CRIMINAL ORGANISATIONS CONTROL BILL 2011

Second Reading

Resumed from 22 March.

HON SUE ELLERY (South Metropolitan — Leader of the Opposition) [5.33 pm]: The Criminal Organisations Control Bill 2011 is a serious bill that addresses a serious matter—that is, the role of organised crime. It bestows some very serious powers on the courts and police. It provides for certain organisations, upon application, to be declared criminal organisations. It also provides an offence for anyone to recruit to such an organisation once it has been declared.

Once an organisation has been so declared, there are further powers available to police to apply for a control order on an individual who is a member of such an organisation, or who regularly engages in criminal behaviour. It provides for both interim and final control orders. The information that may be relied on in determining the application for a control order—that is, criminal intelligence—can be protected; that is, not made open to people who might be affected by such a control order.

The triggers for a control order include: that the organisation of which a respondent is a member must be a declared criminal organisation, and that the declaration must have been published; that the respondent is a former member of a declared organisation; that the respondent has an ongoing involvement with a declared organisation; that, even though the respondent is not a member of a criminal organisation, he or she regularly associates with the declared organisation; or that the respondent engages in, or has engaged in, serious criminal activity.

It is worth noting at this point that, if members were to read the second reading speech as it was published, as opposed to the second reading speech as it was read into the chamber, they would see an additional trigger in the published version that does not appear in the bill before the house; that is because it was amended in the other place before it came here. The second reading speech that was provided to members on the day that it was read in this house is inaccurate, although I am assured that *Hansard* does not reflect that. I will ask the parliamentary secretary to confirm that when he makes his reply; he might recall that we had a conversation behind the Chair on this matter.

What can a control order do? A control order can have what are referred to as standard conditions or nonstandard conditions. Standard conditions include: that the person is not able to associate with another person who is subject to a control order, and there are some exceptions around that; that the person is not to receive funds from, or provide funds to, a declared organisation; that the person cannot be involved in any aspect of the organisation in any event that may be open to the public; and that the person cannot recruit others to become members of a declared criminal organisation.

The nonstandard conditions, which may be imposed at the discretion of the Supreme Court, include a prohibition from carrying on any prescribed activity which includes, but is not limited to, working in the gambling, betting, motor vehicle and security industries, as well as a broad category of occupations that require an authorisation, which are to be prescribed by regulations, so we do not yet know what those are. Nonstandard conditions also include the prohibition of the possession of firearms or other forms of weapons; prohibition of the person under control from going to certain places; and prohibition of the person under control from accessing one or more forms of communication or technology that are specified and set out within that order.

The opposition supports the objectives of the bill, but these are very, very serious powers and they address very serious criminal activities. The question remains about whether, in the drafting of this bill, the government has properly covered all bases. While the opposition does not intend to stand in the way of this legislation, there is an amendment standing in my name on the supplementary notice paper, and I will talk about that when we get to that point.

It is important in legislation like this to eliminate the prospect of success of any potential challenge to the legislation by those who would seek to resist the powers of the bill. It is worth taking note of the history of how this bill came before this house; other jurisdictions have tried and failed to address these sorts of powers. Although I am assured that the Western Australian government took into account matters in other jurisdictions that ended up before the High Court, there still remains the issue of whether the government has got it right with the legislation before us.

One of the jurisdictions that tried and failed was South Australia, where the first version of its legislation gave the executive the power to declare a criminal organisation. There was a challenge around whether a member of the executive ought make such a declaration. In New South Wales, the issue was around giving reasons for a

decision. Under the NSW legislation, reasons for a decision did not have to be provided. It was argued that that went to the integrity of the court. The WA bill has addressed that.

We say the WA legislation still leaves a serious question, and therefore is open to challenge: who hears the applications for declaration of a criminal organisation? A non-lawyer like me might describe "persona designata" as a cute technical legal term; that is, a person designated. A current or retired judge hears and determines the application, but not as a judge, even though he or she may still be a judge. In the capacity in which they determine the declaration, they are hearing it not as if they were a judge but as a person acting in their own capacity. They are exercising very powerful laws to determine that. Some of the evidence will effectively be in secret. Some of the evidence may well be deemed to be protected as it has come from criminal intelligence; that is, it is not to be made available to those whose rights will be restricted by any such decision. That is arguably incompatible with the integrity and the independence of the judicial institution. We say that it would be better if someone other than a judge of the court was to hear those applications.

