wrong with

the general and all-embracing terms of the bill, and why they are appropriate. What the member is proposing would reduce the effectiveness of the measures that are proposed in the bill. If the bill was altered to try to define exactly what is and what is not within the scope of the words "a thing", and as a consequence the measures in the bill were seen to be inadequate, we would need to come back to this chamber on a subsequent occasion to fix the problem. That is the issue.

Hon Darren West, who is Hon Martin Pritchard's colleague and a thoughtful contributor on so many occasions, and at such great length, has said he is also concerned about the ability of our police officers to deal with such a complex matter as interpreting the simple and straightforward provisions in this bill. Police officers in the field who are facing a particular set of circumstances, or varying circumstances, currently do not have the powers at their disposal to enable them to act on the public's behalf, and these provisions will make it easier for them.

I will put it this way, and I will then sit down and we can all say that it has been put to bed, and say yes to clause 4, and then have an early shower. A good friend of Hon Kate Doust, whom she will remember—Hon Peter Foss —

Hon Kate Doust: A great mate!

Hon SIMON O'BRIEN: —had a perfect saying, on occasions such as this, to give members comfort and closure in the matter they were pursuing. The question is: how are police officers meant to recognise the situation that is contemplated in this legislation? As Hon Peter Foss used to say, it is a bit like trying to define an elephant to someone who has just arrived from another planet and has never seen an elephant. We might say to the alien it is greyish, it is very large, and it has four legs. The alien might ask whether its legs are little, and we would say no; that is a mouse. We might then say it has a trunk, and the alien might ask, "What is a trunk?" I think we would all agree that it can be problematic to try to define an elephant!

Hon Darren West: Is it a thing?

Hon SIMON O'BRIEN: Yes, it is indeed a thing. The thing about that thing—that pachyderm type of thing—is that even if we cannot accurately define it for all concerned, we certainly can recognise it when we see it. So let us not leave it sitting in the corner of the room. Let us move on and say yes to clause 4.

The DEPUTY CHAIR: Member, I am not sure whether that was a response to Hon Martin Pritchard or whether the Attorney General was going to respond.

Before we go any further, I take this opportunity to welcome into the public gallery the year 6 students from Sacred Heart Primary School. You are very welcome to our public gallery today. You will have heard that we discuss some very interesting things. Perhaps you might all like to go back to class now and try to define an elephant!

Hon MARTIN PRITCHARD: I thank Hon Simon O'Brien for the assistance that he is endeavouring to give me. In response to that, can I say that I am not proposing an amendment or suggesting that the bill be changed—not at this stage anyway. It would seem to me that if it was so simple, I would have had a response by now from the Attorney General that would have satisfied me.

Hon Simon O'Brien: Nothing's going to satisfy you. You've just admitted it.

The DEPUTY CHAIR: Order! I want to bring the debate back to the bill. We have had a bit of leeway. I am sure that Hon Martin Pritchard is now addressing his remarks and questions to the Attorney General rather than Hon Simon O'Brien. Address the Attorney General, thank you, Hon Martin Pritchard.

Hon MARTIN PRITCHARD: If this were a simple matter, indeed it could be put to bed quite quickly. In a matter of a couple of sentences, can the Attorney General indicate to me what a physical barrier is outside what has clearly been described? Having never seen one, I now understand what a locking device is, what it does and how it can cause difficulties. My concern is that this Criminal Code Amendment (Prevention of Lawful Activity) Bill goes broader than that. The minister has indicated to me that in some circumstances a car could be a barrier. I can see in my mind's eye that if a car were locked in such a way as to make it difficult to remove and it covered the full extent of the access required for the legal activity, I think it would be probably fairly easy to drag a car out of that circumstance —

Hon Kate Doust: Not if you've taken the tyres off.

Hon MARTIN PRITCHARD: Even in that circumstance, honourable member, I think it could be dragged out of the way. I am seeking a broader explanation of a "physical barrier". If it is only the personal locking devices or in some very limited circumstances a car, and that is the answer and that is all it is, I might indeed think there should be some amendment. I am not proposing anything at this stage; I am just trying to understand the term

"physical barrier". I say again that if it is easy for me, the public or whoever to understand, it should be easy to explain in a couple of sentences. I ask the minister if he can assist me so that I can make a determination on this bill.

Hon MICHAEL MISCHIN: If I understand it correctly, the member is not struggling with the examples that have been given—he seems to cavil at the idea that someone on top of a pole secured by lines to the entry way of premises is not a physical barrier, so we will have to agree to differ—but because I am insufficiently inventive in speculating how others might come up with some physical means of preventing lawful activity, the bill is too broad in its terms. It works two ways. If the honourable member cannot think of any other means that could fall within the elements of the offence, he need have no concerns that the offences will be more broadly charged in things that are not offensive and preventive of lawful activity in the way that has been speculated upon by groups opposed to this legislation. If he can think of anything that falls within the definition of "physically" and within the elements of the offence that somehow extends the operation of this legislation to things that are anathema to the ability to properly and lawfully protest, I will be glad to hear it. But if he cannot, it seems to me that he has no logical exception to make to the manner in which these provisions have been framed. Rather than complain about how poorly drafted the bill is, he should note that it is very precisely and well drafted. I am sure that police officers would have no trouble at all applying the legislation as drafted, should it be passed.

Hon AMBER-JADE SANDERSON: I, too, have a question for the minister about a barrier. I want to give an example that is current. Last night a group of Christian leaders held what they call a sit-in, a prayer vigil, at Michael Keenan's office as part of a group called Love Makes a Way, in protest at the government's treatment of refugees, particularly women and children in offshore detention.

Hon Michael Mischin: This government or the last Labor government?

Hon AMBER-JADE SANDERSON: The federal government.

The DEPUTY CHAIR: Order!

Hon AMBER-JADE SANDERSON: They call it a prayer vigil. They sit down and their campaign material shows that their strategy is to get in the way. Their main catchphrase, if you like, is "I pledge to get in the way to make them stay." Their strategy is to essentially get in the way of people in electorate offices who are members of the government to stop them from conducting their lawful activity every day. They want to get in the way of them going about their business in their electorate office, seeing constituents and doing what have you.

I ask the minister: would this prayer vigil constitute a physical barrier to those people trying to go about their business in an electorate office? A similar protest was held at Julie Bishop's office and she promptly had the people arrested. Would the police be able to charge those people under this section of the legislation and potentially fine them up to $12 000 per person for essentially conducting a peaceful protest—Christian leaders standing up for women and children in offshore detention?

Hon MICHAEL MISCHIN: Just to show that I am doing this in the right spirit, my stars this morning say, and I quote —

> You're keen to communicate, as you bounce ideas off others and enjoy stimulating conversations. You'll also favour deep personal connections.

It is in that spirit that I deal with this particular offering.

The DEPUTY CHAIR: Those are mine also, Attorney General.

Hon MICHAEL MISCHIN: As the honourable member has pointed out, those who occupy other people's premises and have no lawful excuse to be there can be, and have been in the past, arrested and charged with trespass. As I pointed out yesterday, what needs to be established to fall within this legislation is a much higher threshold; therefore, why on earth would we use this provision, especially when there is an existing offence that these people have committed and the penalty is the same? As I tried to impress upon Hon Darren West—I know he struggles with this sort of stuff—what the prosecution needs to prove to establish trespass is less onerous than what would need to be established to fall within this legislation.

Several members interjected.

The DEPUTY CHAIR: Order! The Attorney General is the one with the call.

Hon MICHAEL MISCHIN: Hon Amber-Jade Sanderson's scenario is academic; it is not relevant to this legislation. There is already a charge that can be laid and charges have been laid in the past. As I have also pointed out repeatedly, but it does not seem to make an impact, we are talking about prevention of lawful activity, not hindrance or obstruction. The people in the circumstances Hon Amber-Jade Sanderson has pointed out would be trespassing. They may be hindering a lawful activity but they can be dealt with in other ways;

to wit, being issued with a move-on notice and, if they breach that, being arrested and moved by force, so it would not apply in this legislation.

Hon AMBER-JADE SANDERSON: The Attorney General stated that it would not, but my point is that it could fall within the legislation because it is too broadly written. If we are talking about physical barriers, the legislation needs to define what they are. It is our job to be as specific as possible in how these laws are applied and interpreted. It is also important that we protect people's right to peaceful protest. That is a fundamental right, and this clause of the bill will not do that. It could quite easily impinge on people's ability to protest peacefully and responsibly under current legislation. If there are adequate means already with trespass and move-on laws, why not leave those in place and clearly define what the thing is and what the physical barrier is?

Hon ADELE FARINA: The Attorney General stated on a number of occasions that the intent behind clause 4 of this bill is for it to serve as a deterrent factor to stop people from using thumb locks and other body part locks in their protests. I would be interested to hear from the Attorney General what evidence in support of that statement he can bring to the chamber and what analysis has been undertaken to come to the conclusion that clause 4 will have a deterrent factor.

Several members interjected.

The DEPUTY CHAIR: Order!

Hon MICHAEL MISCHIN: I keep having to refer to my stars. Hon Adele Farina wants me to provide evidence that an offence that has not yet become law is acting as a deterrent. Is that the idea?

Hon ADELE FARINA: The Attorney General puts himself in these binds when he makes statements that he cannot back up. He has told this chamber on numerous occasions that the purpose of this law is to prevent the activity that is preventing lawful activity—that is, to prevent the use of thumb locks and arm locks and the rest of it. The intention of this piece of legislation is to prevent that activity from happening. What provision in this legislation suggests to the Attorney General that it will prevent that activity from happening when every other law that we currently have in place has failed to do that?

Hon MICHAEL MISCHIN: We will work through this. As part of this component, quite apart from rendering the sort of physical barrier that falls within the scope of this legislation an offence specifically, there is a preparatory offence in proposed section 68AB. At the moment, a protester could, for example, take a thumb lock to a protest site.

Hon Kate Doust: Maybe they like wearing thumb locks.

Hon MICHAEL MISCHIN: Really—on the planet that the member comes from?