The essential differences between this legislation and the legislation in the two other jurisdictions is in who hears the application for a declaration. In Western Australia, under the bill before us, it is this persona designata, who is a current or retired judge, although they are not acting in that capacity. The other difference is that the WA legislation has effectively the powers of a royal commission to address cases in which witnesses may not give any evidence. I guess that is to address the issue that has confronted attempts to get evidence from, in particular, those who are deemed to be members of outlaw motorcycle gangs in which the "code of silence" has operated. A decision needs to be made, either by the Corruption and Crime Commission or the police, about whether the protected information is to be protected. In terms of who hears the application—that is, the persona designata; a judge or a retired judge—they are so appointed after the receiver of the application, who becomes a designated registrar, as I understand it, consults the Chief Justice. The declaration lasts five years. I am advised that in the other jurisdictions they are permanent but they can be revoked.

I now refer to the control orders process. The process is the same across the three jurisdictions of South Australia, New South Wales and Western Australia. The orders are heard in the Supreme Court. Rules of evidence apply, but I will come back to that. When we are dealing with the control order, the rules of evidence apply, but that evidence can include the declaration, which may well have been declared on the basis of secret information. They can be interim or final. They can have protected submissions from the parties who are respondent to it, if the court so determines it is to be protected. If it is so protected, the respondent may not know what evidence is being relied on. The court must give reasons as to its decision, but again that is qualified by the fact that some of the evidence that may be relied on may well be protected evidence. There is the capacity to appeal against a control order through the Court of Appeal. The control order can also be made against young people; that is, people between the ages of 16 and 18. I was advised in the briefing that that order must be executed separately. There is a particular list of conditions.

The other issue I want to touch on is the question of how effective this might be, given that we exist in a federation and there are state barriers that criminal organisations do not necessarily recognise. I am advised that WA will register both a declaration and a control order from interstate as if it were one of our own, and that reciprocal recognition arrangements will be put in place. I have a question around the monitoring and review of this legislation. That is an important issue because we are dealing with very serious powers. The legislation states, I think, at part 8 —

Hon Michael Mischin: Part 8.

Hon SUE ELLERY: I think so. Can you take me to it?

Hon Michael Mischin: Clause 157, "Parliamentary Commissioner to monitor exercise of powers".

Hon SUE ELLERY: Yes. I think I had written it down as clause 158. The Commissioner of Police must provide a report to the parliamentary commissioner; that is the Ombudsman. The monitoring and review provisions say at 157(1), in part —

> … the Parliamentary Commissioner is to keep under scrutiny the exercise of powers conferred on the following persons under this Act —
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> (a) the Commissioner of Police;
>
> (b) police officers.

It states at clause 158(1) —

> The Parliamentary Commissioner must, as soon as practicable after the first, second, third and fourth anniversary of the day on which the monitoring period begins …
>
> (a) prepare a report on his or her activities …

(b) provide a copy of the report to the Minister and the Commissioner of Police.

…

(4) The Minister must cause each report to be laid before each House of Parliament …

I am wondering why it needs to go to the minister before it comes to the Parliament. The parliamentary commissioner might decide to do that as a matter of courtesy, but why does the legislation provide that the parliamentary commissioner, who is an officer of the Parliament, does not in fact report directly to the Parliament? We are talking about very significant powers, which, if they were to be abused and used against those who were not engaged in criminal activity, for example, could result in very serious effects on a person's capacity to live their life and to do the work that they normally do and all the other sorts of things we take for granted. I ask the parliamentary secretary to explain why the government took the view that an officer of the Parliament must report to the minister before that officer reports to the Parliament. As I said, we support the bill, and we support the objectives and the intent. We are not convinced that it will not be susceptible to a challenge, and that is why I will move the amendment when we get to that point.

Hon Nick Goiran: Will you take an interjection?

Hon SUE ELLERY: Sure.

Hon Nick Goiran: You mentioned earlier that the South Australian legislation failed because of the use of the executive.

Hon SUE ELLERY: Yes.

Hon Nick Goiran: As I understand, the amendment is to bring in the Corruption and Crime Commission. Could it be argued that it is part of the executive?

Hon SUE ELLERY: No. The executive is the government of the day, but if a constitutional lawyer wants to point out something different to me, they may, but I think there is a difference.

With those comments, I think I will leave my further comments until we get to the point at which I can move the amendment. However, I make the point again that this is serious legislation. It is attempting to address a very serious problem, and we do not want to stand in the way of it, but if we are going to do something like this, with this level of powers, we ought to do it in a way that minimises the capacity for those who would seek to continue to operate outside the law to challenge it through the courts and overturn it.

HON GIZ WATSON (North Metropolitan) [5.51 pm]: I rise to make some comments on the Criminal Organisations Control Bill 2011. The purpose of this bill is to provide for the declaration of a specific organisation as a declared criminal organisation and for the making of control orders for the purpose of disrupting and restricting the activities of organisations involved in serious criminal activity, their members and associates, and certain other persons who engage in serious criminal activity. The bill also provides for the imposition of criminal sanctions on persons who recruit members for such organisations, or finance or support them in other ways. It amends a number of acts: the Criminal Code, the Criminal Property Confiscation Act 2000, the Evidence Act 1906, the Misuse of Drugs Act 1981 and the Sentencing Act 1995. As the Leader of the Opposition has said, quite rightly, this is very serious legislation, with some very serious consequences. In our view, it is another attempt by the state government to deal with organised crime through the banning of declared organisations and through control orders for their members.

It has already been noted that attempts at similar legislation in New South Wales and South Australia were challenged in the courts, and in each case the legislation was declared invalid. I understand that this bill has made some changes to try to address those concerns, but I think it is worth pointing out the reasons given in those two decisions so that the house is clear about what came up with regard to similar legislation in other states. I refer to a report from the government of South Australia's Attorney-General's Department entitled "Combatting Serious and Organised Crime", dated August 2011. At part 4 of that report, it gives a brief summary of those two cases. About halfway down page 8, under the title "Repair of the Serious and Organised Crime (Control) Act 2008", which is the title of the South Australian act that was challenged, it states —

> On November 11, 2010 the High Court decided that where the Magistrates Court was required to make a control order on a finding that the respondent was a member of a declared organisation under SOCCA, —

That is the acronym for the act —

> the court was acting at the direction of the executive, not as a court within the meaning of Chapter III of the Commonwealth *Constitution* and that section was, therefore invalid … The effect of that decision was that this part of the legislative scheme in the Act is inoperable.

In relation to the New South Wales case, it states —

> The High Court more recently heard a challenge to the New South Wales equivalent of SOCCA: *Wainohu v State of New South Wales*. The New South Wales legislation is materially different from SOCCA in that the decision whether to declare an organisation to be a criminal organisation rests, not with the Executive, but with judges who have been nominated for the task. The High Court declared the whole Act invalid. The Court found that a key section of the Act was invalid (and the Act as a whole fell as a result) because the Act said that a judge did not have to give reasons for making a declaration and because it is an essential component of the judicial function required by Chapter III of the Commonwealth *Constitution* that a judge give reasons.

Both those acts ran into trouble for different reasons. Again, I acknowledge that this bill has been drafted to overcome those two issues that arose but, like the Leader of the Opposition, I do not think that necessarily means that this bill, if passed, will not be subject to similar High Court challenges, and I will go into that in a little detail further on.

The verdicts of the High Court send some very clear messages to us as parliamentarians. The first is that the integrity, independence and authority of the court need to be maintained in determining whether a person charged with a criminal activity is guilty of the crime and punishing them accordingly if they are. The Attorney General should not have a role in the decision whether an organisation is to be a declared a criminal organisation.

Whereas I note that this is not the case in the bill before us, the bill even goes as far as to contain a declaration relevant to this point in clause 28. Similarly, the issue about the decision maker being required to provide reasons for the decision is covered in the bill. Therefore, although it appears that the concerns of the High Court have been addressed in the bill before the house, other aspects of this bill may yet result in challenges.

The bill contains mandatory detention provisions. An organisation is declared a criminal organisation by a designated authority, which could be a judge or a retired judge, and the relevant control order that is based on that DCO then has to be made by a Full Bench of the Supreme Court. In our view, this system is wrong. The DCO decision will have a significant impact on any individual in terms of their liberties. Therefore, that decision should also be made by a Full Bench of the Supreme Court in the first place. Also, the application process requires that an advertisement be placed in the *Government Gazette* and in a Western Australian newspaper, but the grounds for the application do not have to be part of that application. It must be required only to indicate the possible consequences if such an application were successful. This shows that the government is not committed to an open and accountable process, in our view. The rule of evidence does not apply in the process. In fact, secret intelligence can be used in the process. The respondent will not have an opportunity to challenge such intelligence in the court.

I think it is worth noting that there has been some commentary, as we would expect, in the press on this bill. A quote from an article in *The West Australian* entitled "Lawyers hit back over bikie laws", which was published in November last year, states —

> Lawyers have criticised the State Government's proposed bikie gang control laws as "populist" and said they are the latest example of WA politicians' "law and order auction" to be the toughest on crime.
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> …
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> But the WA Law Society and Criminal Lawyers Association said their opposition was chiefly based on the mandatory sentencing provisions, which they said stopped judges considering individual circumstances.