The preparatory offence will set a standard of conduct that will hopefully deter people from engaging in it and preparing to create the physical barrier that will be prohibited by these provisions. If they then go to that step, there is an offence that is specific to that intention when it has been executed. If it involves endangerment or injury, there is an aggravating circumstance that exposes them to an even higher penalty. How one provides evidence that a law that has not been passed has achieved its end escapes me. The government's policy in this is quite plain. This legislation has been crafted to achieve a particular end and to set a particular standard of conduct and, hopefully, people will abide by it. If they do not, they will fall foul of it and they will be dealt with, and we will gauge its success in due course.

Hon ADELE FARINA: The preparatory aspect of this provision requires a police officer to be present at the time that the person turns up to the forest block with the thumb lock and before they apply the thumb lock to themselves in order for the police officer to use that provision of the bill. The reality is that, according to most police officers who have attended these scenes, that sort of stuff happens before they get there. That provision of the bill is not likely to be used that often and is not likely to be all that effective in preventing the activity.

The other aspect of this provision is that the Attorney General has told us repeatedly that the penalty in this provision is the same as the penalty for trespass. Trespass provisions have not been very effective in stopping any of this activity to date. If the penalty for this offence is exactly the same as that for trespass, why would the Attorney General think it will have a greater deterrent effect than the current trespass provisions?

Hon MICHAEL MISCHIN: Perhaps the honourable member might help me out with this. Someone is manufacturing drum locks or thumb locks of the character that we have been talking about and the police know about it. The person puts an advertisement in the paper for any protesters who want to buy thumb locks or barrel locks. What offence are they committing and how does one stop them from doing that? I ask the member rhetorically: What will stop them from doing that? If a vehicle that is intercepted by police on the way to a site contains such articles, what offence is being committed that allows the police to stop those articles from being transported and distributed?

Hon KEN TRAVERS: The Attorney General talks about thumb locks. I think we need to be a bit clearer, because the bill refers to "things", which is intended to capture —

Hon Michael Mischin interjected.

Hon KEN TRAVERS: Do not get all snarly just yet; let me go through the point I want to make. Just settle and take a deep breath.

The DEPUTY CHAIR: Order!

Hon KEN TRAVERS: The reason that thumb locks are not referred to in the bill is that the word "thing" captures a broad range of potential items. It is very clear that a thumb lock has no lawful purpose. I cannot think of a reason, but there may be a reason, why someone would own a thumb lock other than for the purposes that the Attorney General hopes to capture with this bill. Clearly, other items can be captured under the definition of "thing".

Hon Robin Chapple interjected.

Hon KEN TRAVERS: No; in fact, it could be a piece of rope. If people are going to string themselves up in a tree with a rope to prevent a lawful activity, they may have a lawful purpose to have that rope in their car. Would the Attorney General accept that the definition of "thing" will capture a range of items that may be possessed by somebody that may have a purpose that is intended to be captured by this legislation and also an alternative lawful purpose?

Hon MICHAEL MISCHIN: Yes, but how would someone be charged unless all the elements of the offence could be proved? If I simply am found with a rope in the back of my car, how could a police officer legitimately charge me under proposed section 68AB? If the member can point that out, we can engage more sensibly in this discussion, bearing in mind the elements of the offence that need to be proved, not the rhetoric that has been disseminated.

Hon KEN TRAVERS: That is why debate on clause 4 of the bill is so important. I am glad that we have got on to clause 4 so that we can get into this detail. The next element of clause 4 is that a person must not adapt or knowingly possess a thing for the purpose of using it or enabling it to be used in the commission of an offence. In terms of the element, the person has to knowingly possess it and it has to be able to be used in the commission of an offence referred to in paragraph (a), but the element does not include that the person has to be using it in an offence at that point; it just has to be able to be used in the commission of an offence. Of course, proposed section 68AB(2) states —

> A person making, adapting or knowingly possessing a thing is presumed to have the purpose referred to in subsection (1) if —
>
> (a) the circumstances give rise to a reasonable suspicion that the person has the purpose; and
>
> (b) the contrary is not proved.

Hon Helen Morton: There you go—reasonable suspicion. It's a common term.

Hon KEN TRAVERS: There are so many budding ministers on the other side that they clearly do not have confidence in the Attorney General to explain and they feel that they need to interject. We had Hon Simon O'Brien and now we have Hon Helen Morton interjecting.

The DEPUTY CHAIR: And there are aspirational ministers on this side of the chamber as well. Let us stick to the subject at hand.

Hon KEN TRAVERS: When you say "this" side of the chamber, Madam Deputy Chair —

The DEPUTY CHAIR: I indicated the left-hand side of the chamber. And, noting the time, I will leave the chair until the ringing of the bells!

Sitting suspended from 1.00 to 2.00 pm

Hon KEN TRAVERS: I want to finish off the point I was making before we were rudely interrupted by the lunchbreak!

There is the capacity for someone to have an item on them that potentially has a lawful use and a use intended to be captured by this bill. The next element is that the person possessing that item is presumed to have the purpose referred to in proposed section 68AB(1) if —

> (a) the circumstances give rise to a reasonable suspicion that the person has the purpose; …

It then becomes a set of a reasonable suspicion. But is it not possible that someone could be engaging in an activity that gives rise to a reasonable suspicion although they are actually going to do something lawful? For example, someone travelling through the forest on the way to do some abseiling could have a range of ropes and other materials on them that would be captured by the legislation as "things" because they could be used to engage in activities to prevent a lawful activity. That person is in a forest area with the intent to do something lawful, but they would be presumed to be going to do something unlawful because the circumstances are such that a reasonable person could have a suspicion that that person has the purpose. That person would have the onus of proving that wrong; that is their only defence. In those circumstances, how would that person prove that that is not the case?

Hon MICHAEL MISCHIN: The idea of drawing inferences in order to determine a person's mental state, intention or purpose is nothing novel for the law. In fact, much of the criminal law is based on the ability to draw inferences from the evidence available not only in respect of what is proposed in this bill, but also more generally. Whether, for example, an item may be a weapon depends on the circumstances around its possession and how it is being used; a variety of other factual circumstances can point to a particular item that may have an innocent purpose being a weapon. There is nothing novel about this.

Hon Ken Travers: No.

Hon MICHAEL MISCHIN: Police officers and courts have to make many decisions about whether articles have a lawful use or are intended for unlawful use—the possession of housebreaking implements, for example. Somebody might be carrying certain items that are part of a toolkit in innocent circumstances; if, on the other hand, they are found with these articles hanging around someone's house in the middle of the night, that may give rise to a suspicion that those articles are being used for housebreaking purposes. The strength of the case to establish that depends on all the circumstances. There is nothing novel in this. All that is being said is that, as to a person's intention or purpose, the circumstances give rise to a reasonable suspicion that the person has that purpose; that is the threshold. If the police only have a suspicion because it looks odd or someone has looked at a police officer in a funny way type of thing, that would not be a reasonable suspicion or a suspicion based on reasonable grounds. It requires a suspicion that is reasonable and, hence, able to be supported and explained by reference to circumstances. If a police officer gives evidence that he had a suspicion and it turns out that that suspicion was not based on reasonable grounds, the charge fails and does not get to the stage of the accused having to explain their purpose. It is only if a magistrate is satisfied beyond a reasonable doubt that there was such a suspicion and the other elements of the offence are established, and that suspicion was based on reasonable grounds, that the evidential burden, at very least, is activated to explain what the purpose was, and, ultimately, potentially proof. That proof is on the balance of probabilities, not beyond a reasonable doubt. Again, there is nothing remarkable about that. Hon Ken Travers must read the entire offence in its context and the things that the prosecution would have to prove beyond a reasonable doubt, rather than taking things out of context.

Hon Ken Travers has given some broad circumstances; whether those circumstances are capable of amounting to the elements of the offence and establishing the threshold of a reasonable suspicion that those articles are to be used for a particular purpose that is proscribed by the offence-creating provision will be a matter of circumstances on the strength of the case. At the moment, for example, to determine whether a particular article in someone's possession is going to be used for a particular purpose depends on all other evidence as well as the mere possession of it—the time, place, circumstance, any explanations they may come up with for what they are going to do with it, the alternative uses to which it can be legitimately put; all sorts of things. That does not change either. It is a facilitation of proof, and it provides a threshold that then triggers the responsibility to rebut the reasonable suspicion that has been drawn and the reasonable inferences being drawn from in the circumstances. That is all it amounts to.

Hon KEN TRAVERS: The first set of circumstances the Attorney General outlined and equated to this bill was if someone was found with items that may be lawful but could raise a reasonable suspicion that they may be used for housebreaking because of the circumstances in which they were found. Those circumstances are very different from the provisions of this bill, because in that situation the onus is upon the prosecution to present the evidence to prove that point. That would need to be proved in those circumstances. By way of this legislation, the only thing the prosecution will need to provide as evidence is that there was a reasonable suspicion that the person had that purpose. That is a very different test from the one that the Attorney General outlined at the beginning. Once a police officer can say that the circumstances provide a reasonable suspicion—for instance, at the time the police officer believed that he had a reasonable suspicion, which would be about his sense and his point of view at that time—someone would have to prove that that was not a reasonable view of the officer at the time he conducted the arrest. The onus would still be back on the person committing the offence. It is very different from the set of circumstances that the Attorney General outlined in the first place. However, if he follows the logical conclusion of what he is arguing to the chamber—that this will still have all the elements that

the courts need to prove the intent of the person at the time, which is effectively where the Attorney General led us to in that debate—it would strike me that his claim that this bill will have the effects that it has leaves us in no different place from the current circumstances that we face today in that for many of the charges that are available, the onus is still on the state. Therefore, the detail of this bill will not deliver the policy outcomes outlined in the second reading speech. The Attorney General seems to be having it both ways. I do not agree that it is substantially different from how the current law applies in these matters—in break and enters and the like—to a situation in which a person who is going about their lawful purposes with lawful items could find themselves in a set of circumstances that gives rise to a reasonable suspicion and then they have the complete issue of proving the contrary. One of the things that is really hard—it is probably the hardest thing in the world—is to prove the contrary to something when a set of circumstances is put forward rather than the courts proving that it is the case. As I said, if the Attorney General were to accept any other argument, in my view, he would be undermining a significant chunk of what he claimed in his second reading speech was the policy of the bill.