It is also worth putting on the record the comments of a criminal lawyer, Hylton Quail, who was until recently the President of the Law Society of WA. I will quote from his final report in which he made some comments specifically on this legislation. His comments were taken from the December 2011 edition of *Brief*. He said —

> As I write, the public sex offender register which we and others, including the WA Police Union, have vigorously opposed is about to become law. Anti-association laws which include mandatory imprisonment provisions for those who commit offences in association with a 'member of a declared criminal organisation', have been introduced to parliament. For example, a person charged with minor property damage or possession of a joint of cannabis will face mandatory imprisonment for two years if the offence is committed in association with such a person …

That is clause 181 of the current bill. He continues —

> Even innocent association between members of declared organisations will be an offence punishable by up to two years imprisonment …

That is clause 99. He continues —

> When I read the Bill the mechanics of it, albeit not its purpose, reminded me of the reviled Internal Security Act 1982 which in another time and place prescribed a three year maximum for association between members of 'unlawful organisations' …

He then says —

> We should be grateful for small mercies.
>
> The introduction of these various Bills in the last parliamentary session of the year suggests that we may be entering the run up to another 'law and order' election next year. I hope I am wrong, but if it proves so the Society must again stand firm in opposing election promises, from both sides of politics, which erode important civil liberties and other principles we hold dear. I have come to learn that successful engagement in law reform, particularly in criminal law, can be measured not only by the success of pro-active Society initiatives but also by preventing bad laws being passed. I am very proud of the job the Society has done in holding Governments of both political persuasions to account. Through public education, lobbying and an effective media campaign the Society was instrumental in defeating proposed arbitrary 'stop and search' powers.

Sitting suspended from 6.00 to 7.30 pm

Hon GIZ WATSON: Just before we broke for dinner I was quoting Mr Hylton Quail from the Law Society of Western Australia and I hope at some point I might have my notes returned by Hansard. They are here; that is great. That is very useful because I think I might refer to them again in a minute. In the Greens' view, this is another bill that was hastily conceived during the very brief period of the last election campaign and it is again a classic populist bill to tackle what we all agree are serious concerns about organised crime. However, the question is whether this bill will be able to achieve in this regard. Although we do not disagree that there are some issues to do with serious crime that still need to be addressed, we argue that this bill presents some serious concerns that I will now outline.

Our concerns are, firstly, that the declared criminal organisation decision—whether an organisation is to be declared—is to be made by a designated authority instead of the Full Bench of the Supreme Court. Secondly, the use of retired judges is not appropriate, given the significance of an organisation being declared a criminal organisation. Thirdly, the rules of evidence do not apply in the court proceedings, secret intelligence is the basis for the decision and this information cannot be challenged in court. Fourthly, although the designated authority is not mandated to make the DCO decision, the consequences of the DCO decision are in fact mandated. This does not comply with the integrity, independence and authority of the courts. Under clause 31, the designated authority will act in a personal capacity and not as a member of the court, and again, in our view, this is in breach of the integrity, independence and authority of the courts. The mandatory detention provisions for breach of a control order stop judges from having the capacity to consider the individual circumstances of any offence, and again we consider that that is a breach of the integrity, independence and authority of the courts. Significantly, this legislation also breaches fundamental human rights with regards to the freedom of assembly, namely article 21 of the International Covenant on Civil and Political Rights, which of course was signed and ratified by Australia. Finally, the DCO order remains in place after an organisation changes its name or in the case that some members of the controlled organisation join a different organisation. In our view such provisions are a breach of the rule of law principle; that is, you are entitled to be considered innocent until proven guilty. An automatic shift of the status of DCO to a different organisation breaches provisions of natural justice, especially the right to be heard in relation to that change. Therefore, there are a number of reasons we will not support the bill and I want to go into a bit more detail about those, having outlined what they are.

A designated authority is to be established to make a decision about whether an organisation is to become a declared criminal organisation once an application has been received. A designated authority can be a judge of the Supreme Court or a retired judge other than from the Supreme Court. A single judge, in our view, is problematic because that judge will lack the support of the court and, for example, would usually not have a registrar to assist as required in clause 7(5) of the bill. To give an organisation the status of DCO is a much more wide-ranging decision and should be made, as I said previously, by the Full Bench of the Supreme Court. Control orders are a second step that could be made by a single judge as the designated authority, however, decision-making by a retired judge should not be allowed. In our view when a judge retires there are good reasons for it. Either they have reached 70, which, I think, is the retirement age for judges or they have resigned of their own volition. To bring people back to serve some other quasi-judiciary function I think is —

Hon Michael Mischin: Don't we use retired judges for royal commissions and the like?

Hon GIZ WATSON: We do.

Hon Michael Mischin: So are you saying that we shouldn't be doing that?

Hon GIZ WATSON: I would argue that they are special cases. They are stand-alone and they have specific time frames.