Hon MICHAEL MISCHIN: If that is the case, so be it, but there is nothing remarkable in the concepts that I have explained. The criminal law is replete with them. I will give an example. Section 557E of the Criminal Code states —

> A person who is in possession of a thing —

Hon Ken Travers: It being a different thing from the thing in this section.

Hon MICHAEL MISCHIN: It is a thing. I continue —

> with the intention of using it to facilitate the unlawful entry of any place is guilty of an offence and is liable to imprisonment for 12 months and a fine of $12 000.

Hon Ken Travers: But you have to prove their intent.

Hon MICHAEL MISCHIN: I will get to that. The penalties are precisely as are applied here for the possession of a thing—I know that Hon Darren West has trouble with that—with a particular intention. Section 557G states —

> A person who is in possession of a thing with the intention of using it to cause damage consisting of graffiti is guilty of an offence and is liable to a fine of $6 000.

Section 557A states —

> A person is presumed to have an intention referred to in this Chapter in relation to a thing in the person's possession if —
>
> (a) the person is in possession of the thing in circumstances that give rise to a reasonable suspicion that the person has the intention; and
>
> (b) the contrary is not proved.

None of this caused trouble back in 2004 when the then Attorney General sponsored the bill that introduced these provisions into the Criminal Code, so I fail to understand why these concepts are giving so much trouble to the members on the other side of this chamber now.

Hon LYNN MacLAREN: I appreciate the effort that the Attorney General has gone to to explain in detail how a police officer might come to the conclusion that someone could be charged for this offence. It is difficult for the public to understand when these circumstances will be deemed to be in play. Therefore, the ambiguity in the bill that the Attorney General is equating in this instance to other offences under the Criminal Code has introduced confusion, which is why we are specifically asking what a "thing" is and how we know whether we are preparing to prevent a lawful activity et cetera. The Attorney General just described a few offences from the Criminal Code. I do not think anyone here would question whether breaking into a house is a lawful activity. It is clearly not. We can see that someone might come to a reasonable conclusion that if someone was carrying materials and preparing to break into a house, that might make them eligible to be charged for that.

This bill will prevent protest activity. Protest activity is quite broadly understood in the community's view. Some protest activity has included thumb locks. Thumb locks are used by protesters. Why has the Attorney General not defined in greater detail the offence of lawful activity? Let us go back to James Price Point because it is referred to in the second reading speech. Protesters were involved in stopping an activity that was subsequently proved to be unlawful. This offence could not be used to charge the protesters, yet the underlying purpose for this offence was to stop those kinds of activities—to stop what was deemed at the time to be lawful, which was proven subsequently to be unlawful. When the Attorney General lists the other offences in the Criminal Code, I do not

think it helps me as a member, for example, to understand how this particular offence escapes the criticism of being too broadly drafted.

Hon MICHAEL MISCHIN: I will not go through all this again; I went through it all yesterday. On this last occasion, let me outline the elements of the offence. I am not sure which one the honourable member is referring to. Is she referring to proposed section 68AA(2) or proposed section 68AB(1)? Let us pick proposed section 68AA(2), which states —

> A person —

It has to be a person —

> must not, with the intention of preventing a lawful activity —

The prosecution would have to prove that the accused had the intention of preventing a lawful activity and, as part of that, establish what the lawful activity is by particularly raising it in the charge —

> that is being, or is about to be, carried on by another person —

So the prosecution would have to establish that element of the offence —

> physically prevent that activity.

Therefore it would have to be established beyond a reasonable doubt that there was a physical prevention of that activity within the meaning of the act. Those things would have to be proved beyond reasonable doubt. How does one establish that intention to prevent that unlawful activity? I would have thought simply having a rope in a car would not go anywhere near establishing an intention to do anything. However, if a person is there with their thumbs in a thumb lock device, around a piece of machinery that a driver would ordinarily use to do the job that he has been contracted to do, then we might think that would give rise to a reasonable suspicion that the person is intending by doing that, and has in fact, prevented the lawful activity.

If the person pleads not guilty to the charge, the prosecution will have to establish all those elements of the offence, including the intention that is referred to—that is, an intention of preventing the lawful activity that is being or about to be carried on by another. There is a facilitation of proof, because if all those circumstances that are observed and led in evidence give rise to a suspicion that is testified to and is based on reasonable grounds so far as the court is concerned, then the inference can be drawn by the court in the absence of other evidence that the person had that intention as well as it having proved all the other things—that lawful activity had in fact been prevented. There is no irrebuttable presumption, but it is one that the court can draw in the absence of any proof to the contrary. That proof can be provided by the person who is charged by saying, "The reason I had my thumbs locked around this vehicle is not because I was intending to impede any lawful activity, let alone prevent it; it's just that I like the fresh air and being attached to vehicles all day." The court might buy that argument and say that it does have a reasonable doubt as to whether that person had the intention to prevent a lawful activity; namely, the use of that vehicle. On the other hand, the court might find it compelling that there was that intention and it was exercised. What is the problem? It depends on the circumstances. If the circumstances are ambivalent, there will not be sufficient evidence to establish all the essential elements of the charge. There is nothing remarkable about that. It is no different from the other possession offences for unlawful activity that are prescribed already in the Criminal Code and caused no-one any trouble when they were passed in 2004. I do not think I can take the argument any further. I have been through it all. We have dealt with the question of what might or might not be an unlawful activity. If the prosecution cannot prove that the activity is a lawful one and has been impeded, the charge does not get off the ground—end of story.

Hon LYNN MacLAREN: An ambiguity that I am struggling with at this point is the intention part of this. As I tried to indicate before, often when a protest action is going on, there are usually lots of people involved. One person may be involved in a lock-on and is physically locked on. As the Attorney General illustrated in his examples, usually one person locks on. A lot of the people who are there may be involved. They may be carrying ropes or have thumb locks from previous protests, or they may be there simply because they are feeding someone or because they drove a car. My concern with the way that clause 4 reads in totality, with the reversal of the onus of proof and the assumption that a person may be thinking about preparing to prevent a lawful activity, is that nothing in the bill protects people who are at the same place where thumb locks are being manufactured or are being transported to a particular protest but who have no intention whatsoever of stopping a lawful activity; they are merely there because they believe in saving the forests and they want to peacefully occupy the place. Maybe they would be charged with trespass normally today. I just do not see how there is anything in these two proposed new sections that protects that kind of person, who is in real, rational and logical circumstances that occur all the time when a person is protesting. Can the Attorney General explain how clause 4 would protect those innocent people who are attending an activity but not participating in the prevention of a lawful activity?

Hon MICHAEL MISCHIN: There seems to be some fundamental misunderstanding about how the criminal law works. It is not a question of what protects innocent people. It is for the police and the prosecution to prove the elements of the offence, and not look around for ways that they cannot prove the elements of the offence. I might be able to help the member if she could have outlined the circumstances, but she could not. The member touched on a variety of circumstances that are disparate and not necessarily connected to a particular activity and how they fit the elements of the offence. Give me a factual circumstance that fits the elements of the offence yet results in an injustice.

Hon LYNN MacLAREN: Proposed new section 68AA on page 3 at line 3 states —

> (3) A person is presumed to have the intention referred to in subsection (2) if —
>
> (a) the person prevents a lawful activity in circumstances that give reasonable grounds for suspecting that the person had that intention; and
>
> (b) the contrary is not proved.

Hon Michael Mischin: And that is connected to the presumption to have a specific intent. You do not read that in isolation. That is an adjunct to subsection (2), which is the offence-creating provision. Find me circumstances that fit subsection (2), the elements of the offence there that lead to an injustice.

Hon LYNN MacLAREN: I believe the injustice comes when proposed new section 68AB —

Hon Michael Mischin: Hang on. Are you talking about 68AA?

Hon LYNN MacLAREN: My concern is when they are read in totality. Proposed new section 68AA states —

> (2) A person making, adapting or knowingly possessing a thing is presumed to have the purpose referred to in subsection (1) if —
>
> (a) the circumstances give rise to a reasonable suspicion that the person has the purpose; and
>
> (b) the contrary is not proved.

Hon MICHAEL MISCHIN: I take it that the honourable member cannot think of any circumstance that fits the offence-creating provision in proposed new section 68AA(2) and now we are moving on to finding one for proposed new section 68AB(1); is that right? If the member can think of a circumstance that is covered that satisfies the elements of offence in the offence-creating provision of proposed new section 68AB(1) that leads to an injustice, I might able to answer it.

Hon LYNN MacLAREN: My concern is related to a person who is, say, one of the people in a location where perhaps a road is being logged, so it takes lots of people to block that road.

Hon Michael Mischin: Hang on a minute; 68AB is talking about making, adapting or knowingly possessing.

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Hon LYNN MacLAREN: Sorry, I thought the Attorney General wanted me to describe proposed section 68AA.

Hon Michael Mischin: I do not know which one you are talking about. You started off on AB.

Hon LYNN MacLAREN: Okay, I will go back to proposed section 68AA, the original one that I drew the Attorney General's attention to. He wants me to be very specific and I am trying to be.

Hon Michael Mischin: Okay, proposed section 68AA(2).

Hon LYNN MacLAREN: My concern is subsection (3), which states —

> A person is presumed to have the intention referred to in subsection (2) if —
>
> (a) the person prevents a lawful activity in circumstances that give reasonable grounds for suspecting that the person had that intention; …

If some in a group of people are blocking the road, under what I understand the Attorney General is defining this offence to mean, they have therefore prevented the lawful activity of that truck from going down that road. If their body is physically in front of a truck and they have succeeded in stopping it, does that meet what the Attorney General is describing thus far? If there is a person with that group, who may have the intention of stepping into the road and may not, is that person captured by this proposed section?

Hon Michael Mischin: Which subsection, (2) or (3)? Subsection (2) is the offence-creating provision.

Hon LYNN MacLAREN: The Attorney General can tell me. Are they caught by either subsection (2) or (3)?