How can a retired judge perform the function that we would normally expect a court to be performing? Clause 7(5) makes lodging the application with the registrar compulsory. The registrar is usually part of a court and a retired judge would not have a registrar available and perhaps in response, the parliamentary secretary might indicate how that is meant to operate in a practical sense. The retrospective registrar will be designated by regulations and will be able to pass things on to a judge. A retired judge has chosen to no longer be available for judicial work. Allowing the government to appoint a retired judge as a designated authority appears short-sighted and has the potential to transgress the independence of the judiciary. According to the Judges' Retirement Act 1937, a judge retires either at their own request or upon resignation and it seems to me, having debated in this place the issue we had before with judges not having a retirement age, that there certainly have been cases in which judges have reached their use-by date and have not resigned, and at least we now have a fixed time when judges resign, and I do not think we should be bringing people back out of retirement once they have reached that age. We might have a difference of opinion on that.

Hon Michael Mischin: We do that anyway, don't we, when judges have their terms extended beyond their retirement age for particular purposes? We have a coroner at the moment who has been appointed to assist the Coroner's Court, who I think had retired. What's the problem? Do they suddenly turn sour at age 65 or something?

Hon GIZ WATSON: Seventy is the retirement age, actually.

Hon Michael Mischin: Seventy then—extraordinary!

Hon GIZ WATSON: My next point is about the fact that the designated authority will be given the powers of a royal commission. The position of the designated authority is said to be that of a royal commission, and section 5 of the Royal Commissions Act 1968 limits the role of a commission to inquiries and reports on specific matters and, if within the terms of reference, to make recommendations. Although usually certain findings are made by such commissions, recommendations often do not carry much weight. I note that recent royal commissions—for example, the Mahoney inquiry—have made recommendations, but not many have been implemented. Many of the 339 recommendations of the Royal Commission into Aboriginal Deaths in Custody, which submitted its report more than 20 years ago, have still not been implemented.

Only a court should make a decision of such magnitude. The issue is a question of law and the Supreme Court is best placed to make that decision regarding a declared criminal organisation in the first place. In terms of the designated authority not being a court, we believe that although the Attorney General has made attempts to maintain the integrity and independence of the authority of the courts, the bill still breaches the separation of powers. Clause 31 clarifies that the designated authority does not act as a court but acts in a personal capacity. This declaration is surprising and confusing at the same time. My question to the parliamentary secretary is: do similar provisions exist in other jurisdictions in this regard whereby judges act alone; and, if so, in what capacity?

Taking the designated authority outside the court system breaches the principles set out in the High Court decision and—along the same lines as what the Leader of the Opposition said—in our view this may also lead to a challenge in the High Court. Similar provisions for a judge acting in a personal capacity as issuing authority for warrants requested by the Australian Security Intelligence Organisation in counter-terrorism crimes were subject to research by Rebecca Welsh from the University of New South Wales in her paper "A question of integrity: The role of judges in counter-terrorism questioning and detention by ASIO". That article considers —

> *... the constitutional issues arising from the involvement of serving judges in the Australian Security Intelligence Organisation's counter-terrorism questioning and detention warrant regime. It deals first with the role of "issuing authority" conferred on federal judges in their personal capacity ..., and secondly with the role of "prescribed authority"—the overseer of interrogation and detention—conferred on State judges, again in their personal capacity. It is concluded that these roles would be likely to survive constitutional challenge based on Ch III of the Constitution. However, the recognition that judicial process is central to judicial power, and that this scheme is at odds with judicial process, indicates that the involvement of judges in the scheme is incompatible with judicial independence, even if the roles are in keeping with current constitutional doctrine. Unfortunately, it is likely that judges will be increasingly involved in politically controversial, rights-offensive regimes as a matter of policy; and this will continue to erode judicial independence.*

Although the matter of judges acting in a personal capacity for non-judicial purposes is recognised, the judge in this case has to act in a judicial function, but at the same time in a personal capacity. In this case, the designated authority is not entirely reliant on executive advice in determining whether the application is successful or otherwise. A designated authority will take into consideration all submissions from respondents and other people who make submissions following the public advertisement of the application. The designated authority is examining the application for compliance with the statutory law and therefore performing a judicial and not a quasi-judicial function, and that should be left for a court to perform and not to a judge acting in a personal capacity.

My question to the parliamentary secretary is whether there has been an examination of such a construct and whether it is a breach of that judicial independence; and, if so, what is his conclusion?