The DEPUTY CHAIR (Hon Brian Ellis): Order, members! We cannot have a general discussion going back and forward. I request that when the member gets up to ask a question, to stipulate the question. For the ease of Hansard, we cannot keep having members speak to-and-fro. One at a time, member—when I call you. I think we have got to the Attorney General.

Hon MICHAEL MISCHIN: Subsection (3) is not to be read in isolation. It deals with one element of the offence. The prosecution has to prove all the elements of the offence. It focuses on a specific element—that is, the intention of preventing a lawful activity that is being or is about to be carried on by another person. To charge, it does not create a separate offence. It is an expansion, if you will, of the offence-creating provision in subsection (2) and has to be read subject to that and in that context.

In the circumstances that Hon Lynn MacLaren has described of a group of people blocking a road, we would not have to resort to this. We would simply charge trespass if it is on private property or some other property that it can be established that these people have no entitlement to be on and they would then have to prove that they have a lawful excuse for being there. It could be obstructing traffic under the Road Traffic Act and code. It could be a variety of other offences or it could simply be if they refuse to move—a breach of a move-on notice. We would not have to resort to this. But let us say that a police officer does like to make life difficult for themselves and chooses to eschew all the other easily proved offences that are exposed by that behaviour and wants to use this provision. They would have to be able to prove beyond reasonable doubt, as I have said, that the particular person that they are charging had the intention of preventing a lawful activity that is being or is about to be carried on by another and physically prevented that activity, not just hindered or obstructed. That would also depend on the circumstances if that person did not admit it. In the absence of the person when they are interviewed by the police officer saying, "Yes, look, I intended to ensure that no-one was able to drive this truck down this road ever or for at least an extended and indefinite period of time until I got my way, and I have used a physical barrier that is not merely a hindrance but is a preventive measure", the police would have to have a reasonable suspicion in all the circumstances—to wit, circumstantial evidence—that that was the person's intention. If that suspicion is based on reasonable grounds and is a reasonable inference to draw, if a court is satisfied of that, it would be up to the accused. The accused would have the opportunity to rebut that presumption by giving an explanation of what their intention really was. The strength of the prosecution case would depend on all the circumstances. If they are seen, for example, handing a set of arm locks to someone who has locked themselves to a device in circumstances that prevents lawful activity, they could be considered a party to that offence, which is nothing remarkable. It is set out in section 7 of the Criminal Code. Or, if there was evidence of them explaining to someone how, "You be the dupe and you chain yourself to that"—because they do not want to get into trouble—"You are saving the world and this is the way to do it", and the evidence points to their intention being to counsel and procure the commission of the offence, they would be captured by section 7 of the Criminal Code as a party.

Again, I ask the member to point to a set of circumstances that will meet the elements of the offence that the prosecution must prove beyond reasonable doubt, and yet give rise to an injustice not by vague reference to protest actions and right to protest and the like, but what is being focused on here: whether it is in context of some alleged protest or whether it is someone simply being bloody-minded and wanting to stop someone going about their lawful business, and just how this creates a problem.

Hon LYNN MacLAREN: Thank you, Attorney General; I do appreciate that. Further to the original scenario that I painted about the James Price Point protest action that succeeded in preventing what at that time was lawful activity, if this offence were in play at that time and the protesters had been charged with this offence and then the action that they stopped was subsequently proven to be an unlawful action, rather than a lawful action, is there a spent conviction? What would happen in those circumstances and can the Attorney General explain to me how the law would work in that regard?

Hon MICHAEL MISCHIN: As I explained yesterday and I also covered it a little earlier, it is a question of how one particularises the unlawful activity. If the charge was with the intention of preventing a lawful activity—to wit, a project at James Price Point—and they physically prevented that activity, which turns out was not a lawful activity within the meaning of the legislation, the charge is not made out; end of story. If there has been a conviction in the meanwhile and the charge is proved to be flawed because it was particularised in a certain way, there would be a basis for a review of that decision, by way of an appeal or, in extreme cases, by resort to the royal prerogative of mercy and the setting aside of the matter or a referral to the Court of Appeal or whatever it happens to be. There would not be a need for a spent conviction. It depends how one is categorising and the lawful activity that is alleged that needs to be proved beyond reasonable doubt, and if there is any ambiguity about whether that particular activity is lawful it is a matter to be decided by the court. If the court is not satisfied beyond reasonable doubt that what is being charged as having been prevented is a lawful activity, the charge will be dismissed, which is right and proper.

Hon LYNN MacLAREN: In circumstances in which someone has been charged and convicted and the activity is subsequently proven to be unlawful, are there any compensation provisions for someone who is wrongly convicted?

Hon MICHAEL MISCHIN: A number of avenues could be used. If the conviction is set aside on appeal, there could be an order for costs under the Official Prosecutions (Accused's Costs) Act. It may be that in some circumstances there is an act of grace payment. That can be achieved by a variety of means.

Hon LYNN MacLAREN: What about the damage of reputation that might ensue from being charged and convicted of an offence that can be attached to a two-year prison term and the high fine of $24 000?

Hon MICHAEL MISCHIN: It is no different from any other circumstance when someone's conviction is set aside. The conviction would be expunged and removed from their record, and it would be no different in this case.

Hon SUE ELLERY: I want to explore the shifting sands of the government's position on how this bill will work in practice. When the Attorney General brought the bill into the house, it was described as being specifically for the purpose of meeting a gap in the law. It was said that there was a requirement that in addition to existing offences against public disorder and that range of offences, a specific law was needed to take account of the methods by which some protesters at some events had disrupted activities in pursuit of their point of view and the nature of the material they were using to meet their objectives. That was the Attorney General's position. The Minister for Police explained this as a law that was necessary as a resources question; it was taking up too much police time. In particular, James Price Point was mentioned, where specialist equipment and extra police had to be brought in. The Premier today put a slightly different point of view on radio and described this as a preventive law. He said it was before Parliament; that he would listen to the arguments and he thought it was a preventive measure rather than one that was going to be used in practice.

One of my colleagues, Hon Ken Travers, described it this morning as the prophylactic law, so it is a preventive measure; it is used to prevent something else from happening. He used a slightly different word, but I am going to stick with prophylactic. If the Premier's position today is that it is about prevention and sending a message, what thought has been given to how we grade either the nature of the lawful activity being interrupted or the extent of the physical barrier being used? There has been some debate already in the course of the committee debate about the nature of the physical barrier. However, given the Premier's comments this morning, are we now talking in an implementation sense about perhaps a grading of the lawful activity? I will give an example. If James Price Point is one example, perhaps the intention is that it would be applied only on development projects and actually out on the ground at the point of development. In the forestry industry, would it be applied out on the ground where the forestry activity was going on versus a dispute about a forestry decision by a corporate, or about a resource industry by a corporate, or about a decision about banking when the kind of protest was that somebody padlocked themselves to the doorway of the corporate head office? Is there a grading? Will we not apply these laws to the people who chain themselves to the front door of a corporate headquarters but if they are out on the ground stopping the bulldozers, chaining themselves or concreting themselves to them, we are going to stop it—is that what the Premier is talking about when he says that it will not be used very often? Is a grading now being envisaged about the nature of the physical barrier that we are talking about? The reason it is necessary to ask this question is that every day for the last three days a government minister—the Attorney General, the Minister for Police or the Premier—has put a slightly different spin on the practical application of this law. Meanwhile, we are still debating it. There is no series of amendments from the government to say it changed its mind—namely, that it thinks it needs to put in a grading for the kind of lawful activity to which this provision would be applied or some kind of hierarchy for measuring the physical barrier. I ask the Attorney General what is his view today or the best advice from either the Premier or the Minister for Police about how exactly this bill will be used. To give effect to the Premier's comments, does the government need to consider putting in a qualification to either the lawful activity or to the physical barrier?

Hon MICHAEL MISCHIN: The answer to the last question is no. I am not clear precisely what the Premier or Minister for Police have said, but I know that from what I have heard, none of it is inconsistent with the policy that underlines the need for the legislation, and it is embraced by the terms of the legislation. Just as a general proposition, one hopes to prevent a mischief that is seen to be antisocial by setting the standards of conduct or proscribing certain types of conduct that give rise to that mischief. That is what is being done here. All I have heard about objections to it is an inability to articulate how this will create a problem, except in the circumstances I have outlined for people engaging in conduct that is repugnant and unacceptable to a society that prides itself on allowing people to go about their lawful business, and where some think that they ought to be able to interfere with that under the label of protest. Whether it is protest or whether any other form of interference is the colour given to the excuse used for interfering with other people's lawful activity is beside the point. I hear a groan from Hon Amber-Jade Sanderson, who a little while ago demonstrated her ignorance of

how the law works. I cannot help her. Plainly the mindset is such that we can only go so far to assist with understanding a simple piece of legislation that is no different in character and construction from legislation that was passed by the Labor government in 2004 in respect of other matters—simple—and with the same mechanisms operating, but now they seem to cause a problem. I do not think I can help anymore in this. If we are just going to go over the same arguments again, it is simply wasting everyone's time. It is not helping out members of the opposition, because they either do not want to or cannot see the government's position on this.

Hon SUE ELLERY: Here is the difficulty that I face. The words being expressed by the three government ministers commenting on this legislation are words that I think are designed to make people think that this will be a law, when enacted, that will be used only in a very narrow band of circumstances. That is the public message. However, the words in the bill, in the clauses we are looking at right now, are broad enough that the law, once enacted, in fact could be used in a very broad range of circumstances. That is why I am asking why we should believe it when the Premier says it will not be enacted in practice, and that there is nothing for us to worry about, when there are no words in the clauses we are debating now that qualify what kind of lawful activity or what kind of physical barrier it is. Why should we believe the Premier if the words do not reflect what the Premier is saying?

Hon MICHAEL MISCHIN: Can the member help me out here? She says that there is a broad range of circumstances: like what?

Hon SUE ELLERY: The reason I raise it is that the Premier said the following —

> Look, it's before the Parliament. We'll listen to the arguments. I think it's a preventative measure rather than one that's … going to be used in practice …

I think he is saying that it is not going to be used in practice. I think he was trying to support the argument that the legislation will have a very narrow application.