My next point is to do with organised crime. From the second reading speech, I understand that only a small number of people in Western Australia were involved in so-called criminal organisations. The minister estimates this number to be somewhere around 500. I also understand that, according to a report in *The Sunday Times* about two years ago, some 135 so-called patched members had been charged with over 600 offences. Let us see how these figures sound in relation to other crime figures. This data is from the Australian Bureau of Statistics. In 2010, there were 20 884 victims of assault in Western Australia with an overall victimisation rate of 909.4 victims per 100 000 persons. These figures lead to the question: what percentage of crimes is actually committed by members of motorcycle clubs and what evidence supports any special legislation for this particular small percentage of criminal activities? The point that I have made many times in this place is that we have no problem with evidence-based responses to particular criminal activities and criminal statistics. However, I am strongly of the view that this is a highly politicised piece of legislation aimed at a very small group of the community, and I challenge the government to provide the statistics that show that this particular group is responsible for anything like the sorts of rates associated with victims of assault. For example, what percentage of that is attributed to so-called bikie activity?

Hon Michael Mischin: This does not deal with just bikie activities—it is organised activity.

Hon GIZ WATSON: I think all the —

Hon Michael Mischin: The rhetoric from some friends of these gangs has been that the government has been saying that this is aimed at bikie gangs alone. In my second reading speech, I claimed that it is not just aimed at them but at any organised crime organisation.

Hon GIZ WATSON: But this bill is aimed at bikie gangs.

Hon Michael Mischin: As well as others—yes. Are you saying the mafia should not be included in this? I would have thought that the whole idea of this is to address criminal organisations, in the general sense, of the type that is specified in the definitions to the bill.

Hon GIZ WATSON: I would put it to the parliamentary secretary that a lot of the popular selling of the need for this legislation has been around the issue of dealing with "bikie gangs" and —

Hon Michael Mischin: True.

Hon GIZ WATSON: I do not disagree with the member that the bill extends beyond those organisations, but certainly, in putting the argument in the public arena about the need for it, the fears or concerns around the activity of bikie gangs has been the main focus of debate—rightly or wrongly.

Am I on unlimited time these days? Oh my goodness! New standing orders—what luxury. I had forgotten about them.

Hon Simon O'Brien: As long as you don't use it all.

Hon GIZ WATSON: I can take all month! That is the first time in 15 years that I have looked up and not seen the clock ticking down. It is good.

Hon Michael Mischin interjected.

Hon GIZ WATSON: It is all right; I am not going to go on.

The DEPUTY PRESIDENT (Hon Brian Ellis): It may help the member if she continues her contribution to the second reading debate rather than debating across the chamber.

Hon GIZ WATSON: Thank you, Mr Deputy President; certainly I will. That is why I was checking the progress of time.

When I looked to the question of how organised crime is defined in this piece of legislation and how it is defined in other jurisdictions, I found that the Australian Institute of Criminology has a definition on its website that sorts the information under various headings. One system of sorting is by crime types. Under "organised and transnational crime" is listed the following: corruption, human trafficking, money laundering, organised criminal groups and networks, and other transnational and organised crimes. The website states —

> Organised crime in Australia has been estimated to cost at least $10 billion and is responsible for much of the nation's serious crime. The most successful groups operate across many sectors and crime types but are typically involved in some form of financial crime or money laundering. They will also have some connection with the illicit drugs market and may be involved in crimes such as people or firearms trafficking, fraud or high tech crime.

I will not anticipate debate on another bill, but there is an issue about how "organised crime" is currently defined by Western Australia Police. As a matter of interest, the definition that is on its website is basically two or more people who plan any crime, which I do not think would meet the standard of any other —

Hon Michael Mischin: If I can interject, there is a difference between organised crime and a criminal organisation. We are dealing with a criminal organisation, and that is defined. Two burglars burgling a place in company can be considered to be organised.

Hon GIZ WATSON: There is another bill coming up, and we will get onto that one; I will not cross over. It is similar but not the same.

As I said, we have no problem with an evidence-based approach. Indeed we are interested in instances in which the research and evidence gathered by the Australian Institute of Criminology was considered by the minister when drafting this bill. We understand that in 2010 the AIC co-hosted an international conference on the fight against serious and organised crime. The proceedings of this conference, together with the AIC's latest research and papers from Australian and international crime experts, are available on the AIC's website. The website also refers to a 2009 report by the Home Office of the UK Parliament, which is entitled "Extending Our Reach: A Comprehensive Approach to Tackling Serious Organised Crime". I wonder whether, in drafting this particular bill, consideration was given to some of these alternative approaches being taken in other jurisdictions. For example, the UK report identifies four guiding principles to stay ahead of organised crime. It states —

> Chapter 2, 'Principles Guiding our Response', sets out the guiding principles behind our—

"Our" being the UK report —

> approach, building on the vision in *One Step Ahead*:
>
> > We will take action against all known organised criminals — the 'hard to reach' at the top end, and the 'long tail' at the lower end
> >
> > We will use whichever tools will have maximum impact—criminal, administrative, regulatory, or tax
> >
> > We will work together across government, with all law enforcement bodies but also with others in the public sector
> >
> > We will work better with our partners—international partners abroad, and businesses and the public at home.