Hon Michael Mischin: That is your assumption.

Hon SUE ELLERY: Yes, the Attorney General is right, it is, and I want him to convince me that my assumption is wrong.

Hon Michael Mischin: I do not have to, actually.

Hon SUE ELLERY: The point of the debate is to try to convince each other, and if we think we cannot do that, it is to make sure that the views of those people who have one view or another are fully ventilated. That is the point of this chamber and that is what I want to do now. My issue is this: it seems to me that the Premier is saying, "Look, folks, there's a lot of hype about this, but actually we're not going to use it very often at all." If that is the case, surely the expressions used in the bill about the range of lawful activity or the range of things that could constitute a physical barrier should be narrowed so it is clear to everyone that the legislation can only be used in a very narrow set of circumstances. Instead, as it is cast now, any lawful activity interrupted by someone using a physical barrier falls within the scope of the bill. I cannot reconcile that with the Premier saying that the legislation will only have a very narrow application.

Hon MICHAEL MISCHIN: There are several non sequiturs in that reasoning. I think I have been pretty plain in saying that I would hope that it would not ever need to be used, because the sorts of behaviour it is aimed at —

Hon Kate Doust: Who knows?

Hon MICHAEL MISCHIN: We do not know, but I would hope that we would not need to use the legislation, because it sets a standard and says that certain conduct is not acceptable and is now an offence. Its success is to be measured not simply by the number of charges laid under the offences that have been created, but also by a change in conduct and whether the conduct we have seen in the past is pursued in the future. That remains to be seen. None of what the Premier has said is inconsistent with what I have been saying or, to my mind, is inconsistent with what the Minister for Police has said, nor is it inconsistent with the policy of the bill as explained in the second reading speech or my explanation of the government's position in the reply to the second reading debate.

Hon Adele Farina: What about the words in the bill?

Hon MICHAEL MISCHIN: Nor is it inconsistent with the words in the bill.

Hon Sue Ellery: It is.

Hon MICHAEL MISCHIN: We will have to differ on that. It is plain that I am not going to be able to convince members to the contrary, so let us vote on the clause and any amendments to it and we will agree to differ.

Hon ROBIN CHAPPLE: I just want to touch on proposed section 68AB(1), which states —

> A person must not make, adapt or knowingly possess a thing for the purpose of using it, or enabling it to be used, in the commission of —
>
> (a) an offence under section 68AA; or
>
> (b) an offence under section 70A.

Section 70A of the Criminal Code deals with trespass, and I thought I heard from the Attorney General quite clearly that a person would either be charged under trespass or under this piece of legislation for having a "thing", but proposed section 68AB(1)(b) identifies that charges can be applied for the act of trespass. That was not what we were being told to a large degree, because we were being told by the Attorney General that in most cases trespass would actually be used. Why is there a need to specifically identify section 70A, which is the act of trespass, when he has been really been saying that there is either this or trespass?

Hon MICHAEL MISCHIN: I indicated that it would be easier to charge trespass in most circumstances rather than under this proposed section for the things causing particular anxiety to the honourable member, but that is under proposed section 68AA and section 70A. Proposed section 68AB refers to particular devices, implements and so forth and preparation, so there is nothing unreasonable to include in that a prohibition against the making, adaptation or possession of a thing for the purpose of using it or enabling it to be used in the commission of a trespass, which is to be on someone else's property without lawful excuse.

Hon ROBIN CHAPPLE: Thank you, Attorney General. Proposed section 68AB(1) states —

> A person must not make, adapt or knowingly possess a thing for the purpose of using it …

I do not want to belabour the issue of the "thing", but at what stage can that person be apprehended? Can that be a person known to the police as an inveterate protester?

Hon Michael Mischin: That is not an element of the offence. What has to be proved is that the person has made, adapted or knowingly possessed a thing for a particular purpose. That is what the prosecution has to prove.

Hon ROBIN CHAPPLE: Yes, exactly.

Hon Michael Mischin: Someone who has been at a protest in the past is hardly going to establish any of that.

Hon ROBIN CHAPPLE: But what if there is an assumption that he or she is noticeably going to be in the next protest? The Attorney General said there were inveterate protesters.

Hon Michael Mischin interjected.

The DEPUTY CHAIR: Order! Hon Robin Chapple has the call.

Hon ROBIN CHAPPLE: I really want to try to figure out at what stage: is it as the person approaches the event or the protest, is it somewhere on the road between their home and the protest or is it at their home? With what stage are we dealing? The words are "must not make or adapt", and a person does not make or adapt an arm lock or thumb lock or anything like that at the protest; they make it somewhere else and transport it. That is what I am trying to get to.

Hon MICHAEL MISCHIN: A person could be arrested for that offence and charged from the moment that that person makes, adapts or knowingly has possession of a thing for the purpose of using it to commit an offence under proposed section 68AA or section 70A—that is what the proposed section states. There is no question of whether they may have once in the past had a thought or might in the future; that is what the prosecution has to prove beyond reasonable doubt. If the prosecution does not have sufficiently cogent evidence to establish any of the elements in the events or to establish the intention, even with the assistance of proposed section 68AB(2)—namely, being able to draw on a set of circumstances that give rise to a suspicion on reasonable grounds that that is what the person's intention was—the charge cannot be laid or if laid, will fail.

Hon ADELE FARINA: When a person is charged with an offence under the legislation and the physicality aspect is based on paragraph (c)(ii) under proposed section 68AA(1), which is the creation or maintenance of a risk of injury to a person, how does that then get upgraded to the aggravation charge? Both definitions refer to injury and safety, so is the difference that in the case of a straight-out offence it is a risk of something and in the case of aggravation a person actually has to endanger the safety of a person, so a person has to be endangered rather than at risk? Is that where the difference lies?

Hon MICHAEL MISCHIN: The offence-creating provision is proposed section 68AA(2). The honourable member has referred to one of the means of establishing physicality for the purposes of that particular element in proposed subsection (2), but in order attract the higher maximum penalty, the prosecution would also have to prove beyond reasonable doubt the elements set out in the definition of circumstances of aggravation. Some of the evidence that establishes the principal offence may either contribute to or establish the circumstance of

aggravation, or it may be that additional evidence is required, but there are two levels to prove. The circumstance of aggravation would not be got to if the principal offence could not be proved, and it may be that additional evidence would be required to show there has been an injury to or endangerment of, rather than simply a risk of injury.

Hon ADELE FARINA: That is what I want to get clear. The Attorney General said that perhaps it may need evidence that it has caused injury.

Hon Michael Mischin: Additional evidence, yes.

Hon ADELE FARINA: I want to get clear that in order to establish the aggravation offence—the higher offence—they would need to establish that injury had been caused or had endangered the safety of a person. A higher requirement needs to be proved to establish aggravation. In the initial offence, physicality is based on paragraph (c)(ii) —

> a risk of injury to a person ... or of damage to property as a direct consequence of carrying on the lawful activity.

In order to raise it to an aggravation offence, a person would need to be injured.

Hon MICHAEL MISCHIN: One of the elements of the offence in proposed subsection (2) is the physical prevention of the unlawful activity that is being charged and particularised. To determine whether the element of "physically" has been established, the court would revert to an exhaustive definition. One set of circumstances that if proved beyond reasonable doubt can establish that element of "physically" is the one that has been referred to and that would assist in the establishment of the offence. It is only once the offence is proved beyond reasonable doubt that then, if the circumstance of aggravation is charged in addition to the principal offence, one would revert to seeing whether those circumstances of aggravation have been established by the evidence. It may be that they are not, because the creation or maintenance of a risk of injury to a person or damage to property as a direct consequence of carrying on a lawful activity helps establish the physicality element, but to establish the circumstance of aggravation and hence attract the higher maximum penalty they would have to prove beyond reasonable doubt that the offence was committed in a manner that would cause injury to or endanger the safety of a person, whether the offender or another participating in the offence. The concepts may overlap; the same evidence may help to establish both, but one does not necessarily flow from the other because the terms are different.

Hon ADELE FARINA: I suppose I am saying that when I read these provisions, I am struggling to understand what takes it to the next level of aggravation, because paragraph (c)(ii) refers to the creation or maintenance of a risk of injury to a person. Proposed subsection (1) in "circumstances of aggravation" says "in a manner that causes injury to, or endangers the safety of, a person ..." Therefore, endangering the safety of a person is the same as causes a risk of injury to a person.

Hon Michael Mischin: It can be, yes.

Hon ADELE FARINA: I appreciate that, but if it is not always the case, how would the Attorney General distinguish those two phrases? I am struggling to understand where the line of distinction might sit.

Hon MICHAEL MISCHIN: It may be that if someone is charged with a principal offence on the basis of the physicality—I would have thought that in most cases, if not all, that looking at any of those in the definition is establishing the physicality element—but if they are charged also with a circumstance of aggravation that the circumstances in which the offence was committed was in a manner that caused injury to or endangered the safety of a person and they were able to explain in a way that did not allow for beyond reasonable doubt that there was no endangerment in fact and no injury in fact, then they would not be convicted of the circumstance of aggravation and they would simply be convicted of the principal offence and be subject to 12 months' imprisonment and/or a $12 000 fine as a maximum penalty rather than attracting the higher penalty. The formulation is slightly different and for a different purpose.

Hon ADELE FARINA: I am not too sure that the formulation is that different to make it clear in which circumstances when using that aspect of the definition of physicality would enable it to be raised to the next level of aggravation, but I have made the point and I am happy to move on. We will leave it for the judges to interpret the legislation when it is their turn to do so. Can I clarify that defences under the Criminal Code are applicable to these offences?

Hon MICHAEL MISCHIN: Yes, absolutely. Provisions in chapter V of the Criminal Code set out several exculpatory factors and defences, quite apart from any specific defence that is attached to a particular offence under the code, that apply to all offences under the code and indeed apply to all statutory offences across the

state, quite apart from the code. Questions of unwilled action, unintended event or accidents, honest and reasonable mistakes of fact and not guilty on the basis of unsoundness of mind would all still apply.