In our view there are more ways of dealing with organised crime than the sorts of extreme approaches that are undertaken in this bill. I am suggesting that we might need to look at some other examples rather than what we are looking at today.

With regard to human rights, although neither Australia nor WA has a human rights bill or charter, certainly human rights are constructed to be recognised under common law here in Western Australia. The bill does not refer to them in particular, but in clause 4(2) it acknowledges the existence of certain human rights, including the freedom of persons to participate in advocacy, protest, dissent or industrial action. The subsection does not, however, exclude the application of the legislation to such activities. It only declares the relevant intention of Parliament for the legislation to not be applicable in such cases. On the one hand it is acknowledging the expectation that the bill will not be applied to those activities, but in my view it is not worded in a way that is explicit in excluding those activities from the operation of this legislation. It is aspirational rather than explicit.

Hon Michael Mischin: No, it would be the governance, the manner in which the act is to be interpreted and applied. The same way as you interpret the act by reason of its stated objectives in the long title, the purposes of the act are set out. That would colour and inform the exercise of discretions under the act in a manner in which the law is to be applied. When you are looking at whether or not an association meets the definition of a

"criminal organisation" within the meaning of the act, that would come into play and influence whoever is considering the matter—it has to.

Hon GIZ WATSON: Mr President, I am mindful that we probably should debate that when we get to the committee stage.

Hon Michael Mischin: I just thought it might be helpful; that is all.

Hon GIZ WATSON: That is an interesting point about where it is situated in the bill. I would be happy to debate that when we get to it.

In our view the bill breaches the International Covenant on Civil and Political Rights, especially article 21, which states —

> The right of peaceful assembly shall be recognized. No restrictions may be placed on the exercise of this right other than those imposed in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety, public order … , the protection of public health or morals or the protection of the rights and freedoms of others.

Someone will argue—I can hear it already—that this bill is necessary to protect the —

Hon Michael Mischin: So how does it contravene that?

Hon GIZ WATSON: Yes. Again, we will not go into it right now.

From experiences in the past, we are concerned about the government's definition of "serious criminal activity". If I can go back to the debate in the house on the CHOGM bill in 2011, members might remember that the committing of serious criminal offences was a prerequisite for a person to be put onto the excluded persons list. We had the debate about what was a sufficiently serious criminal offence in that context as well.

When we get to the committee stage, I will also talk about the issue of spent convictions. Normally a spent conviction would not be considered by the court. In the case of this bill it is made clear that spent convictions can be considered. I have a number of amendments, including an amendment to delete that particular provision.

At the moment as it stands in the bill, the publication of applications is in the *Government Gazette* and in one newspaper that circulates in the state. I have some concerns that that might not be sufficient, particularly with regard to what we would argue is a requirement that all attempts are made to inform all affected persons. I have some amendments that I will move to seek to insert that into the bill at clause 6, which does not require the application to be brought to the attention of the respondent. It only has to be lodged with the registrar who refers the application to the designated authority, who will then notify the applicant and organise the publication of the application. We would argue that in terms of providing people with natural justice, a reasonable attempt should be made to contact and notify a respondent as well. The same thing came up in the debate we had on the CHOGM bill. We argued very strongly that when a person was put on an excluded list, every effort should be made to contact them to say that they had been put on such a list. This is a very similar provision.

According to clause 16, the declaration remains in force for five years following the day it takes effect. I have a query about whether that period is similar to periods in other jurisdictions in Australia. It seems to me that is a considerable period. With regard to the change in name of an organisation, the DCO remains in place after an organisation changes its name or in case some members of the controlled organisation join a different organisation. Such provisions again are a breach of natural justice in our view, as we are entitled to be considered innocent until proved guilty. I am interested in more explanation for why that control order would stay in place if a person were to move to another organisation.

Hon Michael Mischin: If the Rebels change their name to the Flower Fairies, the order should just drop off, should it? Change of name is important, is it? That would be silly, wouldn't it?

Hon GIZ WATSON: So is that designed to deal with a change of name and not with someone moving from one organisation to another?

Hon Michael Mischin: You were complaining about change of name as well. But all right; okay.

Hon GIZ WATSON: I have a number of questions about that. Rather than ask them now, I will go into them when we deal with that clause.