Hon ADELE FARINA: A number of the offences proposed in the bill have an element of intention that needs to be established. A number of aspects of the offences that are detailed in the bill have an element that needs to be satisfied, and that is intention—that the person acted with the intention to prevent a lawful activity. For example, proposed section 68AA(2) reads —

> A person must not, with the intention of preventing a lawful activity …

Subsection (3) reads —

> A person is presumed to have the intention …

So the issue of the intention is fairly critical in some aspects of the offences.

Under the Criminal Code, intoxication is a defence. Section 28(3) reads —

> When an intention to cause a specific result is an element of an offence, intoxication whether complete or partial, and whether intentional or unintentional, may be regarded for the purpose of ascertaining whether such an intention in fact existed.

I clarify on the record that it may be possible for someone to avail themselves of the defence of intoxication as a defence to a charge of an offence under the Criminal Code Amendment (Prevention of Lawful Activity) Bill 2015.

Hon MICHAEL MISCHIN: Strictly, it is not a defence; it is more of an exculpating factor that applies, in respect of section 28(3), to offences in which there is an element of having to establish a specific intent—an intent to achieve a particular purpose or end. Yes, intoxication, whether complete or partial and whether intentional or unintentional, is something the court can take into consideration in determining whether that intention existed. So when a charge is contemplated under section 68AA(2)—to intend to prevent a lawful activity in the circumstances set out—and the person is intoxicated, has been slipped a mickey finn or has drunk themselves into a state of disordered thinking, a court can take into account whether they had that particular intention and whether it could be established that they did. It is another factor taken into consideration, yes.

Hon ADELE FARINA: Opposition members have expressed some concern about the scope of clause 4 being much broader than the intended application as stated by the Minister for Police on radio and TV when defending the legislation. To some extent the Attorney General has conceded that point; for example, he has agreed that the bill is neither aimed at, nor limited solely to, protesters. Opposition members have also expressed concern about the meaning of some of the words used in clause 4, such as "thing", and the Attorney General has told us, in effect, that we are being silly or the questions we are asking are stupid because the word is to be read as having its ordinary, everyday meaning. The Attorney General quoted a dictionary definition of "thing" to us.

Hon Michael Mischin: It is consistent with the use of the word in the other existing provisions of the code; it takes its colour from its context.

Hon ADELE FARINA: The Attorney General has suggested that opposition members cannot read legislation, and that they should take some classes on the subject matter and avail themselves of the professional development opportunity that will shortly be on offer. For the record I should state that a number of us on this side of the house have taken classes on how to read legislation, and at least one of us has a law degree—not that I think having a law degree necessarily means people can read legislation, but anyway. However, accepting the advice of the Attorney General that there is always room to improve one's knowledge or expertise in a matter, I decided to refresh my knowledge on how to read legislation. I found this interesting guide from the Parliamentary Counsel's Office, titled "How to read legislation, a beginner's guide". It is not exactly an exciting read, but it does cover the basics. Page 26 reads —

> Being in English, the Act's words usually have their ordinary, everyday, current meanings as recorded in generally available dictionaries.

That backs the statements made by the Attorney General. Yesterday, Hon Rick Mazza used the words "prevention", "hinder" and "impede" interchangeably in a question he asked of the Attorney General. The Attorney General corrected him by saying, "Look, prevention is very different from impede or hinder. If one is merely impeding or hindering, one would not fall foul of clause 4 offences because one has to actually prevent lawful activity", and that it was a matter of degree. I think the Attorney General used the phrase "it depends on the length of time". Although I could see the argument being presented by the Attorney General, I had some sympathy for the argument and view put by Hon Rick Mazza that those words were interchangeable. So, I went to my dictionary and looked up "prevent". The definition was "to keep from happening, esp. by taking precautionary action … hinder; impede". I then decided I had better check the definitions of "hinder" and "impede". The definition of "impede" includes "hinder" and "obstruct", and the definition of "hinder" includes

"to prevent". So, going to the dictionary to clarify my understanding of the ordinary meaning of the words has not exactly helped me much; in fact, it has given weight to the point of view put forward by Hon Rick Mazza that the words are interchangeable.

I think it is wrong to suggest that legislation has but one accurate meaning that we only need to search long and hard to find. That point was made by Hon Michael Kirby, a former justice of the High Court, in a paper he presented to RMIT University, Melbourne, on 13 August 2009. His paper states —

> The notion that a word of the English language has a single, objective and scientific meaning, that had only to be discovered, has gradually given way to a more candid recognition of the choices that face those who interpret the written law and the way in which values and policy considerations can influence the making of those choices.

His paper states that the task of statutory interpretation requires —

> … analysis of the *text*, *context* and *policy* of the statute in question.

Meaning the whole of the statute, which is the point I was trying to make during consideration of clause 1 of the bill. His Honour's paper continues —

> Questions of construction of statutory language are notorious for generating opposing answers, no one of which is indisputably correct.

His Honour then cites a number of cases in support of that statement. His paper continues —

> That makes the task of statutory interpretation so challenging, interesting and important for the content, application and future of the law.

He then explains that it is necessary for judges to explain their reasoning in the decisions they make on the meaning of contested legislation. His paper continues —

> … the judge must try to explain how his or her mind has arrived at a result different from that favoured by colleagues who, by definition, have been trained in the same discipline, apply the same statutory instructions for interpretation and have generally endorsed the same injunctions about the approach that is to be taken in the task.

In clear words, His Honour states that judges may look at the same provisions of an act and come to very different conclusions about the meaning of that provision. That is nothing new and we all know that, and there is a lot of case law in which the High Court has not delivered a unanimous decision, so we are not learning anything. For the Attorney General to suggest that the words used in clause 4 are precisely and well drafted, with only one clear meaning, is not exactly accurate. He is being insincere in making that statement. His suggestion that members of the opposition are being silly or are asking stupid questions when seeking clarification on the meaning of words used in clause 4 or the scope of clause 4, or highlighting that the meaning of the scope is broader than the Attorney General claims it to be, is in my view more of a reflection of where the Attorney General's mind is at than where the minds of the members of the opposition are at, especially when we acknowledge the words of His Honour that judges of the High Court, with decades of training in the application and interpretation of statutory law, will often come to a very, very different conclusion. In his paper, which I recommend members read, he used an example of an instance in which he came to a very different decision from his colleagues in the High Court. It related to the interpretation of the Western Australian Criminal Code.

Hon Michael Mischin: Which provision?

Hon ADELE FARINA: I cannot remember. It is not really relevant. The Attorney General can have a copy of the paper later. The point is that questions are being asked by members on this side of the house and it has been suggested that we are simply wasting time, we do not like the legislation and we are just taking up time. That is unfair and inaccurate. They are genuine questions. The English language is not always clear and words often have more than one meaning. I think we have an obligation in this place to try to clarify what the law that we are passing is saying, or what its intended meaning is. If the Attorney General is correct in his statement that the words in this bill are very clear and have only one meaning, applying the laws of statutory interpretation one would go no further than to read the legislation itself. However, if a judge thought that some aspect of it was ambiguous and needed further clarification, the Interpretation Act would enable that judge to go to extrinsic material, in which case they would go to the explanatory memorandum, which is not much help at all and does not really say anything different than the bill, and also the second reading speech. That is where we have a problem. The second reading speech focuses on protesters, thumb locks and other body locks but the words in the bill are much broader than that. This is where we have started from with the questions that we have been

asking during consideration of the bill. I wanted to put that in context because suggestions have been made that members on this side simply do not understand legislation.

The DEPUTY CHAIR (Hon Alanna Clohesy): I call Hon Adele Farina.

Hon ADELE FARINA: The legislation is complex. If His Honour Michael Kirby is prepared to put that on the record, which he did—we know that the High Court does not always deliver unanimous decisions—the exercise that we have been involved in here is quite fair and reasonable. I encourage the Attorney General to help facilitate that exploration in future rather than continually block it and make statements of a personal nature about people.

I want to conclude by saying that despite the fact that we have sought to explore the meaning of some of the words, I do not think we have got very far. That has certainly been a point of frustration for me. I am fairly confident that we will be back in this place looking at this legislation again as the courts will struggle to apply provisions of the bill because of that lack of clarity, particularly if they have to go to extrinsic materials to clarify the intention of the legislation because it is not clear at all. I take the Attorney General back to the Parliamentary Counsel's Office "How to read legislation, a beginner's guide", which very clearly states that we will not find out the purpose of the bill in the long title, the short title, and often, after reading the whole bill, we still will not understand the intention of the bill. We really need to go back to the extrinsic material available at the time the bill was enacted; that is, the debate in Parliament, the second reading speech and consideration in detail. That is why this process is so important. It is very important and should not simply be waved aside as a waste of time. It is absolutely critical. It is disappointing that we did not receive answers to a number of questions we asked.

Hon ROBIN CHAPPLE: I want to touch on proposed section 68AA(1)(c)(ii), which states —

> a risk of injury to a person (including the offender) or of damage to property as a direct consequence of carrying on the lawful activity.

The Attorney General has quite clearly said that somebody up a tree, for example, was at risk of injury if he or she had to be moved or whatever. I now want to go to the next stage. Somebody such as Hon Simon O'Brien may be standing in the middle of the road wanting to stop a logging truck. No, sorry; he would not. Anyway, assuming someone wanting to stop a logging truck was standing in the middle of the road and the logging truck moved forward and struck that person, that person is then carrying out an activity that has placed him or her at risk of injury. Because the person has now been injured in part of a process, is that person then subject to proposed section 68AA(1)(c)(ii) relating to the physical prevention of lawful activity because an injury has occurred merely by seeking to prevent a lawful activity?

Hon MICHAEL MISCHIN: It certainly establishes the element of physicality that is one of the elements of the offence prescribed by proposed section 68AA(2). That particular paragraph deals with one of several means of establishing that there has been physicality as described under "physically" within the meaning of the act. It does not establish an offence in itself.

Hon ROBIN CHAPPLE: In this case we have established that the person was injured in pursuit of protest; trying to stop a truck moving forward and was injured in that case. As a result of that, is the person then caught by subsection (3), which states —

> A person is presumed to have the intention referred to in subsection (2) —

Which states —

> A person must not, with the intention of preventing a lawful activity that is being, or is about to be, carried on by another person, physically prevent that activity.