An interim control order is made by the Supreme Court under clause 38(3), part 3, division 2. Clause 38(1)(b) limits the consideration by the court of material provided by the applicant, even in the case when the respondent is present in the court. The respondent does not have the right to be heard before the application is made but has the right to have it explained to him or her only under clause 39. This again is a breach of natural justice principles and derogates the court to an executive body that makes a decision based on material presented by the

executive without an opportunity to examine the case properly. Again, we consider that to be a breach of the independence of the court.

The same limitation on the information contained in applications is made under clause 42(1)(c) for the content of a notice about the interim control order. Also a failure to comply with the provision to explain the order does not have any consequence, according to clause 39(5). This diminishes the value of the provision made in the first place and, in our view, should be taken out. The making of an interim control order does not have any requirements such as the detail for why a normal control order is not sufficient—again I have a number of questions to ask when we deal with this clause in more detail. A person subject to a control order who was not present in the court when the order was made has the opportunity to apply for revocation of the order under clause 46. In such a process, the person has to provide information for why an order should not have been made in the first place. The onus on the individual is not appropriate; rather, that person should have the opportunity in the first place when the interim control order is made. Therefore, all applications for interim control orders should be served to the relevant person in the first place. No order should be made without notice to the person to whom the order applies. Such a practice, again, is a breach of fundamental legal principles, and reasonable steps should be made to notify the person who will be affected by the order. Again, I have an amendment to include "reasonable attempt to contact", so we can discuss that.

Hon Michael Mischin: What about VROs. Should interim VROs be taken out in the case of domestic violence when we cannot get hold of the respondent?

Hon GIZ WATSON: I think it best that when we get to that clause, the member will see where the amendment sits. It is consistent with the approach to VROs.

Hon Michael Mischin: But I didn't hear any argument against the idea of protecting a person by taking out an interim VRO when you can't get the perpetrator of domestic violence—when that was being debated—as a fundamental breach of human rights and the like.

Hon GIZ WATSON: I am not arguing that if the person cannot be contacted therefore an order cannot proceed. It is about reasonable attempts to contact them. It is not absolute.

In the case of a control order the person to whom the application relates has the right to file a notice of objection; however, how will that person know about that right? The bill does not provide for such information to be contained in the serviced application. Again, I am proposing an amendment to clause 54 to ensure the person affected by the control order under application is aware of what he or she can do in terms of the court proceedings.

I am getting near the end. I am not sure whether the latest supplementary notice paper has been circulated.

Hon Michael Mischin: Number 3 contains amendments in your name.

Hon GIZ WATSON: Okay. This is foreshadowing some of those amendments that we will go into in more detail then. The bill also amends the Sentencing Act. It requires the imposition of mandatory minimum sentences on offenders who commit certain offences at the direction of or in association with or for the benefit of a declared criminal organisation. The bill also makes such offenders ineligible for parole. We have spoken out against any form of mandatory sentencing pretty much in any circumstances. If for no other reason, we oppose the bill for this provision and find ourselves agreeing with the Law Society on this. Mandatory sentencing erodes the ability of a judge to take into consideration personal circumstances or the individual circumstances of each offence before imposing a prison sentence. Mandatory sentencing provisions also disregard the duty and capacity of our justice system. Again, they are a breach of the integrity, independence and authority of the courts. Making sentencing provisions mandatory is very easy for the government, but it finds it hard when it comes to making mandatory things such as energy targets, recycling or building standards. The government has interesting attitudes to when things should be mandatory and when they should not. The main claims made by advocates of mandatory sentencing are that it prevents crime, provides consistency in sentencing and is a democratic response to widespread public concern about crime. These claims were examined by the Australian Institute of Criminology in its December 1999 research paper, which states —

> *This paper argues that judges who are publicly accountable for their decisions may be in a better position to ensure that justice is served through a greater understanding of the context of the offence than legislation introducing mandatory sentencing which cannot make allowances for the circumstances associated with the crime in question.*

That paper concluded that the critics of mandatory sentencing argue that it is a crude policy resting on crude assumptions about how crime is prevented and what the public want and what legislation can deliver.
That concludes my comments on the bill itself.

Discharge of Order and Referral to Standing Committee on Legislation — Motion

HON GIZ WATSON (North Metropolitan) [8.08 pm] — without notice: I move —

(1) That order of the day 9, the Criminal Organisations Control Bill 2011, be discharged and referred to the Standing Committee on Legislation for consideration and report not later than 14 August 2012.

(2) That the committee has the power to consider the policy of the bill.

Adjournment of Debate

HON SIMON O'BRIEN (South Metropolitan — Minister for Finance) [8.09 pm]: I move —

That the debate be adjourned to a later stage of this day's sitting.

By way of brief explanation to members, Mr President himself has an item of business to introduce.

Question put and passed; debate thus adjourned.

[Continued on page 1719.]