That person has physically stood in front of the truck and physically been injured, which is the definition of "physicality".

Hon MICHAEL MISCHIN: The fact of injury, having regard to all the circumstances, may help establish the person's intention, but other elements of the offence also have to be proved beyond reasonable doubt, which is that the activity has been prevented.

Hon Robin Chapple: The person is lying on the ground. The truck has now stopped, and therefore he is being prevented.

Hon MICHAEL MISCHIN: That might hinder the activity. I would not have thought it would stop the activity and amount to a prevention.

Hon Robin Chapple: We're coming back to the points that Hon Adele Farina made—that difference in wording.

Hon MICHAEL MISCHIN: In a sense, and just on that subject, yes, there is a broad definition of "prevent" which may in the dictionary embrace a variety of degrees. However, the use of the word in its context is important and there is also case law to the effect that "prevention" is more than "hindrance". It means to achieve, as much as possible, a stopping or a prevention of an activity. The use of the word "prevent" selectively in this, as opposed to, say, the use of "obstruct" or "hinder"—obstruct being used and having a specific definition in other parts of the Criminal Code—suggests that a specialised and restricted meaning is intended for it in the context of this offence. The courts will, in any event, read narrowly provisions that establish criminal offences. If it is in respect to a criminal provision, the courts will as a matter of course read down the provision as narrowly as possible. If there were the usual formulations, such as that used in obstructing a police officer—hindering, preventing or impeding and the like—then, yes, it would be a very broad provision indeed. But we have eschewed all of that and chosen "prevent", which means "to stop". I would have thought that the courts, if there were any doubt as to the scope intended, would have reference to extreme materials, which would be the second reading debate and what I have said about that, and what Parliament's intent has been having regard to the concerns raised by other members as to the breadth of what might be contemplated. I have answered two questions in that regard now.

Hon ROBIN CHAPPLE: I now want to turn to something slightly different. There are a number of clauses in the Mining Act 1978 which deal with the right of access for mining companies, the right of prospectors, the right of people holding miner's rights and those sorts of things. It states clearly in several places in that act that there is nothing that stops a miner, prospector or fossicker accessing land. In most cases the person has to make some representation to the landholder—say, a farmer or pastoralist—and they are to attempt to contact the person and are supposed to enter into some negotiation. The Attorney General may be aware that in the area of central Greenough, 96 per cent of the residents have supported the concept of becoming a gas-free community and have determined—to use the words—to "lock the gate". There seems to be some misinterpretation of what "lock the gate" means. "Lock the gate" is a legal process whereby they advise, by notices on fences, a person's common law right to enter is expressly withdrawn and admittance is by invitation only to all persons and entities. So this is a process whereby individuals are identifying that contact must be made with them through written form rather than by entry. It is clear that what has been said in this place is irrespective of whether somebody locks the gate, in the case of electricity supply, the miner, or others, can enter the property anyway. I would like to know the Attorney General's view about people expressly withdrawing the common law right to enter property by advising anybody that admittance is by invitation only. If that has legal standing, is that a prevention in the bill?

Hon MICHAEL MISCHIN: Yes, people can withdraw the implied licence to enter property by simply erecting a sign that says "no entry". However, that cannot override the statute law passed by this or the commonwealth Parliament; it never has. A police officer, notwithstanding a sign saying "no entry", is empowered to execute warrants. He may be empowered to do other things depending on the legislation under which he is operating. Occupational health and safety inspectors and environmental protection officers have powers to enter upon property. I hope the honourable member is not suggesting that a farmer can say, "Do not enter", to environmental officers. Union officers can have a power, I think, under the labour relations legislation to enter upon property for specific purposes, and they are not even public officials. If there is a right to enter, notwithstanding the withdrawal of licence or permission, it is a right that can be enforced, and it has always been the case and cannot be otherwise.

Hon ROBIN CHAPPLE: It is my understanding that there is some legal interpretation about stating that it is expressly withdrawn, but I am not a lawyer so I will leave that up to others to determine whether it has that legal status. I know it does in other states; I am not sure how it fits in other states.

Hon Michael Mischin: I thought I conceded that was the case.

The CHAIR: If the Attorney General could rise to his feet, so that it is clearly on the record, to answer that comment.

Hon Michael Mischin: It is okay.

Hon ROBIN CHAPPLE: I then go to the point that the issue of locking the gate, as it has been described, is not actually the physical activity of locking the gate, so to speak, but denying access. We have heard already from our National Party colleagues that access to land is possible at all times. Given that a community is saying, by signs erected on all their fences, that they do not wish an activity to take place in their region and they follow that up with different levels of physical impediment, whether it be blocking the road, placing tractors in the way of drill rigs, or the like, are all those elements caught by this legislation? They are not necessarily thumb locks or

lock-on devices, but they are big pieces of equipment on roads, and stuff like that. As we have seen in France, the French farmers are very adept at shutting down the whole of France by using tractors. Are all of those things caught by this legislation? Is a farmer who puts a tractor in the way of the progress of a drill rig caught by this legislation?

Hon MICHAEL MISCHIN: It is caught under a number of pieces of legislation. I trust that the honourable member is not suggesting that even a community can divorce itself from the laws applicable to the rest of the community to which it is subject by simply saying, "We don't want to obey them."

Hon Robin Chapple: But they might take action; that is quite clear.

Hon MICHAEL MISCHIN: I take it the member is not endorsing the notion that a community can say, "We don't like this and therefore it shall not take place." I could say that I do not want to have an environmental protection officer on my farm telling me what to do, and therefore I do not want to let them on. He is not suggesting that, is he?

Hon Robin Chapple: I am not endorsing anything; I am just making the observation. Many shires make by-laws restricting certain practices.

Hon MICHAEL MISCHIN: That is true, and shire officers also have powers to enter onto private property to enforce elements of their by-laws.

Hon Robin Chapple: I think you understand the element of my question, so let us not have this broad dialogue.

Hon MICHAEL MISCHIN: It is relevant to the situation, because the Local Government Act might empower officers to enter onto private property, whether or not the owner likes it, or whether or not even several owners like it, in order to enforce their by-laws, as do the Health Act, the Occupational Safety and Health Act, the Mining Act and various other acts. If there is a power to do certain things, and the exercise of that lawful activity is prevented, within the meaning of this legislation, then, yes, the person is potentially subject to it. I do not know whether one would resort to that, as opposed to the particular provisions under the relevant legislation, which I would have thought would be far easier to prove, because it would not require a prevention by simply parking a tractor in someone's way. But if it involved impeding or hindering and the like, the person would be charged with that. If someone, for example, is committing an offence under the Mining Act in relation to mining activity, that is the offence with which that person would be charged, and quite properly so.

Hon ROBIN CHAPPLE: Such a person would be charged with impeding, and not, as defined in this bill, with physical prevention. There is a narrow laneway that is the only access to a drill pad—Manari Road is a good example—and somebody who had rights to that land as a lessee or whatever decided to put a combine harvester in the middle of the road. It is impossible to get by a combine harvester. Is that caught by this legislation?

Hon MICHAEL MISCHIN: If a person intended to prevent a lawful activity and, in fact, physically prevented that activity, yes, they could be subject to proposed section 68AA(2). Whether it is a mining company, an environmental protection officer, a WorkSafe inspector, or a police officer who is prevented, the person would tend to be charged under the legislation under which that officer is exercising their power. In the case of mining operations, we would be looking at the Mining Act. I would have thought it would be very difficult to establish an absolute prevention in the meaning of what we are talking about, given that there would be other means of going about that exercise, including cutting through fences, and all sorts of other means.

Hon ROBIN CHAPPLE: I was more than happy to mostly accept what the Attorney General was saying, up until the point at which he quantified it. The Attorney General is saying that in most cases people can go around the object. If he has been out to many farms or pastoral stations, he will see that that is not an option. That was the very point that was identified around James Price Point. There was one road and it was not possible to move either side of it. It could be used only one way. People rode their camels down the road with flags on them, or cemented vehicles into the roadway, and it became a problem. I have great respect for the pastoral and farming community. They tend to be fairly strong willed. From time to time they do not like environmental officers moving onto their property, as a number of prospectors do not like environmental officers going onto their leases. Quite often they go to some lengths to inhibit access. I am trying to determine whether, in times of prohibition and denial of access through physical means to all sorts of things that cannot be got around, that would be caught by this legislation.

Hon Michael Mischin: I have already explained that several times.

Hon ROBIN CHAPPLE: Thank you.

Hon KATE DOUST: I want to raise a couple of matters. I listened to what Hon Sue Ellery said about the Premier's comments on how this legislation would be rarely used. Given the information in the second reading speech, the comments by the Premier, and the comments by Hon Liza Harvey that this legislation had its genesis in the protests at James Price Point and in the forest issue, and that the Premier said that the company involved in James Price Point backed away because of the verbal threats and insults aimed at the staff, our focus pretty much throughout this debate has been around those types of environmental protests. As we look at the two definitions in proposed section 68AA, I was thinking about other types of protests and what it would take for those other types of protests to be picked up by this and to pass what the Attorney General regards as a different threshold from those in other types of legislation and be dealt with in this legislation on what the Premier has said would be rare occasions.

One came to mind that is a bit unusual, but it has been in the press of late. It is a fairly regular protest that occurs out towards Midland, at one of the abortion clinics. On a regular basis, a prayer group, or a group of individuals stands nearby. I would assume that they have some sort of placard or banner, and I understand that they are there every week. They are either talking to people or attempting to persuade people not to enter that particular location, be they people who work there or people who want to use the service. I will not say that I personally am opposed to what they are doing; I am just raising this as an instance of something different. If enough people complained to the police about this type of peaceful protest activity—I imagine that most of them would be women, although I am not sure—and any of the components of the definition of "physicality" were applied in that people said that they had the view or the perception that they were being prevented physically from entering the place, or there may be some implied threat if people attempted to enter the location, would that type of peaceful protest be picked up under this provision, given that the protesters most probably would not accept a move-on order? I do not know whether they are standing on the footpath or on the property itself because I have not been to that particular property.

Hon MICHAEL MISCHIN: Dissuasion is not in itself prevention, but if the behaviour meets the elements of the prescribed offence, then yes. Whether they categorise it as a peaceful protest or otherwise, whether they categorise it as a conscience matter or however they categorise it, if it interferes with the lawful activities of others to the level of prevention, as prescribed under the offence-creating provision, and the other elements can be established, then yes, they are captured by it. However, in the vast majority of cases, there would be no need to resort to this, because other provisions would be far more effective and easier. The member says they would not accept a move-on notice; they do not have a choice. If they are given a move-on notice and they do not obey it, they can be arrested. That is how these things have been dealt with in the past and can continue to be dealt with in the future. But if they decide to use thumb locks, barrel locks, cars parked at the only entrances with cement drums in them that affixes the vehicle to the ground and also fasten them into it in order to prevent people from going about their lawful activity, then yes, they would also fall foul of this and be dealt with accordingly.

Hon KATE DOUST: That is interesting. I just wanted to get that clarified. Proposed subsection (4) states —

> (4) A court convicting a person of an offence … may order the person to pay some or all of the reasonable expenses …

I understand part of the discussion has been about the additional cost to police, in terms of the number of police hours applied to remove those protesters from those locations, or to remove the items the protesters have attached themselves to. Proposed subsection (4)(c) states "by a person or body whose lawful activity is prevented by the offence". If an organisation had to spend money cleaning up after the protest was over, what actions would a person or an organisation be able to claim for this? Are we talking about loss of time for its staff or other types of moneys?

Hon MICHAEL MISCHIN: The entitlement to reimburse reasonable expenses is carefully prescribed and must be done by the court that convicts the person of the offence. There is a discretion that it may order the person to pay some or all of what are reasonable expenses of or incidental to action reasonably taken in removing a physical barrier to the lawful activity that has been created or maintained by the person—to wit, the offender—incurred by a person or body whose lawful activities were prevented by the offence. It is not lost opportunity costs and the like; it is simply related to the removal of the barrier.

Hon LYNN MacLAREN: I will follow on from that issue that has just opened up, because I have an amendment on the notice paper regarding this. I want to clarify whether this is the appropriate time. Can the Attorney General tell us why existing provisions that allow the police to recover the cost of criminal behaviour cannot be used?

Hon MICHAEL MISCHIN: It is because none of the existing provisions would cover what is embraced in proposed subsection (4). That is also the case with creating false belief. Section 171(3) of the Criminal Code states —

> A court convicting a person of an offence under this section may order the person to pay all or some of the reasonable expenses of or incidental to any action that was reasonably taken as a result of the offence, whether or not by the Police Force or emergency services.

There are also provisions regarding out-of-control gatherings under section 75B(5), and section 338C(4) deals with creating false apprehension as to existence of threat or danger—for example, bomb hoaxes and the like—whereby an offender can be ordered to pay the amount of any wages attributable to, or expenses reasonably incurred with respect to any investigation, inquiry or search made in that matter. The current provisions do not cover it, hence the specific powers being proposed.

Hon LYNN MacLAREN: Forgive me, Attorney General, because I was distracted when Hon Kate Doust asked a question. If she did cover this, just let me know. If a third party is engaged to remove protesters, can they seek to recover costs? The Attorney General has used the example of when third parties with expertise or complicated equipment have to be brought in to remove protesters. Can they seek to recover their costs? It does not seem as though anything in the bill reflects that.

Hon MICHAEL MISCHIN: It has nothing to do with removing protesters; it has everything to do with removing a physical barrier to unlawful activity created or maintained by the person. In the case of specialists that police might have to engage to assist them with that task, the police would be billed and that could be recovered, which is not unreasonable.

Hon LYNN MacLAREN: I see the Attorney General's point. I was talking about a protester who is intricately linked to whatever is preventing a lawful activity, and that would include the barrier to which they are attached if that is the case. Could the Attorney General enlighten me about how third parties recoup these costs?

Hon MICHAEL MISCHIN: Because there are costs that have been attracted by the police officer who is responsible for removing that barrier and likewise by persons or bodies whose lawful activity is prevented by the offence. If there was a need for the person whose lawful activity has been prevented to remove the barrier, it is not unreasonable that they would recover the costs from the person who established that barrier.

Hon LYNN MacLAREN: Could the Attorney General please explain how that would happen? Just step us through it. If a contractor is brought in to remove a physical barrier that is preventing a lawful activity, how do they recoup their costs? Do the police pay their invoices? What mechanism exists by which they are entitled to recoup their costs?

Hon MICHAEL MISCHIN: The police would pay the invoice that is rendered to them, and an order can be sought. Whether the court grants that order is another matter. It is a matter solely for the court to decide whether it thinks the expenses are reasonable and connected in the appropriate way to the removal of the barrier, and it is predicated in any event upon there being a conviction.

Hon ROBIN CHAPPLE: I refer to comments by the Attorney General in last night's uncorrected *Hansard* when he responded to Hon Darren West about the guy who chained himself to the ship. He identified that if people were handcuffed, or indeed chained, there would be other ways of getting them off, and they would probably be charged with trespass. Under proposed section 68AB, preparation for physical prevention or trespass, a person must not make or adapt—forget those two parts—or knowingly possess a thing for the purpose of using it, or enabling it to be used, in the commission of an offence under either trespass or proposed section 68AA. I have not really heard a cogent response to this question: at what stage do we determine that it needs to be one of those components that is made or adapted rather than just being in possession of; for instance, a heavy chain and a set of padlocks? Why is there suddenly a differential between somebody who has knowingly attached themselves to a sheep ship and this provision, which is the preparation for physical prevention or trespass? Is there a different definition under new section 68AA, the act of being tied onto a ship, or is there a difference under "preparation"?

Hon MICHAEL MISCHIN: The bill states that a person must not make or adapt—some of these circumstances might not be applicable to the particular facts of the case—or knowingly possess a thing for the purpose of using it or enabling it to be used in the commission of trespass. Rather than getting to the point at which the accused has actually affixed chains and locks and so forth to himself on board the ship, this provision will apply if he is found about to go up the gangway carrying chains and locks and he says that he is going to chain himself to a sheep. Therefore, the person can be stopped at that stage.

Hon ROBIN CHAPPLE: I understand that, and that is quite clear. Had the person who the Attorney General identified to Hon Darren West yesterday actually chained himself to the ship, rather than be prosecuted under proposed section 68AA, he would most probably be charged with trespass because there is a workaround. In this case, is there a workaround that the person would be charged with someone else who was carrying that same chain to the ship?

Hon MICHAEL MISCHIN: No, that is why it is there. We are looking at one circumstance in which the actual purpose has been affected by the person affixing themselves to something. That can be by way of something that does not amount to a prevention, in which case we could look at the charge of trespass. If it did amount to a prevention because of the character of the thing they are using to affix themselves with, we would resort to this. However, a person could be charged with this offence in preparation of committing it in order to stop them, it is hoped, from effecting their purpose, which is to trespass in a particular way. Can it result in more than one charge? Yes, technically it can. Whether more than one charge would be preferred is a matter of judgement and whether or not the same evidence is established in both charges. If that is the case, there is a protection under section 11 of the Sentencing Act. In any event, it gives rise to the question of double jeopardy. To the extent that there is a considerable overlap in the circumstances, it may very well be that a court will impose no additional penalty, or if it is a term of imprisonment it will be made concurrent or whatever it happens to be to accommodate the justice of the situation.

Hon LYNN MacLAREN: I move —

Page 3, lines 14 to 20 — To delete the lines.

I still have some remaining concerns, even after all the questions have been addressed by the Attorney General. It is my understanding that this amendment would address one of the problems that has been raised by criminal lawyers and UN human rights lawyers about the reversal of the onus of proof. The problem with these lines is that they are also giving police licence to assume guilt and then push the responsibility to prove otherwise onto the person about whom the presumption has been made. The major difficulty with that in this context is that the police may assume guilt on the basis of what might be called indicators of stereotypes. That is, if a person is in the vicinity of a protest and they are wearing a "Save the Forest" T-shirt, this might be considered by police as "circumstances that give reasonable grounds for suspecting". It can lead to what is called profiling and it weakens the checks and balances on the police when they are taking a decision to interfere with an individual's freedom and privacy.

Hon KATE DOUST: Although I understand what Hon Lynn MacLaren is trying to do—she thinks that by making these changes it might improve the bill—the opposition is of the view that we cannot salvage this bill; nothing will save it. No amount of amendments to this legislation will make it more palatable. Sadly, on this occasion, we will not be supporting the member's amendment.

Hon MICHAEL MISCHIN: The government cannot support the amendment. I have already explained how the clause would operate and how its operation is consistent with analogous offences and the limited scope of its operation and the thresholds that must be reached before it even kicks into operation. The government will not support the amendment.

Division

Amendment put and a division taken, the Chair (Hon Adele Farina) casting her vote with the noes, with the following result —

Ayes (2)

Hon Lynn MacLaren	Hon Robin Chapple *(Teller)*

Noes (30)

Hon Martin Aldridge	Hon Kate Doust	Hon Nigel Hallett	Hon Helen Morton
Hon Ken Baston	Hon Phil Edman	Hon Alyssa Hayden	Hon Simon O'Brien
Hon Liz Behjat	Hon Sue Ellery	Hon Col Holt	Hon Martin Pritchard
Hon Jacqui Boydell	Hon Brian Ellis	Hon Peter Katsambanis	Hon Sally Talbot
Hon Paul Brown	Hon Donna Faragher	Hon Mark Lewis	Hon Ken Travers
Hon Jim Chown	Hon Adele Farina	Hon Rick Mazza	Hon Samantha Rowe *(Teller)*
Hon Alanna Clohesy	Hon Nick Goiran	Hon Robyn McSweeney	
Hon Peter Collier	Hon Dave Grills	Hon Michael Mischin	

Amendment thus negatived.

Committee interrupted, pursuant to standing orders.

[Continued on page 455.]

Sitting suspended from 4.15 to 4.30 pm